JAMES SMITH

v. Docket No. 93-LABOR-423

W. VA. DIVISION OF LABOR

DECISION

Grievant, James A. Smith, employed by the Division of Labor (Labor or Respondent) as a Labor Standards Compliance Officer I, advanced a grievance appeal to level four on October 12, 1993, in which he contested the termination of his employment. An evidentiary hearing supplementing the lower-level record was conducted on December 7, 1993; proposed findings of fact and conclusions of law were submitted by the parties on or before January 25, 1994. (See footnote 1)

The evidence of record establishes that Grievant was first employed by Labor on February 16, 1993. He had nearly completed a six month probationary period when Roy M. Smith, then Commissioner, issued a letter dated August 13, 1993, in which he advised Grievant that his employment was to beterminated effective August 28, 1993. That letter stated in pertinent part:

The purpose of this letter is to inform you of my decision to dismiss you from your duties as a probationary Labor Standards Compliance Officer I in the Wage and Hour Section of the West Virginia Division of Labor. . . The reasons for this action are two specific incidents of unprofessional conduct as follows:

In March, 1993 during lunch break at the Hardee's in Bridgeport, you approached colleague Labor Standards Compliance Officer Dusty Perdue from the rear and "snapped" her bra strap. This action occurred in the waiting line in full view of restaurant patrons. Ms. Perdue and yourself had arrived in a State vehicle and were displaying identification badges. This type of unprofessional and sexual harassing behavior would not be tolerated in private, let alone in a public establishment. In addition to the embarrassment caused Ms. Perdue, the discredit reflected on the Division of Labor and the State of West Virginia is incalculable.

On another occasion, while working with colleague Labor Standards Compliance Officer Lee Powell, you, in a public place, cleared your throat and spat upon the windshield of a state vehicle. Again, the discredit reflected on the State is incalculable.

The probationary period is a trial work period designed to allow the agency an opportunity to evaluate the ability of the employee to effectively perform the work of his/her position and to adjust to the organization and the programs of the agency. The probationary period is an integral part of the examination process and is utilized for the most effective adjustment of a new employee, and for the elimination of those who do not meet the standards of work required by the employer. You, unfortunately, have failed to meet these required standards, as evidenced by your unprofessional behavior.

As a Labor Standards Compliance Officer I, you travel throughout an assigned geographic area in a State vehicle and display the identification badge of the State of West Virginia, Division of Labor. The duties of your position involve personal contact with employers and employees, alike, for the purpose of assuring compliance with the Minimum Wage and Maximum Hour Standards Act, Wage and Payment Collection Act, Prevailing Wage Law, Child Labor Law, contractors licensing and laws affecting private employmentagencies. You are recognized as an employee of the State and your behavior and professionalism, or lack thereof, are a direct reflection on the Division of Labor and the State of West Virginia. It is reasonable for the State to expect a high standard of conduct and professionalism from all of its employees, particularly those such as yourself, with public contact and a high level of visibility and recognition. "Snapping" the bra strap of a fellow employee and spitting on a state vehicle, both in public places, tarnishes the image and professionalism of yourself and your employer, and fails to meet a reasonable standard of conduct, all of which is sufficient to warrant your dismissal as a Labor Standards Compliance Officer I, employed by the West Virginia Division of Labor.

At the level three hearing Buddy Compton, Supervisor of the Wage and Hour Section of the Division of Labor, testified that after Grievant was hired in mid-February, he was unable to provide training himself and assigned Grievant to work with Officer Dusty Perdue. Within a matter of weeks Officer Perdue advised the Supervisor that she could no longer work with Grievant. Mr. Compton recalled that he learned of the bra snapping incident on March 24 when Grievant and Officer Perdue

were in the Charleston office.

Grievant was subsequently assigned to work with Officer Lee Powell. Mr. Compton stated that Officer Powell also called several times to complain that he could not work with Grievant. Officer Powell convinced Mr. Compton that he had "reached the end of his rope" when Grievant spit on the windshield of the State vehicle in which they were traveling. Based upon these incidents Mr. Compton stated that he recommended Grievant's employment be terminated.

Officer Perdue testified that she worked with Grievant approximately twelve days. She recalled that Grievant wasworking with her on March 12, and that they stopped at Hardee's in Bridgeport for lunch. She proceeded directly into the restaurant while Grievant first visited an adjacent bank. As she was waiting in line to be served, Grievant approached her from the rear and snapped her bra strap. Officer Perdue stated that she did not say anything to Grievant at that time but that the incident made her feel very uncomfortable, to the point of requesting that she not be required to work with Grievant any longer.

Grievant's explanation of the two incidents differs significantly from that offered by Mr. Compton and Officer Perdue. Grievant offers several responses to Officer Perdue's complaint. He first asserts that his time records establish that he was never alone with Officer Perdue in Bridgeport at lunchtime during the period of time the incident was alleged to have occurred.

Second, Grievant asserts that if the event did occur, there is no evidence that any member of the public actually viewed the incident; thus, there would be no discredit to Respondent as alleged by Commissioner Smith in the termination letter. Even if anyone observed the incident, Grievant suggests that it was unlikely that they would have identified the officers as State employees because they wore their badges on their belt buckles, offering limited visibility.

As a third alternative, Grievant asserts that Officer Perdue could not positively state that it was he who hadsnapped her undergarment because her back was turned, effectively prohibiting her from observing and/or identifying the actual culprit. Grievant suggests that during a busy lunch rush, any number of people could have actually committed the act. Although she may have observed him standing behind her, he claims that he could have just approached her without perpetrating the act. Finally, Grievant notes that Officer Perdue indicated in her testimony that the bank he visited was very busy. Based upon this observation, Grievant concludes that it would have been impossible for him to conduct his business at the bank and be right behind her in line at the restaurant.

Grievant questions Officer Perdue's credibility, noting that she could not initially report an exact date and time the alleged incident occurred. Grievant also notes that Officer Perdue's time sheets were not submitted until the level four hearing while his records had been admitted at level three and could not have been amended to substantiate his assertion that they were not in Bridgeport on March 12. Grievant notes that his records indicate that the two officers were in Clarksburg on March 12 while Officer Perdue's records indicate that they were in Bridgeport. Grievant argues that Officer Perdue's records should not be considered probative inasmuch as they were submitted only after she had provided the particular date.

Grievant concludes that he subsequently met with Officer Perdue alone and suggests that if the event hadoccurred it would be unlikely that she would have willingly continued to meet with him. Grievant suggests that Officer Perdue's motivation regarding this matter was her desire to be transferred to the counties which he had been assigned, based upon his understanding that she wanted to be near relatives in the area.

Grievant admits that on or about August 13, while traveling in a state-owned vehicle with Officer Powell, he spat on the inside of the windshield. Grievant explained that the purpose of this action was to clean cigarette smoke off the glass. He observed that Officer Powell showed no reaction at the time and that he (Grievant) cleaned all the windows, inside and out, during their next fuel stop. Grievant asserts that the action was not taken for the purpose of destroying state property, but rather his intent was only to clean the glass. Furthermore, the act occurred as the officers were traveling on Interstate 79; therefore, he argues that it did not take place in public view and could not reflect poorly upon the State.

Grievant asserts that neither incident was brought to his attention prior to his dismissal and that no citizen complaints were filed in reference to any of his actions. Grievant argues that the charge of unsatisfactory performance is in fact a sham and that the actual reason for the dismissal was his refusal to move to the Elkins area. Grievant states that he was living in Martinsburg until he was employed by the Division at which time he moved to LostCreek (Harrison County) with his wife who was attending Fairmont State College.

As a Compliance Officer, Grievant was assigned to cover Barbour, Randolph and Pendleton counties. Grievant denies that there was any agreement at the time he was hired that he would establish his residence in any particular location. Grievant states that he first learned of Respondent's

desire that he live within his assigned area when he received a letter dated August 3, 1993, from Deputy Commissioner Robert Miller. Grievant responded by letter dated August 11, which he hand delivered to Mr. Compton on August 12. In that letter Grievant stated that he had not previously been advised of any residential requirements and that he could not move to the Elkins area at that time.

Grievant states that Mr. Compton read the letter and left the room commenting that he was going to speak with the Commissioner. Approximately an hour and a half later Mr. Compton returned and convened a meeting with Grievant, Personnel Officer Mitch Samples and Office Manager Barbara Gandy. At this meeting Mr. Compton advised Grievant that he was going to be dismissed but did not respond when asked the reason for the decision. Grievant concludes that his refusal to relocate, made that very day, was the determining factor in his employment status.

W.Va. Division of Personnel Rules and Regulations, Section 11.06 provides that "if at any time during the probationary period, it is determined the services of theemployee are unsatisfactory, the employee may be separated from the service. . . ." Grievant was a probationary employee on August 13, 1993; therefore, Respondent was authorized to terminate his employment after determining that his services were unsatisfactory. Respondent stated two incidents as the basis for the conclusion that Grievant had exhibited unsatisfactory performance. It must be concluded upon review of the record in its entirety that Grievant did exhibit the unsatisfactory performance alleged by Respondent.

Grievant's responses to the allegation that he snapped a female officer's bra strap while in a restaurant are conflicting and unpersuasive. Grievant denies that he was even there, yet apparently admits that he was standing behind her. There is no evidence to support his suggestion that another individual may have been the culprit and his assertion that other patrons would not have identified them as state employees appears to be an implicit admission to the act.

The record contains no evidence of motivation for Officer Perdue to fabricate the charge. Grievant's assertion that she desired a transfer to his geographic area was resoundingly discounted by Officer Perdue who testified that she had not applied for transfer when the position held by Grievant was vacant, nor did she intend to do so in the future. Officer Perdue also denied that her family lives in Pocahontas County. Many inconsistencies appear to exist when comparing the Hourly Time and Travel Reports filed by Grievant and Officer Perdue; however, both reports indicate that at least part of the day was spent in the Clarksburg area. Neither report indicates where the officers ate lunch. Administrative notice is taken that Bridgeport is adjacent to Clarksburg and that the

reports do not indicate any activity that would preclude their having lunch in Bridgeport. Finally, the fact that Officer Perdue continued to meet with Grievant in public after this incident is not a reliable indicator that the incident did not occur.

Grievant admits to the second incident but indicates an understanding that such behavior is not acceptable since he offers an explanation in which he characterizes the activity to be the result of necessity and for good reason. Apparently Grievant was not driving at the time of this incident; in any event, while cigarette smoke may deposit a haze on glass, there is no assertion that Grievant's view was obstructed to any substantial degree. Furthermore, saliva is not generally recognized as an efficient glass cleaner. Grievant's explanation for this action is simply incredible. Thus, Respondent has proven that Grievant engaged in the activities upon which it determined that his performance was unsatisfactory.

Grievant has failed to prove that his employment was terminated for reasons other than those set forth in the August 13, 1993, letter. Deputy Commissioner Miller'smemorandum of August 3, 1993, clearly sets forth Respondent's position that

in your interview, you stated you would relocate to our area of assignment in order to properly represent the division. The requirement of living within your assigned area is due to increased business expenses for the division along with the need for you to be highly visible and readily accessible by the citizens you serve.

Grievant offers no evidence in support of his assertion that there was no agreement at the time he was hired regarding living arrangements. In his letter of August 11, 1993, Grievant states that he was interviewed by Shelby Leary and that "she never once informed me that a requirement of the position would be to move to Elkins." Reasonably, Grievant could have called Ms. Leary as a witness to substantiate his understanding.

Respondent's timing in advising Grievant of his dismissal understandably led to his connecting the termination with the refusal to relocate; however, the remainder of the evidence does not support Grievant's conclusion. Mr. Compton's recollection of his meeting with Grievant on August 12 was that Grievant presented him the letter dated August 11 responding to Mr. Miller's inquiry regarding his relocation. He did leave his office at that time to meet with the Commissioner and Grievant's letter was one of several subjects that were discussed. Mr. Compton states that neither the letter nor his meeting with the Commissioner had any bearing on the decision to terminateGrievant's employment

because he had already made the recommendation for termination in a meeting on August 9.

Furthermore, he states that when they met with Mr. Samples and Ms. Gandy he advised Grievant that he would be "let go" and the reasons why. Although Mr. Compton's testimony does not explain why he mentioned the letter to the Commissioner prior to advising Grievant of the termination, it will be accepted that the decision had been made on August 9 and was not based on the relocation issue. (See footnote 2) Based upon the foregoing facts and discussion it must be determined that Respondent's decision to terminate Grievant's employment must be upheld.

In addition to the foregoing narrative, it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was employed by the Division of Labor as a Labor Standards Compliance Officer I on February 16, 1993. 2. Two of Grievant's co-workers refused to work with him complaining that he had snapped the bra strap of Officer Perdue and that he had spit on the windshield of a vehicle driven by Officer Powell.

3. In August 1993 a dispute arose between Grievant and Respondent regarding his domicile. At that time Grievant refused to move to the geographic area to which he was assigned.

4. Prior to the completion of a six-month probationary period Grievant was advised that his employment was to be terminated as the result of unprofessional conduct.

CONCLUSIONS OF LAW

1. Respondent properly terminated Grievant's employment in compliance with W.Va. Division of Personnel Rules and Regulations, Section 11.06 which provides that an employee may be terminated at any time during the probationary period when it is determined that his services are unsatisfactory.

2. Grievant failed to prove that the acts cited by Respondent did not constitute unsatisfactory performance or that his employment was terminated based upon his refusal to relocate to the geographic area which he was assigned.

Accordingly, the grievance is DENIED.

June 15, 1994 SUE KELLER

SR ALJ

Footnote: 1

Grievant originally filed this complaint directly to level four on August 23, 1993. Because the termination of probationary employment has been held not to be disciplinary in nature, Grievant was not entitled to file under the expedited procedure. The grievance was remanded for hearing at level three and was refiled at level four following a denial by the Division Hearing Examiner.

Footnote: 2

1Hearing Examiner Brown noted in the level three decision that "while the opposition to relocate is not specifically cited in the August 13, 1993 letter of dismissal, it is a reflection of his un-willingness to adapt to the regulations and policies that govern classified employees of the the state. Mr. Smith's opposition to relocation is a consideration."

It is also noted for the record that Grievant indicated in his August ll letter that efforts towards relocation would be undertaken in May 1994 after his wife graduated from college. He stated that she would seek employment within the specified geographic area.