RODERICK DEVISON,

Grievant,

v. **Docket No. 02-BEP-290**

WEST VIRGINIA BUREAU OF

EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, Roderick A. Devison, employed by the Bureau of Employment Programs (Respondent or BEP) as an Administrative Law Judge (ALJ), filed a level one grievance on March 7, 2002, following the termination of his employment. (See footnote 1) Marcella Townsend, Chief Administrative Law Judge, lacked authority to grant the requested relief at levels one and two. The grievance was denied by Deputy Commissioner Mark Miller at level three, and the matter was advanced to level four on September 11, 2002. A level four hearing was conducted to supplement the record on November 20, 2002. Grievant appeared pro se, and BEP was represented by William S. Steele, Esq. The grievance became mature for decision upon receipt of the lower-level exhibits on January 16, 2003. (See footnote 2)

Background

By letter dated February 13, 2002, BEP Commissioner Robert J. Smith advised Grievant as follows:

This letter is to notify you of my decision to dismiss you from your position as Administrative Law Judge II with the Board of Review, effective Friday, February 28, 2002. Thisaction includes the required fifteen (15) -calendar day notice and is being taken in accordance with Section 12.2 of the West Virginia Division of Personnel Administrative Rule. You are specifically being dismissed as a result of your negligence in the performance of your duties as demonstrated by your continuing failure to meet the performance standards of your position, despite this agency's repeated attempts at remediation.

___Your hearings and decisions do not satisfy the Quality Standards promulgated by the United States Department of Labor. Your average score for all four quarterly evaluations of 2001 was below the passing score of 85%. These poor scores have a detrimental effect on our State's average scores. You have been afforded numerous opportunities to bring your work to acceptable standards. In spite of these efforts, you continue to be either unwilling or unable to meet the expectations of your job.

In your cases selected for the fourth quarter of 2001, you received unsatisfactory scores in areas that are critical for fair hearing and due process. Parties were not provided with an opportunity to ask questions about the hearing process or procedures before proceeding with the hearing. Parties were not provided with a timely opportunity to question their own witnesses. Exhibits were not handled properly. You failed to obtain and admit into the record reasonably available evidence such as a follow-up fact finding statement by the claimant. Finally, the decisions are written poorly and fail to include all of the findings of fact necessary to resolve the issues and support the conclusions.

In addition to the unsatisfactory scores for our quarterly evaluations, your cases on the Board's docket on February 5, 2002, reflect a pattern of poor work performance. For instance, parties were not given a chance to review or offer objections to exhibits entered into the record. You received prior counseling on this issue on several occasions, including a written warning on January 24, 2001.

While it is unfortunate that I must take this action, I believe that any other alternative would serve no useful purpose. You have been afforded numerous opportunities to bring your performance up to acceptable standards. In spite of these efforts, your hearing and decision quality evaluationhave not improved.

The following facts are derived from the record in its entirety.

Findings of Fact

1. Grievant was first employed by BEP in July 1973 as a trial examiner. This classification title was later changed to Administrative Law Judge (ALJ) II. Grievant's duties consisted of conducting hearings for individuals seeking unemployment benefits, and issuing decisions on those claims.

2. In 1990, then Chief ALJ Robert J. Smith began issuing Grievant written memoranda regarding the unsatisfactory quality of his work. Specifically, Mr. Smith noted that Grievant was

required to rewrite decisions, was late for hearings, failed to record or improperly recorded hearings, conducted hearings without the presence of all parties or counsel, failed to provide the parties with appropriate due process, failed to admit necessary documents and evidence, slept through hearings, conducted hearings in a manner contrary to U.S. Department of Labor and Department of Employment Security guidelines, and included inappropriate remarks in his decisions that were not related to the issues. Grievant's actions resulted in additional expense for parties who were required to participate in a second hearing, and delayed rulings on claims, resulting in various complaints from employers and other parties.

3. BEP is subject to “Quality Standards for Hearings and Decisions” issued by the United States Department of Labor (DOL). These standards set forth the duties and responsibilities of ALJs to ensure the rights of the claimant, the employer, and the Division are protected. The DOL reviews decisions from each state on a random basis. If a state does not meet the minimum passing score of 85%, the state agency must developcorrective action plans, and be monitored by the DOL for one year. If the state continues to receive a less than satisfactory score, it may lose its administrative funding.

4. In an effort to meet the federal standards BEP produced a written guide for ALJs directing them how to conduct a hearing and dictate a decision. The guide contained boilerplate language for decisions, and a script that the ALJ should follow during the hearing, including questions that should be posed. Grievant was specifically directed to use the guide.

5. BEP additionally provided annual training to its ALJs on how to conduct hearings and draft decisions.

6. BEP failed to meet the 85% passing threshold in 1994 and 1995, in part based upon the decisions of Grievant and one other ALJ.

7. BEP continued to provide Grievant memoranda or reprimands throughout the 1990's, in an effort to improve his performance. While some progress would be noted, from time to time, sustained improvement was not demonstrated by Grievant.

8. During 2001, Grievant was issued at least nine written counseling memoranda and written warnings relating to the quality of his work. Grievant continued to improperly dismiss cases and failed to operate the tape recorder during hearings, which caused many of the cases to be remanded for rehearing.

9. In May, the Board of Review determined that Grievant would no longer be assigned telephonic hearings due to his failure to properly tape record hearings and operate the telephone.

10. Grievant's average score was failing for all four quarterly evaluations in 2001. Grievant's poor performance had a detrimental effect on the state's average score. 11. In December 2001, Judge Townsend compiled Grievant's annual performance evaluation. Grievant was rated as “Needs Improvement” in twelve of twenty- three (23) categories.

12. Grievant's quarterly evaluations for 2001 showed that he kept making the same mistakes, including failing to explain hearing procedures, failing to properly handle exhibits, and failing to permit cross-examination.

13. By letter dated December 6, 2001, Commissioner Smith notified Grievant that he was suspended for three days “as a result of [his] continual failure to meet the performance standards . . . .”

14. In January 2002, Grievant failed to recuse himself from a hearing involving an employer against whom he had filed a civil action, representing the plaintiff. Due to Grievant's conflict of interest, the claim was remanded for a new hearing.

15. One case completed by Grievant in 2002 was selected for review. The evaluation revealed that Grievant did not give the parties an opportunity to ask questions about the hearing process, and did not inform them of their right to question witnesses. He also made inappropriate comments on the record as to the conduct of the claimant. Grievant received a score of 73 for that case.

16. Grievant's employment was terminated effective Friday, February 28, 2002.

Discussion

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidenceis generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The employer must also demonstrate that conduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West

Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

BEP dismissed Grievant for failure to complete his duties in a satisfactory manner despite numerous warnings and opportunities to improve. Grievant, however, raises an affirmative defense, asserting that the Commissioner lacked authority to hire and fire, therefore his decision relating to Grievant must be treated as *ultra vires* and *void ab initio.*

Grievant bears the burden of proving his defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995).

W. Va. Code § 21A-2-6(4) provides in part:

The commissioner is the executive and administrative head of the bureau and has the power and duty to:

(1) Exercise general supervision of and make rules for the government of the bureau;

(2) Prescribe uniform rules pertaining to investigations, departmental hearings, and promulgate rules;

* * *

(4) Prescribe the qualifications of, appoint, remove, and fix the compensation of the officers and employees of the bureau, subject to the provisions of section ten, article four of this chapter, relating to the board of review . . . .

Grievant argues that this definition of the Commissioner's authority is specifically subject to the provisions of W. Va. Code § 21A-4-10, which states:

By and with the consent and approval of the commissioner, the board shall appoint such examiners as are necessary to hear appeals from determinations of deputies, and such other personnel as is necessary for the proper conduct of a system of administrative review of disputed claims. Subject to the provisions of the merit system and with the consent and approval of the commissioner, the board

shall prescribe the qualifications of, fix the compensation of, and remove the employees of the board. No person who is identified with the interests of either employers or employees shall be appointed examiner.

Grievant's interpretation that Section 21A-4-10 overrides Section 21A-2-6(4) is unsupported by the evidence. Further, the commissioner's authority regarding employees is more specifically set forth in several other sections, including:

W. Va. Code §21A-2-1, which provides that “the bureau shall be under the supervision of a commissioner of the bureau of employment programs”;

W. Va. Code §21A-2-8, “the commissioner shall appoint, upon a nonpartisan merit basis, the division and unit heads and such assistants and employees as may benecessary to the efficient operation of the bureau”; and,

W. Va. Code §21A-2-11, which places responsibility upon the commissioner to establish regulations governing dismissals, terminations, layoffs and suspensions.

In any event, BEP asserts that the Board approved Grievant's termination, and with no evidence to the contrary, it is accepted that the action was with Board approval.

Addressing the specific charges regarding his performance, Grievant concedes that he has at times been late for hearings, but offered a multitude of decisions to illustrate his satisfactory performance. Accepting that the decisions offered by Grievant were satisfactory, they do not negate those decisions evaluated and found unsatisfactory. Further, other aspects of Grievant's work were also found lacking, such as failure to tape record hearings, etc.

Grievant also asserts that the reason given for his dismissal was pretextual, and was in fact motivated by his age and/or political affiliation. Grievant did not state his age for the record, but did mention that he has been a member of the Bar for fifty years. Grievant did not reveal his political affiliation.

BEP has proven by a preponderance of the evidence that Grievant was unable or unwilling to complete the duties of an ALJ in a satisfactory manner, notwithstanding efforts to assist him, and that his dismissal was warranted.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer and the employer must

meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 2. The employer must demonstrate that conduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 216 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. BEP proved by a preponderance of the evidence that Grievant completed the duties of an ALJ in an unsatisfactory manner over an extended period of time, and that efforts to correct the deficiencies were unsuccessful, leading to dismissal.

4. Grievant failed to prove that the dismissal was motivated by his age or political affiliation.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees GrievanceBoard nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: February 28, 2003 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The grievance was erroneously dated February 7, 2002.

Footnote: 2

Grievant could have elected to file an expedited grievance directly to level four under W. Va. Code § 29-6A-4(e) since the issue was the termination of his employment.