GARY CUNNINGHAM

v. Docket No. 93-FMC-312

WEST VIRGINIA FARM MANAGEMENT COMMISSION

DECISION

Grievant, Gary Cunningham, was advised by letter dated June 29, 1993, that his employment with the West Virginia Farm Management Commission (FMC or Respondent) would be terminated as part of a reduction in force, effective July 30, 1993. Grievant requested an informal conference with his supervisor on August 3, 1993; immediately thereafter, he filed a grievance at level one in which he alleged that he had been improperly "laid off." The matter was denied at combined levels one/two and at level three after which appeal was made to level four on August 11, 1993. An evidentiary hearing was conducted on November 11 and Grievant filed proposed findings of fact and conclusions of law on December 1, 1993. Respondent declined to submit post-hearing proposals.

The evidence of record includes minutes of the June 28, 1993,FMC meeting. That document establishes that

[a]fter much discussion on the FY94 reorganization plans, a unanimous decision was reached to implement the following:...Huttonsville Farm - One position will be eliminated immediately, with a 30 day notice given making the layoff effective 7/30/93. The position will be decided by the farm manager based on seniority within job classification.

Huttonsville Farm Manager Mark Pritt subsequently determined that Grievant, the sole employee in the Farm Worker I classification, was the most expendable of the six farm employees. Respondent asserts that the reduction in force was properly implemented utilizing procedures set forth by the West Virginia Division of Personnel, i.e., the person with the least seniority in the targeted classification was released from employment.

Grievant sets forth two arguments. First, the FMC implemented the termination in violation of the West Virginia Division of Personnel (Personnel) Rules and Regulations, Section 13.04, by failing to follow a procedure in determining which employee would be released. That section provides in

pertinent part:

(a) When it becomes necessary by reason of shortage of work or funds...the appointing authority mayinitiate a layoff in accordance with the provisions of this rule. Prior to the separation or involuntary demotion of any employee by layoff, the appointing authority shall file with the director a proposed plan which shall include:

1. a statement of the circumstances requiring the layoff.

2. the organizational unit(s) in which the proposed layoff will take place.

3. a list of the employees in each class affected by the layoff in order of retention...

(e) Order of Separation. After the number of positions to be abolished has been determined and the organizational unit has been approved the order of separation shall be applied in the following manner:

1. non-status employees in the same class or classes identified for layoff in the following order: emergency, ninety day exempt, intermittent, temporary, provisional, and probationary.

2. permanent employees by job class on the basis of tenure as a permanent employee of a state agency or in the classified service regardless of job class or title....

Grievant claims that the reduction was based solely on the opinion of the farm manager. Grievant opines that Mr.Pritt did not even consider discharging any of the other employees and questions the manager's judgment in retaining a second manager for a four man crew while choosing Grievant for termination because he, the manager, could assume Grievant's duties.

Grievant asserts that FMC also acted in violation of W.Va. Code §29-6-10(5) which requires that [f]or layoffs by classification for reason of lack of funds or work, or abolition of a position...consideration shall be given to an employee's seniority as measured by permanent employment in the classified service or a state agency. In the event that the agency wishes to lay off a more senior employee, the agency must demonstrate that the senior employee cannot perform any other job duties held by less senior employees within that agency in the job class or any other equivalent or lower job class for which the senior employee is qualified...

Grievant argues that with sixteen and one-half years of service he has more seniority than any other employee at the farm and that he is capable of performing the duties required of the other farm positions. Implicit in this assertion is a claim that Grievant should have been allowed to bump into another position at the farm.

Responding to the fact that he is the sole Farm Worker I,the only classification targeted for reduction, thereby subjecting him to termination, Grievant alleges that in 1992 Mr. Pritt manipulated the classification of the farm employees to set up his termination. Grievant argues that he was arbitrarily classified as a Farm Worker I, even though he would perform the functions and duties of workers in other classifications. For example, he performed many duties listed on the position classification for Farm Worker II, and he would drive the cattle truck but was not classified as a truck driver. Grievant further notes that there were no postings when these positions were created and no testing was conducted to determine which workers would fill the positions.

In addition to the procedural violations, Grievant argues that his termination was in fact motivated by his open disapproval of Mr. Pritt's actions which he alleged to be misuse of work time and FMC equipment as well as the theft of supplies from the farm. (See footnote 1) Grievant claims that he has observedMr. Pritt routinely drive away from the farm with corn and other items in the truck. He also stated that he has observed the farm truck which Mr. Pritt drives at times and places inconsistent with his work schedule, leading him to conclude that Mr. Pritt uses the vehicle to conduct personal business during, and after, work hours. Grievant argues that these alleged activities of Mr. Pritt are contrary to State and Federal laws and the policies of the FMC and that his open criticism of the activities led to a retaliatory discharge. Dismissal for this reason, he continues, is a violation of public policy as addressed in Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978).

The evidence of record establishes that Respondent had developed a reorganization plan which included the elimination of positions at the Lakin Farm as well as Huttonsville. The elimination of three positions, together with other personnel changes, were implemented in "an attempt to reduce costs associated with operating the WV Farm Management Commission." Allowing the farm manager, who must maintain the daily operations, to determine which position he could most afford to lose was not arbitrary, but rather was a reasonablealternative to the commissioners making the decision.

It is further determined that Respondent did not act arbitrarily in targeting the position of Farm Manager I for elimination. Mr. Pritt stated that he made the decision based upon a review of the duties performed by the five farm workers. Tom Arbogast is classified as a Farm Worker II and serves as Assistant Farm Manager in addition to coordinating and assigning inmates to jobs and operating equipment as needed. When questioned as to the necessity of an assistant manager for such a small operation, Mr. Pritt advised that an assistant was needed because someone must be in charge in his absence. Sherman Arbogast is employed as a mechanic and he also functions as an equipment operator, truck driver and welder. Marvin Warner, a Farm Worker II, provides direct supervision of inmate laborers, serves as the hog lot manager, helps with cows and calves during calving season, and operates farm equipment. Mike Welch primarily serves as a truck driver but also works in the feedlots, welds, and assists with cows and calving, as needed. Mr. Cunningham's duties were listed as heading the cow and calf operations, operating larger farm equipment, and performing general farm work. Mr. Pritt'sdecision that Mr. Cunningham's duties could be absorbed by the other employees and inmate laborers does not appear to be arbitrary or capricious.

After making the determination that Farm Worker I was the appropriate position to eliminate, Grievant was properly identified for termination by virtue of being the only employee assigned to that classification. Although Grievant may be capable of performing the duties of a Farm Worker II, Mechanic, or Truck Driver II, neither Personnel Regulation 13.04 nor W.Va. Code §29-6-10(5) permits an employee to bump into a higher job classification, and there was no equivalent or lower job class position available for which Grievant was qualified.

Grievant's allegations that Mr. Pritt had manipulated an earlier change in classification to facilitate Grievant's termination and that the farm manager had chosen him for termination because of his criticism of alleged misconduct are unsupported by the evidence. The record shows that Mr. Pritt advised William Carson, Acting Director of the FMC, by letter dated January 17, 1992, that he had reviewed the positions atthe farm and found three employees to be misclassified. Effective February 1992, Tommy Arbogast was reclassified as a Farm Worker II, Sherman Welch was reclassified as a Driver II, and Marvin Warner was reclassified as a Farm Worker II. Previously, all three employees had been classified as Farm Workers I. There is no evidence that these individuals or Grievant are presently misclassified.

Contrary to Grievant's allegation that Mr. Pritt was personally motivated to terminate his

employment, a letter dated May 13, 1993, to Mr. Carson establishes that Mr. Pritt reviewed the duties of the five-man staff and urged the administrators "not to eliminate any position from the Huttonsville Farm at this time." Mr. Pritt had also recommended Grievant for a merit raise in June 1992, advising Mr. Carson that "I feel this raise is long over due." Neither of these documents would indicate that Mr. Pritt was eager to terminate Grievant's employment.

Mr. Pritt responded to Grievant's allegations of misconduct at the level four hearing by stating that he had no personal reason to terminate Grievant because he had not engaged in the alleged activities. He noted that no supplieshad been found missing in the inventory and that his use of work time and the farm truck could be accounted for in the daily log which he keeps. He explained that he leaves the farm frequently for business purposes and that the truck he drives may be seen parked at a local discount department store where he buys supplies. Mr. Pritt admitted that he might stop at a convenience store to get milk or bread on the way home, but that Mr. Carson had given him permission to use the farm truck for such limited personal uses.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was employed by the Farm Management Commission as a Farm Worker I assigned to the Huttonsville Farm.

2. In June 1993, members of the Farm Management Commission approved a reorganization plan, the purpose of which was to reduce costs. The plan included the eliminationof three positions, two at the Lakin Farm and one at the Huttonsville Farm.

3. Mark Pritt, Manager of the Huttonsville Farm, stated that he chose for elimination the position with the most general farm duties which could be assumed by the remaining staff and inmate labor. That position was Farm Worker I.

4. Grievant was the only employee classified as a Farm Worker I in June 1993.

5. Grievant had accrued more seniority than the other employees at the farm; however, there were no positions of equivalent or lower classification into which he could bump.

6. The record does not support a finding that the farm manager targeted Grievant for termination in retaliation for Grievant's allegations of misconduct by the manager.

CONCLUSIONS OF LAW

1. Respondent acted in compliance with W.Va. Division of Personnel Regulation 13.04 when implementing a layoff of three employees in 1993.

2. Because there was no position equivalent to, or oflower classification than, Farm Worker I at the Huttonsville Farm, Grievant had no opportunity to bump a less senior employee as provided by W.Va. Code §29-6-10(5).

3. Grievant has failed to prove that his termination was a retaliatory action taken by the farm manager in response to Grievant's allegations of the administrator's misconduct.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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SUE KELLER, SENIOR

ADMINISTRATIVE LAW JUDGE

Dated: February 28, 1994

Footnote: 1Grievant advised the undersigned at the level four hearing that he had recently reported this matter to a federal investigatory agency. No supportive evidence was introduced to substantiate the allegation of misconduct, the merits of which need receive no further consideration as part of this grievance.