

MICHAEL SCRAGG, .

Grievant, .

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v. . Docket Number: 93-BOD-436R

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WEST VIRGINIA BOARD OF DIRECTORS .

at WEST VIRGINIA STATE COLLEGE, .

Respondent. .

DECISION

Michael Scragg, Grievant, was employed by the West Virginia Board of Directors at West Virginia State College as a Police Officer III until his dismissal on August 6, 1993. He filed a grievance pursuant to West Virginia Code §§18-29-1, et seq., challenging his dismissal. By decision dated December 30, 1995, the termination was upheld, although a finding was made that Respondent had violated his procedural due process rights by failing to give him a pre-termination hearing. Grievant appealed this decision to the Kanawha County Circuit Court. The Honorable Tod J. Kaufman, by Order dated September 19, 1995, affirmed the decision, in part, and remanded the case to the Grievance Board for rehearing on the issue of whether Grievant possessed a property interest in his employment at the time of his termination. The Order concluded that he would be entitled to back pay plus benefits, besides the nominal damages earlier awarded upon a finding that he had a property interest in his position. [\(See footnote 1\)](#) The remand hearing was held on January 16, 1995, at the Grievance Board's Charleston, West Virginia Office.

The United States Supreme Court stated the following in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972):

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id., at 577. For a public employee to possess a property interest in his employment, he must have a sufficient expectancy of continued employment derived from state law, rules or understandings. McBride v. City of Roanoke Redevelopment and Housing Authority, 871 F. Supp. 885 (W.D.Va. 1994); Bragg v. Trupo, 638 F. Supp. 311 (N.D.W.Va. 1986); Swiger v. Civil Service Commissioner, 365 S.E.2d 797 (W.Va. 1987). The expectation must be more than unilateral. Queen v. West Virginia University Hospitals, Inc., 365 S.E.2d 375 (W.Va. 1987).

At the hearing, the parties stipulated that Grievant was employed in Respondent's classified position of Police Officer III. It was also stipulated that Grievant was hired yearly pursuant to a one-year contract of employment from which he could not be terminated without just cause. Given this fact, the legal issue is whether Grievant had a property right in continued employment with Respondent.

Under W. Va. Code §18B-9-1, the two governing boards of higher education have been required to "establish, control, supervise and manage a complete, uniform system of personnel classification." Under Section 2 of this Article, a classified employee is "any regular full-time or regular part-time employee of a governing board . . . who hold[s] a position that is assigned a particular job title and pay grade in accordance with the personnel classification system established by the appropriate governing board . . ." There is no statutory provision that establishes a just cause standard for the termination of higher education, classified employees or that could reasonably be interpreted to create an expectation of continued employment for classified employees.

However, an entitlement to a protected property interest may be grounded in contract. State ex rel. Tuck v. Cole, 386 S.E.2d 835 (W.Va 1989), citing Roth, supra. Here, Grievant did not have a property right in continued employment beyond the terms of his year-to-year contract but there was a mutual understanding that he would not be terminated during the contract period except for cause. Pursuant to the parties' stipulation of fact, it is found that Grievant had a constitutional property right

in his employment as of the time of his termination. The focus then shifts to the damages to which he is entitled.

Grievant contends that because he has never been provided with a pre-termination hearing, he is entitled to damages as both lost wages and reimbursement for annual leave that he would have accrued until the date of Judge Kaufman's Remand Order. Respondent agrees that he is entitled to both benefits but contends he is only entitled to damages from the date of his termination, August 6, 1993, to the date of the level two grievance decision, October 6, 1993. It contends that as of the issuance of the level two decision, Grievant had been given notice of the charges against him and a meaningful hearing to address these charges. Therefore, all harm resulting from the lack of a pre-termination hearing having been given was then cured.

In the original grievance decision it was concluded that Grievant's termination was supported by a preponderance of the evidence and he was deprived of a required pre-termination hearing, but that he was given a prompt post-termination hearing. These conclusions were affirmed by the Circuit Court. Also, the Remand Order concluded that Grievant was not to be reinstated as it was established his dismissal would not have been prevented had he been given a pre-termination hearing.

In Fraley v. Civil Service Commission, 356 S.E.2d 488 (W.Va. 1987), similar rulings were made involving a public employee who had been dismissed for violating W. Va. Code §29-6-20(e)(3). [\(See footnote 2\)](#) The main issues in Fraley were whether the appellant had been given the proper procedural due process prior to being dismissed, and then, whether a violation of these rights required reinstatement. The Court concluded that the Appellant had not been given a pre-termination hearing but that such would not have prevented his termination from occurring; therefore, reinstatement was not awarded. The Appellant was given a post-deprivation hearing before the Civil Service Commission. With regard to damages, it was concluded that the Appellant was entitled to a recovery of back pay and benefits from the period of his termination to the date of his hearing before the Civil Service Commission. Based upon the Court's ruling in Fraley, it is determined that Grievant is entitled to back pay and benefits from August 6, 1993 to October 1, 1993, the date of his level two grievance hearing.

This is consistent with the discussion in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), when the Supreme Court suggested that an employer should

suspend an employee with pay if it believes that its best interests would be served by removing the employee from the work site without a pre-termination hearing. Under this scenario, the employee would be paid until his termination is affirmed after a post-termination hearing. With the award herein, Grievant is compensated by the same amount had Respondent followed the Court's guidance in Loudermill. Therefore, he is made whole.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusion of law.

Conclusion of Law

At the time Grievant was terminated from employment with Respondent, he maintained a constitutional property right in continued employment until the completion of his yearly contract.

Therefore, pursuant to the Remand Order of September 19, 1995, Grievant is entitled to \$1.00 nominal damages, back pay (salary plus a pro-rated value for the annual increment) in the amount of \$3304.92, and the cash value of the annual leave Grievant would have accrued until October 1, 1993. No interest, costs or attorney fees are awarded. Any party may appeal this decision to the Circuit Court of Kanawha 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.

ALBERT C. DUNN, JR.

Administrative Law Judge

January 29, 1996

[Footnote: 1](#)

This damage award, if appropriate, is to be in addition to the one dollar nominal damages award provided in the first decision for a recognition that Grievant's due process rights had been violated.

[Footnote: 2](#)

This statutory provision makes it illegal for a classified civil service employee to hold any paid, public office.