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**JEWELL WHITE**

**v.**

**Docket No. 89-DOH-137**

**W.Va. DEPARTMENT OF HIGHWAYS**

**DECISION**

Grievant, Jewell White, filed a grievance at Level IV April 1, 1989, protesting the termination of her employment. A hearing was held May 30, 1989 and proposed findings of fact and conclusions of law were received by June 30, 1989.<sup>1</sup>

The relevant facts of the case are essentially undisputed. Grievant was hired by the Department of Highways (DOH) in July 1988 as a Highway Administrative Manager (Manager) in its District 10 office located in Princeton, West Virginia. The job

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<sup>1</sup>At hearing, after a review of the procedural record and opening remarks by counsel, the undersigned advised counsel that only certain disciplinary actions could proceed directly to Level IV and it did not appear grievant's case was such. Subsequent discussion revealed the reasons for grievant's termination were not at all clear and the parties joined in a request to have the matter heard de novo, which was granted. The evidence in its entirety does not reveal any disciplinary intent on the agency's part but a remand at this point would only serve to prolong a resolution of the matter. See State ex rel. the Board of Education of the County of Kanawha v. Casey, 349 S.E.2d 436 (W.Va. 1986).

description for the position (Employer's Exhibit No.1), under the heading "Nature of Work" contains the following:

An incumbent in this position serves as the key administrative/technical liaison between Executive Management and the District Headquarters Administration. Reporting directly to an Executive Assistant, the position is responsible for assisting the District Management by ensuring Department of Highways' directives concerning policies and procedures dictated by Executive Management are being effectively implemented. The incumbent exercises independent judgment in the analysis, interpretation and application of Department of Highways' administrative directives.

Graduation from an accredited four-year college or university was listed as the minimum training requirement for the job but appropriate experience could serve as a substitute. It is undisputed that the position was not covered by civil service.<sup>2</sup>

Grievant performed her duties, which consisted mainly of personnel matters, under the supervision of Mr. Bruce Leedy, District Engineer. There is no evidence that she did not perform those duties satisfactorily. By letter dated February 17, 1989, Mr. Fred VanKirk, Acting Commissioner/State Highway Engineer, informed grievant that, effective the end of the day February 28, 1989, her position was abolished. Mr. VanKirk further stated:

[T]his action is being taken as a result of a decision to eliminate this position on a statewide basis. It is my belief that a non-Civil Service position of this nature is not needed to effectively administer a district organization.

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<sup>2</sup>There was some testimony indicating that the Civil Service System, now the W.Va. Division of Personnel, developed the job description at the request of then-Governor Arch Moore, Jr.

If you desire to seek other employment within the Department, I would encourage you to take the necessary steps to qualify for any Civil Service vacancy we may have. You will be given every consideration for any such vacancy for which you qualify.

By letter dated February 23, 1989, grievant requested of Mr. Leedy a clarification of Mr. VanKirk's letter, specifically asking if she was to assume a different position on February 28. Mr. Leedy, who had not received prior notice of the action, subsequently discussed the matter with Mr. VanKirk and, by letter dated March 1, 1989, informed grievant that "[t]he letter...dismissed you effective at the close of business on February 28, 1989."

At the time of grievant's termination, there were two vacancies in District 10 in a data job coordinator position and a field representative position. It is somewhat unclear what effect a hiring freeze, imposed by Governor Gaston Caperton at the time, would have had on the filling of these positions but it is not contested that DOH could entertain applications for them.<sup>3</sup> Grievant approached Mr. Leedy about these jobs and was advised to complete Civil Service applications. Mr. Leedy also advised her "to submit those and to get on the register and I'll do everything I can to help you." Additionally, Mr. Leedy talked with

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<sup>3</sup>Mr. Leedy testified that District 10, at the time of grievant's termination, was already in compliance with personnel budget reduction requirements and, although he had authority to recommend vacancies be filled, some justification that the position was "critical" would have to be made.

Mr. Joe Shelton, DOH's Personnel Director in Charleston, to make him aware that, pursuant to Mr. VanKirk's directive, every effort was to be made to help grievant if a suitable Civil Service position became available.

Grievant applied for the aforementioned positions and a Management Analyst vacancy. The Civil Service System (CSS) advised grievant on each that it was not conducting tests for the positions at the time. In talks with Mr. Leedy, both before and after her termination, grievant related CSS's response and was informed that her name would have to appear on a CSS register if she were to be awarded one of the positions. The record does not reveal the reason why tests were not being conducted for the positions.<sup>4</sup>

Curiously, grievant concedes the abolishment of the Highway Administrative Manager position was proper<sup>5</sup> and asserts only that

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<sup>4</sup>Significantly, grievant did not move to join CSS as a party, see Hayes v. W.Va. Department of Natural Resources and W.Va. Civil Service System, Docket No. NR-88-038 (March 28, 1989), nor did she subpoena CSS staff who may have been able to offer a reason. This failure is of some consequence to the analysis herein since grievant provided neither DOH or CSS policy concerning the method by which registers are developed.

<sup>5</sup>Grievant's proposed conclusion of Law 2 specifically states:

The Claimant was displaced from her position as highway administrative manager due to the exercise of the lawful discretion of the Governor of the State of West Virginia in determining that the functions were no longer needed in state government.

Mr. VanKirk improperly prevented her retention and/or rehiring because of her political affiliation. Grievant is a member of the Republican Party. No case law was cited by grievant in support of her position.

DOH maintains there were no improper motives on the part of Mr. VanKirk and grievant was not retained or rehired because of her failure to achieve placement on a CSS register. For reasons hereinafter discussed, the undersigned concludes that grievant has failed to establish that Mr. VanKirk or other DOH officials improperly prevented her retention and/or rehiring.<sup>6</sup>

Grievant's allegations are essentially ones of discrimination on the part of DOH.<sup>7</sup> The success of this claim necessarily requires some showing that persons similarly situated were treated differently due to their political beliefs. The only evidence, however, that grievant presented in this regard was her

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<sup>6</sup>It is noted that there is a serious question as to whether grievant, following the abolishment of her position, was an "employee" for the purposes of utilization of the grievance procedure contained in W.Va. Code §§29-6A-1, et seq. Inasmuch as she asserts, although vaguely, that she should have been retained in another position and DOH does not raise the issue of her standing, see Ryan v. Wood County Board of Education, Docket No. 54-86-332-3 (September 1, 1987), the merits of her grievance are addressed.

<sup>7</sup>State employees may advance such claims to the West Virginia Education and State Employees Grievance Board pursuant to the provisions of W.Va. Code §29-6A-1(i). W.Va. Code §29-6A-2(d) defines discrimination as:

Any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

own testimony that she was a Republican and Mr. Leedy's testimony that Mr. VanKirk stated in one of their telephone conversations that he "wanted to take politics out of the system." This remark is susceptible of a great many interpretations and grievant offers no particular one but generally avers that the statement supports her contentions. Whatever connotations may be attributed to the statement, it alone is insufficient to show political motivations on Mr. VanKirk's part. Significantly, there was no evidence presented concerning his party affiliation.<sup>8</sup> Also of substantial importance is the lack of any evidence whatsoever concerning other Managers whose positions were eliminated. It is undisputed that all such positions were abolished statewide but grievant made no attempt to show that the displaced employees were retained in some other capacity.

Although the parties offer no authority concerning retention in employment and the undersigned is unaware of such, analogy can be made to cases involving discharge of employees because of their political affiliation. In Kauffman v. Puerto Rico Telephone Co., 841 F.2d 1169 (1st Cir. 1988), the Court reiterated the pronouncement in Branti v. Finkel, 445 U.S. 507, 100 S.Ct.

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<sup>8</sup>DOH, in its proposed findings, points out that testimony did show that Mr. VanKirk had served as direct supervisor of District Engineers since 1981, which reveals that he held that position during Democratic and Republican administrations and now serves as such during another Democratic administration. This fact was afforded little probative value since the record does not establish whether Mr. VanKirk's position has ever been afforded Civil Service protection in the past or present.

1287, 63 L.Ed.2d 574 (1980) that in order for employees to establish a prima facie case that their terminations constituted patronage dismissals violative of their First Amendment rights, they would have to prove that affiliation with their political party was the substantial or motivating factor underlying their dismissals. See also Kercado-Melindez v. Aponte-Rogue, 829 F.2d 255 (1st Cir. 1987); Rosaly v. Ignacio, 593 F.2d 145 (1st Cir. 1979).

Grievant has clearly failed to make any showing that her membership in the Republican party caused any DOH official to take any action to prevent her from obtaining other positions. The record as a whole shows, as DOH asserts, that it was her failure to achieve placement on a CSS register which resulted in her non-retention and/or non-rehiring. Mr. VanKirk's letter to grievant encouraged her to work toward placement on the register and Mr. Leedy's un rebutted testimony indicated he was ready, per his own interpretation of the letter, to afford her a preference in hiring. Absent some evidence that grievant's inability to attain CSS register approval was the result of some action on DOH's part, it cannot be concluded that she has established a prima facie case of political discrimination.

In addition to the foregoing, the following finding of fact and conclusions of law are incorporated herein.

### FINDINGS OF FACT

1. Grievant's non-civil service position of Highway Administrative Manager was abolished by DOH effective February 28, 1989.

2. Grievant was encouraged by DOH to apply for Civil Service positions, but, for reasons not fully disclosed by the record, she was not successful in obtaining placement on a CSS register.

### CONCLUSIONS OF LAW

1. In order to establish a prima facie case that an employee's termination constituted a patronage dismissal violative of his or her First Amendment rights, they would have to prove that affiliation with their political party was the substantial or motivating factor underlying their dismissals. Kauffman v. Puerto Rico Telephone Co., supra; Branti v. Finkel, supra.


2. Grievant failed to establish a prima facie case of political discrimination.

Accordingly, the grievance is **DENIED**.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Mercer 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.

  
JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: March 7, 1980