WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES WILLIAM DORAN,
Grievant,

v. **Docket No. 2013-0076-DVA**

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

Grievant, James William Doran, was employed by Respondent, West Virginia Department of Veterans Assistance, as a Veterans Service Officer. Mr. Doran filed a level two grievance form dated July 18, 2013, claiming "Wrongful termination"[1] of his employment. As relief Grievant seeks, "Retention of my position with the WVDVA." An Order was entered on July 30, 2012, instructing Grievant to select whether he wanted to start at level one or level three. A level three hearing was held in Beckley, West Virginia on February 20, 2013. Grievant appeared *pro se* and Respondent was represented by Katherine A. Campbell, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on April 2, 2013. This matter became mature for decision on that date.

Synopsis

Respondent dismissed Grievant for making unprofessional and inappropriate comments to a client of the agency. This was not the first instance of inappropriate behavior. Grievant argues that respondent denied him due process and failed to prove

[1] Mr. Doran attached a two page addendum to his grievance which is incorporated herin by reference.

the incident occurred. Respondent proved by a preponderance of the evidence that the dismissal was justified.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant was employed as a Veterans Service Officer, by the West Virginia Department of Veterans Assistance, from September 16, 2009, until his employment was terminated on July 19, 2012.

2. Grievant generally worked in a field office located in Beckley, West Virginia and his direct supervisor was Mike Lyons.

3. On the day he was employed, September 16, 2009, Grievant received a number of policies, rules and regulations. He signed an acknowledgement form for each one noting that he received a copy, and that he was responsible for becoming familiar with and following the rules set out therein. Among the documents for which Grievant signed acknowledgement forms were the following: Division of Veterans Affairs Regulations for Operations ("DVA Regulations") (86 C.S.R. 3);[2] Division of Personnel Workplace Security Policy;[3] and the Division of Personnel Prohibited Workplace Harassment Policy.[4]

4. DVA Regulations Section 4.04 addresses the office etiquette for Veterans Service Officers and requires that they "be extremely courteous to people at all times,"

[2] Respondent's Exhibit 3 is the regulation, and Respondent's Exhibit 4 is the acknowledgement form for this regulation.
[3] Respondent's Exhibit 5, acknowledgement form for the Workplace Security Policy.
[4] Respondent's Exhibit 7, acknowledgement form for the Prohibited Workplace Harassment Policy.

and that they attempt to make each applicant feel that his or her problem is important. Respondent's Exhibit 3.

5. In November 2009, Grievant received a verbal reprimand for comments he made to the soon-to-be widow of a veteran. Her daughter had just died, her husband was terminally ill, and she suffered from Parkinson's Disease. She was seeking assistance from Grievant in getting her affairs in order. When she said she could not work, Grievant suggested she get a job at McDonald's making shakes. (Respondent's Exhibit 9). This comment upset the claimant, and she made a formal complaint. Grievant ultimately apologized to the claimant.[5]

6. In April 2011, Grievant became frustrated during a telephone conversation with an employee at the Federal Veterans Affairs Pension Center in Philadelphia, Pennsylvania. Grievant stated to the employee, "Well what am I going to have to do, come down there or send a pipe bomb?" A complaint came to the State Director of Veteran's affairs through the Federal Veterans Affairs Office in Huntington. (Respondent's Exhibit 10). Grievant received a three-day suspension without pay for this incident.[6] (Respondent's Exhibit 11).

7. Grievant had a difficult relationship with employees at the Huntington Veterans Affairs Office. His supervisor, Mike Lyons, regularly received complaints from the Huntington office regarding Grievant's inappropriate comments.[7]

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[5] Grievant testified that he made the comment in an apparently unsuccessful attempt to lighten the client's mood.

[6] When confronted with this allegation Grievant stated that the comment was directed at the Huntington office, not the Philadelphia office and it was just a joke. (Respondent's Exhibit 10).

[7] Grievant testified that these complaints were the result of personality conflicts rather than actual inappropriate behavior.

8. Veterans James Thomas and Erik Reynolds became acquainted when they were in a Compensated Work Therapy Program together. On June 27, 2012, Mr. Thomas showed Mr. Reynolds how to get to Grievant's office in Beckley so that he could apply for benefits.

9. After waiting for some time to see Grievant, Mr. Reynolds went into Grievant's office and asked him how to go about filing a claim for benefits. Grievant responded that an applicant had to give oral sex to the guy doing the paperwork,[8] and then laughed. Grievant talked with Mr. Reynolds for a few minutes, gave him some forms to fill out and Mr. Reynolds left.

10. Shortly after meeting with Grievant, Mr. Reynolds met Mr. Thomas in another part of the building. He told Mr. Thomas what had happened in Grievant's office. Mr. Thomas suggested that Mr. Reynolds meet with Ernie Beringer, a counselor for the Federal Department of Veterans Affairs, for help with his benefits.

11. Mr. Reynolds met with Mr. Beringer at his office in Bluefield to seek assistance with his benefits. While there, Mr. Reynolds told Mr. Beringer what had happened in Grievant's office.

12. After with meeting with Mr. Reynolds, Counselor Beringer called Grievant's supervisor, Mr. Lyons and reported that Grievant had made inappropriate comments to Mr. Reynolds.

13. Mr. Lyons started an investigation in to the allegation. He interviewed and took written statements form Veterans Reynolds and Thomas.[9] Supervisor Lyons also

[8] The exact wording of the statement changed slightly between Mr. Reynolds' written statement and his testimony, but the nature of the statement remained the same.
[9] Respondent's Exhibit 1, Reynolds statement and Respondent's Exhibit 2, Thomas Statement.

spoke with Grievant by telephone and Grievant denied making the statement to Mr. Reynolds.

14. Mr. Lyons met with Grievant for a predetermination conference on the morning of July 18, 2012. He discussed the issue with Grievant and received no new information. Mr. Lyons gave Grievant a letter dated July 18, 2012, terminating Grievant's employment for making the comments to Mr. Reynolds after he had earlier warnings about making inappropriate comments.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Grievant, as a permanent state employee in the classified service, could only be dismissed for "good cause," meaning "misconduct of a substantial nature directly

affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty, it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Respondent was able to prove that Grievant made an extremely inappropriate statement to an applicant for veterans' benefits. Respondent also proved that Grievant had made similar statements to others, and had been warned about not repeating this conduct. Grievant attempted to explain his conduct by saying that he was attempting to lighten a difficult situation, or put the claimant at ease. Unfortunately his conduct obviously had the opposite effect. The intent of DVA Regulations Section 4.04 is for the Veterans' Officer to be very courteous with people and let them know their issues are important and taken seriously. Regardless of Grievant's intent, his comments to the applicants came across as flippant and callous, and his comments to the Philadelphia office seemed threatening. This is clearly in violation of the professional conduct

expected pursuant to the policy and reflects poorly on the entire program. Considering Grievant's employment history, Respondent proved charges serious enough to warrant terminating Grievant's employment.

Grievant argued that Mr. Thomas did not hear him speaking to Mr. Reynolds and therefore his statement was insufficient to prove the charges against Grievant. However, Respondent did not rely solely upon the statement of Mr. Thomas. Rather, Mr. Reynolds testified as to the comment that Grievant made directly to him. Mr. Thomas' statement only shows that very shortly after the incident occurred, Mr. Reynolds told someone else what happened. Mr. Reynolds' direct testimony was sufficient to uphold the dismissal.

Next, Grievant argued that he was denied due process because he was not informed of the charges until the predetermination meeting after which he was dismissed. The West Virginia Supreme Court of Appeals has consistently held that a tenured state employee has a constitutionally protected property interest in his continued employment. *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012) (citing *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977)). The Court has also found that this guaranteed property interest requires "some kind of hearing" before discharge even though, as in this case, the employee is entitled to a full hearing after the disciplinary action is taken. Syl. Pt. 3 of *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987) (*citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)). The Supreme Court also noted that:

> The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due

> process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination.

Farley supra, page 732.

Grievant received the due process protection to which he was entitled. His supervisor held a predetermination conference with him and explained the charges against him. Mr. Lyons shared with Grievant the results of his investigation and gave Grievant an opportunity to respond before he terminated Grievant's employment. Respondent did not violate Grievant's due process rights.

Given Grievant's employment history and the surrounding circumstances, Respondent proved the charges against Grievant by a preponderance of the evidence. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). *Litten v. W. Va. Dep't of Trans., Div. of Highways*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

2. Grievant, as a permanent state employee in the classified service, could only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. Respondent proved the charges against Grievant by a preponderance of the evidence. Given the totality of the circumstances, the charges were serious enough to justify the termination of Grievant's employment.

4. A tenured state employee has a constitutionally protected property interest in his continued employment. *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012) (citing *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977)).

5. A tenured State employee's guaranteed property interest requires "some kind of hearing" before discharge even when the employee is entitled to a full hearing after the disciplinary action is taken. Syl. Pt. 3 of *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987) (*citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)).

6. The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination. *Farley supra,* page 732.

7. Respondent complied with Grievant's pretermination due process rights.

Accordingly, the Grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: AUGUST 2, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE