HOWARD DAVES and LAWRENCE COOL

v. DOCKET NOS. 95-CORR-230/233

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

Grievants, Howard Daves and Lawrence Cool, (See footnote 1) initiated this proceeding pursuant to the provisions of W. Va. Code § 29-6A-1, et seq. They allege that their lay-offs from employment as correctional officers at the West Virginia Penitentiary were in violation of West Virginia statutes and regulations. Since their lay-offs ensued from the closing of the penitentiary, Grievants seek as relief to be transferred/reinstated to like positions at the Northern Regional Jail and Correctional Facility, along with back pay. (See footnote 2)

These grievances were filed directly at level four, pursuant to the provisions of W. Va. Code § 29-6A-4. A prehearing conference was held on October 11, 1995, and a level four hearing was conducted on January 7, 1997, both in the Wheeling, West Virginia, offices of the Grievance Board. After numerous attempts to provide Respondent with an opportunity to present additional evidence, the record was deemed closed, and the parties were given until April 15, 1997, to file post- hearing submissions. (See footnote 3) This grievance was reassigned to the undersigned administrative law judge for decision on September 30, 1997. The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant Daves has been employed by the Division of Corrections ("Corrections") as a correctional officer at the West Virginia Penitentiary ("penitentiary") since 1981.

2. Grievant Cool has been employed by Corrections as a correctional officer since 1978, and worked at the penitentiary since 1983.

3. Due to the impending closure of the penitentiary, (See footnote 4) in 1992, the legislature enacted W. Va. Code § 25-1-21, the purpose of which was to ensure that full-time, permanent

employees of the penitentiary would be provided with the opportunity for continued employment. In part, the new legislation provided that such employees, if "in good standing," would be provided the opportunity to transfer to similar positions at the new penitentiary at Mt. Olive, to the medium security facility at Huttonsville, or to the new Northern Regional Jail and Correctional Complex at Moundsville.

4. W. Va. Code § 25-1-21 also directed the Commissioner of the Division of Corrections to "promulgate rules . . . to effectuate notice and procedures for said transfers." Accordingly, effective May 22, 1995, a legislative rule was adopted--Title 90, Series 4--addressing the transfer and placement of employees of the penitentiary. Among other things, the rule defines "good standing" as an employee who has not had any suspension or demotion within the twelve months prior to the transfer. L IV Hearing, Gr. Ex. 2. 5. As a result of a disciplinary action, Grievant Daves was dismissed from his employment on October 19, 1994. After he filed a grievance, a settlement agreement was reached, whereby the dismissal was reduced to a thirty-day suspension, and Grievant was reinstated to his position as a correctional officer at the penitentiary. He returned to work on December 17, 1994. L IV Hearing, Gr. Ex. 6.

6. As the result of disciplinary action, Grievant Cool was dismissed from employment on an unknown date in late 1994. He also filed a grievance, which was settled prior to the rendering of a level four decision. As part of the settlement, Grievant made restitution to Corrections and was reinstated to his prior position as a correctional officer at the penitentiary. He returned to work in October of 1994. L IV Hearing, Gr. Ex. 5.

7. Because of the disciplinary actions described in the two preceding paragraphs, Grievants were not considered by Corrections to be "in good standing" and, thus, not eligible for transfer to other institutions. This determination was made in early February of 1995, and the basis was the definition of "good standing" set forth in the legislative rule, not yet formally effective. See Prehearing Conference ALJ Exhibits 1 and 2. (See footnote 5)

8. By letters dated May 22, 1995, Grievants were informed that, due to the closing of the penitentiary, they were being laid off at the close of business on June 15, 1995. At that time, they were both placed on a recall list, pursuant to statutory provisions providing recall rights to employees in the classified service who are subject to lay-off. 9. Grievants were recalled to work and resumed employment as correctional officers on October 11, 1995.

Discussion

Grievants' claims in this matter only relate to the propriety of and the manner in which their lay-offs were accomplished. They have raised a variety of arguments, most of which relate to the definition of the phrase “good standing” as contained in W. Va. Code § 25-1-21 and the legislative rule adopted pursuant to that section, Title 90, Series 4.

The first contention that Grievants assert involves statements made by various parties prior to the closure of the penitentiary, regarding how the phrase “good standing” would be interpreted by Corrections officials. In particular, Grievants point to remarks which were made at a meeting held on October 19, 1993, which was apparently convened by officials of the penitentiary, local legislators, and General Skaff, Secretary of the Department of Public Safety, to allay concerns of the penitentiary's correctional officers about losing their jobs. At that time, General Skaff allegedly made statements to the effect that, so long as an employee was currently working at the penitentiary when it closed, that employee would be given the benefit of the transfer provision of the statute. No mention was made of the 12-month disciplinary restriction. Similarly, Grievants have introduced several “Warden's Reports,” which were periodically addressed to penitentiary employees and included in their paychecks. In several of such reports in 1992 and 1993, the warden attempted to define “good standing,” stating that good attendance and satisfactory performance evaluations would be key issues in making the determination.

The West Virginia Supreme Court and, accordingly, this Grievance Board, have recognized that unlawful or ultra vires statements made by public officials when functioning in theirgovernmental capacity are not binding upon the agency. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991); Daniels v. Greenbrier County Bd. of Educ., Docket No. 96- 13-150 (Jul. 31, 1996). It would be ludicrous for the undersigned to give binding legal effect to the opinions of certain individuals, rather than to a properly enacted regulation which has the force of law. Moreover, in this instance, the alleged statements were made prior to the penitentiary's closure, prior to promulgation of the legislative rule, and prior to the application of the statute and rule to the institution's employees. Until such time as the rule defining “good standing” had been formally authorized by the legislature, no official, including General Skaff, had the authority to state what the rule would say. This is true especially in light of the fact that, prior to final legislative vote, the definitions contained in the rule could have been altered by members of the legislature without any input from Corrections

personnel.

No evidence was submitted by either party to explain why the definition of “good standing” was ultimately restricted, but the fact remains that it was, in fact, defined prior to its application. The record indicates that the proposed rule was filed with the West Virginia Secretary of State's office in November of 1994, several months prior to its adoption. Therefore, it was available to the public for review and comment, and it was also subjected to the legislative rulemaking process, which also allows for public comment prior to the adoption of agency rules. Although, in 1993, officials may not have wanted to restrict the “good standing” status to only employees who had not been disciplined within twelve months, that position obviously changed when it came time to adopt rules and regulations. Accordingly, the only definition of “good standing” which is binding upon Corrections is the one contained in the final, approved rule which was voted upon by the legislature, effective May 22, 1995. Grievants have attempted to make an argument that they have somehow relied upon the statements described above and suffered harm because of that reliance. Both Grievants testified that they have somehow been harmed by settling their previous grievances in 1994, but they did not state that “but for” their understanding of the definition of “good standing,” they would not have settled those grievances. In fact, had they not settled their grievances, both Grievants could have been determined by an administrative law judge to have been justifiably discharged; if so, they would have had absolutely no rights to transfer, lay-off or recall upon closure of the penitentiary. Therefore, it was in Grievants' best interests to settle their cases and be reinstated regardless of the definition of “good standing.” It they had not settled, they might not now be full-time correctional officers, recalled to work in accordance with their statutory rights as classified employees. There is no merit to the argument of detrimental reliance.

Yet another argument asserted by Grievants is that Title 90, Series 4 conflicts with and/or is beyond the scope of the authorizing statute, W. Va. Code § 25-1-21. The test for determining whether a regulation or rule exceeds statutory authority was articulated by the West Virginia Supreme Court in Syllabus Point 3 of Appalachian Power Co. v. State Tax Dept. of W. Va., 466 S.E.2d 424 (W. Va. 1995), which states, in part:

> In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., ... The court must first ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position can only be upheld if it conforms to the Legislature's intent.

The Court went on to explain, in Syllabus Point 4 of the opinion, the standard of review in cases in which a statute's meaning is unclear:

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [A] properly promulgated legislative rule . . . can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary and capricious.

Application of the principles set forth in Appalachian Power results in the conclusion that Corrections did not exceed its statutory authority in this case. It is undeniable that the term “good standing” as used in W. Va. Code § 25-1-21 is ambiguous and is open to a variety of interpretations. Therefore, we must move to the second part of the test and determine whether Corrections' definition is “a permissible construction of the statute.” The undersigned finds that it is. Clearly, a necessary element of effectuating the procedure for the transfer of employees “in good standing” to other institutions involves an initial determination of which employees are, in fact, “in good standing.” Thus, Corrections acted within the legislature's mandate to promulgate rules “to effectuate notice and procedures for said transfers,” which necessarily required defining “good standing.”

In Appalachian Power, supra, the Court ardently expressed its reluctance to interfere with an agency's rulemaking duties, noting “[w]e will not set aside a formally adopted legislative rule without clearcut evidence of an inconsistency between the rule and the authorizing statute.” 466 S.E.2d at 439. Additionally, the Court made this pertinent observation:

> We believe that if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap and the agency is entitled to deference on the question. Thus, [the] agency's interpretation will stand unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'

Id. at 440. “Good standing” being such an ambiguous phrase, deference is called for in this instance, and Corrections' definition is not “arbitrary, capricious, or manifestly contrary to the statute.” Accordingly, Title 90, Series 4 is a valid legislative rule and was appropriately applied to these grievants.

Finally, Grievants assert that the regulation in question was given retroactive effect. This is simply

not true. Grievants were laid off effective June 15, 1995, and the rule had become effective on May 22, 1995. Even if one argued that the rule was applied to Grievants on May 22, 1995, the date of their lay-off letters, this is still the same date that the rule took effect, so no retroactive effect was given to it. Grievants also argued that the effect of the regulation was ex post facto and, thus, improper. In addition to simply not being the case here, the principle of ex post facto law applies only to criminal proceedings. Shumate v. W. Va. Dept. of Motor Vehicles, 392 S.E.2d 701 (W. Va. 1990).

Based upon the foregoing analysis, the undersigned finds that Grievants were not in good standing, as that term was defined by statute and legislative rule, and thus ineligible for transfer upon closure of the penitentiary. Furthermore, Corrections complied with other provisions of the rule requiring that all remaining employees not subject to transfer be placed in reduction-in-force status in accordance with statutes governing lay-offs of classified employees, W. Va. Code §§ 23-6-10 (5) & (6) and 5F-2-2(d). Grievants introduced no evidence indicating that the reductions-in-force were contrary to these provisions. Although a correctional officer position was posted on August 31, 1995, (ALJ Exhibit 3) which neither Grievant was selected to fill, no evidence was introduced regarding the person who received the position, who may have had greater seniority and superior recall rights to Grievants. Therefore, Grievants did not prove that their lay-offs were improper or that their recall rights were violated.

In addition to the foregoing findings and discussion, the following conclusions of law areappropriately made.

1. In nondisciplinary matters, a grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Crow v. W. Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989).

2. Unlawful or ultra vires statements made by public officials when functioning in their governmental capacity are not binding upon an agency. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991); Daniels v. Greenbrier County Bd. of Educ., Docket No. 96- 13-150 (Jul. 31, 1996).

3. Grievants did not prove by a preponderance of the evidence that they relied upon statements of Corrections and other officials to their detriment.

4. If a statute is unclear, a court must determine whether the agency's interpretation is based upon a permissible construction of the statute. A properly promulgated legislative rule can be ignored

only if the agency has exceeded its constitutional or statutory authority or is arbitrary and capricious. Syl. Pt. 4, Appalachian Power Co. v. State Tax Dept. of W. Va., 466 S.E.2d 424 (W. Va. 1995).

5. The definition of "good standing" contained in Title 90, Series 4, is not contrary to nor does it exceed the statutory authority of W. Va. Code § 25-1-21.

6. Grievants were not in good standing and ineligible for transfer to other institutions upon the closure of the West Virginia Penitentiary, pursuant to W. Va. Code § 25-1-21.

7. Grievants' lay-off, effective June 15, 1995, did not violate any law, policy, statute, rule, regulation, or written agreement.

Accordingly, this grievance is **DENIED**.

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.

Date: November 18, 1997 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Although filed as two separate grievances, all hearings, evidence, and other matters pertaining to them have been addressed as if they were one single grievance. Accordingly, although not formally consolidated prior to this Decision, they are now considered a single, consolidated grievance.

Footnote: 2

Since both grievants resumed employment on October 11, 1995, they are only entitled to back pay, if they are successful in this grievance.

Footnote: 3

Neither party filed such submissions.

Footnote: 4

Closure of the penitentiary was ordered by the West Virginia Supreme Court of Appeals in its decision in the case entitled Crain v. Bordenkircher, 342 S.E.2d 422 (W. Va. 1986). Two replacement institutions were to be built by the Regional Jail Authority, the Northern Regional Jail and Correctional Complex and the Mount Olive Correctional Complex.

Footnote: 5

A prehearing conference was held on October 11, 1995, at which time Administrative Law Judge Nedra Koval, Grievants' representative, and counsel for Corrections were present. Certain documents were marked as exhibits during that conference, pursuant to agreement of the parties, and are considered to be part of the record in this case.