STEVEN A. THOMPSON

v. Docket Nos. 96-MCHD-223/448

MONONGALIA COUNTY HEALTH DEPARTMENT

D E C I S I O N

Grievant, Steven A. Thompson, employed by the Monongalia Count Health Department (MCHD), as a custodian, filed a level one grievance on April 29, 1996, in which he complained that MCHD had implemented a reduction in force and reduced his salary on April 8, 1996, in violation of Division of Personnel (Personnel) Rule 11.04 and W. Va. Code §29-6-10, in that the pay plan did not receive prior approval from Personnel and was a continuing practice of noncompliance with "Civil Service law since at least December 1992." He asserted that his time in service and exemplary employment record would support the same wages he previously earned as a Maintenance Mechanic, and the creation of the position of custodian was unnecessary in that their job descriptions are interchangeable. Grievant further alleged the salary adjustment was punitive and retaliatory in response to his "whistle blower" activities. Numerous other acts of Respondent's noncompliance with Personnel Regulations and State law were also cited.

The grievance was denied at level one based upon a finding that the claim had not been filed in a timely manner. Notwithstanding this ruling, Director of Administration James Strosnider addressed Grievant's claims and determined they were without merit. Following denials at levels two and three based upon the timeliness issue, the matter was advanced to level four on June 13, 1996. (Docket No. 96-MCHD-223).

On October 22, 1996, Grievant filed a second complaint appealing the termination of his employment, effective October 11, 1996. (Docket No. 96-MCHD-448). He asserted that the actionwas "without cause as an act of reprisal in a continuing practice of reprisals." The grievances were consolidated for hearing on December 16, 1996. Neither party chose to submit proposed findings and conclusions.

Docket No. 96-MCHD-223

Grievant stated numerous issues in this grievance. Although many of the specific complaints are unartfully worded, and never clearly expressed or explained, Grievant does assert that the reduction in force, and his subsequent reassignment, were improper because Respondent failed to file a proposed plan with, and receive approval from, Personnel for the changes. His other allegations include that Respondent failed to comply, in an ongoing fashion, with Division of Personnel Regulations and State law regarding the state merit system's employee salary schedule, that former Executive Director Jack Sturms was unqualified to hold the position, and should have been fired for moral turpitude and noncompliance with the July 1994, legislative salary increase, that current director Sally Taylor awarded salary increases in excess of 10% to favored employees in September 1994, and that the pay dates were changed in July 1995. At the level four hearing MCHD made a Motion to Dismiss the issues raised in Docket No. 96-MCHD-223, based on timeliness. Specifically, Respondent asserts, Grievant was advised of the reassignment on April 1, 1996, but did not file a grievance until April 29, 1996. Grievant responded that the grievance was timely filed on April 29, based upon his receipt of additional information on April 16, or the date his new duties became effective, April 12, 1996.

W.Va. Code §29-6A-4(e) states that a grievance must be filed at level one "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance." "Days" is defined by W.Va. Code §29-6A-2(c) as "working days exclusive of Saturday, Sunday or official holidays."

The grievable event in this matter is notification of the reassignment, not the effective date of the change, or the date Grievant received additional information. Although Grievant may have been verbally notified of the change in position on April 1, 1996, the first documentation of notification was dated April 3. Unquestionably, he was aware of the events by April 5, as evidenced by his signature on the returned letter, indicating his acceptance of the custodial position. Even if the ten day period is determined to begin on April 5, when Grievant acknowledged and accepted the reassignment, he did not file this complaint in a timely fashion. The remaining issues are also not timely, one instance involving a salary adjustment

having occurred as early as 1989, predating Grievant's employment. The time has passed for consideration of the 1994 salary increase, Mr.Sturms's employment and the change in pay dates in 1995. In consideration of the foregoing, the Motion to Dismiss grievance Docket No. 96-MCHD-223 is GRANTED. (See footnote 1)

Docket No. 96-MCHD-448

The burden of proof rests with the employer in disciplinary matters. W.Va. Code §29-6A-6. In support of the decision to terminate Grievant's employment, MCHD presented the following evidence. In September 1995, Maintenance Supervisor Jerry Johnson suspended Grievant for six days based upon five charges:

1) Insubordination in not utilizing the chain of command for communication (second offense in two months), counseled by Jim Strosnider after first violation in August.

2) Willful, unauthorized use of Department keys in accessing and entering locked employee offices after work hours.

3) Willful, unauthorized use of Department copier to reproduce personal letters.

4) Loitering after work hours on Department property to be disruptive.

5) Violating the interoffice mail policy by not clearly identifying sender and date on a communication to employees.

These charges arose from a three page, single spaced letter which Grievant authored relating concerns on behalf of himself and all MCHD employees regarding compensation and classification practices and management in general. Grievant reproduced approximately 500 copies of the letter on Respondent's photocopy machine, using Respondent's paper, and then posted or placed it in various work areas, departmental mailboxes, and on desks in unlocked offices. He used his office pass key to open locked offices to deliver the letter.

After a review of the matter by the MCHD Board of Directors, charges one and four were deleted from the letter and the suspension reduced to three days. Grievant appealed the suspension; however, the disciplinary action was upheld at level four. See Thompson v. Monongalia County Health Dept., Docket No. 95-MCHD-578 (June 14, 1996). (Thompson I).

By memorandum dated January 17, 1996, Mr. Johnson issued a written warning to Grievant

based on the following two incidents:

1. On Friday afternoon, January 12, 1996, you were operating the Gravely brushing snow and slush from the Building #1 upper parking lot. During the process Sally Taylor's car was thoroughly covered with slush and dirt, even inside the doors, while several other cars in the same area were not affected in this same manner. No contact was made with her concerning the incident or any effort made to correct the situation. You were instructed in the future to show respect for the property of all employees, to use care when operating equipment around parked cars, and if an incident occurs to report it immediately.

2. On Tuesday afternoon, January 16, 1996, at approximately 3:00 PM, you were seen conducting a personal interview with WDTV Channel 5 in front of Building #1. You did not request annual leave for this purpose and had not reportedback to work from your earlier meeting that afternoon. Neither had you notified your supervisor of your absence. You noted that you were aware of the need to request annual leave to conduct any kind of personal business during work hours. You have been reminded of this policy as recently as last month. You were instructed in the future, that you must follow Department policy regarding such matters. (See footnote 2)

Mr. Johnson continued to advise Grievant that further violations would result in progressive discipline, up to and including discharge.

Sometime in mid-March, 1996, Grievant left the following voice mail message for the employees at MCHD:

Friends, this is Steve the maintenance man. What I have in mind is a proposal to grassroots organize to, uh, maintain our family medical benefits at least until June 30. It was proved at the staff meeting the other night that WIC and School Health are budgeted from an outside source. That money cannot be touched. That is our salary benefit budget package cannot be touched. Home Health proved that they are self sufficient. Dental proved that they are self sufficient. That's at least four divisions. We need to stick together on this. What they're going to ask you to do next week, Wednesday, Thursday, something like that, I forget what the memo says, but they want you to come over and sign your family medical benefits away. You are willfully signing your medical benefits away for your family if you do this. Do not fill that

form out under any circumstances. If you do nothing you still have family coverage. Now they may try and take it out of your pay in which case we will all file grievances on misappropriation and withholding of contracted salary benefits. The benefits that we were told that we would have when we took this job. And I will be sending this message around to everybody that I can think of that has kids in this agency and I want you to talk to everybody in thisagency that you know that has kids or family members on this insurance. Do not fill those forms out under any circumstances. We will file grievances on the term misappropriation of our budgeted and contracted salary benefits. Uh, if you have any questions I will be back from vacation on the 1st of April. Now unfortunately I'm not going to be here next week to fight them on this, but I guarantee you that they cannot do this. And we will fight them. We must stick together. I'm going to have a couple people that will be our contact people for a lawyer. And the lawyer has agreed to try and help us out.

Dr. Taylor responded to this message via memorandum to all MCHD employees on March 27, 1996. On March 28, Dr. Taylor advised Grievant specifically that in reference to his voice mail, she was unaware of any misappropriation, but considered the matter serious. She directed that he report to her any “knowledge of any act, transaction, or claim of misappropriation that you consider illegal or fraudulent, or any act of misappropriation made by anyone, including myself” by Wednesday, April 3, 1996. Dr. Taylor further advised Grievant that he should utilize the office voice mail system only for authorized and/or directory purposes. Grievant was warned that failure to comply with the memorandum would lead to consideration of disciplinary action for insubordination, divisive conduct, and causing disruption in the workplace.

During a meeting on April 1, Grievant requested clarification of the March 28 memorandum, claiming not to understand what was wanted. After an explanation, Grievant stated that he had no proof of misappropriation. On April 3, Grievant filed a written response stating that his voice mail message was simply an “invitation for collective bargaining though participation in the grievance procedure.” He also opined that employeesare free to associate, communicate, and consider grievances with full due process protection and with no retaliation or reprisal.

By certified letter dated April 18, 1996, Dr. Taylor issued Grievant a written reprimand in which she recounted the above-recited events and advised Grievant that while she agreed to

his right to file a grievance, that right did not grant immunity from responsibility for his conduct nor did it absolve him from the inappropriate and unauthorized use of the agency's voice mail system for divisive purposes. Dr. Taylor opined that Grievant's actions were calculated to damage employer/employee relations, and that the message was not only misleading, implying misappropriation when he had no proof, but was also insincere as demonstrated by the fact that Grievant completed the insurance forms after urging other employees to the contrary. She concluded that Grievant did not exhibit a reasonable standard of conduct, warranting the reprimand, and warned that he would be dismissed upon "the very next occurrence of such misconduct."

On September 4, 1996, the lead headline in the West Virginia University student newspaper, The Daily Athenaeum, was "[a]llegations aimed at Mon Health Dept." The story reported that Grievant "said he is worried about the health of county residents and about illegal actions being taken by department administration." More specifically, he cited his concerns that MCHD had created its own merit system, changed employees' pay dates, withdrawn family health benefits, implemented a reduction in force and given raises, all illegally. He advised that the reduction in force had been completed without the submission of a budget amendment to the state for approval, and stated his belief that the reductionwas promoted in retaliation for a petition signed by 46 full-time employees requesting that Personnel order MCHD comply with civil service laws.

As a result of this event, Dr. Taylor notified Grievant by letter dated September 26, 1996, that "[t]he Department cannot continue to suffer the damage to the public interest caused by your reckless behavior. For this reason, your are being given this opportunity to provide proof of the truthfulness of your allegations so we can address such if they exist. Should you fail to do so, I will have reasonable cause to believe you have willfully defamed this agency and its employees which shall be grounds for your dismissal." This documentation was to be provided by 4:30 p.m., October 11, 1996. No evidence was produced and Grievant's employment was terminated, effective that date. (See footnote 3)

Grievant's response to the foregoing was haphazard at best. Primarily, he relied upon his right to protected speech. He did explain that he was on compensatory leave time when he spoke to the WDTV reporter in January 1996; however, he offered no proof of that statement.

Grievant stated at level four that he did not provide Dr. Taylor with the information which she requested in the September 26, 1996, letter because he did not believe that she was the proper authority to whom he should address his concerns, in that she was the basis of those concerns. He stated that he did not believe she would be fair, impartial, or reasonable, and that he was under the impression that the matters would be addressed before the Grievance Board. He indicated that he had hoped to obtain the prooffor his allegations through the massive subpoena requests which he had filed at level four. He concluded that his dismissal was based on protected speech, that he was genuinely concerned that the agency would impair its ability to receive funding by “monkeying around”, that his reports to the press were true, and that MCHD had shown no “clear and present danger”. Although Grievant appears earnest in his concern, he produced no proof of his allegations at level four.

Personnel Regulation 12.02 provides that the “appointing authority, fifteen (15) calendar days after notice in writing to an employee stating specific reasons therefor, may dismiss any employee for cause. . . .” MCHD has established that Grievant engaged in ongoing actions which were disruptive to other employees and potentially harmful to the agency. These actions constitute cause for dismissal. Grievant's concerns regarding his right to free speech do not differ from those raised in Thompson I, and the holdings made in that decision to deny those claims are incorporated herein.

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

Findings of Fact

1. Grievant was first employed by the Monongalia County Health Department in 1990 as a Building Maintenance Mechanic. Grievant's employment appears to have been satisfactory and uneventful until 1995.

2. In September 1995, MCHD imposed a six day suspension on Grievant after he used office equipment and supplies to produce five hundred copies of a three page letter in which he aired his views regarding MCHD's compensation and classification practices, and then used his pass key to distribute the letter in locked offices. This suspension was later reduced to three days by MCHD's Board of Directors.

3. Grievant received a written warning in January 1996 after he conducted a television interview during work time regarding the changing of the pay period and after he had covered MCHD Director Sally Taylor's car during snow removal.

4. In April 1996, Dr. Taylor issued Grievant a written reprimand following his use of office voice mail to encourage employees to not accept the changes to be made in their insurance coverage.

5. On September 4, 1996, the West Virginia University student newspaper printed a story in which Grievant made several serious allegations regarding the administration of MCHD.

6. Grievant was directed to produce proof of these allegations by no later than October 11, 1996. Failure to produce was to result in the termination of his employment.

7. Grievant failed to produce the evidence and the termination was finalized.

Conclusions of Law

1. Respondent, Monongalia County Health Department has established cause for the termination of Grievant's employment by a preponderance of the evidence. See Div. of Personnel Regulation, Section 12.02.

2. Grievant's written and spoken personal comments and criticisms of his employer's compensation and classification practices, unsupported by any evidence, did not address amatter of public concern and were not protected under the First Amendment to the United States Constitution. Thompson v. Monongalia County Health Dept., Docket No.95-MCHD- 578 (June 14, 1996).

3. Grievant failed to establish sufficient mitigating circumstances or any other reason which would warrant a lesser punishment than that imposed.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: January 31, 1997

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

Notwithstanding this ruling, it is noted that Respondent's past failure to comply with Personnel regulations is a matter of record. Further, Dr. Taylor testified at level four as to the financial situation which led to the 1996 reduction in force. It is undisputed that Respondent did not pre-file a reduction in force proposal with Personnel; however, both Joe Smith, Assistant Director of Personnel's Employee Relations Division, and Lowell T. Basford, Assistant Director of Personnel's Classification and Compensation Division, testified that they had reviewed the matter and the action was approved after the fact. Both characterized the failure to pre-file a plan as a technical error, not controlling of the outcome. Grievant failed to demonstrate that he has suffered any prejudice as the result of his employer's non-compliance. Mr. Basford stated that Grievant's reassignment had been properly implemented. Finally, the reduction in force affected employees other than Grievant as evidenced by another grievance which arose from the same event, Waugh and Livengood v. MCHD/Div. of Personnel, Docket No. 96-MCHD-163 (Dec. 23, 1996). Based upon all of the foregoing, it cannot be determined that Grievant's reassignment was retaliation for any whistle-blower activities which will be discussed in greater detail following.

Footnote: 2

A transcript of the 47 second aired interview with Grievant reveals that he was addressing the change in pay dates, from the 1st and 15th of the month to the 7th and 22nd of the month, claiming a breach of contract.

Footnote: 3

Interestingly, Grievant reported the termination of his employment to The Daily Athenaeum, stating that he was not told why the action had occurred, but speculated that it was tied to his prior report to the press.