JOHN HARRIS

v. DOCKET NO. 93-BOD-008

WEST VIRGINIA BOARD OF DIRECTORS/

SHEPHERD COLLEGE

DECISION

Grievant, John Harris, employed as a Security Officer at Shepherd College (Shepherd or Respondent), advanced this appeal to level four on January 7, 1993, alleging:

> I feel I was terminated unjustly, that all facts were not presented adequately, and that my termination amounted to cruel and unusual punishment based on the alegations [sic] and my overall work performance record here at Shepherd College.

After a long delay to brief evidentiary issues, a level for hearing was conducted on April 15, 1994. Proposed findings of fact and conclusions of law were filed by both parties on May 31, 1994, completing the record for administrative review. (See footnote 1)

The incidents which led to the filing of this grievance began on September 13, 1992. Grievant was on duty in his capacity as a security officer when it became necessary for him to proceed from White Hall on the east campus to the west campus. In order to reach his destination Grievant was traveling along High Street whenhe observed a former Shepherd employee, Vicki Fork, carrying a bag and walking up the street in a laborious manner. Grievant proceeded to provide Ms. Ford a ride home while in route to his destination. Ms. Ford's residence is immediately adjacent to the Shepherd College west campus. It is standard procedure at Shepherd for the college security officers to complete a log noting activity during their shifts. Grievant's log indicates his presence at White Hall and his trip to the west campus, but does not include an entry stating that he provided Ms. Ford a ride home.

Later that day Grievant was called by the Shepherdstown Police Department to act as a backup on a domestic dispute reported at the home of Ms. Ford. Grievant testified that some negative

feelings had already developed between himself and Charles “Turtle” Williams, who was involved with Ms. Ford and known in the community to be an alcoholic, so he reluctantly responded to the call. Upon his arrival at Ms. Ford's home, Grievant recalled that Turtle cursed and threatened him, finally punching him in the chest and advising that the next time he saw Grievant he would kick Grievant's posterior.

The following day, September 14, 1992, Grievant was off duty and sitting in the city park when he was approached by Turtle who threw up his hands as if to hit Grievant. After what was apparently a brief initial confrontation, Turtle retreated across the street but quickly reappeared brandishing a knife. At this time Grievant retrieved a nightstick from his car. He claimed that he did not wave or threaten Turtle with the stick but held it so that it could be seen. At this point the altercation came to anabrupt end. It is undisputed that the night stick was the property of Shepherd College.

By memorandum dated October 9, 1992, Clinton Davis, Administrator of the Security Department, advised Grievant that:

> At 9:00 a.m. on Monday, October 5, 1992, an inquiry was held in my office in the College Center which addressed three specific charges regarding your recent conduct as a security officer. The three charges were related to incidents in which you participated on September 13th and 14th , 1992. They were:
>
> 1) Misuse of a security vehicle.
>
> 2) Falsification of a security report.
>
> 3) Use of a college issued nightstick without authorization in an off campus altercation while not on duty.
>
> You were found guilty of each of the charges. You are hereby terminated from your employment with Shepherd College effective Friday, October 9, 1992. You are to immediately return all equipment and uniforms to Senior Security Officer Grover Boyer.

Although not mentioned in the termination letter, at both levels two and four Respondent has asserted that Grievant is an at- will employee as per W.Va. Code §18B-4-5, which provides that “[t]he governing boards may at their pleasure revoke the authority of any security officer.” Therefore,

Respondent contends Grievant's dismissal may be implemented at its discretion so long as the action is not in violation of public policy.

As a secondary argument, Respondent asserts that Grievant's admission of transporting a person who was not a student or an employee of Shepherd College in a security vehicle, his failure to report the activity on his daily log, and the unauthorized use of the nightstick, are serious failures to comply with institutional policy and would justify dismissal even if Grievant were not an at-will employee. Specifically, Respondent cites the following violations of the Shepherd College Officer's Code of Conduct:

> 14. No officer shall appropriate to his own use or the use of another property belonging to the college... Any officer found guilty of misappropriating College property regardless of condition will be subject to termination of employment.

> 15. No officer shall knowingly make false statements or misrepresentations to fellow members, supervisors, or in daily long.

> 34. Officers are to use the Security vehicle for the purpose of patrolling campus. Offers are not permitted to utilize the vehicle for personal use or drive the vehicle off campus for unrelated security purposes except when authorized.

Grievant argues that Respondent's reliance upon Code §18B-4-5 is misplaced since that provision merely allows the revocation of a security officer's authority and makes no statement regarding termination. However, if found to be employed “at-will,” Grievant asserts that that status has been amended by a Board of Directors' policy establishing a progressive disciplinary process. In support of this argument he cites Wilson v. Long John Silver's, Inc., 188 W.Va. 254, 423 S.E.2d 863 (1992), at Syllabus Point 5, which states:

> If an employee violates a company rule which does not call for immediate discharge, yet is terminated without the progressive disciplinary steps provided for in the employment manual, then the issue of whether the manual provides a unilateral contract of employment altering the employment at-will relationship may be relevant.

Based upon his entitlement to utilize the grievance procedure established by W.Va. Code §§18-29-1 et seq., and because the Board of Directors has implemented a detailed disciplinary procedure which

lists reasons for dismissal and provides for progressive discipline, Grievant argues that the policies have created aunilateral contract entitling him to the protection and benefits they afford.

Grievant continues to assert that he is not guilty of any conduct listed in the Board of Directors' policy as reasons for immediate dismissal, nor would his conduct qualify as just cause for termination; therefore, he is entitled to the benefits of progressive discipline, if he is to be disciplined at all.

Grievant argues that no discipline should be imposed for any of the three charges. First, he asserts that other security officers have been known to transport individuals who were not students or employees in the security vehicles and that none have been terminated for this activity. Grievant also denies that he falsified records when he failed to note in his log that he had taken Ms. Ford home. He claims that not every action of a security officer is included in the logs, and that providing Ms. Ford a ride home was an inconsequential good deed, done between one official stop and another. Grievant denies that he knowingly made a misrepresentation in the log.

Addressing the third charge, Grievant denies that he used the nightstick. He admits having the weapon while off-duty but justifies the possession based upon the ongoing confrontations with Mr. Williams which began when he was on duty. While he did remove the nightstick from his car and used it to demonstrate that he was armed, no actual assault ever took place. Again, Grievant asserts that his self defenses arising from a work-related incident does not constitute just cause for dismissal.

Finally, Grievant argues that he was not given the benefit ofcounsel at the early stages of the grievance procedure, particularly during meetings held on September 18 and October 5, 1992, which resulted in his termination. Grievant argues that all evidence obtained during these meetings, including statements/admissions which he made, should be suppressed. Without these statements, Grievant claims there is no evidence for any of the three charges.

It may be determined that the language of Code §18B-4-5 establishes Grievant to be an at-will employee. When a governing board at its pleasure revokes the authority of a security officer, the outcome of that action is that the employee may not perform the duties for which he was hired and is terminated. Although the term “at-will' is not specifically used, there exists reasonable certainty that was the intent of the passage.

The evidence does not support a finding that Grievant's at- will status was affected by the Board of Directors policy. Unlike the employee in Wilson, who worked in the private sector, Grievant is a public employee holding a position governed by statute. In Williams v. Brown, 437 S.E.2d 775 (W.Va.

1993), the Supreme Court of West Virginia recognized the rulings of other jurisdictions that hold a personnel policy or manual will not override explicit statutory authority to discharge. The Court also held that the receipt of certain employment related benefits cannot be construed as an implied contract of continuing employment in the public employment sector. Thus, the Board of Directors' policies do not, and cannot, alter Grievant's at-will status. Although termination for the stated charges may appear to be excessive consideringGrievant's explanation of the events, there is no assertion that the dismissal was for any reason contrary to public policy; therefore, Respondent's action must be upheld.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. Grievant was first employed as a security officer at Shepherd College in 1990.

2. On September 13, 1992, while on duty and between calls, Grievant gave a female acquaintance a ride to her home. This activity was accomplished in route to his next official stop and apparently did not interfere with the performance of his duties.

3. Grievant's log book for September 13, 1992, did not include an entry indicating that he had provided transportation for anyone not a student or an employee at Shepherd College.

4. On September 14, 1992, while off duty, Grievant retrieved a nightstick owned by Shepherd College from his personal car to deter an aggressor in a continuation of a confrontation which began on September 13, 1992, kin the course of Grievant's duties.

Conclusions of Law

1. The governing boards for state institutions of higher education are authorized to appoint bona fide residents of this state to act as security officers upon any premises owned or leased by the state of West Virginia and under the jurisdiction of the governing boards, subject to certain conditions and restrictions. The governing boards may at their pleasure revoke the authority ofany security officer. W.Va. Code §18B-4-5.

2. Neither personnel policies or manuals, nor the receipt of certain employment-related benefits, may be construed as an implied contract of continuing employment in the public sector and thereby

override explicit statutory authority granting the employer the right to discharge an at-will employee. Williams v. Brown, 437 S.E2d 775 (W.Va. 1993).

Accordingly, the grievance is DENIED.

Any party may appeal this DECISION to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED: August 31, 1994 _____

SUE KELLER

SENIOR ADMINISTRATIVE

LAW JUDGE

Footnote: 1 ***The grievance had previously been denied at levels one and two.***