WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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THADD M. MCCLUNG

v. Docket No. 89-DPS-240

W.Va. DEPARTMENT OF PUBLIC SAFETY

D E C I S I O N

Thadd M. McClung filed a grievance alleging that he had been improperly terminated on May 25, 1989, from his employment with the West Virginia Department of Public Safety (DPS) for having divulged criminal records in violation of DPS policy.[1] At the level IV hearing DPS orally moved to dismiss the grievance on the basis that the grievant had voluntarily resigned from his employment and therefore could not invoke the expedited grievance procedure established by W.Va. Code §29-6A-4(e), which permits an employee to file directly with the Grievance Board only in cases involving a dismissal, demotion or suspension exceeding twenty days. Grievant opposed the motion contending his typewritten

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[1] A level IV hearing was held on July 7, 1989. The hearing had previously been continued upon motion of DPS for good cause.

resignation had not been voluntary. He argued that he signed the resignation only because he had been told that he would be terminated immediately if he did not do so.[2]

The motion was denied at the hearing because a question of fact was presented as to whether the grievant's resignation was voluntary. If the resignation were found to be involuntary, grievant's removal would be tantamount to a dismissal and the case would be properly before the Grievance Board under the expedited grievance procedure. This threshold issue will be addressed first.

The Grievance Board has not previously spoken to this jurisdictional question. The West Virginia Supreme Court of Appeals, however, considered a similar situation in its per curiam decision of Adkins v. Civil Serv. Comm'n, __ W.Va. __, 298 S.E.2d 105 (1982). The Commission had ruled that it lacked jurisdiction to consider the matter because the employee had voluntarily resigned from employment. The civil service statute in effect at that time was substantially similar to the statute involved in this case. The employing agency had promulgated a regulation that provided that an oral resignation could be accepted if it was unequivocal. Finding that the employee's oral resignation was not unequivocal, the Supreme Court decided, without any

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[2] DPS also indicated that if its motion were not granted it planned to introduce evidence to establish that the grievant had improperly divulged criminal records and was properly terminated.

discussion, that the Commission had jurisdiction over the employee's dismissal and remanded the case for a hearing on the merits.

The Grievance Board, of course, has only that jurisdiction conferred on it by the Legislature. W.Va. Code §29-6A-4(e) provides, in pertinent part, that "an employee may grieve a final action of the employer involving a dismissal, a demotion or suspension exceeding twenty days directly to the hearing examiner." This provision gives the Board's hearing examiners the authority to hear three types of major personnel actions at what is ordinarily level IV of the grievance procedure. It gives employees an option to bypass the first three levels which must be pursued in other personnel actions.

The Board's jurisdiction and the question of whether a resignation is voluntary are inextricably intertwined. This reasoning was implicit in the Adkins decision. A truly voluntary resignation on the part of the employee is not ordinarily grievable. The employer in such a situation has not taken any action adverse to the employee, and there is thus no grievable act within the meaning of grievance as defined in W.Va. Code §29-6A-2(i). However, if the resignation is involuntary and, for example, was submitted as a result of agency coercion, the Grievance Board would have jurisdiction to determine whether the grievant was improperly terminated from employment under the expedited grievance procedure. The grievant bears the burden of proving by

a preponderance of the evidence that the resignation was involuntary, and will ordinarily be entitled to a hearing on the issue.[3]

It is therefore necessary to consider whether the grievant's resignation was voluntary. To determine whether an employee's act of resignation was the result of coercion, rather than a voluntary act, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice. Hammond v. Department of the Navy, 35 M.S.P.R. 644 (1987). See Billings v. Civil Serv. Comm'n, 154 W.Va. 688, 178 S.E.2d 801 (1971); Bava v. Civil Serv. Comm'n, 154 W.Va. 701, 178 S.E.2d 839 (1971).

The facts surrounding the grievant's resignation are not in dispute. The grievant was nineteen years of age and had been employed for approximately six months as a terminal operator. His duties consisted largely of responding to teletype requests from law enforcement agencies seeking criminal background information and automobile and driver's license information.

DPS received information and conducted an investigation indicating that the grievant had improperly divulged

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[3] These general principles are consistent with the law governing the jurisdiction of the Merit Systems Protection Board which hears certain types of appeals by federal employees. See e.g. Schultz v. United States Navy, 810 F.2d 1133 (Fed. Cir. 1987); Dumas v. Merit Systems Protection Bd., 789 F.2d 892 (Fed. Cir. 1986).

information concerning criminal records on two occasions. When the grievant arrived at work on May 25, 1989, he was directed to report to a Lieutenant Paul Rogers, who advised him, in the presence of other DPS officials, of the alleged misconduct. He was presented with a termination letter and a letter of resignation which had been prepared prior to his arrival and was told that he would immediately be terminated unless he resigned. The grievant denied improperly divulging any information concerning any criminal records and was permitted to use the telephone in the office where the meeting was taking place to contact his father for his advice. After speaking with his father, who had advised him that it would look better on his record if he resigned rather than being fired and that he could fight it later, he signed the letter of resignation, retrieved his belongings and was escorted from the building.

There can be little question under the circumstances of this case that grievant's resignation was involuntary. Grievant was only nineteen years old and was given only a very brief time period to decide whether to resign in order to avoid an immediate termination based upon alleged acts of misconduct. The resignation, which was made effective immediately, was imposed by DPS as a condition to avoid an immediate termination.

The Board recognizes, however, that where an employee is faced merely with the unpleasant alternative of resigning or being subject to removal for cause, such limited choices

do not necessarily make a resulting resignation an involuntary act. See, Schultz, supra, at note 3.

The remaining issue is whether the alleged acts of misconduct were sufficiently proven by DPS. DPS maintains that it acted properly in terminating grievant's employment.[4] Counsel for the grievant acknowledged that grievant's termination would be justified if DPS could establish the alleged misconduct. Grievant's position is that the witness relied upon by DPS is not credible and consequently the removal was improper. The only issue that has been presented to the hearing examiner is whether to believe the grievant, who denied disclosing the information, or the complaining witness who stated he revealed to her the criminal records of her older sister and two other persons.

The testimony and documents introduced by DPS and the grievant must be reviewed in some detail. Lieutenant Rogers, the Director of Communications, testified that he first became aware that the grievant may have divulged confidential criminal records from Captain J. R. Smith, the commanding officer of Company B, who had spoken to the complainant, Ms. A,[5] about the matter. The first step he

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[4] The parties agreed that grievant, as a civilian employee of DPS, is not covered by the Civil Service laws.

[5] The names of the complainant and other members of her family have not been included in this decision to protect the family from public disclosure of the information contained herein.

took in response was to ask the grievant and another employee whether they had divulged criminal record information and cautioned them about the confidentiality of such information. Both employees denied disclosing any information. He next arranged for a conference on May 23, 1989, with Ms. A and her mother. At the interview Ms. A alleged that the grievant told her one of her older sisters had previously been convicted of a felony. She had not been aware of this and asked her mother about it.[6] A memorandum prepared by Lieutenant Rogers summarizing the interviews was introduced in evidence solely for the purpose of showing that he had conducted an investigation that included the meeting with the complainant and her mother. Lieutenant Rogers subsequently made a manual check of DPS criminal records and confirmed that the information Ms. A had given him concerning her sister's criminal record was contained in the DPS files.

Ms. A also informed Lieutenant Rogers that grievant told her about the criminal record of her former boyfriend. Lieutenant Rogers stated that she had described the offenses using the terms "sexual assault," rather than rape and "B and E," instead of breaking and entering. He did not believe an ordinary person would have used such terminology, and this led him to believe that the grievant had revealed

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[6] Ms. A's mother was not available to testify at the hearing.

the information. He checked the criminal files and again the information was contained in the files.

Ms. A. also told Lieutenant Rogers that the grievant had used the expression "like father, like son" in saying that the former boyfriend's father had a criminal record. He checked the criminal records and found that the father did have a prior conviction of DUI. Based upon this information, he concluded that the allegations were true. He discussed the matter with two of his supervisors and a decision was made to give the grievant an opportunity to resign because of his youth.

On cross-examination, Lieutenant Rogers admitted that he had considered the possibility that the complaining witness had learned of her older sister's criminal record through other family members and not from the grievant. He discounted this factor because the crime had occurred several years ago when the complainant would have been much younger, and therefore it would not be surprising that she would not have known about it. He also acknowledged that the only way he had to corroborate the complainant's story was to check whether the persons named did have criminal records, because there was no way to determine objectively whether the grievant had actually looked at the index cards or criminal files for the individuals involved.

Ms. Deborah Beckner, Communication Coordinator for DPS, testified that she advised the grievant of the confidential nature of DPS records during the initial hiring process.

There is no dispute about the grievant's knowledge of the confidentially requirement. She offered no opinion on how many criminal files the grievant may have pulled to obtain information during the course of his employment with DPS.

At the level four hearing, Ms. A testified grievant told her that her older sister had been convicted of embezzlement and that her former boyfriend and his father had been convicted of certain offenses. She was not aware of her sister's criminal record and was very disturbed and upset to learn about it. With one exception she had not been aware of criminal offenses committed by her former boyfriend and his father. About one month after the grievant started his job with DPS he told her that he had looked in the files to determine whether anyone in either his or her family had a criminal record. He also had attempted to explain to her how he went about checking criminal records and had taken her to where he worked to show her the computers he used.

She testified that initially she thought that checking criminal records was a part of his job and that he had not done anything improper. She also said that she inquired about the propriety of the grievant's conduct because her mother and older sister had been very upset that she had learned about her sister's previous conviction. She first learned that it was improper when she spoke to Captain Smith, whom she had known prior to this matter. She said that she felt that her privacy had been invaded, since she

had not known about her sister's criminal record and did not want to know about it. She added she had felt guilty for a time about the grievant having lost his job as a result of her reporting what had occurred.

On cross-examination, she admitted that she and the grievant had dated for a considerable period of time and had confided in one another. She said she thought it had been a good relationship although she conceded that the grievant may think differently. She denied that her mother had accused the grievant of fathering an illegitimate child, and admitted that in April 1989, she had mistakenly accused the grievant of damaging her car. She also admitted having an argument with the grievant in 1988 because he had gone out on a date with someone else and having kicked his car leaving a dent in the side. She denied being angry now about their relationship having ended.

She also stated that she was not testifying out of revenge, that they had not dated for several months, and that she was getting along just fine. She also said that when she initially spoke to Captain Smith she had expressed a willingness to take a polygraph examination and was still willing to take it.

Ms. A's older sister testified that only she and her mother had been aware of her criminal record. Her father did not even know and it had not been known in the general community. It had been very upsetting to her to be asked about it by her younger sister. On cross-examination, she

stated that she is twenty-five years of age and her younger sister, Ms. A, is twenty years of age. The conviction occurred in Kanawha County when she was eighteen years old.

The grievant called a high school student who had been present in Coonskin Park on April 23, 1989, to testify that he had observed the grievant and Ms. A in an argument. The student had been asked to drive her car a short distance and in the process he hit a wooden post and unknowingly damaged the rear fender area of her car.

Grievant's father testified that Ms. A had called and alleged that his son had damaged her car but it subsequently turned out that the high school student had caused the damage. He stated that his son and Ms. A had dated a long time and that his son had tried to end the relationship for some period of time. On more than one occasion, Ms. A had called his wife and falsely accused the grievant of physical abuse. On some occasions, he said it turned out that just the opposite may well have been true. The grievant's father also stated that he had learned of Ms. A's character from members of the community at the beginning of the relationship and told his son that she was not the kind of person he should associate with.

On cross-examination, grievant's father admitted that Ms. A and her family did not follow up on and file a complaint with the police or an insurance company about the damage to her car. He said that early in the relationship, when community members were indicating that Ms. A was of

dubious character, the grievant told him that Ms. A had said that one of her sisters had a criminal record.

The grievant testified that he was currently enrolled at Marshall University and had previously been enrolled for one year at West Virginia State College in a pre-law program. In November 1988, he was employed by DPS as a certified communications operator who worked primarily in teletype and government communications matters but sometimes at night he had to perform criminal identification checks. He was certified for the position in January 1989. He had access to the criminal records from the beginning but until he was certified he worked with someone else while receiving on-the job-training and did not have free reign to investigate and look up criminal histories. Consequently, he was not in a position to have revealed someone's criminal record during the first two months of his employment.

He dated Ms. A for about three years beginning in December 1986 and had attempted to break off the relationship on a number of occasions, particularly after the incident in April 1989, when she damaged his car. Ms. A told him on several occasions prior to his employment with DPS that her sister and other family members had criminal records. He stressed the fact that they had a close relationship and she confided in him about everything.

He denied abusing his privilege or position as a civilian employee of DPS by discussing or disclosing the criminal record of any individual. To do this, he

explained, he would have to blatantly pull the file and obtain the details. He denied ever pulling a criminal file on any member of Ms. A's family and stated he had pulled only three to five actual criminal files, as opposed to the index cards. He had, however, seen the index card for Ms. A's older sister by accident while searching for the index card for a person with a similar name.

On cross-examination, the grievant was asked to explain the inconsistency between his testimony and that of Ms. A. He emphasized that she had divulged highly confidential information to him about her personal life and that of her family and pointed out that he had not gained anything from what had occurred. In fact, he had lost his job and any opportunity to work in a law enforcement capacity.

Grievant stated that when Ms. A. advised him that her sister had been convicted of a crime she had described her sister's conduct as taking money from a corporation. Based on his training, he advised her that this would be embezzlement. He also stated that since he had used law enforcement or police terminology during the time he dated Ms. A. it would not be surprising for her to use such terms. He also admitted that the term embezzlement is used on the criminal index form for Ms. A's sister.

He again denied ever inquiring into the criminal background of the other persons that she alleged he had told her about. He explained that one of those people had been Ms. A.'s boyfriend before he started dating her. He had

been confronted by this individual and asked Ms. A about him. She then told him of his criminal background and the background of his family.

Several letters written over some period of time by Ms. A. to the grievant were introduced in evidence to show her emotional nature and to provide a possible explanation or motive for Ms. A.'s complaint to DPS of the alleged misconduct. Counsel for the grievant argued that Ms. A probably had knowledge of her sister's criminal record from the members of her family and stressed that she wrongly accused the grievant of damaging her car when she must of have known that he was not in a position to have caused the damage.

After a careful consideration of all the evidence and the argument of counsel, I credit Ms. A's testimony. Her demeanor and forthright responses at the hearing were convincing. Her sister's testimony corroborated her testimony that she had not previously been aware of her criminal record, and her mother's action in participating in the investigatory interview likewise supports her testimony.

She admitted she had made a mistake in accusing the grievant of damaging her car, and in the undersigned's opinion this does not render her testimony unworthy of belief. The damage was so minor that a question must have arisen concerning who caused it. The student who drove the car did not realize he had caused any damage. Her previous romantic relationship with the grievant and the emotional letters she wrote do not render her testimony unbelievable.

She would have been only about thirteen years old when her sister was convicted. It seems improbable that she would fabricate this story because the grievant terminated their relationship, though it certainly may have played a part in her decision to contact DPS.

On the other hand, the grievant's testimony was unpersuasive and appeared rehearsed and calculated. His statements concerning how difficult it would have been to check on the criminal records of the three individuals he allegedly disclosed was totally unconvincing and served to undermine the credibility of his remaining testimony. The contention that the criminal record of Ms. A's sister was known in the general community is not supported by any evidence.

In addition, there is no dispute that DPS records contained the information allegedly disclosed, and it is of some significance that Ms. A used certain terminology to describe the criminal offenses. DPS conducted a reasonable investigation before terminating grievant's employment.

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. The grievant improperly divulged confidential information concerning the criminal records of three individuals to Ms. A.

2. The grievant's act of resigning his employment was coerced and not voluntary.

Conclusions of Law

1. Since the grievant's act of resigning his employment was coerced and not voluntary, the Grievance Board has jurisdiction under the expedited grievance procedure created by W.Va. Code, 29-6A-4(e), to determine whether he was properly terminated.

2. DPS proved by a preponderance of the evidence that the grievant committed the acts for which he was terminated from employment.

The grievance is, therefore, **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

C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

DATED: August 14, 1989