GARY D. FOX

v. Docket No. 93-BOT-149

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, Gary D. Fox, employed by West Virginia University (Respondent or WVU), was terminated from his employment as an Inventory Clerk B on January 7, 1993. The grievance was denied at levels one and two; the West Virgin ia Board of Trustees declined to review the issue at level three. Appeal was made to level four on May 3, 1993, and a hearing was held on August 25 and October 7, 1993, to supplement the lower-level record. Proposed findings of fact and conclusions of law were submitted on or before November 12, 1993, at which time the grievance became mature for decision.

Samuel J. Lopez, Manager of Inventory Management, verbally advised Grievant of the termination of his employ ment, effectively immediately, on January 7, 1993. Mr. Lopez hand-delivered a follow-up letter confirming theaction to Grievant on January 15. The termination of Grievant's employment was the culmination of a series of events which began on December 30, 1992, when he entered the women's locker room at the WVU Natatorium. (See footnote 1) Three individu als were present during the incident: Grievant, Suzanne Blume, a parent who was picking up her children, and Megan Kovalcik, a fourteen year old student who had been swimming. The statements of these three participants present a consis tent account of what occurred during their encounter.

Grievant's explanation is that he had stopped at the facility at approximately 5:15 p.m. to confirm what hours the Natatorium and Shell Building were scheduled to be open during the holidays. His children were visiting during the school break and one of the planned activities was to go swimming. Grievant stated that he had only been in the building a limited number of times and was not familiar with the floor plan. He recalled that when he entered the building he noticed that the lights were low and he experi enced difficulty in locating any information regarding pool hours. While there he found it

necessary to utilize the restroom and entered what he thought to be the men's facili ties. Grievant stated that the door was either not marked as the women's room or any designation was covered by various and assorted notices which he did not remove. Once inside, he saw two females and immediately recognized that he was in the wrong room. He excused himself and made ahasty departure, this time into the men's locker room. When Grievant re-entered the hallway he was approached by several men who demanded to know why he was there. Grievant declined to be detained but provided them with his name and identifi cation prior to leaving the area.

While the men were attempting to question Grievant, Suzanne Blume called the WVU Department of Public Safety (DPS). The DPS officers arrived at the Natatorium after Grievant had left; however, they were provided Grievant's identification and Ms. Blume filed a complaint relating to the incident. Corporal R.A. Wolfe conducted an investiga tion which consisted of interviewing Ms. Blume, Ms. Kovalcik, and Grievant. On January 4, Ms. Kovalcik also identified Grievant from a book of sixty-nine photos as the man who had entered the women's locker room. Upon completion of the investigation, Cpl. Wolfe filed a complaint in the Magistrate Court of Monongalia County charging Grievant with "knowingly, and without being authorized, licensed or invited did enter and remain on property as to which notice against entering and remaining was given by actual communi cation or posting in violation of WV Code 61-3B-3." (See footnote 2)

Grievant was arrested on January 5, 1993, and appeared for arraignment before Magistrate Ruth Garlow. Grievant pled nolo contendere to the charge of trespassing and was fined $100. plus court costs. On January 6, 1993, Cpl.Wolfe served Grievant with a notice from the DPS that he was banned from entry on "all WVU buildings excluding Glennlock [Hall]," his assigned work station. The basis for this order was that Grievant's demonstrated behavior and conduct could not be condoned in or around the University facility. Grievant was further warned that if he was found on any banned area without written permission from the President, or his designated representative, he would be subject to immediate arrest.

Colleen Lankford, WVU Employee Relations Specialist, testified that the DPS restriction on Grievant's accessibil ity impinged upon his ability to execute the full range of his job duties. Specifically, as an Inventory Clerk Grievant might be assigned duties in any building on cam pus. (See footnote 3) Furthermore, she stated, the nolo contendere plea to the criminal charge went to the heart of the University's mission and raised an issue of public trust, all of which constituted gross

misconduct, warranting dismissal under the WVU Employee Handbook.

A review of the evidence establishes that there had been prior incidents of a man entering the women's locker room at the Natatorium. There is also some indication that certain locked doors were being jammed with toilet paper to prohibit the lock from closing and allowing unlimited accessto the rooms in question. In her written statement given to DPS Ms. Blume explains the situation in some detail:

I arrived at the pool where my daughters had been swimming at 5 p.m. I went into the women's locker room [and] engaged in conversation with a swimmer who was changing clothes. While there, I went to check the emergency door that opens into the back hall. I found that the paper had been placed in both of the 2 doors leading to the back hall, allowing them to be opened from that hall. As the swimmer and I were examining the door, a short, stocky, dark blonde, bearded man entered the locker room. He was wearing a ball cap. I said 'What are you doing in here?' He said, 'Oops, I must have got the wrong bathroom.' I yelled 'No you didn't. You're the SOB that's been coming in here.' He ran out into the main hall. I followed him out and observed him ducking into the men's locker room. I then went into the pool area to call for assistance from some of the fathers of our swim team.

When I went back into the outer hall my husband, Ed Blume, and Frank Rusnock met me after they had come thru [sic] the men's locker room. My husband question[ed] me about what the man looked like. As we were talking the man, with his cap on backwards, came out of the men's locker room. I pointed to him and told Mr. Rusnock and my husband that the man in the ball cap behind them was the one who was in the women's locker room.

I went to call WVU security while my husband and Mr. Rusnock attempted to detain the man.

Ms. Kovalcik's statement also confirms Grievant's appearance in the women's locker room:

It was about 5:00 p.m. when I got out of the pool and went into the woman's locker room. I went into the shower to wash my hair. I heard the one door open and I thought that I saw someone so I looked out of [the] shower and I saw the back of a man who had bluejeans on, a red shirt and had a white ball cap on turned backwards and he had light brown sort of reddish hair and he had a beard. Later on Mrs. Blume came in and the same man came in and I'm sure it was the same guy and he said 'Oops I went into the wrong restroom.' Then Mrs. Blume went after him and I went into the pool deck

to tell her husband and the other adults there and some of them went after him and one of them called the police.

On January 4 a police officer came in and showed me some photos. Number 76 looked familiar especially the eyes and nose. He had a different hair style and a different outfit so I'm not a 100 % sure if it was the guy but I think if I saw him with the fuller beard and the brownish red color that I could definitely recognize that it was him.

Mr. Lopez stated that the decision to terminate Grievant's employment was made by John Signorelli, Associate Vice-President for Finance and Administration. Because Mr. Signorelli did not testify at either hearing the reasoning which led to that decision is absent from the record. Therefore, the letter of dismissal provides the formal basis for the action. That letter states in pertinent part: This letter will confirm our meeting of Thurs day, January 7, 1993 at approximately 9:05 a.m. in my office. During this meeting we discussed WVU Department of Public Safety documentation regard ing a charge against you for criminal trespassing and the case disposition. During our discussion, you acknowledged the charge and confirmed the sequence of events as outlined in your statement to DPS incident No. I-92-205. You then affirmed the "no contest" plea of January 5, 1993 offered by you at Magistrate court. Further, as a result of the criminal trespassing conviction, you have been banned from access to all University leased or owned properties with the exception of Glennlock Hall. During our meeting, you were advised that the nature of this offense is seri ous. I requested clarification from your perspec tive to charges, however, you offered no informa tion in addition to, or contrary to that contained in the DPS investigation summary.

As outlined in the WV Board of Trustees Classi fied Employees' Handbook and the WVU Employee Handbook, "immediate dismissal may be appropriate in cases of flagrant or willful violations of rules, regulations, standards of accepted behavior or performance, or for actions where an investigation proves the employee was in clear violation of policy."

Your actions are a clear, flagrant violation of University policy and contrary to expected stan dards of conduct. The conviction and resulting restrictions have a significant negative impact on the operational needs and image of Inventory Management Services. In particular, the resulting restrictions significantly limit your ability to efficiently and effectively execute the full range of duties

and responsibilities of the Inventory Clerk B position.

Based on the above outlined issues and con cerns, I advised you that your employment with WVU would be terminated, effective immediately.
This correspondence will confirm your dismissal.

A review of the evidence in its entirety does not support the action of either the DPS or the subsequent decision to terminate Grievant's employment. This conclu sion is based upon several critical factors. First, Grievant does not deny entering the women's locker room during the incident upon which Ms. Blume's complaint is based. Although there may have been other episodes of this nature at the Natatorium, there is no evidence to link Grievant to them. He stated that his presence was acciden tal and there is no evidence to prove otherwise. Ms. Kovalcik's statement indicates that Grievant may have been in the locker room somewhat earlier; however, she stated that she only saw the back of the intruder at that time. It is noted that her description of the individual's clothing is inconsistent with the description given by both Grievantand his fiancee. (See footnote 4) Most significant is the fact that neither Ms. Blume nor Ms. Kovalcik testified at either hearing, thus, the record does not contain any examination of their statements given to DPS.

The second critical factor to be considered is that WVU erroneously relied upon Grievant's plea of nolo contendere as a basis for the dismissal. An employee's pleading of nolo contendere in a criminal case cannot be considered an admission in a grievance proceeding, nor does the plea fulfill the Respondent's burden of proving by a preponder ance of the evidence that the employee was guilty of gross misconduct, as charged. Lough v. W.Va. Dept. of Health, Docket No. 90-H-240 (Aug. 31, 1990).

The third factor which must be considered is the DPS action banning Grievant from all buildings on campus save Glennlock Hall. Again, the Director of the DPS did not testify at either evidentiary hearing. Clearly, it was not Grievant's presence in any building which was perceived to be the problem, it was only his presence in the women's facilities, and Glennlock Hall undoubtedly has women's restrooms to which he would have continued access. The ban imposed upon Grievant was unreasonable in that it was overly broad in the territory which it included, making it theoret ically impossible for Grievant to perform the duties of his position, yet it failed to include all of the relevant areassince the women's restrooms in Glennlock Hall remained accessible. More importantly, placing

the ban on Grievant without proving that he had intentionally engaged in tres passing was an arbitrary and capricious act.

Because dismissal is a disciplinary matter, WVU must prove the charges by a preponderance of the evidence. W.Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). While the evidence suggests that Grievant might have exercised more diligence in deter mining exactly what area he was entering, WVU failed to prove that Grievant intentionally entered the women's locker room; therefore, the restriction on his accessibility to WVU property and the subsequent termination of his employment was improper.

In addition to the foregoing narration it is appropri ate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was employed by West Virginia University as an Inventory Clerk B on December 30, 1992, when he entered the women's locker room at the Natatorium.

2. Grievant asserts that his entry into the women's facility was accidental. Although one individual indicated that she saw Grievant in the area a few minutes earlier, theevidence relating to that matter is conflicting; therefore, it is determined that Grievant had not been there earlier.

3. Grievant was charged with trespassing and pled nolo contendere at his arraignment in Magistrate Court.

4. As a result of the nolo contendere plea the Depart ment of Public Safety banned Grievant from any WVU property with the sole exception of Glennlock Hall, his primary work station.

5. Based upon the geographic restriction which could potentially affect his ability to execute the full range of job duties and a finding that his action was in violation of WVU policy and contrary to expected standards of conduct, Grievant's employment was terminated effective January 7, 1993.

CONCLUSIONS OF LAW

1. Grievant's pleadingnolo contendere in a criminal case cannot be considered an admission in this grievance proceeding, nor does Grievant's so pleading fulfill Respon dent's burden of proving by a preponderance of the evidence that Grievant was guilty of trespassing, as charged. See Lough v. W.Va. Dept. of Health, Docket No. 90-H-240 (Aug. 31, 1990).

2. The evidence of record does not support a finding that Grievant knowingly, and without being authorized, licensed or invited, entered and remained on property towhich notice against entering and remaining was given by actual communication or posting, in violation of W.Va. Code §61-3B-3.

3. Respondent has failed to prove that Grievant acted in flagrant or willful violation of rules, regulations, standards of accepted behavior or performances. Further, Respondent's investigation failed to prove that Grievant acted in clear violation of policy.

Accordingly, the grievance is Granted. Respondent is hereby Ordered to reinstate Grievant to the position of Inventory Clerk B, provide full back-pay minus appropriate set-off, and remove from Grievant's personnel file any reference to the charges.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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.

Dated: March 8, 1994 _____

Sue Keller

Senior Administrative

Law Judge

Footnote: 1

The Natatorium houses the WVU swimming facilities.

Footnote: 2

The definition and statutory citation commonly refer to trespassing.

Footnote: 3

Grievant's testimony that he had actually worked outside Glennlock Hall for only a brief period of time since he was hired is undisputed. Respondent's position that he might be required to work in other areas at any time is also undisputed.

Footnote: 4

It is also considered that the testimony of Grievant and his fiancee is self-serving however; other than the reference to the ball cap, Ms. Blume did not state what Grievant was wearing.

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