TED WILEY,

Grievant,

v.

DOCKET NO. 99-DOH-109

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Ted Wiley, filed a grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH"), on February 1, 1999, protesting his non-selection for the position of County Maintenance Supervisor of Wayne County, West Virginia. The grievance was denied at level one by Grievant's immediate supervisor, Mr. Wilmer Napier, Wayne County Maintenance Supervisor, and at level two by J. Wilson Braley, District Engineer. A level three hearing was conducted on February 25, 1999, and Grievance Evaluator Brenda Craig Ellis, Esq., recommended denial of the grievance by decision dated March 4, 1999. Assistant Commissioner Thomas Badgett accepted the level three recommendation and denied the grievance by letter dated March 4, 1999. Grievant appealed to level four on March 11, 1999, and a level four hearing was conducted on June 15, 1999. This matter became mature for decision on July 7, 1999, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Charles M. Hatcher, Jr., Esq., Hatcher Law Office, and DOH was represented by Krista L. Duncan, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Application for Examination of Ted Wiley, dated September 28, 1998.

Ex. 2 -

County Maintenance Superintendent III classification specification.

Ex. 3 -

Application for Examination of Wilmer Napier, dated September 30, 1998.

Level Three DOH Exhibits

None.

Level Four Grievant's Exhibits

Ex. 1 -

West Virginia Division of Personnel Administrative Rule, effective July 1, 1998.

Ex. 2 -

Application for Examination of Wilmer Napier, dated June 9, 1998.

Ex. 3 -

Application for Examination of Wilmer Napier, dated September 30, 1998 (same as LIII Ex. 3).

Ex. 4 -

West Virginia Department of Highways Administrative Operating Procedure, Vol. IX, Chapter 23, Posting and Filling of Job Vacancies.

Ex. 5 -

April 15, 1999 letter from Thomas F. Badgett to Ted Wiley, with attached level three decision dated April 15, 1999.

Ex. 6 -

Grievance of Ted Wiley, dated October 7, 1998.

Level Four DOH Exhibits

None.

Testimony

Grievant testified in his own behalf and presented the testimony of J. Wilson Braley, Jimmy Joe Wedge, Yvonne Wilhelm, Wilmer Napier, Noka Martin and Dennis Martin. DOH presented no additional witnesses.

FINDINGS OF FACT

1. In November 1997, the County Maintenance Superintendent position for Wayne County became available due to the incumbent, Topper Sprye, vacating that position. Mr. Sprye's removal was the subject of articles reported in the local newspapers. (See footnote 1)

2. Around that time, James Teets, the Governor's Chief of Staff, and other members of the Governor's office, met with a group of top political figures in Wayne County. Mr. Sprye's dismissal was the topic of that meeting, as well as who would be his replacement. Wayne County is a predominantly Democratic county.

3. As a result of that meeting, Jimmy Joe Wedge, Governor's Assistant for Administration, talked to Tom Badgett, Assistant Commissioner of DOH, and told him that the people in Wayne County wanted Mr. Wilmer Napier as Acting CMS. Mr. Wedge's role as Assistant for Administration is to make recommendations to agencies regarding hiring for positions. He oversees all appointments to Boards and Commissions for the Governor. Mr. Wedge is heavily involved in the selection for will and pleasure positions. His role regarding classified positions is to make recommendations, but he does not get involved in the qualifications and hiring process for those positions.

4. Mr. Napier was asked by Jim Booten, a member of the Wayne County Commission, and others, if he was interested in acting as the Wayne County CMS. Mr. Napier replied he was interested if there weren't “any strings attached”, meaning political interference.

5. In June 1998, Tom Badgett, Assistant Commissioner for DOH, called Mr. Napier and asked if he was still interested in the position, and directed him to talk to Mr. Braley about the position.

6. At or about the same time, Mr. Braley received the recommendation to hire Mr. Napier from Mr. Badgett. Mr. Braley met with Mr. Napier and interviewed him for the Acting CMS position.

7. In June 1998, Wilmer Napier applied for and was hired as Acting CMS. LIV G. Ex. 2. Mr. Napier had never worked for DOH before this time.

8. In September 1998, applications were accepted for the CMS position, and Grievant applied for the position on September 28, 1998. LIII G. Ex. 1.

9. Mr. Napier also submitted an application for the CMS position on September 30, 1998. LIV G. Ex. 3.

10. Approximately five (5) applicants, including Grievant and Mr. Napier, were interviewed for the position by J. Wilson Braley, District Engineer, and Dave Bevins, Assistant District Administrator. 11. Grievant has been employed with DOH for more than 29 years as a laborer, operator, crew leader, and assistant supervisor. He has worked in a supervisor's position for a period of 16 to 18 years, as Assistant County Maintenance Superintendent, and was Acting Superintendent for a seven-month period. LIII G. Ex. 2.

12. Mr. Napier has more than two (2) years of supervisory experience, and more than five (5) years experience in site development, including excavating, laying drainage pipe, and constructing roads. The majority of Mr. Napier's experience is in residential building construction.

13. Grievant is a Republican. Mr. Napier is a Democrat. Wayne County is a predominantly Democratic county.

14. Grievant, his daughter and grandson, met with Mr. Wedge to discuss Grievant's interest in the CMS position.

15. Mr. Braley got the recommendation to hire Mr. Napier from Mr. Badgett's office. Mr. Braley ultimately recommended Mr. Napier for the position, and he was awarded the CMS position in January, 1999. (See footnote 2)

BACKGROUND

Historically, the CMS positions had been political appointments, and the incumbents were replaced whenever a new administration took office. W. Va. Code § 29-6-4(d)(1989)listed certain positions where political affiliation was deemed essential to effective performance, and as an appropriate hiring requirement. The CMS positions were included in that list. However, the West

Virginia Supreme Court of Appeals, in Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992), held that the position of CMS did not require its holder to share the same political affiliation or association as the governor, to effectively perform the duties attendant to such position. Akers, 425 S.E.2d at 846.

Mr. Akers had been appointed CMS by then-Governor Arch Moore. After Governor Gaston Caperton took office, the then-Secretary of Transportation informed the 35 CMS incumbents that they had the option of transferring to other positions, or remaining intact until they were replaced by the new administration. Mr. Akers rejected the transfer and was ultimately replaced by a Democratic employee. Mr. Akers filed a grievance protesting his replacement. The Grievance Board denied his grievance, but was reversed by the Circuit Court of Kanawha County, which held that the CMS' were not policymaking positions, and that W. Va. Code § 29-6-4(d), as it applied to CMS positions, was unconstitutional. The West Virginia Supreme Court of Appeals agreed, as noted above. (See footnote 3)

DISCUSSION

Grievant argued forcefully at level four that the consideration and appointment of Mr. Napier was based upon political considerations and, therefore, was in violation of Akers, supra, as well as the basic intent and purpose of the civil service statute. The WestVirginia Division of Personnel Administrative Rule, Section 11.1, Method of Making Promotions provides, in relevant part:

> (a) Whenever practical and in the best interest of the service, an appointing authority shall fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. In filling vacancies, appointing authorities should make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees.

DOH denies the hiring of Mr. Napier was politically motivated, and asserts he meets the minimum qualifications for the CMS position. Further, DOH asserts that, because the CMS position was classified-exempt at the time, the Division of Personnel Administrative Rules on selection did not apply to the filling of this position. While DOH may be correct that the Division of Personnel Administrative Rules do not apply to at-will positions, the Court in Akers recognized the at-will status of the CMS positions, but held, nonetheless, that political affiliation or consideration was an

inappropriate requirement for selection. Therefore, just because a position may have at-will status, that does not necessarily mean that political considerations may be utilized in selecting applicants for that position. See Akers, 425 S.E.2d at 843. See also Sales v. Grant, No. 97-1496, (4th Cir. 1998).

The governing law under which we assess the evidence here is settled and undisputed. The First and Fourteenth Amendments protect state and local government employees from discharge or other significant employment actions taken because of their political affiliations, see Rutan v. Republican Party of Ill., 497 U.S.62, 79 (1990); Elrod v. Burns, 427 U.S. 347, 360 (1976), unless their public employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public officeinvolved," Branti v. Finkel, 445 U.S. 507, 518 (1980), or can prove that even if the action was motivated in part by political considerations, it would have been taken in any event for reasons unrelated to political affiliations. See O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 725 (1996)(applying "mixed-motive principles of Mt. Healthy City Bd. of Ed. V. Doyle, 429 U.S. 274 (1977) to patronage termination of service provider's contract with municipality). And, within these general principles, it has been established in West Virginia that these substantive protections extend to the position of County Road Supervisor and to decisions not to reappoint holders of that position. See Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992). See also, Sales v. Grant, No. 97-1496 (4th Cir. 1998).

In Sales, supra, the plaintiffs, former Assistant Registrars for the City of Lynchburg, brought a Section 1983 action against members of the Electoral Board, alleging that, acting "under color or state [law]" had "subject[ed], or cause[d] [them] to be subjected to the deprivation of" those rights. 42 U.S.C. § 1983. Critically for that case, the section 1983 causation language, "subject[ ] or cause[ ] to be subjected," imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury.

> The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional injury.

Id, citing Gutierrez-Rodriguez v. Cartogena, 882 F.2d 553, 560-61 (1st Cir. 1989)(Bownes, J.)(citations omitted). This principle of effective causation by indirect means, grounded in the literal language of section 1983 and in general tort law, see Monroe v. Pape, 365 U.S. 167, 187

(1961)(holding that section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his action.”), overruled on other grounds, Monell v. Department of Social Servs. of City of New York, 436 U.S. 658 (1978), has been widely recognized and applied in section 1983 litigation. See, e.g., Malley v. Briggs, 475 U.S. 335, 345 n.7 (1986)(holding that misleading warrant application by section 1983 defendant could be effective cause of ensuing false arrest on judicially-issued warrant); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988)(holding that misleading statements by section 1983 defendants to prosecutor could be effective cause of ensuing prosecution); Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984)(holding that deliberate indifference of prison officials could properly be found effective cause of subordinates' infliction of constitutional injury); see also Spell v. McDaniel, 824 F.2d 1380, 1387-88, 1390 (4th Cir. 1987)(applying general principle to impose municipal liability for policy found to be effective cause of constitutional injury inflicted by employee).

Finally, in Sales, supra, the Fourth Circuit Court of Appeals found that, “this general principle indisputably applies as well to the section 1983 patronage action here at issue.” The issue then became “whether the evidence was sufficient to support a rational jury finding that Mason and Grant, or either of them, for politically-motivated reasons, effectively caused Miller and Sales not to be reappointed.” After assessing the evidence de novo, the Fourth Circuit disagreed with the trial court that the plaintiffs had not produced sufficient evidence, and reversed the trial court's granting of summary judgment against the plaintiffs. The Court noted that the plaintiffs' “burden was to offer sufficient evidence to permit a finding that that conduct was substantially motivated by political considerations. See O'Hare Truck Service, 518 U.S. at 725. Those considerations might relate either to the targeted person's affiliation with one political party or lack of affiliation with or support of another party. See Rutan, 497 U.S. at 64; Elrod, 427 U.S. at 359-60.” Sales, supra.

Constitutional “patronage” law is clear that the requisite political motivation, as any state of mind, can be proved by circumstantial evidence as commonly the only kind available for this purpose. See e.g., Anthony v. Sundlen, 952 F.2d 603, 605-06 (1st Cir. 1991)(holding that proof of political motivation in patronage case not confined to “(relatively rare) instances in which a 'smoking gun' can be produced” and commenting that “circumstantial evidence alone can support a finding of political discrimination”); Cygnar v. City of Chicago, 865 F.2d 827, 844-45 (7th Cir. 1989)(holding that evidence that patronage targets names were known by defendant to be on Democratic Party

contributors' list sufficient to support finding that defendant knew, despite his denial, of their political affiliations). Sales, supra.

The Findings of Fact presented above are not in dispute. The only contested matter concerns the conversation between Grievant and Mr. Wedge regarding the hiring for the CMS position, which took place in Mr. Wedge's office. Grievant testified at level four that Mr. Wedge told him that Mr. Napier was going to the get the job, because the administration had to do a favor for Mr. Sprye, and presumably the Wayne County Democrats, in order to avoid a lawsuit over how Mr. Sprye's removal was reported in the newspapers. Noka Martin, Grievant's daughter, and Dennis Martin, Grievant's grandson,were in attendance at that meeting, and both testified at level four that Mr. Wedge told them “they” (the administration) had to do Mr. Sprye a favor to avoid a lawsuit over how his removal was reported in the newspapers.

Mr. Wedge recalled the meeting with Grievant, his daughter and grandson, and recalled telling them that Mr. Napier was getting the job. However, Mr. Wedge denied telling Grievant that the Governor's office was doing Mr. Sprye a favor by hiring Mr. Napier. Further, Mr. Wedge testified he did not know anything about Mr. Sprye's alleged lawsuit against the Department.

Obviously, the testimony presented is in conflict, and the issue of witness credibility must be resolved. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). “The fact that [some of] this testimony is offered in written form does not alter this responsibility.” Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absenceof bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. Id.

Both Grievant and Mr. Wedge testified in an open, honest and forthright manner. Clearly, Grievant and his relatives have an interest in showing that Mr. Napier's appointment was made for political reasons, specifically, to “do a favor” for Mr. Sprye, in order to avoid a lawsuit against the department. Just as clearly, Mr. Wedge has an interest to protect in preserving the integrity of the selection of Mr. Napier for the CMS position. The rumor of Mr. Sprye's lawsuit apparently was rather common knowledge, and I find it incredible that Mr. Wedge had no knowledge of that rumor. However, because of that common knowledge, Grievant and his relatives could just as easily have heard the rumor somewhere other than Mr. Wedge's office. A determination of credibility must be made on the basis that something “more likely than not” occurred. In this instance, I am unable to find that Grievant and his relatives more likely than not heard the rumor about Mr. Sprye's lawsuit, and the resulting “favor”, from Mr. Wedge. This does not mean that Grievant's testimony regarding the rumor is untrue. All it means is that I am unable to make a finding that he heard the rumor from Mr. Wedge.

In any event, whether he heard the rumor from Mr. Wedge or elsewhere does not change the outcome of this grievance. The evidence outlined earlier supports the allegation that political considerations more likely than not led to the acceptance of Mr. Napier's application and his selection to the CMS position. The totality of thecircumstances surrounding his appointment all point to the conclusion that the appointment was made for political reasons.

According to his application, Mr. Napier had no experience at DOH, and little or no experience in actual road construction, the majority of his experience being in residential building. Despite Mr. Braley's testimony that Mr. Napier had “superior managerial experience”, Mr. Napier testified that at the time he was selected, he had no employees, and that he had not had any employees since 1995. Prior to 1995, Mr. Napier testified he had, at the most, 3 employees, and subcontractors, who he supervised.

Mr. Napier testified he knew Mr. Sprye, and knew of the “trouble” in the Wayne County district because his son had worked for DOH for 3 or 4 years. Mr. Napier was contacted by Mr. Booten of the Wayne County Commission about the job, and asked him “why me?” Mr. Booten told him he was concerned about the morale in the district, and thought Mr. Napier could bring some “coalition”. Mr. Napier told Mr. Booten he would consider the job as long as there were “no strings attached”, and Mr. Booten assured him that there would be no political involvement in his operation of the district. Mr. Napier's concerns about “strings” being attached to his appointment indicates that he was aware that

his placement was political in nature, and reflect his concern that politics not be involved in his actual running of the district.

Of particular significance in this case is the fact that the appointment took place after a meeting of top officials in the Governor's office, and top political figures in Wayne County, which resulted in Mr. Napier being recommended for the position. Mr. Napier's name was passed down from the Governor's office through Transportation, and ultimately to Mr.Braley, who did not know Mr. Napier. It is uncontested that the matter of Topper Sprye was discussed at that meeting in Wayne County. Mr. Wedge was not present at that meeting, and no one who was present testified at level four. Thus, the validity of the rumor of Mr. Sprye's alleged lawsuit against the department is unknown.

The preponderance of the evidence shows that the consideration and appointment of Mr. Napier to the CMS position was due to political considerations, whether it was to appease Mr. Sprye and/or the Wayne County Democrats. (See footnote 4) The evidence establishes that Mr. Napier's appointment was contrary to the constitutional protections elicited in Rutan, supra, and its progeny.

CONCLUSIONS OF LAW

1. Grievant established by the clear preponderance of the evidence that the application of the successful applicant was improperly considered in violation of Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992). 2. The preponderance of the evidence establishes that Mr. Napier was considered and appointed to the CMS position based upon political considerations and not on the basis of merit and fitness.

3. The appointment of Mr. Napier was contrary to the constitutional principles set forth in Rutan, supra, and its progeny, including Akers, supra.

4. Grievant did not prove by a preponderance of the evidence that he would have received the CMS position but for the improper hiring of Mr. Napier for the position. There were other applicants for the position, and Grievant did not prove he was entitled to the CMS position over those other applicants.

Accordingly, this grievance is **GRANTED**, and DOH is hereby **ORDERED** to remove Mr. Napier from the CMS position in Wayne County, and rebid the position utilizing and adhering to all of the appropriate civil service laws and regulations.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 3, 1999

Footnote: 1

At all times pertinent to this decision, the County Maintenance Superintendents ("CMS") were classified-exempt, at-will positions. (See footnote 5) Effective July 1, 1999, W. Va. Code § 29-6-4 was amended to add the following paragraph:

> *(e) All county road supervisor positions shall be covered under the classified service effective the first day of July, one thousand nine hundred ninety-nine: Provided, That any person employed as a county road supervisor on the effective date of this section, shall not be required to take or pass a qualifying or competitive examination upon or as a condition of becoming a classified service employee. All county road supervisors who become classified service employees pursuant to this subsection who are severed, removed or terminated in his or her employment must be severed, removed or terminated as if the person was a classified service employee.*

Thus, Mr. Napier now is a member of the classified service and afforded all the protections included therein.

Footnote: 2

Grievant has since resigned his employment with DOH due to medical and stress- related ailments which he attributes to abusive treatment he has received from Mr. Napier. Grievant filed a grievance over this treatment in October 1998 (LIV G. Ex. 6), and a level three Grievance Evaluator found in Grievant's favor on April 15, 1999, issuing a cease and desist order to Mr. Napier, and instructing him to attend managerial training. LIV G. Ex. 5.

Footnote: 3

The Grievance Board decision was based upon the legal premise that executive branch agencies do not have the authority to declare a statute unconstitutional.

Footnote: 4

The effect of Mr. Napier's political appointment is that he now holds a position that is in the classified service. This is surely contrary to the purpose of the civil service law. The Supreme Court of this State has recognized that one of the principal purposes of the civil service law is to provide a "means . . . of attracting competent, principled, and dedicated individuals into the public service." W. Va. Dept. of Corrections v. LeMasters, 313 S.E.2d 436, 438-39 (1984). See generally, State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). One way of achieving that goal is to ensure existing personnel are not denied opportunities for advancement because positions are filled based upon political affiliation. See Frantz/Devaul v. W. Va. Dept. of Employment Security, Docket Nos. 89-ES-050/89-ES-186 (July 25, 1989), aff'd Circuit Court of Kanawha County Civil Action No. 89-AA-155 (Oct. 21, 1991).

Footnote: 5

CMS positions became classified positions due to new legislation, effective July 1, 1999.