

KEVIN WELCH

v. Docket No. 95-CORR-261

W.VA. DEPARTMENT OF CORRECTIONS

DECISION

The grievant, Kevin Welch, filed this complaint at Level IV June 21, 1995, protesting an "unfair, unjust and forced resignation" from his position as a probationary Corrections Officer I (COI) for the West Virginia Department of Corrections (CORR). [\(See footnote 1\)](#) An evidentiary hearing was held October 2, 1995, and the parties submitted proposed findings of fact and conclusions of law by November 13, 1995.

Background

The grievant was first employed by CORR as a COI at the Mount Olive Correctional Complex (MOCC) on February 20, 1995. On April 28, 1995, for reasons which are unclear, he was suspended for twenty-one days without pay. On or about May 16, 1995, Acting Deputy Warden Teresa Waid advised the grievant that an investigation into "allegations against [him]" were "unsubstantiated," and that he would be reimbursed for any loss of wages and benefits. Records of the suspension were removed from the grievant's personnel file and he returned to work on May 16. At or near the end of his May 30 4:00 p.m. to 12:00 a.m. shift, the grievant was advised that he was to work an overtime shift from 12:00 a.m. to 8:00 a.m. on May 31. Per CORR's scheduling practices, the grievant was then required to report for his next regularly scheduled afternoon shift.

At approximately 12:30 a.m. on May 31, the grievant approached fellow COI Rosalee Hershman and indicated to her that he was having problems with obtaining his pay for the suspension period

and that he was frustrated over what he believed to be CORR's refusal to provide him details on an inmate complaint which prompted the disciplinary action. He may have also expressed displeasure with the overtime assignment. At the conclusion of their conversation, Officer Hershman believed that the grievant intended to resign his position.

At approximately 9:00 a.m. on May 31, the grievant was present in MOCC's Human Resources office when another COI was finalizing his recent resignation by relinquishing his MOCC-issued equipment. According to the grievant, he jokingly commented to the officer, in the vicinity of other employees, that he, the grievant, should be the one resigning. According to Human Resources Office Assistant Julie Brown, the grievant specifically advised her at that time that he was quitting as of 2:00 p.m. that day. Both agree that at some point, the grievant asked to see Deputy Warden Howard Painter or Human Resources Director Rita Albury.

The grievant was not present at the beginning of the May 31 4:00 p.m. to 12:00 a.m shift. When he did not respond to roll call, Officer Hershman advised Lt. Steve Berryman, the shift operations officer, that the grievant had indicated to her that he was resigning. Per the lieutenant's directions, Ms. Hershman completed an incident report on the matter. On Lt. Berryman's "daily watch roster" for the shift, he noted that the grievant was absent and listed "resignation" as the reason. It is undisputed that since MOCC was opened, several officers have announced their resignations by simply not reporting for their assigned shifts.

Ms. Hershman's incident report and a report completed by Ms. Brown were forwarded to MOCC Warden George Trent and Deputy Warden Painter on May 31 or June 1. Apparently, Warden Trent then determined that the grievant had effected his resignation and that it should be accepted.

The grievant reported for work at 4:00 p.m. on June 1 and a shifts operations officer, who evidently had not been instructed otherwise, directed him to a post. Shortly thereafter, Captain Ricky Nottingham, per directions from Lt. Tony LeMasters, ordered the grievant to MOCC's administration offices where he advised him that his resignation had been accepted and that he was to turn in his equipment and exit the complex. Captain Nottingham had little knowledge of the matter, and the grievant was unable to reach Warden Trent, Deputy Warden Painter or Lt. LeMasters prior to leaving.

It appears that the grievant's next contact with MOCC's administration was the following June 5, 1995 letter from Warden Trent.

The purpose of this letter is to advise you that I have accepted your verbal resignation to Officer Rosalee Hershman, Operations and Ms. Julie Brown, Human Resources.

You have the opportunity to either meet with me in person or to present me with a written explanation of the reason why you may think the facts and grounds in this letter are in error and why you may think this action is inappropriate, provided that you do so within eight (8) calendar days (June 14, 1995). If you choose to either meet with me or to write, please contact my secretary at (304) 442-7213 or deliver to me your written explanation on or before Wednesday, June 14, 1995.

Finally, for any appeal rights you may have, please refer to WV Code 29-6A et seq. - "Expedited Grievance Procedure for State Employees." If you choose to exercise your appeal rights, you must submit your written grievance directly to the Grievance Hearing Board at 808 Greenbrier Street, Charleston, WV 25301 within ten (10) working days of the effective date of this action. Copies of your grievance should be forwarded to the Commissioner of Corrections, 112 California Avenue, Charleston, WV 25305 and the Director of Personnel, Building 6, State Capitol Complex, Charleston, WV 25305.

The grievant met with Warden Trent shortly thereafter and explained that any comments he may have made regarding resignation were in jest, and that he wished to retain his employment. He explained that Lt. Joseph Woods was in the Human Resources area at the pertinent time and would confirm that he also jokingly discussed resignation. Lt. Woods subsequently denied the grievant's representations and advised Warden Trent that he had encountered the grievant only briefly on the morning in question near the Human Resources area, and that the grievant merely advised him that if he did not find a certain document in his personnel file, he was going to resign.

Warden Trent advised the grievant of his refusal to reconsider in the following June 7 letter.

Pursuant to my letter dated 5 June 1995, second paragraph, I stated that you have the opportunity to either meet with me in person or present me with a written explanation of the reason why you may think the facts and grounds in this letter are in error and why you may think this action is inappropriate.

I met with you in my office 7 June 1995 at approximately 11:27 AM. You reiterated to me that you were angry over having to work overtime and that you had not received overtime pay. You stated that you were joking with other staff about resigning and that you made the statement in a group of fellow employees. You stated that Lt. Joseph Wood was among the group and that he, too, had said he might resign.

I told you I would check this out with Lt. Wood and advise you of my decision.

I did check with Lt. Wood, this date, and, have decided not to rescind your resignation, but let it stand as is.

It is undisputed that the grievant has never submitted a written resignation or completed any paperwork normally associated with a voluntary termination of employment with CORR. It is also clear from the record that the grievant has never advised anyone in his "chain of command" that he was quitting.

Argument

The grievant asserts that CORR acted arbitrarily in treating his inopportune comments to co-workers as a resignation. He contends CORR essentially discharged him for unspecified reasons. The grievant denies that he intentionally missed a scheduled shift on May 31.

CORR maintains that the grievant unequivocally tendered his resignation to Ms. Brown and that his failure to report for the May 31 afternoon shift merely confirms that he intended to terminate his employment. CORR also avers that even if it were found that the grievant was "constructively" discharged, the failure to report was an offense for which the grievant, a probationary employee, could have been dismissed.

Analysis

The parties appear to agree that a resolution of the case rests, at least initially, upon factual determinations, namely whether the grievant tendered a verbal resignation and whether he missed a scheduled shift. The evidence on both questions is conflicting. The evidence on the missed shift is confusing and inconclusive.

While CORR's records for the pertinent period establish with at least reasonable certainty that the grievant was scheduled to work a 4:00 p.m. to 12:00 a.m. shift on May 31, they cannot and do not establish whether he purposely failed to report. The grievant convincingly testified that he may have mistakenly believed that his schedule called for him to be off that date but that he never intentionally missed the shift. While the undersigned doubts generally the veracity of the grievant's explanation as

to how he determined that he was not slated to work, the record as a whole otherwise supports that it is entirely plausible that he simply erred. Indeed, the only clear conclusion supported by the evidence on this issue is that CORR's efforts to staff all posts at MOCC on three daily shifts can necessarily result in some confusion. [\(See footnote 2\)](#) It is accepted that the grievant's absence on May 31 was unintentional.

Moreover, it appears that the absence did not play a role in Warden Trent's considerations. His assertion during his Level IV testimony that it was "one of the reasons" he declined to change his position appears to relate to his June 7, 1995 discussion with the grievant and not his initial decision to treat the grievant's remarks to Ms. Brown or Ms. Hershman as a resignation. That there is no mention of a missed shift in Warden Trent's June 5 and 7 letters supports the grievant's testimony that he had never been advised orally or in writing that he had ever missed a scheduled shift and that it was not a subject of discussion in his talk with the warden. For these reasons, it is concluded that Warden Trent primarily, if not wholly, based his decision on the reports of Ms. Hershman and Ms. Brown concerning their conversations with the grievant.

It also appears that while the warden cited the grievant's conversation with Ms. Hershman in his June 5 letter, it was the comments to Ms. Brown which he deemed the resignation. In any event, the undersigned finds that the grievant could not and did not effect a proper resignation by telling a co-worker that he was quitting.

The undersigned finds that Ms. Brown was more credible than the grievant on the issue of what transpired in Human Resources on the date in question. Ms. Brown was particularly convincing in her assertion that the grievant specifically entered her work area in Human Resources and advised her that he was quitting. To accept the grievant's assertion that she could only have heard his joking comments to another officer would be to find that she completely fabricated her testimony. There is no evidence of record which suggests that she had any motive for doing so. Accordingly, it is accepted that the grievant did make statements to Ms. Brown to the effect that he was resigning, and that he made them in such a manner as to cause her to believe that he was earnest.

The undersigned finds, however, that the grievant's remarks to Ms. Brown, did not constitute a valid resignation. CORR does not assert, and the record will not support, that she had the authority to accept the resignation. Further, there is no evidence that her duties were such that other employees, including the grievant, would have reason to believe that she had any control over significant

personnel matters. Ms. Brown's own testimony confirms that she did not believe that she had any greater responsibility in the matter than to advise her superiors of her contact with the grievant.

Further, and perhaps more importantly, Ms. Brown's testimony supports that the grievant couched his remarks in terms of what he would do, and that she believed or assumed that some additional formal notice would be tendered to Mr. Painter or Ms. Albury. In short, the record reflects that the grievant was disgruntled over his suspension and other matters, and most likely intended to quit but that he stopped short of tendering a resignation to anyone who might be in a position to accept it.

The record as a whole supports that CORR was quick to seize upon the grievant's comments to Ms. Brown and characterize them as a voluntary termination of his employment. The failure of CORR to explain why complicates further inquiry in the case.

Smith v. W.Va. Dept. of Corrections, Docket No. 94-CORR-1092, (September 11, 1995), and authority cited therein, instruct that once an employee establishes that a resignation was coerced or otherwise involuntary, the case is essentially treated as a dismissal for cause. Here, as was the case in Smith, since the grievant was a probationary employee in the classified service, in order to effect an involuntary termination of his employment, CORR was bound to follow the following regulations of the West Virginia Division of Personnel.

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.

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 the person 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.

It is accepted, at least for the purpose of the present analysis, that a state employer could defeat a probationary employee's proven claim of involuntary resignation by demonstrating that the

employee's performance or conduct during the probationary period was unacceptable. It appears that such proof would constitute constructive notice of the deficiencies and that such notification would be sufficient to meet Personnel's requirement that reasons be presented to the employee. Since CORR has made no charges against the grievant except those related to the missed shift, there can be no further findings on the issue. Accordingly, the holdings herein are confined to the issue of whether the grievant voluntarily relinquished his position. The undersigned finds that his reinstatement to probationary employment is the only appropriate remedy.

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

FINDINGS OF FACT

1) On May 31, 1995, the grievant, a probationary Corrections Officer I assigned to the Mount Olive Correctional Complex, made comments to a co-worker and to Office Assistant Julie Brown to the effect that he was resigning his position. The grievant had been exonerated in an inmate complaint which led to a thirty day suspension, but was disgruntled over what he believed to be a failure on the part of Mt. Olive officials to provide him details on the complaint. He was also dissatisfied over the manner in which he was to be reimbursed for the period of suspension.

2) Mt. Olive Warden George Trent and Deputy Warden Howard Painter were quickly advised of the grievant's remarks. Warden Trent determined that the grievant had effected a proper and valid resignation and that he would accept it.

3) The grievant was scheduled to work a 4:00 p.m. to 12:00 shift on May 31, 1995 but did not.

CONCLUSIONS OF LAW

1) A preponderance of the evidence in the case establishes that it is more likely than not that the grievant believed that he was scheduled to be off on May 31, and that his absence on the afternoon shift on that date was unintentional.

2) A resignation is, by definition, 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. Smith v. W.Va. Dept. of Corrections, Docket No. 94-CORR-1092 (September 11, 1995).

3) As a general rule, an employee may be bound by his verbal representations that he is resigning when they are made to a person or persons with the authority to address such personnel matters. See, Copley v. Logan County Health Dept., Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer.

4) A preponderance of the evidence in the present case establishes that while the grievant led his co-worker and Ms. Brown to believe that he was resigning, neither had the authority, real or apparent, to bind him to his statements. The record does not support that the grievant voluntarily relinquished his position.

Accordingly, the grievance is **GRANTED** and the West Virginia Division of Corrections is hereby **ORDERED** to reinstate the grievant to his position as a probationary Corrections Officer I and compensate him for any loss of wages he may have incurred.

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.

JERRY A. WRIGHT
ADMINISTRATIVE LAW JUDGE

Dated: January 31, 1996

[Footnote: 1](#)

Pursuant to W.Va. Code §29-6A-4(e) "[a]n employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days, directly to [Level IV]." The action of which the grievant complains does not fit neatly into any of these categories. As discussed herein, there are, however, certain disciplinary aspects to the termination of the grievant's employment, and he was specifically advised, via a June 5, 1995 letter from MOCC Warden George Trent, that any appeal should be made directly to Level IV. At hearing, counsel for CORR indicated that the agency had no objections to the case proceeding at Level IV and waived its right to address the grievant's claims at the

lower levels.

[Footnote: 2](#)

It is not necessary to set forth an extensive discussion or analysis of the evidence on the issue. Briefly, the controversy is centered on CORR's use of A, B or C to designate particular units of correctional officers which adhere to different weekly schedules. It is undisputed that the grievant was moved from "B Group" to another group on or about May 25 and that his regular days off changed as a result. The record tends to support that on May 31, he was assigned to "A Group" which had received May 28 and 29 off and was not scheduled to be off until June 4. The daily watch registers for May 30 and 31 appear to indicate, however, that he had been placed in C Group which was scheduled to be off on those days. Finally, because neither party submitted evidence on the means by which an employee is advised of his schedule, it cannot be determined whether the change(s) were ever clearly communicated to the grievant.