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STATE EMPLOYEES GRIEVANCE BOARD

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VIVIAN BOWMAN	Docket No. 90-WCF-037
NORMAN HONAKER	Docket No. 90-WCF-042
WILLIAM SMITH	Docket No. 90-WCF-043
HOWARD MULLENS	Docket No. 90-WCF-096
DONALD HARRISON	Docket No. 90-WCF-138

v.

WEST VIRGINIA WORKERS' COMPENSATION FUND

DECISION

All grievants, except Vivian Bowman,<sup>1</sup> were employed by the West Virginia Workers' Compensation Fund (WCF) as Claims Investigators<sup>2</sup> in various areas of the state prior to the termination of their employment on April 5, 1990. They initiated grievances over that anticipated action at Level IV on or about February 2, 1990. It was subsequently determined that the terminations were not for disciplinary reasons and the cases were remanded in March

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<sup>1</sup>Grievant James Bowman died shortly after the Level IV hearings and a subsequent motion to substitute his widow and executrix of his estate, Vivian Bowman was granted.

<sup>2</sup>Grievant Mullens held the title of Chief Claims Investigator.

1990 for compliance with the hearing requirements of W.Va. Code §29-6A-4. The grievances were consolidated at Level III, for hearing which was held March 26, 1990. An April 4, 1990, decision denied the grievances at that level and the matter was again advanced to Level IV April 18, 1990. A hearing was held May 24, 1990 and September 18, 1990. The parties submitted proposed findings of fact and conclusions of law by September 18, 1990.<sup>3</sup>

The following facts are uncontested. All the grievants were appointed to their positions, which were designated classified-exempt at the time, during the administration of Governor Arch A. Moore, Jr. All received good performance evaluations during their tenure in the positions and were never subject to any disciplinary actions. Ms. Emily Spieler assumed the duties of Commissioner for WCF on January 16, 1989. She subsequently began a review of its organizational structure and the nature of certain positions within that structure. On January 19, 1990, all the grievants received the following letter from Ms. Spieler:

I have been informed by the Personnel Division that we must eliminate the Claims Investigator position at the Workers' Compensation Fund based upon an opinion of the Attorney General which required the elimination of similar exempt positions in the Division of Motor Vehicles (formerly the Department of Motor Vehicles). This Attorney General's opinion holds that

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<sup>3</sup>Grievants Harrison, Bowman, Smith and Honaker presented their cases on May 24, 1990, and submitted their proposals by July 16, 1990. Grievant Mullens appeared on September 18, 1990, and submitted his proposals on that date. At that time counsel for WCF indicated that its previously-submitted proposals would apply to all the grievants.

investigatory positions of this nature are not appropriate for exempt status.

This agency has a strong commitment to continuing to perform investigatory functions. We will be reviewing exactly how these functions should be performed over the next few months. However, in view of the advice of the Personnel Division and the opinion of the Attorney General, I regret to inform you that your classified exempt position of Claims Investigator will be eliminated at the close of business on April 5, 1990.

We are providing you with this notification period in order to allow you ample time to take the appropriate civil service tests and be certified to a register in the event you are interested in applying for other positions. You should telephone the Division of Personnel Testing Center at 348-5946 to schedule an examination as soon as possible. You will, of course, be considered for any position for which you meet the qualifications and are adequately ranked on the register.

We will be making every effort to assist you in finding other employment either within or outside state government. Representatives from the Division of Personnel and the Division of Employment Security will be available to provide you assistance in the weeks ahead. I urge you to take advantage of this support. I truly regret that this action has become necessary.

When the positions were abolished, WCF obtained job specifications from the West Virginia Division of Personnel for the positions of Investigator I, II and III. As of September 18, 1990, when Level IV proceedings were concluded, several Investigator positions in WCF's Charleston area had been posted but none of the grievants had been reemployed, although some had applied for those positions.

Grievants advance two legal arguments for reversal of WCF's action.<sup>4</sup> First, they assert that certain provisions of W.Va. Code §29-6-4 prohibit the abolishment of their classified-exempt positions. Second, they maintain the action was taken because of their political affiliations. WCF asserts that the cited statutory provisions are inapplicable and that the action was taken in compliance with a 1983 Attorney General's Opinion. WCF denies any political motivation for the elimination of the positions. For reasons hereinafter discussed, the undersigned concludes that the grievants have failed to substantiate their claims.

Grievants' claim regarding a statutory prohibition against abolishment of their positions is based on that portion of W.Va. Code §29-6-4, which provides that, "the classified-exempt service includes all positions included in the classified-exempt service on the effective date of this article." It is the grievants' position that this clause, which became effective July 1, 1989,

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<sup>4</sup>At various levels certain grievants vaguely mentioned their ages as a possible motivation for their termination. Others gave their ages and merely explained that they would be hindered in their attempts to re-enter the workforce. In any event, the focus of their legal arguments was never upon any theory of age discrimination and none was ever clearly articulated, although the undersigned, during the Level IV proceedings, allowed amendment of their original filings, which did not include such an allegation, to encompass the theory. Other than testifying as to their ages, no other evidence in support of an age discrimination charge was presented by the grievants and their post-hearing proposals make no mention of any such claim. Accordingly, this decision deals only with the arguments hereinafter discussed.

had the effect of "grandfathering" or protecting all Claims Investigators who held those positions as of that date. The obvious flaw in this argument is that the statute makes no mention of any prohibition against the abolishment of classified-exempt positions. While the intent of the quoted language is certainly susceptible to more than one interpretation, it appears that it merely attempts to define the classified-exempt service. Supportive of this conclusion is the wording of the statute before the July 1, 1989, revision. Before amendment it read, "The classified-exempt service comprises all positions not included in the classified service and those positions specifically excepted from the classified service as provided in this section." To impose an interpretation on the language which prohibited an agency from eliminating positions for lack of need or other good cause would certainly be a distortion of the statute. It is, therefore, concluded that the provision has no applicability to the grievants' case.

Grievants' political discrimination assertions are not supported by the evidence presented. It is well-settled that in order to establish a prima facie case that a particular employee's termination was a constitutionally-impermissible dismissal, he or she must show that affiliation with a particular political party was the substantial or motivating factor underlying the dismissal. Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); White v. West Virginia Department of Highways, Docket No. 89-DOH-137 (March 7, 1990). Essentially, the only evidence in this regard which the grievants presented was

their statements that they were hired when the Governor of the state was Republican and the adverse action of which they complain was taken at the time when the Governor was a Democrat. This was essentially the only evidence offered in White, supra, and it was deemed therein that such testimony alone clearly was insufficient to establish a prima facie case of political discrimination. The same conclusion must be reached in the present case. It is, therefore, unnecessary to address the sufficiency of WCF's evidence in support of the propriety of the abolishment of the positions.

In addition to the foregoing recitation of facts, the following conclusions of law are made.

#### CONCLUSIONS OF LAW

1. In order to establish a prima facie case that an employee's termination constituted a patronage dismissal violative of his or her First Amendment rights, he or she would have to prove that affiliation with his or her political party was the substantial or motivating factor underlying their dismissals. Kauffman v. Puerto Rico Telephone Co., 841 F.2d 1169 (1st Cir. 1988); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

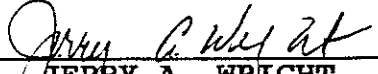
2. Grievants failed to establish a prima facie case of political discrimination.

3. W.Va. Code §29-6-4 does not prohibit the abolishment of classified-exempt positions.

Accordingly, the grievance is DENIED.

Either party or the West Virginia Division of Personnel may appeal this decision: in the case of Vivian Bowman v. West Virginia Workers' Compensation Fund, Docket No. 90-WCF-037, to the Circuit Court of Marion County; in the case of Norman Honaker v. West Virginia Workers' Compensation Fund, Docket No. 90-WCF-042, to the Circuit Court of Greenbrier County; in the case of William Smith v. West Virginia Workers' Compensation Fund, Docket No. 90-WCF-043, to the Circuit Court Marshall County; in the case of Howard Mullens v. West Virginia Workers' Compensation Fund, Docket No. 90-WCF-096, to the Circuit Court of Cabell County; and, in the case of Donald Harrison v. West Virginia Workers' Compensation Fund, Docket No. 90-WCF-138, to the Circuit Court of Berkeley County and such appeals 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 Hearing Examiners is a party to such appeal and should not be so named. Please advise this

office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

  
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JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: January 21, 1991