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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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HARRY GILLISPIE

v.

DOCKET NO. 89-CORR-354

W.Va. DEPARTMENT OF CORRECTIONS

D E C I S I O N

The primary question presented in this grievance is whether a provision in this State's civil service statute which requires that an employee who becomes a candidate for any paid public office be placed on an unpaid leave of absence is applicable to a nonresident who runs for such office in his home state. For the reasons which follow, the undersigned concludes that the Department of Corrections (Corrections) acted lawfully in placing the grievant on an unpaid leave of absence.

There is no dispute concerning the salient facts surrounding this controversy; the only question presented is how the law applies to the facts. Grievant has been employed by Corrections for approximately sixteen years and most recently has served as a Section Chief IV under the

civil service classification plan. In May 1989, grievant, a Pennsylvania resident, was the successful candidate in the municipal primary election for the position of Township Supervisor in the Township of Rich Hill, located in Greene County, Pennsylvania. He filed a petition of candidacy in February 1989 and ran on the Democrat ticket. Grievant had run unsuccessfully for the same office in 1987 and at that time had been required by Corrections to take an unpaid leave of absence pending the outcome of the general election.

After grievant confirmed that he had become a candidate for elected office in a telephone conversation, the Warden of the West Virginia Penitentiary by letter dated June 9, 1989, suspended him for fifteen calendar days pursuant to Section 13.03 of the rules and regulations of the Civil Service Commission of West Virginia, pending an investigation into his alleged willful and knowing violation of state law.

Following the investigation, the Warden, by letter dated June 21, 1989, increased grievant's suspension to a period of thirty calendar days ending on July 8, 1989, at which time he would be placed on an unpaid leave of absence until after the general election.¹ Grievant did not advise

¹ On July 17, 1989, grievant filed directly with the Grievance Board under the expedited procedure provided for in W.Va. Code §29-6A-4(e), and after two continuances a
(Footnote Continued)

his supervisor of his candidacy or request an unpaid leave of absence prior to the May primary election. Since grievant had previously been required to take a leave of absence while running for public office in Pennsylvania, Corrections considered grievant's conduct in not advising his supervisor or the personnel officer of his candidacy as a knowing and willful refusal to request a leave of absence as required by W.Va. Code §29-6-20(g).

Grievant, the only witness at the hearing, testified that an unknown employee in the Attorney General's office advised him shortly after he was forced to take a leave of absence when he ran for office the first time that the statute did not apply to his candidacy. He also stated that he made no secret of his candidacy and that it was widely known within the penitentiary.

W.Va. Code §29-6-20 provides in pertinent part as follows:

(e) Notwithstanding any other provision of this code, no employee in the classified service shall:

(3) Be a candidate for any national or state paid public office or court of record; or hold any paid public office. . . .

* * *

(g) Any classified employee who becomes a candidate for any paid public office as permitted by this section shall be placed on a leave of absence without pay for the period of such candidacy, commencing upon the filing of the certificate of candidacy and upon such other terms and

(Footnote Continued)

hearing was conducted on September 11, 1989, at the Board's Wheeling office. The final post-hearing submission was received on September 29, 1989.

conditions as may be prescribed by legislative rule to be promulgated by the Civil Service Commission no later than the first day of September, 1984.

Grievant contends that these statutory provisions do not proscribe his candidacy for local office in another state. He contends that the word "state" as used in subsection (e)(3) refers to the state of West Virginia only, not any other state, and that any other interpretation of this statute would exceed the intent of the Legislature. He argues the statute was only intended to apply to a civil service employee who becomes a candidate for a paid public office in West Virginia.

Corrections recognizes that subsection (e)(3) does not prohibit grievant's candidacy but argues that the language of subsection (g) is clear and unambiguous and creates a mandatory duty upon it to place grievant on an unpaid leave of absence.

A merit-based civil service system was enacted in this State in 1961. This legislation contained substantial restrictions on partisan political activities by public employees and, like similar laws in most jurisdictions, is patterned after the federal Hatch Act.² The courts have

² 5 U.S.C. §§7321 et seq.; See, Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Crittenden, Restrictions On Political Activities of Government Employees, 87 W.Va. L. Rev. 165 (1984); Annot., 44 A.L.R.Fed. 306 (1979).

widely recognized that restrictions on partisan political activities by public employees serve valid and important state interests, such as attracting greater numbers of qualified persons by insuring their job security, free from the vicissitudes of the election process. See Note 2.

The present statute was the result of amendment in 1983, easing the restrictions on political activities to a limited extent. For example, the statute previously provided simply: "no employee in the classified service shall be a . . . candidate for nomination or election to any paid public office." W.Va. Code §29-6-20(e) (1977).

It is clear from reading subsection (e)(3), as quoted earlier, that a civil service employee is absolutely prohibited from becoming a candidate for any national or state paid public office or court of record, or from holding any paid public office. It is also clear that grievant's candidacy for a municipal office does not violate this subsection. Hence, the critical issue is the scope of subsection (g).

Research did not reveal any cases discussing the interstate applicability of a state statute restricting partisan political activities by public employees. The traditional and safest method for ascertaining and effectuating legislative intent is to carefully examine the language of the statute itself and give the words their ordinary and commonly understood meaning.

Grievant's argument improperly focuses on and emphasizes the language of subsection (e)(3) that prohibits a civil service employee from being a candidate for any national or state office. The undersigned concludes that the statute is clear and unambiguous. While grievant's candidacy for the municipal office is not proscribed by subsection (e), subsection (g) expressly requires grievant to be placed on an unpaid leave of absence for the period of such candidacy. He is without question a candidate for a paid public office. The statute applies to "any paid public office" and contains no language limiting its reach to a public office within this State. Moreover, the evidence indicates that grievant will receive some remuneration in the office, and grievant testified that if he is elected to this position he intends to work full-time on an hourly basis and will resign his position with Corrections. There is thus no question that the office is a paid public office within the meaning of the statute.

Although grievant's testimony about his candidacy being known within the penitentiary and other respects is found to be entirely credible, and there is nothing in the statute specifically requiring employees to report their candidacy, the undersigned believes Corrections had the right to expect and demand grievant to officially report his candidacy in view of the circumstances surrounding his previous candidacy.

The West Virginia Supreme Court of Appeals recently decided a case involving subsection (e)(3) in Fraley v. Civil Serv. Comm'n, ___ W.Va. ___, 356 S.E.2d 483 (1987). There an individual who had held a paid public office as a county coroner for several years was properly dismissed from his civil service position with the West Virginia Department of Highways. The employee had been the coroner since 1972, and began working as a civil service employee in July 1981. He was terminated from employment in August 1985, because he was holding a paid public office. The Court based its decision, as it has in numerous recent cases, on the basic principle that "where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). The same fundamental principle also applies here and controls the outcome in this case.

Grievant also alleged that he had been harassed and discriminatorily punished for his conduct but offered only vague arguments and no evidence to support these claims. There was some argument that the thirty day penalty was excessive and beyond the punishment imposed on others for more serious infractions. Again, however, there was no evidence introduced to support this contention and the record will not support a finding that the grievant's

suspension was clearly excessive.³ See, Schmidt v. W.Va. Dep't of Highways, Doc. No. DOH-88-063 (Mar. 31, 1989).⁴

In addition to the findings of fact and the conclusions of law contained in the foregoing discussion and analysis, the following findings of fact and conclusions of law are also made:

Findings of Fact

1. Grievant, a civil service employee and resident of Pennsylvania, became a candidate for a paid public office in Pennsylvania and did not advise his supervisor of his candidacy or request an unpaid leave of absence.

2. Grievant had previously been required to take a leave of absence when he ran for the same office in 1987 and was aware that Corrections interpreted the civil service law as requiring his placement on an unpaid leave of absence.

³ The length of the suspension is nonetheless troublesome in one respect. There was some suggestion at the hearing that the suspension imposed may have been selected in part to permit the grievance to come directly to the Grievance Board under the expedited procedure for suspensions exceeding twenty days. This is, of course, not a permissible factor for consideration. If this is the case, Corrections should mitigate the penalty it imposed upon the grievant.

⁴ Under W.Va. Code §29-6-20 the leave of absence is to begin upon the date of the filing of the certificate of candidacy. Here this would appear to be in February when he filed a petition for candidacy, rather than May when he won the primary election, or June when he was suspended.

Conclusions of Law

1. Corrections carried its burden of proof and established by a preponderance of the evidence that grievant's conduct was a knowing and intentional attempt to avoid being placed on an unpaid leave of absence during the period of his candidacy as required by W.Va. Code §29-6-20(g).

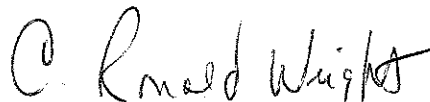
2. W.Va. Code §29-6-20(g) is clear and unambiguous and is applicable to a nonresident civil service employee who runs for a paid political office in the state of his residency.

3. Grievant failed to establish that Corrections violated or misinterpreted W.Va. Code §29-6-20(g), when it placed him on an unpaid leave of absence during the period of his candidacy.

Accordingly, this grievance is hereby **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County 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 Hearing Examiners is a party

to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

Dated: October 31, 1989