ROBERT H. WILHELM

v. **Docket No. 94-L-038**

DEPARTMENT OF TAX AND

REVENUE/LOTTERY COMMISSION

D E C I S I O N

On February 7, 1994, Mr. Robert Wilhelm, Grievant, filed this grievance directly at Level IV after receiving notification of his discharge as Deputy Director of Finance and Administration with the West Virginia Lottery Commission ("Commission"). Because the Grievant was an at-will employee, a pre-hearing conference was scheduled on March 18, 1994 to clarify Mr. Wilhelm's grievance and the issues that would be brought before the Administrative Law Judge. Prior to the hearing, the Respondent filed a Motion to Dismiss contending:

1) the Grievant, as an at-will employee, has failed to state a claim on which relief could be granted, and

2) the Grievant was not a permanent employee pursuant to W. Va. Code §29-6A-2(e).

At the hearing Grievant's attorney stated there were no "Harless" substantial public policy (See footnote 1) issues in this case, but that the Grievant had been discriminated against because he was treated differently than other employees. After the hearing the Grievant was allowed to amend his grievance and the parties filed briefs on their positions.

Background

On May 1, 1989, the Grievant was hired to be the Deputy Director of Finance and Administration for the Commission. The Grievant concedes this is an at-will position pursuant to W. Va. Code §29-22-8(a)(1).

As many people are aware, the Commission has been through a rather difficult couple of years.

The trials and subsequent convictions of the Director of the Lottery and the Lottery's attorney have been highly publicized. According to Grievant's pleadings he appeared in front of the Federal Grand Jury along with other Commission employees. He testified he had knowledge of improper activity and failed to report this information to the proper authorities. Mr. Wilhelm has not been charged with any criminal offense.

Mr. Richard Boyle is the current Director of the Commission. Apparently, on January 14, 1994 he met with the Grievant andinformed him he would be dismissed. Mr. Boyle then met with Grievant and his attorney, Mr. Greg Campbell, on January 18, 1994, at which time the Grievant was allowed "to present facts or arguments which [he] believe[d] should be brought [Mr. Boyle's] attention in this regard." Dismissal letter, January 24, 1994. On January 24, 1994 Mr. Boyle wrote Grievant and informed him that since he was a will and pleasure employee he could be released without cause. Nevertheless, Mr. Boyle stated the reason for the discharge was because he had lost confidence in Grievant's ability to effectively discharge the duties and responsibilities of his position. The entire termination letter is reproduced below:

> This letter is to inform you of my decision to dismiss you from your position as Deputy Director of Finance and Administration with the West Virginia Lottery. The dismissal shall be effective February 8, 1994, which represents a fifteen (15) calendar day notice of this personnel action.
>
> This contemplated action was communicated to you in a meeting in my office on January 14, 1994. Further, you and your attorney, Greg Campbell, have met with me on January 18, 1994 so as to present any facts or arguments which you believe should be brought to my attention in this regard.
>
> As you are aware, you serve at the will and pleasure of the Appointing Authority of the Lottery, and may be released from employment without cause. Nevertheless, I wish to share with you that the reason for this action is my loss of confidence in your ability to effectively discharge the duties and responsibilities of your position as the West Virginia Lottery Deputy Director of Finance and Administration.
>
> Though you have been given an opportunity to respond to this matter, I wish to provide you with this fifteen (15) calendar day notice period to avail yourself of any appeal rights you may have under W. Va. Code § 29-6A-1, et seq.,, Grievance Procedure for State Employees. If you choose to exercise your appeal rights, you mustsubmit your appeal to me as set forth in the Grievance Act.

Issues

According to his amended grievance, Mr. Wilhelm protests his discharge on several grounds: 1) while the pretermination due process afforded him was technically correct, Grievant argues that it was inadequate because Mr. Boyle failed to specify or detail any reasons for the dismissal thus damaging his reputation with veiled accusations; 2) conversely, the Grievant argues that although he was an at-will employee and could be fired for no reason, since the Respondent gave a reason, "loss of confidence," the Respondent is obligated to prove this "charge" by a preponderance of evidence presented at a Grievance Board hearing; and 3) his dismissal constituted discriminatory action by the Commission because other Lottery employees who committed the same "offense" were not discharged. Of the other employees involved in these "offenses" two resigned, two were suspended for three days without pay, and one was reprimanded.

Respondent argues the Grievant was an at-will employee and as such could be dismissed for cause or no cause. Thus, the Respondent argues, the Grievant has failed to plead anything in his amended grievance that rises to the level of a grievable event or to state a claim for which relief can be granted. (See footnote 2) Respondent also contends that, since the Grievant admits his due process protections were technically correct, a lack of due process cannotconstitute a grievance. The Respondent also argues the Grievant is not a permanent employee and, thus, should not be afforded the right to grieve.

The Respondent also identified a major inconsistency in Grievant's argument:

> 1) Grievant argues his due process rights were violated because Mr. Boyle did not specify a reason for his dismissal, and
>
> 2) the reason given for Grievant's dismissal has sullied his reputation and stigmatized his future employment opportunities.

Of course, grievants are allowed to make alternative arguments before the Grievance Board.

Discussion

Parties' contentions will be discussed individually.

I. Permanent Employee Status

Respondent argues Grievant is not a permanent employee and as such does not have the right to avail himself of the grievance process. This argument is based on a grievance procedure definition of employee which is defined as "any person hired for permanent employment, either full or part time" W. Va. Code §29-6A-2(e). Additionally, the West Virginia Division of Personnel defines a permanent employee as "any employee who was hired from a register . . . ." W. Va. Administrative Rules at 4.

This issue was addressed by the Grievance Board in Bonnell v. W. Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). In that case the Board ruled that the plain and unambiguous language of W. Va. Code §29-6A-2(e) defined employee as anyone hired for permanent employment and was not limited to the definition of permanent employee as stated by the Division of Personnel. In Bonnell the Board found the grievance procedure was available to probationary employees. Bonnell at 26. The same reasoning would apply here. Although Grievant is not a permanent employee per the Division of Personnel's definition, he is an employee hired for permanent employment as per the grievance procedure definition. Thus, Grievant had a right to file a grievance.

II. Due Process Arguments

Grievant argues his due process protections, while technically correct, were inadequate because "charges" or "offenses" were not specified. Also, Grievant appears to argue that because no "charges" or "offenses" were specified, he was not able to respond adequately to these concerns. Prior to the discharge letter of January 24, 1994, Mr. Boyle met with Grievant on January 14, 1994 to inform him of his decision to terminate him. Mr. Boyle met with Grievant and his attorney at least one other time, on January 18, 1994 and restated the reasons for Grievant's discharge as loss of confidence in his ability to perform his duties and responsibilities. The Grievant requested other reasons for the discharge and none were forthcoming.

Classified employees are ordinarily entitled to pre-termination notice of charges and an opportunity to respond, butare not entitled to a full evidentiary hearing before a neutral fact finder. See, Queen v. W. Va. University of Hospital, 365 S.E.2d 375 (W. Va. 1987) (citing Cleveland Bd. of

Educ. v. Loudermill, 470 U.S. 532 (1985)). Grievant's two conversations with Mr. Boyle before the discharge letter was written met the above-stated requirements even though he was an at-will, non-classified employee. Additionally, it must be noted that the Respondent never leveled any charges or accused the Grievant of committing any offenses.

The West Virginia Supreme Court in the case of Waite v. Civil Rights Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) is also instructive regarding due process claims. Waite requires a two-step process. The first step is to determine if the Grievant has a property or liberty interest in his continued employment.

"A 'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Id. at Syl. Pt. 3, in part. Non-classified, at-will employees do not have a property interest in continued employment because they do not have a legitimate claim of entitlement to the position. Deputy Sheriff's Ass'n v. County Comm'n, 376 S.E.2d 626, 627-29 (W. Va. 1988). Thus, Grievant has no property interest in his continued employment.

"A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma orother disability on him that forecloses future employment opportunities." Waite, at Syl. Pt. 2, in part. "[A]n accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty interest." Id. at 167-168.

The Respondent has not accused the Grievant of wrongdoing. The dismissal letter merely states a "loss of confidence in your ability to effectively discharge the duties and responsibilities of your position . . . ." Using the standard outlined in Waite, this language does not belittle the Grievant's worth and dignity so as to foreclose future employment opportunities. See, Parker v. W. Va. Health Care Cost Review Authority, Docket No. 91-HHR-400 (June 30, 1992) (citing Grievant's "failure to inspire confidence" and to "fulfill responsibilities of the position . . . render continued employment impossible.") This language does not stigmatize the Grievant or damage his standing and associations in his community. Id. at 19. In essence, this language does not charge the Grievant with any offense, and does not deprive the Grievant of any liberty interest.

Grievant received pretermination notice of his discharge and had an opportunity to respond to his

dismissal. Additionally, Grievant did not demonstrate a property or liberty interest in his employment. Accordingly no due process violation has been proven.

III. Discrimination

The Grievant alleges discrimination under W. Va. Code §29-6A-2(d). This section defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

The act of discrimination alleged by the Grievant is that other employees who "committed offenses similar to those leveled at [the Grievant]" had lesser disciplinary actions taken against them. Grievant's Amended Grievance at 2. Grievant states other employees who had knowledge of improper activities but failed to report them were allowed to resign, were reprimanded, or were suspended for a short time.

There are two major flaws in Grievant's argument that he was the victim of discrimination. First, he was not "charged" with any "offense" by his employer. The Grievant's supervisor only stated he had lost confidence in him. Second, since the Grievant admits he had knowledge of wrongdoing and did not report it until required to testify before a Federal Grand Jury, it is only reasonable that the Director would lose confidence in his ability to effectively carry out his duties as the Deputy Director of Finance and Administration.

It is clear, pursuant to W. Va. Code §29-22-6b, that the Grievant is an at-will employee, and as such can be terminated any time with cause or without cause. Syl. Pt. 4, Williams v. Brown, 427 S.E.2d 775 (W. Va. 1993). In other words, Grievant can betreated differently from other employees. But, Harless, supra requires that the employer's right to discharge an at-will employee be tempered if the employer's motivation for discharge contravenes some substantial public policy (See footnote 3) principle.

The West Virginia Supreme Court has recognized an at-will public employee cannot be terminated for exercising certain constitutional rights. Williams at n.7. Termination in these instances "is a contravention of substantial public policy . . . ." McClung v. Marion City Comm'n, 360 S.E.2d 221 (W. Va. 1987); See e.g. Adkins v. Miller, 421 S.E.2d 682 (W. Va. 1992) (termination of non-policy maker/non-confidential employee solely because of political affiliation unacceptable); Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983), cert. denied, 469 U.S. 981 (1984) (discharge of librarian for engaging

in free speech not allowed).

The Grievant has not argued his discharge was for exercising any constitutional rights. If, for example, the Grievant had reported the illegal acts he knew of and was then fired for reporting these acts, his discharge would certainly contravene substantial public policy. Here, the Grievant knew of improper activities and did not report them. He did not report what he knew until he was subpoenaed and placed under oath before a Federal Grand Jury. Thus, Grievant's termination was not a retaliatory discharge as a result of exercising constitutional rights.

Additionally, since the Grievant did not identify the positions of the other employees, it is unknown if they are similarly situated to him. For example, it is unknown if the other individuals Grievant alleges were "charged with offenses" were at-will employees, in a position of authority like himself, had similar job responsibilities, and were in the Finance and Administration area. Further, the Grievant, a white, American, male has not alleged any of the typical types of discrimination which are viewed as a contravention of a substantial public policy. Additionally, he has not alleged "whistleblowing," retaliatory discharge, exercising rights under Veterans Reemployment Act, filing a Workers' Compensation claim, refusing to violate safety standards, or refusing to submit to a polygraph test. See, Roberts v. Adkins, 444 S.E.2d 725, 728 (W. Va. 1994) (discussion of what types of situations that would constitute a contravention of substantial public policy); see also Birthisel v. Tri-Cities Health Services, 188 W. Va. 371 (1992).

Even if the Grievant was given the benefit of the doubt, and it is accepted that he was treated differently than other similarly situated employees, this action still does not rise to the level of contravention of some substantial public policy. W. Va. Code §29-6A-2(d) was discussed at some length in Goff v. W. Va. Dept. of Educ., Docket No. 93-DOE-446 (Sept. 9, 1994). Goff concluded this section was ambiguous and subject to interpretation to effectuate the Legislature's intent. In the instant case, it is concluded that the discrimination provision of the grievance procedure wasnot intended to restrict or limit a State agency's ability to terminate the employment of statutorily at-will employees. See Williams, supra. The West Virginia Supreme Court held in Williams, supra, that a duty of good faith and fair dealing is not owed to an at-will employee in the public sector. Id. at 781. The Court reasoned that to impose this duty would be contrary "to the general principles . . . that grant the appointing authority an unfettered right to terminate an appointee." Id. The Court reported it had found no jurisdiction that imposed a duty of good faith and fair dealing upon employers in at-will

public employment and refused to impose such a duty.

The above decision will be supplemented by the following written findings of fact and conclusions of law.

Findings of Fact

1. Pursuant to W. Va. Code §29-22-8(a)(1), Grievant was an at-will employee who served at the will and pleasure of the Commission.

2. Grievant served as Deputy Director of Finance and Administration with the West Virginia Lottery Commission until the date of his discharge on February 8, 1994.

3. The reason given to Grievant, both verbally and in writing, was loss in confidence in his ability to effectively perform the duties and responsibilities of the position.

4. Mr. Boyle met with the Grievant and his attorney to discuss his discharge prior to the writing of the discharge letter. Grievant and Mr. Campbell were allowed at this meeting to "present facts or arguments" on the Grievant's behalf.

5. The Grievant knew of improper activities at the Commission but did not inform anyone. He did testify to this information when he was subpoenaed by the Federal Grand Jury.

Conclusions of Law

1. Grievant, is an employee hired for permanent employment. Thus, he has a right to file a grievance.

2. Grievant, as an at-will employee, did not have a property interest in his continued employment.

3. The stated reason for discharge, loss of confidence, did not belittle or stigmatize the Grievant to such an extent that he was deprived of a liberty interest.

4. Grievant did not prove any due process violation.

5. Unless an at-will employee alleges a "substantial contravention of public policy," such as exercising certain constitutional rights, his termination cannot be challenged through the grievance procedure.

6. The Grievant's allegation of discriminatory treatment does not rise to the level of a "substantial contravention of public policy."

7. The prohibition against discrimination, as stated in the grievance procedure, does not limit or restrict the right of a public employer to decide which at-will employee it wishes to dismiss. In other words, a discharged at-will state employee cannot challenge his dismissal on the basis of discrimination underthe grievance procedure, unless that discrimination rises to the level of a "substantial contravention of public policy."

8. Public employees are not owed a duty of good faith and fair dealing. Imposing such a duty would be contrary to the long standing principle that grants the appointing authority an unfettered right to terminate an at-will employee. Williams, supra at 781.

Accordingly, this grievance is **DISMISSED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1994

Footnote: 1The case of Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) stated "[t]he rule that an employer has an absolute right to discharge an at-will employee must be tempered by the principal that where the employer's motivation for that discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." Id. at Syl. Pt.

Footnote: 2Because of the outcome of this decision, it is unnecessary to discuss this issue.

Footnote: 3Although at the pre-hearing conference the Grievant stated there were no "Harless" type issues in this case, the amended grievance alleged discrimination. Thus, in the interest of fairness to the Grievant, this allegation will be examined.