MICHAEL W. SMITH

v. Docket No. 94-CORR-1092

WEST VIRGINIA DEPARTMENT OF CORRECTIONS

DECISION

The grievant, Michael Smith, was employed by the West Virginia Department of Corrections (CORR) as a probationary Correctional Officer I (COI) assigned to the West Virginia Penitentiary from May 23, 1994 until November 9, 1994, when he submitted a resignation. He filed a grievance at Level IV December 9, 1994, alleging that the resignation had been coerced. A hearing was held February 22, 1995, and the grievant submitted proposed findings of fact and conclusions of law by March 21, 1995. CORR declined to submit proposals. In order to clear up an apparent conflict in the record developed March 21, see n. 3, a supplemental evidentiary hearing was held September 7, 1995.

Background

Much of the factual background of the case is not in dispute. On or about April 20, 1994, the grievant completed his application for employment as a COI. The grievant responded truthfully in the negative to the question on the application, "Have you ever beenconvicted during the past 5 years for any offense which would impact your ability to effectively perform your duties as a [Correctional Officer]?" The application did not require that he divulge any criminal history beyond that period. The grievant responded in the same manner when asked the same question during his interview for the position.

On May 9, 1994 CORR received a report from the Fayette County Sheriff's Office indicating that its records did not reveal any prior arrests, convictions or pending charges against the grievant. Despite that CORR regulations require receipt of a background report from the Criminal Identification Bureau (CIB) of the West Virginia Department of Public Safety before an applicant is employed, the grievant was hired as a probationary employee on May 23, 1994,

prior to the submission of his report. Presumably, his employment was necessitated by time constraints associated with the opening of the newly-constructed prison complex at Mt. Olive in Fayette County.

CORR received a May 24, 1994 CIB report which indicated that a search of the Department of Public Safety's fingerprint files did not reveal any history of criminal convictions for the grievant. It appears that this report covered West Virginia records only or was in error.

On November 9, 1994, Captain Barry Milbert, the grievant's supervisor, was told to have the grievant report to the office of Lieutenant Tony LeMasters, Associate Warden of Security. Neitherthe grievant nor Captain Milbert were advised of the reason for the order.

Lt. LeMasters and Lieutenant Richard Littell, Chief Correctional Officer, met with the grievant for approximately twenty minutes. During their discussion, Lt. LeMasters advised the grievant that a background report had been received (See footnote 1) **and that it indicated a seventeen-year old conviction for abduction and assault with a deadly weapon and a four year prison term in Ohio.** (See footnote 2) **Lt. LeMasters also advised the grievant that he could be facing disciplinary action for failing to reveal this information during his employment interview. The grievant acknowledged the conviction and prison term, but asserted he had done no wrong since he was asked questions regarding convictions during the previous five years only.**

Lt. LeMasters further informed the grievant that as a convicted felon, he could not obtain a permit to carry a handgun in West Virginia and, thus, could not carry a handgun inside the prison. While the content of the remainder of their conversation is in dispute, it is uncontroverted that at the end of thediscussion, the grievant signed and dated a letter which, in its entirety, stated, "Due to financial reasons, I Michael W. Smith due [sic] hereby tender my resignation with the Department of Corrections." Lt. LeMasters accepted the resignation.

Following the meeting, Lt. LeMasters directed Lt. Littell to draft a memo to Warden George Trent, setting forth the contents of their discussion with the grievant. Lt. LeMasters signed the memorandum on November 10, 1994. (See footnote 3) **He also verbally advised Warden Trent that the grievant had been confronted with the report and that he had elected to resign.**

It is also not disputed that CORR has no written policy which addresses the employment of persons with records of criminal convictions. Apparently, the agency has adopted an

informal practice whereby decisions to discharge, retain or hire persons with such records are made on a case-by-case basis. CORR concedesthat it has three officers with records of felony convictions assigned to the Huttonsville Correctional Center (HCC) and that one was hired subsequent to his conviction. (See footnote 4)

In effect at the time of the grievant's employment was a job description for COI promulgated by the West Virginia Division of Personnel (Personnel) which specifically lists a background free of felony convictions as a minimum requirement for the post. (See footnote 5) **Although the record reflects that Personnel "signed off" on the grievant's May 23, 1994 appointment, there is also evidence whichsuggests that Personnel was displeased with reports that CORR was retaining employees with felony convictions at HCC.**

Specifically, of record is a January 11, 1995 memorandum from Personnel Director Robert Stephens to CORR Commissioner Nicholas Hunn in which Director Stephens references the COI job description and at least implies that it constituted binding policy which prohibited CORR from appointing and/or retaining felons. The memo is ambiguous, however, in that it also makes mention of an employee at HCC with a felony conviction but does not provide directions as to what, if any, steps should be taken with regard to the employee.

Argument

The grievant asserts that Lt. LeMasters made statements and representations during the November 9 meeting which had the effect of coercing him into resigning. He characterizes his separation from employment with CORR as a constructive discharge and contends he was the subject of disparate treatment in that CORR has hired or retained others with criminal records. (See footnote 6) **CORR maintains the grievant's resignation was voluntary. Significantly, CORR does not assert that the grievant was guilty of misconduct; that he was incompetent in the performance of his duties; or that he otherwise committed any violation of the agency's "Employee Standards ofConduct and Performance."** (See footnote 7) **CORR also does not make a response to the grievant's claim of disparate treatment.**

Analysis

Following the guidance of the West Virginia Supreme Court of Appeals in Adkins v. Civil

Serv. Comm'n., 298 S.E.2d 105 (1982), the Grievance Board has held that a claim of coerced resignation is cognizable in the grievance procedure for state employees. (See footnote 8) **McClung v. W.Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989). Following the Court's further guidance in Billings v. Civil Serv. Comm'n, 178 S.E.2d 801 (W.Va. 1971) and Bava v. Civil Serv. Comm'n, 178 S.E.2d 839 (1971), and various decisions of the Merit Systems Protection Board, the Grievance Board has held that such claims require careful examination of the circumstances surrounding the resignation "in order to measure the ability of the employee to exercise free choice" at the time it was tendered. McClung, at 4; Ball v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-027 (June 15, 1990).**

Factors to be considered in the analysis are whether the employee was given time to consider his course of action or toconsult with anyone; whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and whether the employer had reason to believe that the employee is not of a state of mind to exercise intelligent judgment. Vandiver v. General Accounting Office, 3 M.S.P.R. 158 (1980). Duress has been found in situations where the employee involuntarily accepted the employer' terms; the circumstances surrounding the resignation permitted no other alternative; and the circumstances were the result of coercive acts of the employer. Vandiver, citing Freuhauf Southeast Garment Co. v. United States, 111 F.Supp. 945 (Ct. Cl. 1953).

Clearly, whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961). After a thorough review of these holdings and the evidence in the present case, the undersigned concludes that the grievant's resignation was coerced.

CORR concedes and Capt. Milbert's Level IV testimony confirms that the grievant's performance prior to November 9 met or exceeded standards and that he was never the subject of any disciplinary action. Capt. Milbert also testified that the grievant had never indicated to him that he was considering resignation for any reason, including financial ones. According to Capt. Milbert, the grievant, from all appearances, was very pleased with his position.

Lt. LeMasters represented that he was furnished a copy of the grievant's background report and was told to "address" the matter. He could not recall who provided the report or

who gave him thatdirection. Lt. LeMasters explained that the purpose of the meeting with the grievant was to confront him with the CIB report and that Lt. Littell was there to serve as a "witness to a possible disciplinary action" and for "documentation" purposes.

Lt. LeMasters also testified that he informed the grievant that he would not be able to obtain a license to carry a firearm because of the felony conviction and that he, therefore, could not carry a firearm in the prison. According to Lt. LeMasters, the grievant then responded, "I guess I'll have to resign." He denied that he encouraged the grievant to do so. He stated that he did advise him that other employers would not have access to his file at CORR if he resigned, but that any employer who completed a fingerprint check would discover the conviction.

Lt. LeMasters responded "Not that I can remember" when asked if he told the grievant he would be fired if he did not resign. He provided the same response when asked if he advised the grievant that a discharge would "follow him for the rest of his life."

Lt. Littell's testimony generally confirmed Lt. LeMasters' account of the meeting with the grievant. He recalled that the grievant was told that he was "going into progressive discipline" for failing to divulge his criminal record in the interview process. Mr. Littell denied that he or Lt. LeMasters suggested to the grievant that he should resign.

Lt. Littell further testified that Lt. LeMasters directed him to review their notes made during the meeting and prepare a memo to Warden Trent, for his, Lt. LeMaster's signature, setting forth thecontent of the discussion with the grievant. Lt. Littell denied that he and Lt. LeMasters discussed their notes prior to his preparation of the memo but later asserted that the memo was "initiated together."

The grievant testified that he felt intimidated by the manner in which he was directed to Lt. LeMasters' office; the presence of two officers of superior rank; Lt. LeMasters' tone of voice; and the confrontational nature of the meeting. He represented that Lt. LeMasters advised him that his employment at the prison violated "state statutes," but was not specific about which ones. The grievant further stated that Lt. LeMasters advised him that he could "resign quietly" or "have something on his record from then on."

The grievant also represented that Lt. LeMasters told him that other officers had resigned for financial reasons and that there would be no objection if he cited such reasons as the

basis for his resignation. He characterized Lt. LeMasters' remarks as "coaching." The grievant also related that, at the time, he believed he did not have much choice in the matter and that Lt. LeMasters could and would discharge him if he did not resign. He represented that neither officer advised him to defer a decision in the matter until he had thought it over.

Finally, the grievant explained that he was a resident of Powellton, Fayette County, West Virginia in November 1994, and that he was staying in Moundsville awaiting the relocation of the penitentiary to Mt. Olive in Fayette County. He represented thatLt. LeMasters' remarks caused him to become very concerned about the effect a dismissal might have on his chances of obtaining unemployment benefits and returning home.

The discrepancies between the grievant's testimony and that of Lt. LeMasters and Lt. Littell must be resolved in the grievant's favor. Lt. LeMasters was noticeably hesitant and even evasive in his responses to a great many questions. He also contradicted himself on at least two occasions. In contrast, the grievant's responses were direct and forthright. While Lt. LeMasters appeared to be anticipating the examiner's purpose for asking a particular question, the grievant almost invariably answered with spontaneity. It seems improbable that Lt. LeMasters would not remember whether he told the grievant he would be fired if he did not resign and that a dismissal would impair his future employability.

Further, the undersigned finds significant portions of Lt. LeMasters' testimony implausible. It seems unlikely that he would not recollect who gave him directions to confront the grievant about his CIB report and that the directions were merely to "address the matter." It is of considerable significance that Lt. LeMasters was very ambiguous in his responses when questioned about the purpose of the meeting. His assertion that he met with the grievant only to obtain his reaction to the report appears dubious in light of his further testimony which confirms that he did much more than simply ask the grievant to acknowledge or dispute the truth of the report.

It also appears suspect that Lt. Littell and Lt. LeMaster did not complete individual written memorializations of the discussion with the grievant. Further, the general ambiguity, and even evasiveness of the Lieutenants' testimony regarding the memo which was prepared casts doubt on the truthfulness of the account of the meeting set forth therein, as well as their testimony. Although he was asked on several occasions to provide details on the process by

which the memorandum was completed, Lt. Littell responded only generally. As previously noted, he finally asserted, without explaining, that it was "initiated together." For these reasons the grievant's account of what transpired during the meeting is deemed the more credible account.

It is, therefore, accepted that Lt. LeMasters made representations to the grievant designed to make him feel threatened and that he suggested outright that the grievant's future employability would be seriously impaired if he did not resign. It is also accepted that Lt. LeMasters suggested that the grievant cite financial reasons for the resignation. The grievant's testimony further supports that he was intimidated by the confrontational and threatening atmosphere created by the manner in which the meeting was convened; the presence of two high-ranking officers whom he believed had authority to discharge him; and his lack of assistance in the matter. The grievant's probationary status and his lack of previous experience in the corrections field support that he was justified in believing thatdischarge was imminent and that Lt. LeMasters had the authority to take such action.

It is also significant that prior to the meeting, the grievant had every reason to believe that CORR had no interest whatsoever in convictions older than five years. Thus, the revelation that he was facing disciplinary action for failing to be truthful was both threatening and confusing. From all accounts, Lt. LeMasters was unresponsive to the grievant's attempts to discern the basis for the "possible disciplinary action." It was deceptive on Lt. LeMasters' part to suggest that the grievant had committed some wrong and not explain the exact nature of the offense. Moreover, as previously noted, CORR does not now assert that the grievant was guilty of any violation of its standards of conduct for correctional officers. It can easily be inferred that Lt. LeMasters was fully aware that the grievant had responded truthfully to all questions posed him during his application process and that he was simply attempting to intimidate him.

It was also deceptive of Lt. LeMasters to advise the grievant that his felony conviction violated unspecified state law and that it would preclude him from carrying a firearm in the prison. Capt. Milbert's testimony established that most posts within the prison were unarmed and that, in any event, the grievant's inability to obtain a state-issued permit would not prohibit CORR from "qualifying" the grievant to carry a weapon inside the facility.

The undersigned also finds, per the holdings in Vandiver, supra, that Lt. LeMasters had a duty to explain the purpose of themeeting to the grievant and provide him a reasonable amount of time to consider his options and seek assistance. In this regard, it is telling that Lt. LeMasters felt the need to have a fellow administrator present in the meeting for "documentation" purposes but did not afford the grievant the right to have a co-worker or union representative present. That he did not, corroborates that the purpose of the meeting was to obtain a resignation and avoid a termination for reasons which were then tenuous at best.

The West Virginia Division of Personnel (Personnel) has promulgated regulations, applicable to CORR employees, which address the manner in which the employment of probationary workers can be terminated. Section 10.02(a) of the then-applicable regulations (See footnote 9) **provides,**

> **Four weeks prior to the end of the probationary period, the appointing authority shall obtain from the probationary employee's supervisor a statement in writing recommending that the employee be continued or not be continued in service. This statement shall include an appraisal of the employee's services and should include a service rating in conformity with the system of performance evaluation prescribed by the Director. In the event it is determined that the services of the employee shall be retained, the appointing authority shall notify the employee and the Director of Personnel of the action no later than the last day of the probationary period.**

Section 10.05(a) of the regulations, in pertinent part, provides,

> **If at any time during the probationary period, it is determined the services of the employee are unsatisfactory, the employee may be dismissed from the service, but such action shall take place only after theperson to be dismissed has been presented with the reasons for the dismissal stated in writing, and has been allowed a reasonable time to reply thereto in writing or upon request to appear personally and reply to the head of the department or his deputy. The statement of reasons and the reply shall be filed as a public record with the Director. Notification of the dismissal shall be given to the employee 15 calendar days prior to the effective date of his dismissal, and no further salary shall be paid to him except in payment for accrued annual leave.**

Obviously, coerced resignation is not part of the process.

Moreover, it appears that prohibitions against coercing an employee to resign are

grounded in considerations of public policy and are, therefore, necessarily implicit in any employer-employee relationship. Further, the undersigned can discern no basis for holding that the prohibitions apply only to tenured permanent employees.

McClung, supra, instructs that once a finding of coercion is made, the resignation may be deemed a discharge and further review is required to determine whether the employer had cause to take such action. Such review in the present case is complicated. As previously discussed, CORR has not alleged that the grievant's services were unsatisfactory or that he committed any act which could be characterized as misconduct. There can be no finding that the grievant's employment violates a CORR prohibition against hiring persons with criminal backgrounds since, as noted, CORR has no such policy.

Further, it is unclear whether Personnel considers its job description and the requirement therein that applicants for COI positions have records clear of felony convictions binding policy. Director Stephens' January 11, 1995 memo to Commissioner Hunn is susceptible of a number of interpretations including that Personnel was leaving such decisions to CORR's discretion. Consequently, it cannot be determined with any certainty whether CORR was mandated by Personnel regulations to dismiss the grievant.

Further complicating the review is CORR's retention of employees with felony convictions and the grievant's claim of disparate treatment based thereon. In that CORR has merely conceded their employment and not explained the reasons therefor, it would appear that the claim has validity. Finally, it is significant that CORR did not simply dismiss the grievant upon receipt of his felony conviction records.

For the foregoing reasons, the undersigned is constrained to rule only on the question of the voluntariness of the grievant's resignation. The finding herein that he was coerced renders the resignation void and of no effect. Consequently, the grievant is entitled to reinstatement to his probationary position and an opportunity to vie for permanent status.

In addition to the foregoing, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) The grievant, a probationary Correctional Officer I assigned to the West Virginia

Penitentiary, was convicted of abduction and assault with a deadly weapon in 1977 and served a prison sentence of nearly four years.

2) At the time the grievant made application for employment with the West Virginia Department of Corrections, the agency had no policy prohibiting the employment of persons with a history of felony convictions. The grievant, who has had no history of criminal behavior since 1977, responded truthfully to questions regarding convictions during the five years preceding his application.

3) Despite that Corrections has a written policy which prohibits employment of persons prior to receipt of a background report from the West Virginia Department of Safety's Criminal Investigation Bureau, the grievant was hired as a correctional officer effective May 23, 1994, prior to the receipt of his report.

4) On November 9, 1994 the grievant was directed to the office of Lieutenant Tony LeMasters, Associate Warden of Security, where he met with Lt. LeMasters and Lieutenant Richard Littell, Chief Correctional Officer. Lt. LeMasters advised the grievant of the recent receipt of a report which revealed the 1977 felony conviction and the grievant acknowledged that it was accurate.

5) Lt. LeMasters also made representations during the meeting which were misleading, deceptive, and designed to intimidate the grievant. He also made statements to the effect that the grievant's future employment possibilities would be seriously compromised if he were discharged. Lt. LeMasters suggested that the grievant resign and list financial concerns as the reason therefor.

6) The grievant was not afforded the opportunity to consult with anyone or reflect on his options. He was also not furnished a copy of the agency's personnel policy or advised of his rights under the West Virginia Division of Personnel's regulations on probationary employment.

7) The grievant, citing financial reasons, submitted a written resignation at the conclusion of the meeting and it was accepted by Lt. LeMasters.

CONCLUSIONS OF LAW

1) A resignation, by definition, is a voluntary act on the part of an employee seeking to

end the employer-employee relationship. Resignations which are obtained through coercion or deception are contrary to public policy. Adkins, supra; McClung, supra.

2) The grievant has proven by a preponderance of the evidence that his November 9, 1994 resignation was the result of coercion and deception on the part of Lt. Tony LeMasters. Rescission of the resignation is, therefore, the appropriate remedy.

Accordingly, the grievance is GRANTED and the West Virginia Department of Corrections is hereby ORDERED to reinstate the grievant to the probationary Correctional Officer I position he formerly held. The agency is further ORDERED to reimburse the grievant for the loss of wages he has incurred since November 9, 1994, less any appropriate set-off.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 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.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 11, 1995

Footnote: 1*The source of this report is somewhat of a mystery. It was not submitted as evidence in the case and there was no testimony regarding its origin or how CORR came to possess it. Counsel for the agency expressed an opinion at the Level IV hearing held September 7, 1995, that CIB may have issued the May 24, 1994 report after conducting a statewide fingerprint check and then issued the second report after completing a nationwide check. In any event, since the grievant concedes that the later report was accurate, its source is of little, if any, importance to the outcome in the case.*

Footnote: 2*As hereinafter discussed, Mr. Littell did not participate in the discussion.*

Footnote: 3*At the February 22, 1995 Level IV hearing, Lt. Littell provided testimony, via telephone, which led the undersigned, the grievant's union representative, and CORR counsel to believe that he and Lt. LeMasters had*

drafted separate memos to Warden Trent. CORR counsel even agreed to obtain and submit Lt. Littell's memo at the conclusion of the hearing but did not. The undersigned subsequently determined that any written account of the November 9 meeting prepared by Lt. Littell was significant evidence in the case. Requests were made of CORR counsel to locate and submit the document.

Counsel ultimately reported that the memo signed by Lt. LeMasters, which was already part of the record, was the only one prepared. The undersigned reopened the record in order that Lt. Littell could be questioned further about the matter. At a supplementary evidentiary hearing held September 7, 1995, Lt. Littell testified credibly that he had prepared one memorandum at Lt. LeMasters' direction. It is accepted that there was only one document prepared but, as hereinafter discussed, the undersigned doubts that it accurately reflects the content of the lieutenants' discussion with the grievant.

Footnote: 4This finding is based on remarks made by CORR counsel at the Level IV hearing and a memorandum prepared by HCC Warden William Duncil in response to November 1994 reports in the media that several employees at the facility "had arrest records at least as bad as the people they were supposed to be watching." The memorandum lists the names of three employees and briefly sets forth the circumstances surrounding their offenses and convictions.

The grievant notes that the newspaper accounts appeared November 11, 1994, and suggests they were a factor in the grievant's "constructive discharge." The evidence on this point is speculative and, because the record is otherwise sufficient for a finding of coercion, it is not necessary to make definitive rulings on the issue.

Footnote: 5Subsequent to the September 7, 1995 evidentiary hearing, counsel for CORR submitted a copy of a May 2, 1994 job advertisement for COI and asserted that it was the posting to which the grievant responded when making his application for employment. Counsel also represented that a copy of Personnel's job description was attached to the announcement. The grievant's representative objected to consideration of counsel's representations and the admission of the job announcement on September 11, 1995. The announcement was admitted over the objections.

The undersigned does not doubt the veracity of counsel's assertions but finds that without evidence on the issue of whether the grievant actually reviewed the job description attached to the posting and understood it to be a requirement that he divulge his felony conviction, it would be speculative to conclude that he did. Further, the undersigned would not find it particularly persuasive, in light of other evidence, if it were shown that he read and understood the description.

Footnote: 6The grievant is black. His claim of disparate treatment, however, does not cite race as the motivation and there is no evidence of record to establish that it was. For reasons discussed, supra, the claim need not be addressed here.

Footnote: 7During the Level IV hearing, a discussion was held regarding the timeliness of the grievance and the grievant testified that he contacted CORR's central office in Charleston on or about November 10, 1994 for

information on the grievance procedure and was told that he would be furnished certain forms and assistance. According to the grievant, he waited a reasonable period and, when the assistance was not forthcoming, filed on December 9, 1994. Counsel for CORR explicitly waived the timeliness defense and did not cross-examine the grievant on the issue. Accordingly, it is not necessary to make findings or conclusions on the grievant's compliance with W.Va. Code §29-6A-4(e).

Footnote: 8W.Va. Code §§29-6A-1 et seq.

Footnote: 9Personnel adopted new regulations effective June 1, 1995, which appear to substantially alter the status of probationary employees. The regulations cited were adopted August 3, 1993, and were in effect at all times pertinent herein.