PETER K. DUFFICY

v. DOCKET NO. 93-DPS-370

DIVISION OF MILITARY AFFAIRS

DECISION

Grievant, Peter K. Dufficy, employed by the Department of Public Safety, Division of Military Affairs, filed a grievance at level four on September 10, 1993, in which he alleged that he was improperly terminated from his position as the Deputy Director of the Mountaineer Challenge Academy. An evidentiary hearing was conducted on October 20, 1993; proposed finding and conclusions, with responses thereto, were filed by the parties on or before December 13, 1993.

A review of the record establishes that Grievant was employed as a Deputy Director of the Mountaineer Challenge Academy effective August 12, 1993. The Mountaineer Challenge Youth Program, a federally-funded program sponsored by the National Guard, is advertised as a "twenty-two week leadership training experience" availableto 16-18 year old high school drop outs. The objectives of the program are assisting students in getting a GED, along with improving life coping skills and employment potential. Accepted cadets are provided room, board and a $15.00 per week allowance for the duration of the program. Upon successful completion, the students receive a $2200.00 stipend for future life endeavors, such as schooling, tools and/or equipment for a job.

The duties and responsibilities of the Deputy Director were set forth on the position vacancy as follows:

-Perform the duties of the Director in his or her absence.

-Directly supervise the Commandant of Cadets, Cadet Services Coordinator, and Administrative/Logistics Supervisor.

-Develop and secure work and community service projects.

-Develop and manage staff proficiency evaluation program.

-Assist the Director in promoting a positive public image for the Academy. -Manage and coordinate cadet outreach and recruitment activities.

-Identify and advise the Director on local, state and federal statutes, regulations and

requirements.

-Supervise food service and medical service contracts.

-Perform all other duties as required.

Grievant's credentials for this position include a Bachelor of Arts degree, with emphasis in English and Social Studies, from the University of California at Santa Barbara. Upon completion of his matriculation Grievant pursued a career in the military, serving in the Army from 1974-1976 and the Air Force from 1980-1992. Grievant's application indicates that throughout his military career he held various administrative positions in the areas of information management, security police, and aircraft maintenance, all of which required that he be responsible for services involving a significant number of people.

Approximately four weeks after assuming the duties of Deputy Director, Grievant was advised that his employment was to be terminated. By letter dated September 10, 1993, Director Hugh P. Dopson advised in pertinent part:

The purpose of this letter is to advise you of my decision to dismiss you from your position as Deputy Director of the West Virginia Challenge Academy. Your dismissal will be effective September 25, 1993. . . .

On August 31, 1993 I held a discussion with you regarding the nature of your work deficiencies. I shared with you that you were being considered for this disciplinary action. Your response was that you felt your work was satisfactory. After reviewing your response and the circumstances, I have decided that this dismissal is warranted.

Since your employment with the West Virginia National Guard Mountaineer Challenge Academy on August 12, 1993, your performance has not met expectations. . . .

According to the information you furnished on your employment application, you met the minimum qualifications for this position; thus, it was expected that you would have possessed the necessary background to quickly adapt to administering this newly established program. I have determined however, while you may fulfill the requirements which satisfy the stated minimum qualifications, you have failed to satisfactorily perform your assigned duties, and therefore are being dismissed. More specifically:

1. With the rigid time frames that have been necessary to ensure a successful opening of the

Mountaineer Challenge Academy on September 19, 1993, all staff have been required to fullyutilize their backgrounds and experience. While you have not demonstrated a lack of effort, you have demonstrated to me that you lack the ability to function in the full-performance position of Deputy Director of the program. Since you and I have shared an office, we have had numerous discussions regarding deficiencies in planning, leadership, communication with staff, supervision of assignments and report writing.

2. You were directed to provide supervision to the Cadet Service Staff until a Cadet Service Coordinator could be hired. At the August 18, 1993 staff meeting it was shared with you that the program starting date had been changed from September 12 to September 19, 1993. It was not until the August 23, 1993 that I discovered that you had failed to inform the Cadet Service Staff of this change. You failure to properly communicate such vital information to the employees under your supervision demonstrates your inattention to detail and ineffective employee communication. As Deputy Director of the program such is inexcusable.

3. While being cognizant of the reduced time frame under which we were working to get the program started, you allowed your staff to schedule an appointment with a software vendor outside my stated deadline. I had advised you that the decision deadline was expected to be August 25, 1993 or August 26, 1993. You failed to ensure that staff contacting the prospective vendor realized the urgency and necessity for compliance with the stated deadline. Your staff scheduled the appointment for September 3, 1993. While I was able to have the scheduled appointment changed to August 27, 1993, you failed to establish a mechanism to ensure initial compliance with the established deadline or to provide a reasonable explanation for the September 3, 1993 appointment date. This action could have delayed the educational package selection decision and ultimately would have become a program "show stopper". These actions indicate a lack of ability to manage a multifaceted critical path operation.

4. As the Deputy Director you were to coordinate the weekly progress reports to the Charleston office of the Department of Public Safety and Military Affairs. Since your employment on August 12, 1993 you have coordinated the submission of three (3) reports dated August 13, 1993, August20, 1993, and August 27, 1993. Realizing that the August 13, 1993 report was submitted after only your first day of employment I counseled you on or about August 13, 1993 regarding the type of information

needed, importance of timely submission and the necessity for accurate information. Yet the August 20, 1993 report you submitted to me for final approval consisted of only two (2) items. As this was incomplete and unacceptable, I had to prepare this report myself. Again, on or about August 20, 1993, I counseled you regarding the report format. On August 27, 1993 you submitted or caused to be submitted a weekly progress report with the incorrect number of applications listed. You reported the applications on hand as 31, while I reported in another document that the number of applications was 29. On or about August 30, 1993, in a conversation with the Charleston Office Staff, I was questioned regarding the inconsistency of these reports. A simple counting of applications on file, as of August 27, 1993, revealed 29 received. You failed to ensure accurate reporting of vital information, which again demonstrated your lack of attention to detail or establishment of a mechanism to ensure the reporting of accurate data.

5. On August 31, 1993 during your presence in our office, I made numerous attempts to contact the Commandant of Cadets, via the intercom system. When he returned to the facility, I inquired of his whereabouts during the period I was trying to locate him. Mr. Howerton informed me that he had advised you of his work assignment in the community before he departed. Whether willfully or inadvertently, you withheld information when you had to know I was in need of such; an unacceptable action for my Deputy Director.

The preceding are representative of your unsatisfactory level of performance. While I would like to emphasize that any one issue would not constitute unsatisfactory performance when viewed singularly, the cumulative effect is one of unacceptable performance. I lack confidence in your ability to satisfactorily perform the duties of your position. Accordingly, the information contained in this letter leads me to the conclusion that you are unable to meet the required standards of your position, and that I must take this action in dismissing you from your employment. . . .

Respondent asserts that it has proven by a preponderance of the evidence that Grievant, an at-will employee, did not satisfactorily perform the tasks for which he was employed; therefore, it was justified and required to terminate his employment. Grievant argues that he did not lack the ability to perform the responsibilities of Deputy Director and that the incidents cited by Mr. Dopson did not occur as described. Grievant additionally asserts that Mr. Dopson was in fact motivated by discrimination to terminate his employment based upon his military affiliation. Specifically, Grievant

proposes that Mr. Dopson found former members of the Air Force to be less acceptable than members of other branches of the armed services.

At the level four hearing Mr. Dopson testified that when filling the position of Deputy Director he was looking for an individual who could work independently. After reviewing Grievant's application and conducting an interview, the Director stated that he believed Grievant had the skills and ability to perform the duties of Deputy Director consistent with his expectations. Based upon Mr. Dopson's recommendation, Grievant was subsequently hired as Deputy Director. Mr. Dopson stated that he quickly became concerned regarding Grievant's performance, as evidenced by a memorandum which he composed, dated August 25, 1993. That document (Respondent Exhibit 3), directed to the Record, listed three incidents which indicated to the Director that Grievant was not performing in a satisfactory manner. Mr.Dopson stated that he counseled and admonished Grievant as he did all employees and found that his continued failure to provide critical information, to act timely, to compose reports which provided a complete and detailed picture of the activities at the Academy, and his lack of attention to detail, as described in part in the dismissal letter, cumulatively led him to conclude that Grievant lacked the ability to satisfactorily perform the duties of Deputy Director and substantiated his decision to dismiss after Grievant declined the opportunity to resign.

Jeannie Hauger, secretary at the Academy, confirmed that the weekly activity reports were at times submitted to her for typing at the last minute, were not typed, or were not done by the Deputy Director. Ms. Hauger also substantiated Mr. Dopson's allegations regarding incident five in the dismissal letter, that Grievant heard the Director call the Commandant of Cadets over the intercom yet did not disclose information which he had that the Commandant had left the grounds. The secretary stated that the offices of the Director and Deputy Director were such that she would characterize the situation as office sharing. Thus, Grievant would have reasonably been expected to hear the Director calling another employee over the intercom.

Respondent also submitted two letters which it solicited in support of incidents cited in the dismissal letter. The first letter, dated September 17, 1993, and addressed to Mr. Dopson, from Kathy Valdez, Manager ofFederal Programs for the Roach Organization, Inc., (TRO) describes her efforts to coordinate a demonstration of instructional materials at the Academy. Ms. Valdez stated that she initially spoke with Thelma Miller on August 20 at which time they scheduled an appointment for Friday, September 3. On August 23 or 24 she received a call from Grievant who advised her that

September 3 would be too late for a demonstration because a decision had to be made as to which materials would be purchased by no later than August 27. Ms. Valdez indicated that she could be at the Academy at 9:00 a.m. on August 27; Grievant approved that time stating that the staff would be available and he would join them following an early morning meeting. On Thursday, August 26, a representative left from Alexandria, Virginia to attend the Friday meeting at the Academy. At approximately 4:00 p.m. Ms. Valdez found a message from Grievant on her voice mail advising that the Friday meeting with her representative would be unnecessary because a decision had already been made to purchase another product.

Respondent submitted a second letter, dated October 5, 1993, from Kathy Lynn Pyles, an instructor at the Academy, directed "To Whom It May Concern." Ms. Pyles recounted two events in which she was involved with Grievant. First, she and another instructor developed a list of classroom concerns, including assessment plans, and requested clarification of listed educational topics from the standard operating procedures manual. This list of concerns wassubmitted to Grievant; however, the instructors received no response. The second incident involved a request for certain educational materials. Again she received no communication from Grievant.

Grievant's response to the charge of unsatisfactory performance, set forth in a thirteen page, undated letter,
is that Mr. Dopson's complaints are substantively inaccurate having been based upon the Director's misperceptions and lack of objectivity. Grievant addresses the five incidents cited in the dismissal letter as follows:

(1) Grievant denies that he participated in any discussions regarding deficiencies in planning or leadership other than that which occurred in the morning staff meetings. Grievant further asserts that Mr. Dopson misrepresented that they shared an office. Grievant asserts that the Director utilizes a private office while his desk was located in the main office which he shared with the secretary.

(2) Grievant explains that he did not advise his staff of the delay in the start-up date from September 12 to September 19 because Mr. Dopson had directed the senior staff <u>not</u> to pass on the change based upon a perception that if the employees remained unaware of rescheduled opening they would continue to work at a pace directed to the earlier date, maintaining peak performance, without loss of momentum. Grievant submitted notes which he made during the August 16, 1993, staff meeting which, he asserts, statesthat the change was labeled "closehold," meaning that the

information was not for broadcast. Grievant further asserts that he reminded Mr. Dopson of this fact during the meeting on August 31, 1993, and that the Director conceded Grievant's recollection to be accurate. Finally, Grievant asserts that he did advise the appropriate individuals, including a Major Padilla and Captain Norris of the National Guard Bureau in Washington, D.C., of the revised opening date.

3. Grievant explains that he directed a subordinate (presumably Ms. Miller) to schedule an appointment with TRO for August 25 or 26 and that he was not aware that she had gone beyond that time frame. Grievant claims that he, not Mr. Dopson, rescheduled the meeting for August 27 when Ms. Valdez called to confirm the September 3 date. When Mr. Dopson later attempted to have that meeting cancelled because he had already made an arrangement with another vendor, Grievant left the message on Ms. Valdez' voice mail advising her that the meeting was unnecessary. Grievant asserts that Mr. Dopson later agreed to meet with TRO after a Mr. Hetherington threatened to file a complaint with the National Guard Bureau in Washington, D.C. Grievant admits that he did not immediately follow-up on Ms. Miller's assignment but charges that Mr. Dopson's claim that he was at fault for the entire situation was "merely a cover-up to hide Mr. Dopson's own 'lack of ability to manage a multifaceted critical path operation'." Grievant further alleges that Mr. Dopson engaged in certain improprieties while negotiating with TRO. Grievant's explanation of that matter is as follows: During the negotiations with TRO on 27 Aug, I had pointed out to Mr. Dopson that while TRO and CLW[a competing vendor] were neck and neck for 17 work stations, TRO's price for a total of 34 work stations was considerably more than CLW's. Mr. Dopson thanked me for pointing out the discrepancy and mentioned to the vendor that a server (a monitoring computer) would take care of the difference. The vendor protested that he, the vendor, would get into big trouble on his Navy contract if he did what Mr. Dopson wanted. The two went into private discussions after this. On 1 Sep, Mr. Dopson advised the senior staff of possible ethics allegations against us and TRO, if word got out about the "server," which TRO was providing to us. The allegation would probably come from the other vendors, who would say that TRO bribed us with a "free" server in order to get our contract.

4. Grievant's recollection of the weekly reports which he was to complete differs significantly from that stated in the dismissal letter. Grievant claims that Mr. Dopson first advised him of the reports on August 16, not August 13, as the Director alleges. Thus, the first report was filed on Friday, August

20. Grievant's explanation of the interaction between himself and the Director is best expressed in his own words:

On Friday morning, 20 August, I entered Mr. Dopson's office. . . I had with me my draft of the weekly activity report. . . Since this was the first one I submitted, I wanted to be sure that I was accomplishing it according to his wishes. The draft, as submitted, contained 16 items, which Mr. Dopson cut to 5 items. The counseling that took place at this time consisted mainly of Mr. Dopson's insistence that I use the passive voice. We had a discussion in which I stated that habitual use of passive voice is poor grammar. Mr. Dopson replied that it was the Army way, I acquiesced, of course, since he was the one signing the report. For the record, I (a former Army Military Police desk clerk with a B.A. in English) would like to say that, while passive voice has its place, it is tobe avoided as the primary means of communicating, as it tends to hide responsibility for actions. . . .

Grievant asserts that his August 27 report indicated that input from staff showed mostly "no change, ongoing renovation," etc., and that Mr. Dopson showed no apparent concern.

Addressing the incident in which two different numbers of applicants were reported, Grievant explained that two females were wavering on their decision to attend and were considered as on-again, off-again applicants. Grievant suggests that if Mr. Dopson's report, showing two fewer students than his weekly report indicated, had already been submitted then the Director should have brought the discrepancy to his attention. It Mr. Dopson's report was submitted later then he should have been aware that Grievant had reported a higher number of applicants.

5. Grievant denies that he ever heard, directly or indirectly, that Mr. Dopson was looking for Mr. Howerton.

Grievant further asserts that Mr. Dopson routinely rejected and at times ridiculed his ideas, which would sometimes resurface as the Director's own. Grievant claims that the Director treated him in a contemptuous and rude manner in an effort to intimidate him into not making any suggestions at all. Grievant asserts that Mr. Dopson's behavior was discriminatory, based upon the Director's open dislike of former members of the Air Force. Grievant recalls that during a staff meeting the Director commented "What we hear from non-Army pukes" in response to asuggestion made by Major Gilbert, who was not present. Grievant recalled that the comment was followed by a disdainful glance in his direction. This was the second anti-Air Force comment Grievant had heard from the Director. A few weeks earlier he noted that Mr. Dopson stated, in reference to another employee, "We don't

need Air Force pukes telling us what to do." Grievant perceived that a glance in his direction had also occurred at this time.

To support his arguments Grievant called three of his co-workers to testify in his behalf. Cathy Pyles restated her efforts to obtain information and materials from Grievant and that she had never received a reply. Charles Clayton, Administrator/Logistics Coordinator, did not recall certain allegations Grievant had made against Mr. Dopson, such as the claim that the Director responded badly to questions from his subordinates. He opined that Grievant received the same treatment from the Director that everyone else received. Walter Howerton, Commandant of Cadets, did not recall Mr. Dopson directing the administrators not to pass on the change in start date to the other employees. He also did not recall Grievant's allegation that Mr. Dopson disliked questions from his subordinates or that the Director had referred to others as "pukes."

Grievant stated that he was flabbergasted at the witnesses' recollection of events asserts that "they were apparently intimidated into a conspiracy to commit perjury." Grievant claims to have proof to substantiate thisallegation but did not present it to the undersigned. He advised in his post-hearing statement that information regarding this matter as well as other illegal activity in which the Director was involved, would be forwarded to the Criminal Investigations Division, Charleston Armory, so as to protect his informant. Following the level four hearing Grievant advised the undersigned that he wished to amend his request for relief because he was no longer interested in reinstatement to the position of Deputy Director. Instead, Grievant requested an unspecified award of damages and several letters of apology.

Because Grievant is an at-will employee he is subject to dismissal for no reason at all or for any reason which does not contravene some substantial public policy principle. Harless v. First National Bank in Fairmont, 246 S.E. 2d 270 (W.Va. 1978). Respondent argues that the evidence supports a finding that the dismissal was for good cause, i.e., unsatisfactory performance. Upon a review of the record in its entirety, it is determined that Respondent has proven that Grievant's performance was unacceptable to his supervisor. It is unnecessary to address the specific examples cited by the Director and Grievant. It is also unnecessary to evaluate whether Grievant possessed the ability or made a reasonable effort to acceptably perform the duties of Deputy Director. Due to his at-will employment status, it suffices that Respondent has established that Grievant did not perform the duties ofDeputy Director in a manner consistent with the expectations of his supervisor.

Notwithstanding Respondent's showing of cause for the termination, Grievant has raised the issue that the action was in fact the result of discrimination by the Director against those employees who had previously served in the Air Force. It would not appear that this argument is a true claim of discrimination but rather is a charge of personal bias or prejudice by the Director. In any event, Grievant's claim is not supported by the evidence. First, the Director, having full knowledge of Grievant's background, recommended Grievant for the position of Deputy Director. Second, at least one other staff member was also a former member of the Air Force. If the Director actually believed individuals to be less capable due their prior military affiliation, his hiring of said individuals would have been illogical.

It appears that the Academy is staffed by former members of various branches of the military as well as civilian employees. Mr. Howerton opined that the reference to "Air Force pukes" was likely just normal inter-service ribbing. This suggestion is certainly possible. Mr. Clayton recalled hearing the Director also refer to "civilian pukes." Although these comments indicate a possible disdain for employees of certain backgrounds and will hardly endear those employees to the Director, itcannot be concluded that his reference to them as "pukes" establishes discrimination.

Finally, Grievant's amended request for relief effectively renders the grievance moot. Because he no longer seeks reinstatement, the request for damages is interpreted to be those exemplary or punitive in nature. These damages are awarded over and above any compensation for actual loss and are intended to solace the individual for mental anguish, hurt feelings, etc., and/or to punish the Respondent. W.Va. Code §29-6A-5(b) provides that level four evaluators shall have the power to "provide such relief as is deemed fair and equitable . . . including , but not limited to, making the employee whole." Thus, while an evaluator is empowered to award actual damages, Grievant offers no authority, and the undersigned is aware of none, upon which the claim of punitive damages may be granted.

The Grievance Board has previously held that apologies, Grievant's second request for relief, are not available as relief under the grievance procedure. The rationale for this holding is that said relief is inappropriate since it has no legal basis and would serve no useful purpose to resolve an employment dispute. Helvey v. W.Va. Workers' Compensation Fund, Docket No. 91-WCF-034 (Mar. 30, 1992); Hall v. W.Va. Division of Corrections, Docket No. 89-CORR- 687 (Oct 19, 1990).

The factual and legal determinations contained in the foregoing discussion and analysis are

incorporated in andmade a part of the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed as the Deputy Director of the Mountaineer Challenge Academy, a subdivision of the Division of Military Affairs.

2. Grievant was employed effective August 12, 1993, and served at the will and pleasure of the Respondent.

3. Academy Director Hugh Dopson terminated Grievant's employment, effective September 25, 1993. The reason for this decision was Grievant's demonstrated unsatisfactory level of performance.

CONCLUSIONS OF LAW

1. In general, an employer has an absolute right to discharge an at-will employee for any reason or no reason at all. This rule must be tempered by the principle that where an employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable for damages. Harless v. First National Bank in Fairmont, 246 S.E. 2d 270 (W.Va. 1978).

2. Grievant has failed to state a viable claim of discrimination based upon former military affiliation. 3. Grievant's requests for relief are unavailable at level four of the grievance procedure.

Accordingly, the grievance is DENIED.

June 16, 1994 SUE KELLER

SR ALJ