GEORGE A. HOFFER, .

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Grievant, .

. AMENDED

v. . DOCKET NO. 95-SFC-441

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STATE FIRE COMMISSION, .

.

Respondent. .

D E C I S I O N

George A. Hoffer (Grievant) filed this grievance at Level IV on September 14, 1995, challenging the reduction-in-force (RIF) action in which he was laid off by the Respondent State Fire Commission (SFC). Following a series of continuances, each of which was granted for good cause at Grievant's request, a hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on March 7, 1996. As agreed at the conclusion of that hearing, this matter became mature for decision upon receipt of the parties' timely post-hearing briefs on April 10, 1996.

Background

While many facts in this case are uncontroverted, certain matters are in dispute, requiring appropriate credibility determi nations. Walter Smittle, III, has served as State Fire Marshall since January 1974. On August 8, 1995, Mr. Smittle sought approval from the Personnel Board to eliminate one Fire Safety Plans Examiner I position in the Office of the State Fire Marshall through a reduction-in-force. R Ex 2. This request was approved on August 17, 1995. G Ex A; R Ex 3. Thereafter, on August 30, 1995, Mr. Smittle issued the following letter to Grievant:

> This is to inform you that it is necessary for the State Fire Commission to initiate a reduction-in-force in the Fire Marshall Division, Plan Review Section. The Plan Review Section has experienced a major decrease in the number of plans submitted

> for fire safety review. Since this decrease has continued for a period of eighteen months and all backlog has been eliminated, it is our belief that one (1) plans examiner can keep the plans current. Regrettably, we find it necessary for you to be laid off from your position of Fire Plans Examiner I at the close of business on September 15, 1995, due to lack of work. (G Ex B.)

Mr. Smittle explained that SFC provides a service by conduct ing reviews of various plans in exchange for a fee. These reviews are not required by any statute, but some agencies may have internal requirements mandating new construction plans be submitted to the State Fire Marshall for review. SFC charges a fee for these reviews based upon the cost of construction. However, the revenue generated from these fees is not sufficient to offset the operating costs of the Plan Review Section.

The amount of time required to review a plan varies with the complexity of the project. A major shopping mall could take weeks, while a new school building might take days, and a simple alarm or sprinkler system might only require a few hours. Reviewers havebeen used on occasion to assist inspectors in the field, but their primary duty is reviewing plans.

Mr. Smittle noted that the number of plans submitted for review has decreased over the years. Accordingly, at the beginning of the Governor's current administration (1993), Mr. Smittle proposed eliminating the Plan Review Section. This proposal was not approved. In early 1994, Mr. Smittle asked his Administrative Assistant to contact the Division of Personnel to determine the procedures for conducting a reduction-in-force. At that time, there were five employees in the Plan Review Section, one clerk and four reviewers. One employee passed away in early 1995 and the position was reallocated to the Inspection Division. Following Grievant's termination in the reduction-in-force at issue, the Plan Review Section consisted of one Fire Safety Plans Examiner, Supervisor, one Fire Safety Plans Examiner, and one Office Assistant (clerk).

Mr. Smittle testified that a long-term backlog of plans awaiting review was cleared up by August of 1995 through the hard work of the employees. At the time of the hearing, Mr. Smittle believed the turn-around time for plans was under thirty days.

Mr. Smittle acknowledged that he was "concerned" by an article by Fanny Seiler that appeared in the Charleston Gazette on April 4, 1995. In essence, the article suggested that Steven Scarborough, employed by SFC in the Plan Review Section, had received favorable treatment by being permitted to work at home after he had used his available sick and annual leave. Mr. Smittle stated that he didnot

know who had provided the information which Ms. Seiler printed in her column.

Mr. Smittle further explained that Mr. Scarborough suffered a stroke and heart attack. After undergoing heart surgery, he was permitted to review plans in the hospital and at home. The work performed in the hospital was part of his rehabilitation. When Mr. Scarborough was released to return to work, his doctors restricted him from climbing stairs. The Fire Marshall's Office is only accessible by stairs. Thus, Mr. Smittle elected to allow him to work at home in order to comply with the Americans With Disabili ties Act.

Grievant was employed by SFC as a Fire Safety Plans Examiner I for nearly three years prior to his termination. He acknowledged that there was a lack of work during the last few months of his employment, but he kept busy performing unspecified duties. He further agreed that there had been a backlog of plans in the office, but the backlog was down to a week at the time he was laid off.

Grievant further testified that his supervisor, Richard Corcovilos, announced in June that he had been instructed by Mr. Smittle to eliminate the backlog in the Plans Section. Thereafter, Mr. Corcovilos personally reviewed plans, work he had previously delegated, and the other Plans Examiner, Mr. Scarborough, made an effort to expedite his reviews. Grievant recounted that in the course of reviewing a school fire alarm plan, he discovered that Mr. Scarborough had failed to note that 12 doors swung in the wrongdirection when conducting an earlier architectural review. Grievant described this as a "basic requirement" which should not be missed in a proper review.

Grievant and Mr. Corcovilos visited Mr. Scarborough in the hospital, following his stroke and second heart attack. At that point, sometime in February 1995, Mr. Scarborough had just come out of intensive care. Although he was coherent, Mr. Scarborough still appeared "seriously ill" and was not then able to review plans. Grievant visited Mr. Scarborough one more time in the hospital and participated in occasional "conference calls" with Mr. Scarborough at home, after he was released from the hospital. Based upon these experiences, Grievant was skeptical that Mr. Scarborough could have properly reviewed 197 plans, as indicated in the records provided by SFC.

Grievant stated that he was laid off because SFC believes that he reported wrongdoing to the newspaper. However, Grievant testified that he first heard of a layoff following an altercation between Grievant and Mr. Scarborough in their work area. According to Grievant, Mr. Corcovilos told him at that time that there was a "lack of work" coming into the office and a layoff was possible. Grievant felt that the comment was aimed at him. Thereafter, Grievant filed a grievance regarding the incident.

Grievant indicated that he never checked Mr. Scarborough's personnel files, although he understands that a state employee's leave records indicating the amount of sick and annual leave accrued are open to the public. Grievant denied having told anyonethat he was the person who provided the information in Ms. Seiler's newspaper column. He further recalled that after Ms. Seiler's article was published, Mr. Smittle and Mr. Corcovilos began treating him differently, no longer exchanging pleasantries and greetings in the office, as well as halting the practice of sending him into the field with the inspectors once or twice each month.

Richard Corcovilos testified that the only reasons a plan would be returned without review are: (1) if the submitter decided to withdraw the plan for some reason, such as deciding not to pay the required fee, or electing to revise the plan and submit a new one for review; or (2) if an inspector had already inspected the completed structure and issued an occupancy permit. (See footnote 1) According to Mr. Corcovilos, if a plan is reviewed by the Plan Review Section and a violation of the state or national fire code is overlooked, the property owner or builder is nonetheless responsible for building in accordance with the applicable code.

Mr. Corcovilos has supervised the Plan Review Section for five years. He testified that during his tenure, the backlog of plans for review has been decreasing. According to Mr. Corcovilos, he was always under instruction to eliminate the backlog. He recalled that there were 500 plans on hand when he took over the section and the backlog was gradually reduced to zero. As of the Level IV hearing, the Plan Review Section had eight plans on hand for review, with an expected turn-around time of two weeks or less. Prior to Grievant's RIF, the Section had as few as zero plans on hand for review.

Mr. Corcovilos recalled Ms. Seiler's article, noting that there was some "controversy" regarding the information published. However, he denied any knowledge regarding who provided the information to Ms. Seiler. Likewise, he did not recall hearing any speculation about who provided the information.

Arnett Corley, Jr., an Administrative Assistant for SFC, testified that there were "informal discussions" in the office regarding Ms. Seiler's column about Mr. Scarborough's situation. He did not recall any of those discussions focusing on Grievant as the person who provided the information to Ms. Seiler. Indeed, there was some speculation that he (Mr. Corley) was responsible for giving the information to Ms. Seiler. Mr. Corley further recounted having obtained information on RIF procedures from the Division of Personnel at Mr. Smittle's request, starting between March and April

of 1994.

Shirley Callison, an Office Assistant at SFC, testified that there was a "lot of talk" in the office about Ms. Seiler's column. She recalled an informal discussion at lunch with other clerical personnel who told her they believed Grievant had released the information. She did not indicate that this view was shared by any supervisory personnel in the office.

Candra Casto, an Office Assistant in the Plan Review Section, testified regarding her duties, including the process for receiving plans and sending out completed reviews. She testified that theworkload in that section has been decreasing steadily during the four years she has been employed there. At one time, it was taking her one hour just to log in the plans received in one day's mail. Presently, she can log in new plans received in five minutes.

According to Ms. Casto, she used to be so busy that she could not assist other sections, but she now has time to assist with typing and filing in other areas as much as two or three days each week. Even with assisting other employees, Ms. Casto indicated there were times she had nothing to do.

Lloyd Cross, SFC's Chief Deputy Fire Marshall for the past fourteen years, testified that he has been responsible for monitoring the workload in the office. He agreed that the workload has been declining in the Plan Review Section, and that this was a long-term trend. Mr. Cross recalled discussion about the informa tion in Ms. Seiler's column. He further acknowledged that he was upset because Ms. Seiler did not wait to confirm the information with him before she printed it. Mr. Cross denied discussing who had released the information, noting that much of the information was incorrect.

The parties stipulated that Grievant filed a grievance on May 24, 1995, involving an altercation between Grievant and a co- worker. Further, Grievant filed a second grievance on June 23, 1995, grieving a Letter of Reprimand.

Discussion

A Grievant alleging an improper termination as the result of a reduction-in-force action has the burden of proving his or herallegations by a preponderance of the evidence. Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Finley v. W. Va. Div. of Veterans Affairs, Docket Nos. 91-VA-435/449/455 (Aug. 28, 1992).

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retalia tion of an employer or agent toward a grievant, witness, represen tative or any other participant in the grievance procedure either for an

alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging unlawful retaliation , in order to establish a prima facie case, (See footnote 2) must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365S.E.2d 251 (W. Va. 1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

In this matter, Grievant has established the elements of a prima facie case of reprisal under § 29-6A-2(p) in that he filed two grievances against SFC which were followed within three or four months by the notice of termination based upon a RIF. Once a prima facie case of reprisal is established, the inquiry then shifts toward determining if the employer has shown legitimate, non- retaliatory reasons for its actions. Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace v. Pizza Hut, 377 S.E.2d 461 (W. Va. 1988).

SFC established that the backlog of plans awaiting review in the Plan Review Section where Grievant was employed had been virtually eliminated by the time Grievant's position was abolished through a RIF action. Indeed, there was no credible evidence to contradict several witnesses who noted that the workload had been gradually decreasing over the years. Ms. Casto's testimony, noting that she had gone from being constantly busy to having time to crochet, was particularly illuminating. Grievant's quarrel with the statement in the RIF notice that there had been a "major decrease in the number of plans submitted" largely represents quibbling over semantics. The notice goes on to note that Grievant is being laid off due to a "lack of work." It is this lack of work which is the essence of the RIF action at issue. While neither party presented adequate statistical evidence to capture the exact number of plans being received for review in any given calendar year, SFC established by a preponderance of the evidence that a decline in the number of plans resulted in the ability of two examiners, Mr. Scarborough and Mr. Corcovilos, to complete these reviews in accordance with the

needs of the employer.

Further, there was insufficient evidence that the reasons given by SFC were merely pretextual. See Burdine, supra; Frank's Shoe Store, supra; Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). The fact that a deceased employee in the Plan Review Section was not replaced is consistent with SFC's claim that the workload was declining. Likewise, the fact that the backlog of plans awaiting review declined after the deceased employee's position was reallocated, even though another employee was off work for an extended period due to a serious illness, further corroborates SFC's contention that the workload did not require three reviewers. Finally, the uncontradicted evidence that Mr. Corley, in behalf of Mr. Smittle, began exploring the proce dures for a RIF in the Plan Review Section as early as April 1994, nearly a year before Ms. Seiler's column appeared or Grievant filed his first grievance, tends to support the legitimacy of SFC's position.

Accordingly, SFC has presented sufficient evidence of legitimate, non-retaliatory reasons for the actions taken to eliminate Grievant's position in the Plan Review Section andGrievant has failed to demonstrate that those reasons were merely a pretext for retaliatory conduct. See Frank's Shoe Store, supra; Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995).

Grievant also argues that SFC elected to eliminate a position in the Plan Review Section in retaliation for the perception that Grievant reported information regarding Mr. Scarborough's employ ment situation to Charleston Gazette columnist Fanny Seiler. It is not clear what authority Grievant relies upon for the proposition that providing information regarding SFC personnel to a newspaper reporter constitutes protected activity. While this Grievance Board has previously recognized that state employees are protected from retaliation under the provisions of the State's "Whistle- blower Law," W. Va. Code §§ 6C-1-1, et seq., (See footnote 3) it is difficult to fit this situation under § 6C-1-3 which requires that any perceived wrongdoing be reported to an "appropriate authority." W. Va. Code § 6C-1-2(a) defines appropriate authority as:

> a federal, state, county or municipal government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency, or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, profes sional conduct or ethics, or waste.

It does not appear that a newspaper columnist constitutes an "appropriate authority" under the

specific definition set forth in W. Va. Code § 6C-1-2. Moreover, Grievant never confirmed or denied that he was the individual who provided the information to Ms. Seiler. He simply attempted to establish, largely through hearsay testimony, that he was the most likely "suspect" according to prevailing "office scuttlebutt." In any event, even if Grievant was believed to have provided the information at issue, and such activity, for the sake of argument, is protected, under the analysis previously applied to Grievant's retaliation claim under § 29-6A-2(p), SFC established legitimate, non-retaliatory reasons sufficient to sustain the RIF action at issue here.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the State Fire Commission (SFC) in the Plan Review Section of the State Fire Marshall's Office for nearly three years as a Fire Safety Plans Examiner I, a position in the classified service.

2. SFC reviews various plans, including architectural plans for new construction, fire alarm systems, fire sprinkler systems and similar plans, in exchange for a graduated fee based upon the cost of construction.

3. Walter Smittle, III, State Fire Marshall, proposed eliminating the Plan Review Section in 1993. 4. In March or April of 1994, Mr. Smittle asked his Adminis trative Assistant, Arnett Corley, Jr., to obtain information from the Division of Personnel regarding the procedures for conducting a reduction-in-force (RIF) action in the Plan Review Section.

5. On April 4, 1995, Fanny Seiler, a columnist for the Charleston Gazette, published an article suggesting that an employee in the Plan Review Section, Stephen Scarborough, had received favorable treatment by being permitted to work at home after he had used his available sick and annual leave.

6. There was conjecture by clerical employees at SFC that Grievant was responsible for providing the information which Ms. Seiler published. Grievant has never acknowledged that he provided the information printed in the Gazette.

7. During the past five years, there has been a gradual, but notable decline in the number of plans being submitted for review by SFC's Plan Review Section.

8. When Richard Corcovilos became the supervisor of the Plan Review Section in 1991, there was a backlog of approximately 500 plans awaiting review. Despite the death of one Fire Safety Plans Examiner in early 1995, and the extended illness of Mr. Scarborough in 1994-95, the backlog was virtually eliminated by August 1995. 9. As of the time of his termination in a reduction-in-force action, Grievant had the least seniority of the two Fire Safety Plans Examiners then employed by SFC.

CONCLUSIONS OF LAW

1. A grievant alleging an improper termination as the result of a reduction-in-force action has the burden of proving his or her allegations by a preponderance of the evidence. Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Finley v. W. Va. Div. of Veterans Affairs, Docket Nos. 91-VA-435/449/455 (Aug. 28, 1992).

2. A grievant alleging unlawful retaliation for filing a grievance, conduct which is prohibited by W. Va. Code § 29-6A-2(p), must prove, in order to establish a prima facie case:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). 3. Grievant established a prima facie case of reprisal under W. Va. Code § 29-6A-2(p) by showing that he was notified that his position was being eliminated in a RIF within a few months after he filed two separate grievances against SFC in accordance with W. Va. Code §§ 29-6A-1, et seq.

4. Although Grievant made out a prima facie case of retalia tion in regard to his RIF action, SFC countered with preponderant evidence that the RIF action was taken for a legitimate non- retaliatory reason, a reduced amount of work in the Plan Review Section. Grievant failed to demonstrate that the reasons presented by SFC were either pretextual or a subterfuge for retaliation. See Tex. Dept. of

Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace v. Pizza Hut, 377 S.E.2d 461 (W. Va. 1988).

5. Grievant failed to demonstrate that he was entitled to protection from retaliation under the State's "Whistle-blower Law," W. Va. Code §§ 6C-1-1, et seq., or any other specific law, rule, or regulation, based upon his contention that SFC believed that he had reported information regarding the employer's unduly favorable treatment of a fellow employee to a local newspaper reporter.

6. Grievant failed to prove that his termination in a RIF was otherwise conducted contrary to W. Va. Code §§ 5F-2-2(d) or 29-6- 10(5).

Accordingly, the grievance is **DENIED**.

Any party 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.

LEWIS G. BREWER

Administrative Law Judge Dated: June 18, 1996

Footnote: 1

Apparently, such action would effectively moot any need for a plan to be reviewed by the State Fire Marshall.

Footnote: 2

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 3

See Coddington v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-265/266/267 (May 19, 1994); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).