WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD
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DAVID SETZER

v. Docket No. 89-DPS-476

W.Va. DEPARTMENT OF PUBLIC SAFETY

D E C I S I O N

David Setzer, a civilian, non-civil service employee of the West Virginia Department of Public Safety (DPS) filed a grievance with the Grievance Board on August 19, 1989, alleging that he had been reduced from his position as supervisor of construction projects to a laborer in the maintenance department and that his salary had been substantially lowered "without cause and for reasons which are outside the scope of my employment."[1] At the level IV

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[1] The allegations of the grievance were treated as a claim of improper demotion properly filed directly at level IV of the grievance procedure under W.Va. Code §29-6A-4(e). Since DPS did not request a remand on the basis that the personnel action was not disciplinary in nature, see Williamson v. W.Va. Dept. of Human Serv., Docket No. 89-DHS-33 (Feb. 27, 1989), and the issue of whether the grievance was properly at level IV did not become apparent until the hearing, the case was heard at this level in the interest of an expeditious resolution of the controversy. The case was set for hearing on August 30 and was continued for good cause over grievant's objection, and a final hearing was held on October 2, 1989. Grievant filed proposed findings of fact and conclusions of law on October 13, 1989, and the case was mature for decision.

hearing, grievant testified that he felt DPS had breached the oral agreement under which he had been hired and thus presented the basic question for decision in this case. Finding DPS did not breach any contractual obligation owed the grievant, the grievance is denied.

I.

There is no dispute concerning the material facts. The primary testimony introduced concerning the terms and conditions under which grievant was hired came from the former Superintendent of DPS, Colonel W. F. Donohoe. He testified that he and grievant had been close friends for many years and that from personal experience he knew grievant to be a skilled building contractor. Colonel Donohoe said that he hired grievant in order to implement a cost-effective, in-house building program and avoid the need for construction contract bidding and payment of craft union wage rates.

He further stated that grievant was hired on July 18, 1988, with the understanding that he would become a permanent full-time employee in charge of the construction and renovation of barracks and other facilities owned or utilized by DPS. He explained that he had wanted to employ grievant in this capacity for some time but sufficient funding had not been available. The monies became available to permit grievant's employment as the result of legislation passed in 1987 doubling the cost of inspection stickers for motor vehicles. This generated a fund of approximately

$750,000 per year dedicated exclusively to the maintenance and construction of DPS facilities. He also testified that he had been assured by the Auditor's office and the Department of Finance and Administration that it would be lawful to hire permanent personnel for this purpose utilizing the funds in this revenue account.

The WV-11 Personnel Action Form completed when grievant was initially hired reflects that he was to be paid at an hourly rate of $9.85 but would be transferred to a full-time paid position the next pay period. A second WV-11 Personnel Action Form dated August 2, 1988, shows that he was transferred into a full-time paid position in the maintenance department on August 1, 1988, at an annual salary of slightly more than $20,000.

Colonel Donohoe also explained that a written contract had been executed when grievant was hired simply to make certain that the Department of Finance and Administration would approve grievant's employment.[2] The agreement dated July 18, 1988, provided that grievant would be employed for a period not to exceed five months, but further provided

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[2] Another WV-11 Form dated December 19, 1988, indicated grievant was hired full-time on July 18, 1988, in a trooper's position and requested that he be transferred to a new full-time position in the Maintenance Division. Colonel Buckalew, the present Superintendent of DPS, testified that what probably occurred was that grievant was hired as a trooper because there were no vacancies in the Maintenance Division when he was employed. He questioned the legality of this hiring procedure in that several legal requirements must be satisfied before a person can be hired as a trooper.

that he would be subject to immediate dismissal without cause during the next twelve month period if his employment should continue for that length of time.[3] The agreement also specified that he would be eligible to participate in the state's retirement and insurance programs and would accrue annual and sick leave benefits. The agreement, however, did not speak to grievant's job classification or duties, his compensation, or any other terms or conditions of employment.

Grievant corroborated Colonel Donohoe's testimony, stating they had discussed his working for DPS on several occasions prior to his employment but sufficient funds had not then been available to permit his acceptance of employment. He stated that he had substantial job experience, having supervised construction projects since about 1963, including over seven hundred homes. He also noted he had performed a major electrical wiring project for DPS, was familiar with plumbing and heating requirements and could operate heavy construction equipment. Grievant further

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[3] The contract stated in part as follows:

> I understand that my employment with the West Virginia Department of Public Safety (State Police) will be for a period not to exceed five (5) months. I further understand and agree to immediate dismissal without cause during the next twelve (12) months if my employment should cover that long a time frame.

testified that he was provided a vehicle for transportation to and from his residence and to job sites.

Corporal Dale Humphreys, the Director of Personnel, who drafted the agreement, testified that the agreement was intended to permit grievant's employment to supervise a particular construction job and to allow for elimination of his position if no further need existed for his services after the project was completed. On cross-examination, he explained that grievant was not hired as a temporary employee, as such employees of DPS do not accrue sick leave or annual leave.

The evidence reveals that during the first several months of employment, grievant supervised a small crew of temporary employees constructing a major addition to an aviation building. In January 1989, Colonel J. R. Buckalew became the Superintendent of DPS and shortly thereafter began laying off the temporary employees grievant had been supervising. On or about March 1, 1989, grievant was contacted by his supervisor, Lieutenant C. E. Starcher, and advised that he would no longer be functioning as a supervisor, since the construction project had been completed and his work crew had been laid off. He was directed to report to Emmitt Eikens, the head of the Maintenance Division, for his work assignments in the future. From then until August, 1989, grievant performed a few assignments but spent the bulk of his time completing minor detail work on the aviation building.

Colonel Buckalew testified that when he took office in January 1989, he was required to reduce his budget by $1,270,000 and perform the unpleasant duty of laying off numerous civilian employees. In early August 1989, it was brought to his attention by a member of the maintenance crew that grievant had been hired on a temporary contract as a foreman to supervise the construction of an addition to an aviation building which had been essentially completed. When he was advised that the grievant was no longer supervising a construction crew and had been working as a maintenance man for several months at the salary level of a foreman, he decided grievant's salary should be reduced in fairness to the other maintenance workers. He indicated that grievant was being paid more than maintenance workers employed by DPS for as long as sixteen years; however, rather than terminate grievant, which he believed he had the right to do in the circumstances, he simply directed that his salary be reduced to the level being paid to other maintenance workers employed a comparable length of time. On August 7, 1989, grievant's position was formally downgraded to that of a laborer in the Maintenance Division at a substantially reduced salary.

II.

Grievant, in his proposed findings of fact and conclusions of law, contends that DPS breached its agreement with him when he was demoted and his salary and benefits were reduced by more than $8,500 per year. He argues DPS has

made no showing of fiscal or economic necessity for reducing his position or pay, and that DPS failed to meet its burden of proving by a preponderance of the evidence that the punitive action taken against him was taken for good cause. This burden he contends can only be carried by establishing the following: (1) that grievant is not competent to perform the duties of his position; (2) that due to fiscal problems funds are not available to compensate grievant; or (3) there is no "work" which grievant can perform. He seeks restoration to his former position, with attendant pay and allowances and for such other general relief as the Grievance Board may deem just and proper.

At the outset it is clear that grievant is not relying on the written agreement he signed when he was hired. Rather, his claim is based on the previous understanding he had with former Superintendent Donohoe concerning the nature and terms of his employment. DPS likewise does not defend the case upon the basis of the terms of the written contract, but rather argues its action was justified and proper in order to provide its maintenance employees equal pay for equal work.

It is also clear that the parol evidence rule which prohibits the introduction and consideration of prior oral statements to alter or vary a written contract has no applicability in this case and does not, as a matter of substantive law, forbid consideration of the understanding under which grievant was hired. The authorities are in

accord that this rule applies to exclude such evidence only where the written agreement is regarded by the parties as a complete embodiment or statement of the agreement. Here that is obviously not the case. See Kanawha Banking & Trust Co. v. Gilbert, 131 W.Va. 88, 46 S.E.2d 225 (1948); A. Corbin, Corbin on Contracts 534-537 (One Volume Add't 1952).

At the commencement of the level IV hearing, DPS contended that the action complained of was not taken for disciplinary reasons and, therefore, grievant had the burden of proof. This contention is borne out by the evidence adduced at the hearing. DPS has not questioned grievant's abilities or performance in any way. It is manifest that grievant has not shown DPS took the adverse personnel action against him for disciplinary reasons or for reasons related to his having been hired by the previous superintendent of DPS.

The record, nevertheless, does establish grievant's allegation that he was hired to supervise a particular construction project with the understanding that he would become a permanent employee in charge of DPS construction and renovation projects. There is no evidence demonstrating that grievant's salary had to be reduced due to budgetary restraints. In fact, the record establishes that DPS lowered grievant's salary so that it would be comparable to that of other maintenance employees employed about the same length of time, rather than out of fiscal concerns.

As DPS pointed out, however, a new administration is in office and a new superintendent has been appointed. Grievant was hired by and had an understanding with the former superintendent. The contention that a new superintendent is legally bound by a predecessor's oral agreement such that no change can be made in the terms and conditions of a worker's employment is a dubious proposition at best.

Considering all the circumstances, the undersigned concludes that the nature of grievant's present employment status is that of an employee-at-will. In the absence of an agreement, a non-civil service employee appears to have little protection from even arbitrary dismissal and no rights with respect to management changes in the terms and conditions of employment. Unless the employment is for a fixed term, the well established common law rule is that either party can terminate the employment at will, with or without cause. Wright v. Standard Ultramarine and Color Co., 141 W.Va. 368, 382, 90 S.E.2d 459, 468 (1955); see Annot., 12 A.L.R. 4th 544 (1982).

Limited exceptions have been carved out of this common law rule for cases where the employer's motivation for the discharge contravenes some substantial public policy principle, Harless v. First Nat. Bank or Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978), or where a contractual obligation not to discharge an employee except for specified reasons can be found to exist based upon an employee handbook or other

personnel policies,[4] Cook v. Heck's Inc., ___W.Va.___, 342 S.E.2d 453 (1987). Neither exception is in issue in this proceeding.

Furthermore, even if DPS had some legal duty to maintain grievant in the supervisory position at the same salary level based upon the oral understanding or agreement, there is no evidence that the agreement was intended to prohibit DPS from changing his position or reducing his salary if no construction projects were being performed. Although grievant perceives DPS's action to be harsh, punitive in nature and a breach of his understanding with the former superintendent of DPS, the evidence does not support the conclusion that DPS was contractually obligated to continue paying him for supervisory work he had not been performing since approximately March 1, 1989.[5] Stated differently, there is no evidence to support a finding of an agreement,

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[4] In addition, and separate and apart from contract principles, an administrative body must abide by any remedies or procedures it properly establishes to conduct its affairs. See, e.g., American Fed. of State, Cty. and Munic. Employees v. Civil Serv. Comm'n, ___W.Va.___, 341 S.E.2d 693 (1985); Powell v. Brown, 160 W.Va. 723, 238 S.D.2d 220 (1977). Grievant neither alleged nor proved that DPS violated any written personnel policies it may have promulgated.

[5] This case is distinguishable from Freeman v. Poling, ___W.Va.___, 338 S.E.2d 415 (1985). Although that case did involve oral promises to public employees, the promises were found to be expressly contrary to state law and, therefore, unenforceable. In this case there is no allegation or evidence that the representations by former Superintendent Donohoe are violative of state law.

enforceable or otherwise, that grievant was absolutely entitled to remain in the supervisory position at a fixed salary level in the future.

It does not appear that DPS acted unreasonably in reducing grievant's salary to an amount comparable to that being paid similarly-situated maintenance workers performing similar functions. However, if and when DPS should engage in major construction or renovation projects in the future, it would be consistent with equitable principles and would appear to be good management to place grievant in a supervisory role where his skills and abilities could be fully utilized and he could be compensated accordingly.

The following findings of fact and conclusions of law are in addition to the findings and conclusions contained in the foregoing discussion and analysis.

Findings of Fact

1. On July 18, 1988, grievant was hired to serve in a supervisory capacity over a particular construction project with the understanding that this would be a permanent supervisory position.

2. On July 18, 1988, grievant entered into a written contract with DPS which provided for a period of employment not to exceed five months, but which further provided that he could be immediately dismissed without cause during the next twelve months of his employment should he be employed for that period of time.

3. The written agreement grievant executed when he was hired did not constitute the complete agreement under which he accepted employment.

4. By March 1, 1989, the construction project had been completed and the temporary employees grievant had been supervising had been laid off.

5. On or about March 1, 1989, grievant was advised that since he was no longer functioning in a supervisory capacity he should report to the head of the maintenance department for the assignment of job duties.

6. On August 7, 1989, grievant's position was formally downgraded to that of a laborer in the maintenance department and his salary was reduced by several thousand dollars to bring it in line with that of other employees performing similar duties.

Conclusions of Law

1. Since this is not a disciplinary matter, grievant bears the burden of proving the allegations of his grievance by a preponderance of the evidence.

2. Grievant failed to establish that DPS breached any contractual obligations or legal duty owed to him. The understanding under which grievant was hired cannot be construed to require that he be retained in a supervisory position and be paid a commensurate salary where there is a lack of need for such services.

Accordingly, the grievance is **DENIED.**

Either party or the West Virginia Division of Personnel 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

C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

Dated: November 24, 1989