LEE REPHANN, III

Grievant,

v. **DOCKET NO. 95-ADJ-298**

OFFICE OF THE ADJUTANT GENERAL/
MAJOR GENERAL JOSEPH J. SKAFF,

Respondent,

D E C I S I O N

This is a grievance by Lee Rephann, III (Grievant), who had been employed as a Security Police Leader with the Office of the Adjutant General at the Martinsburg Air National Guard Base from November 2, 1986 through June 14, 1995. As a requirement for this position an employee must be a member of the West Virginia Air National Guard. Grievant had been a member of the West Virginia Air National Guard until his honorable/medical discharge on May 19, 1995. Grievant received notice on June 14, 1995, from the Office of the Adjutant General that he was being terminated as a Security Police Leader due to the loss of his military membership. Grievant feels that he is being discriminated against because he lost his military membership due to medical disqualification from the WV Air National Guard. Grievant is asking that he be reinstated with full back benefits. Grievant filed this grievance pursuant to West Virginia Code §§29-6A-1, et seq., on July 10, 1995, alleging facthis dismissal was a result of discrimination. Grievant's complaint was submitted directly to Level IV in accordance with W.Va. Code §29-6A-4(e). The case became mature for decision after receipt of the parties' Proposed Findings of Facts and Conclusions of Law and responsive argument on September 12, 1995. (See footnote 1)

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

FINDINGS OF FACT

1. Grievant was an at-will employee who served at the will and pleasure of the Office of the

Adjutant General.

2. Grievant had been employed as a Security Police Leader at the Martinsburg Air National Guard Base since November 2, 1986.

3. Position description #8861, "Security Police Leader", outlines mandatory job requirements. One of these mandatory job requirements is that the individual maintain membership in the WV Air National Guard.

4. Grievant was a member of the WV Air National Guard until his honorable/medical discharge on May 19, 1995.

5. Grievant was honorably discharged from the WV Air National Guard because he was determined to no longer be physically qualified for continued service due to the development of coronary artery disease.

6. J. Dixon Brown, M.D. of the Winchester CardiologyInternal Medicine, Inc., in a letter dated October 6, 1994 stated:

"Mr. Rephann complains of minimal angina, and because of his good exercise tolerance on the treadmill I believe he is able to perform his duties with the military police without restriction." (Grievant's Exhibit #2, p. 9).

7. Grievant appealed his discharge from the WV Air National Guard. This appeal was denied by letter from Colonel Ralph S. Smith, State Air Surgeon for the WV Air National Guard, dated May 7, 1995.

8. Grievant was terminated from his position as a Security Police Leader in June, 1995.

9. The "Adjutant General's Department Guide for State Employees Within the Department, 1 July 1982", the current policy of the Employer, states in Section 1-2A:

"To the extent possible, positions will be filled by members of the West Virginia National Guard. The Adjutant General may grant a waiver for special qualifications or other reason justified by the Supervisor." (Grievant's Exhibit #5).

10. Joseph F. Schmidle, classified as "Security Police" is not a current member of the WV Air National Guard. Mr. Schmidle is retired from the WV Air National Guard but continues in his employment as a Security Police Officer. (Grievant's Exhibit # 4).

DISCUSSION

Grievant believes he was a victim of discrimination from his termination as a Security Police Leader with the Office of the Adjutant General based on the fact that he failed to maintain his membership in the WV Air National Guard. Grievant contends this termination is in violation W.Va. Code §§29-6A-1, et seq.

Discrimination is defined as "any differences in the treatment of an employee unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W.Va. Code §29-6A-2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 2)
of discrimination under §29-6A-2(d) must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Parsons v. W.Va. Div. of Highways, Docket No. 91-DOH-246 (April 30, 1992).

Once a prima facie case is established, the employer can offer a legitimate reason for its action, which the employee must show is pretextual.

Although Respondents argue that Joseph F. Schmidle is employed as a "Guard", Grievant's Exhibit # 4 which is a Memo from CharlesD. Wheeler, Armory Facilities Manager to Frank Hayden, clearly and without question states that Mr. Schmidle is employed under the classification as Security Police at Camp Dawson, Kingwood, West Virginia. This classification is covered under the Position Description #8860--"Security Police" which requires membership in the WV Air National Guard. (See Grievant's Exhibit # 3), yet, Mr. Schmidle is retired from the Air National Guard. The employer does not argue this fact. What is unknown to the undersigned, however, is why Mr. Schmidle continues to be employed as Security Police if he does not meet an essential job requirement?

The Respondents agree that a compelling argument would exist if Joseph Schmidle's position required him to maintain military membership, thus resulting in two similarly situated individuals being treated differently. Nonetheless, this is exactly the situation at hand--two similarly situated individuals are being treated differently. Grievant is similarly situated to Mr. Schmidle, in that (1) both of their positions require that they maintain membership in the National Guard; (2) both Grievant and Mr. Schmidle are not members of the WV Air National Guard. However, where these two individuals differ is the reason for their lack of military membership. This reason is irrelevant. What is at issue is the fact that military membership is a requirement of continued employment and that where one employee has been terminated for losing his military membership, another employee continues to be employed although he also no longer maintains his military membership.

The Adjutant General's Guide For State Employees Within The Department", dated 1 July 1982, under the heading of "Employment", subheading 1-2 "Hiring Procedures" point "a" states as follows:

"To the extent possible, positions will be filled by members of the West Virginia National Guard. The Adjutant General may grant a waiver for special qualifications or other reason justified by the Supervisor." (Grievant's Exhibit #5).

It is unknown whether a waiver was granted to Mr. Schmidle to continue his employment as a Security Police Officer; however, the evidence presented in the record, as stated above, shows that such a waiver can be granted.

The employer has not offered a legitimate, non-discriminatory or work-related reason for disparate treatment of similarly situated employees. Therefore, Grievant has made a prima facie showing of discrimination by demonstrating that he was similarly situated, in a pertinent way to another employee in that the positions of Security Police Leader and Security Police, require an individual to maintain military membership. In addition, Grievant has shown that he was, to his detriment, treated by the employer in a manner that another employee has not been treated whereas the employer continues to employee Mr. Schmidle, has not maintained military membership and the employer terminated Grievant who also does not have military membership.

Nevertheless, Grievant acknowledged in his Findings of Fact that he is an at-will employee, and as such can be terminated any time with cause or without cause. Syl. Pt. 4, Williams v. Brown, 424 S.E. 2d 775 (W. Va. 1993).

Harless v. First Nat'l Bank in Fairmont, 246 S.E. 2d 270 (W. Va. 1978), requires that the

employer's motivation for discharge contravene some substantial public policy 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. 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. The Grievant has not alleged any of the typical types of discrimination which are viewed as a contravention of a substantial public policy. Additionally, the Grievant 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 775, 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).

Although Grievant was treated differently than another similarly situated employee, this action does not rise to the levelof 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 was not 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. The Court reported it had found no jurisdiction that imposed a duty of good faith and fair dealing upon employers in an at-will public employment and refused to impose such a duty.

The above discussion is supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. W.

Va. Code §§29-6A-1, et seq.

2. In order to make a prima facie showing of discrimination under W. Va. Code §29-6A-2(d) a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to the] actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Parsons v. W.Va. Div. of Highways, Docket No. 91-DOH-246 (April 30, 1992).

4. Grievant made a prima facie showing of discrimination under W. Va. Code §29-6A-2(d).

5. Grievant did not prove any due process violation.

6. 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.

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 under the 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 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.

MARY BETH ANGOTTI-HARE

Administrative Law Judge

Dated: December 13, 1995

Footnote: 1This grievance was set for hearing at Level 4 on August 16, 1995. However, the Parties, by agreement, waived the hearing and presented the matter on the record with accompanying Proposed Findings of Fact and responses.

Footnote: 2

A prima facie case generally refers to a set of facts which,

if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).