PATRICK W. GLASSCOCK

v. Docket No. 95-CORR-093

WEST VIRGINIA DIVISION OF CORRECTIONS

D E C I S I O N

Grievant Patrick W. Glasscock, employed as a Correctional Officer III (CO) at the West Virginia Penitentiary (WVP) until October 1994, filed a grievance on March 1, 1995, and alleged as follows: "On [October 13, 1994] I resigned my position as [CO III] . . . under deress [sic] with the threat of dismissal." He requested reinstatement and back pay. Respondent West Virginia Division of Corrections (CORR) denied any wrongdoing and raised a timeliness issue at the March 29, 1995, level four hearing. CORR filed fact/law proposals on May 17, 1995, and Grievant agreed to respond by May 31, 1995. Therefore, the case is mature for decision.

In its post-hearing, fact/law proposals, CORR renewed its argument that the grievance should be dismissed as untimely filed. Clearly, the evidence shows that nearly five months elapsed from the time Grievant resigned in October 1994 until the grievance form was received by the Grievance Board on or about March 1, 1995.

Grievant testified that he attempted to file a grievance shortly after the resignation incident on October 13, 1994. Grievant explained that his father, who was also a correctional officer at WVP, had obtained grievance forms at WVP for his use. Grievant stated that he mailed a grievance form on two separate occasions to the Grievance Board's Charleston office on "Capitol Street," the address printed on the grievance form. He claimed

that he waited and waited each time, but never received a response. He said he finally called WVP's personnel office and was given the Grievance Board's telephone number in Charleston. According to Grievant, when he called the Grievance Board in Charleston to inquire about the status of his case, he was told that a grievance form had never been received from him and that he had used "last year's" address. Grievant stated that he then mailed the third grievance form to the Grievance Board's proper street address in Charleston. CORR's counsel did not question Grievant closely about when the initial grievances were filed; however, at one point, Grievant stated that the forms mailed to the old Grievance Board address were never returned to him via the postal service.

Grievant must be given the benefit of the doubt in this situation. Substantial compliance with filing requirements has been found when a grievant has attempted to file an appeal, but, through no fault of his own, the grievance was not properly filed by the due date. See Duruttya v. Bd. of Educ. of the County of Mingo, 382 S.E.2d 40 (W.Va. 1990); Brown v. Bluefield State College, Docket No. 92-BOD-128 (Mar. 30, 1994); See also, Jack v. W.Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

The substantial compliance standard should be applied here. Grievant testified under oath that he attempted to file a timely grievance, and further stated that grievance forms sent to an outdated address were not returned to him. The grievance form which finally reached the Grievance Board's correct address via first class mail (not certified mail) still contained the outdated instruction to send grievances to the Board's old Capitol Street mailing address. Grievant attached a note to the

grievance form, "This is the third time I sent this grievance. I called the Grievance Board and I had the wrong address." Grievant's account of the "lost" grievance forms must be accept ed because there is no evidence to prove otherwise. Therefore, it is determined that the grievance should not be dismissed on the basis of untimeliness. See Brown, supra.1

The merits of the case will now be addressed. Grievant bears the burden of proving by a preponderance of the evidence that his resignation was involuntary. To determine whether an employee's act of resignation was the result of coercion, rather

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1In Brown, the grievant's level four grievance form apparently was lost in the mail, and several months elapsed from the time the grievant's employer denied the grievance and a (second) grievance form was received by the Grievance Board.

than a voluntary act, the circumstances surrounding the resigna tion must be examined in order to measure the ability of the employee to exercise free choice. See McClung v. W. Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989).

Grievant has not met his burden in this case. At the level four hearing, Grievant testified at some length about his work background. Due to the outcome of this case, it is not neces sary to discuss Grievant's employment history. Suffice it to say that on or about October 12, 1994, Grievant, who is thirty-three years old, was arrested and charged with possession and intent to sell a controlled substance. Apparently, the arrest resulted from the efforts of a drug task force.

After Grievant's arrest, he was placed in the county jail under the control of the Ohio County, West Virginia, sheriff's

department at about 11:00 p.m., and was not permitted to see or call anyone, including his father, until the next morning. The next morning Grievant called a bondsman.

Grievant stated that, at some point after the bondsman arrived, he was told by a sheriff's department official that a representative from WVP wanted to speak to him. Grievant said he was brought into a meeting room and handcuffed to a table. Grievant stated that John Simmons, a WVP correctional officer, entered and asked him how he was and then told him he heard he wanted to resign.

According to Grievant, he agreed to resign when Officer Simmons asked him because Simmons told him he would not be allowed on State property and probably would be fired, anyway. Grievant said he thought at the time he might as well quit because he could obtain unemployment benefits if he resigned. Grievant said he also told Officer Simmons that he needed his paycheck for money to pay the bondsman. After that, Officer Simmons told him he could sign a release for his father to pick up his paycheck and gave him some blank sheets of paper. Grievant then composed a handwritten release for his father to pick up his paycheck and, on a separate sheet of paper, wrote and directed a message to WVP Warden George Trent: "I Patrick W. Glasscock do resign my position as a Correctional Officer as of 10-13-94." Grievant signed the document, and Officer Simmons also signed as a witness.

Officer Simmons testified on behalf of CORR. He stated that, in October 1994, he had been working on special investiga tions under the direction of Warden Trent. After Grievant was arrested, the state trooper who arrested Grievant called him and indicated to him that Grievant wanted to resign from his job as

a correctional officer. He said he then discussed the matter with Warden Trent, and that Trent authorized him to go to the jail and get Grievant's resignation. According to Officer Simmons, the Warden's rationale was that it would be "easier" on all parties concerned if Grievant resigned rather than face disciplinary procedures.

Officer Simmons recounted that right after he asked Grievant how he was, Grievant began telling him details of the events leading to the arrest. He said he told Grievant he was there because he heard Grievant wanted to quit his job with CORR. Officer Simmons denied he had been ordered to obtain Grievant's resignation, and denied he had threatened Grievant in any way. It was only after Grievant had written and signed the resignation, Officer Simmons testified, that he told Grievant the resignation avoided the possibility of suspension or termi nation.

Grievant argues that the resignation was obtained under duress because, at the time he spoke with Officer Simmons, he was handcuffed to the desk and depressed. He states he was anxious for Simmons to leave and the bondsman to return so he could post bond and get out of jail. He said he did not know why Officer Simmons told him he heard he wanted to resign. When Grievant was asked during cross-examination whether he had stated "there goes my job" to the arresting officer, he said he could not remember. He explained he had consumed alcohol after being informed by telephone earlier that night that he was going to be arrested and incarcerated.

Both Grievant and Officer Simmons generally told the same tale of the events surrounding the resignation on October 13, 1994, but from different perspectives. Grievant's perceptions

about what occurred are affected by his overall emotional state at the time. He stated he would have signed anything that day to get out of jail. However, he admitted that his release from jail was not conditioned upon his job resignation. He also stated he could not understand why his father, a "captain" with WVP, was not permitted to see him, while a lessor officer, Officer Simmons, just a "sergeant" with WVP, was ushered right in. Grievant conceded, however, that CORR was not responsible for the treatment he may have received from the sheriff's department.

The evidence simply does not show that Grievant was threat ened or coerced by CORR in the matter of his resignation. In McClung, supra, a nineteen year old youth appeared for work one day and was threatened by his employer with immediate termina tion for an alleged work-related offense unless he resigned. The termination and resignation documents had already been prepared, and the young man had very little time to consider the alternatives. The administrative law judge (ALJ) in that case determined that the young man's resignation was involuntary. The ALJ recognized though, that "where an employee is faced merely with the unpleasant alternative of resigning or being subject to removal for cause, such limited choices do not necessarily make a resulting resignation an involuntary act." McClung at 5-6.

In Grievant's case, when his employer contacted him about a possible resignation, he had already been arrested by an entity other than his employer for alleged criminal activity. Due to the nature of his work, Grievant knew that he would, in all likelihood, be suspended by CORR pending the outcome of the criminal charges. Unlike the worker in McClung, Grievant was a

mature adult and should have been aware of the alternatives and consequences of his act when he drafted his own resignation and signed it. The evidence shows that he considered his actions and determined that unemployment benefits would be easier to obtain if he quit his job.2

In summary, simply because Grievant may have been feeling a great degree of anxiety or even depression about being in jail when he tendered his resignation, his perception of events is not the controlling factor when determining whether the resigna tion was forced. Grievant was asked if he wanted to resign and he agreed he would resign. There were no threats, no entreaties and no coercive actions on Mr. Simmons' part. Grievant's resignation was not involuntary. Because Grievant's resignation was not involuntary, no further consideration of the requested relief of reinstatement is warranted.

Findings of Fact

1. While employed as a correctional officer at WVP, Grievant, who was off-duty, was arrested and jailed overnight on a drug-related criminal offense.

2. Another WVP officer, acting in the stead of the warden, visited Grievant in jail and asked him if he wanted to resign his employment.

3. Grievant realized that, due to the nature of his employment, a suspension was possible pending the outcome of the criminal charges.

2Grievant testified that he had, indeed, been receiving unemployment compensation since December 1994.

4. Grievant, who was thirty-three years old at the time,

decided to resign his employment, and he composed a resignation in his own handwriting which he thereafter signed.

5. Despite the fact that Grievant's incarceration made him upset and depressed, the record reflects that Grievant was able to weigh the alternatives of possible future termination versus resignation in terms of his ability to secure unemploy ment benefits.

Conclusions of Law

1. When a grievant complains that his employer has forced him to resign, he bears the burden of proving that the circum stances surrounding the alleged coerced resignation deprived him of his ability to exercise free choice. See McClung v. W. Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989).

2. Grievant has failed to prove by a preponderance of the evidence that his employer threatened him with dismissal or any other punitive action if he did not resign or that the employer otherwise forced his resignation.

The grievance is, therefore, DENIED.

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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

NEDRA KOVAL

Administrative Law Judge

Date: May 31, 1995