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PAULA K. SILVER

v.

Docket No. 92-HHR-215

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
CHILD ADVOCATE OFFICE**

DECISION

Grievant Paula K. Silver, one of a number of attorneys employed by Respondent West Virginia Department of Health and Human Resources (HHR) as a Children's Advocate, complains because the work status of Advocates has been changed by a legislative act. The grievance she filed at level one and advanced to level four in June 1992 is as follows:

My superiors have formulated and supported legislation that strips me of my Civil Service protection, while retaining and/or acquiring their own status and protection. This action was taken against me because I truthfully testified under subpoena in the Federal lawsuit Brinkley et. al. vs. Terry, et. al. in which my superiors were found to be in contempt of Court, and/or for political reasons, which is contrary to law.

I demand restoration of my full civil service protection, rights and privileges and that no retaliatory action be taken against me.

Grievant requested a level four hearing.

Officials had denied the grievance at levels one and two on the basis of lack of authority to grant the requested relief. Later, the grievance evaluator at level three dismissed the case upon Respondent's motion, finding, in essence, lack of jurisdiction. By letter dated June 25, 1992, the undersigned advised Grievant that she believed the Grievance Board had no authority to grant the requested relief and invited Grievant to respond.

In a lengthy letter dated July 14, 1992, Grievant alleged, among other things, that the statute which excepts her from the civil service system is "discriminatory."¹ She also charged that new policies developed for Child Advocate Office employees are discriminatory, that her superiors were subjecting her to "political" pressures, that partisan politics entered into the considerations to remove the Children's Advocates from civil service and that she had specific evidence of retaliatory actions already taken against her since the passage of the bill which removed her from civil service status. Grievant explained that she would soon be on leave and requested further time to more fully explain her position.

¹The statute at issue in this case, W.Va. Code §48A-2-6(b) (1992), effective from date of passage on March 7, 1992, states: Notwithstanding the provisions of section three and four, article six, chapter twenty-nine of the code relating to the manner in which additions are made to the list of positions in the classified service, and any other provision of the code to the contrary, the positions held by employees of the [child advocate] office shall be positions in the classified service except for children's advocate, assistant children's advocate, the director's secretary and those positions named in subdivisions (2),(3),(4),(9) and (12), subsection (a) of said section four.

By letter dated August 6, 1992, Grievant raised yet a new issue. She stated that attorney civil service positions superior to hers had been filled in Child Advocate Offices without posting the positions, said actions being discriminatory and contrary to law in her view. She also complained about another recent matter in which a superior had spent several days reviewing some of her work while she was absent from her office; said unannounced visit was, according to her, contrary to a grievance she had "successfully settled" in December 1991. As she had done in her July 14 letter, she included additional documentary materials. She concluded that she needed more time to comment further upon her case because of a recently decided Fourth Circuit Court of Appeals case about "state road workers and the civil service" which she needed to analyze.

About one month earlier than when Grievant filed her grievance at level one, another Children's Advocate who worked in a different part of the State also instituted a grievance on the issue of his loss of civil service status. Upon adverse decisions at the lower grievance levels, the grievant in that case ultimately appealed to level four. A decision was rendered in that matter on September 14, 1992, Sowa v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-159. The administrative law judge who decided Sowa concluded "that the primary claims advanced by the grievant are not grievable, and thus, the Grievance Board lacks subject matter jurisdiction." He further reasoned and held that

the allegations in this case are direct challenges to the constitutionality of the amendment removing child

advocates from the classified service. It is evident that the respondent has no lawful authority or power to act in a manner contrary to the command of that statute; it cannot now in the face of the statute grant the grievant's request and restore his position to the classified service.

. . . . Regardless of whatever posture the respondent took in regard to the proposed statute, the legislature has acted and the respondent cannot unilaterally change that now. Even if it were assumed that the respondent favored the amendment for base political reasons, as the grievant alleges, neither the respondent nor the undersigned have any capacity to change the statute or provide the relief the grievant requests. The grievant's constitutional challenges to the statute are thus not grievable matters within the meaning of W.Va. Code, §29-6A-2(2), and the Grievance Board is without jurisdiction over such claims.

Apparently, the grievant in Sowa had relied upon the holding in syllabus point 5 of Baker v. Civil Serv. Comm., 245 S.E.2d 908 (W.Va. 1978), which states, in part: "The legislative right to abolish public employment position is not without limitations." The ALJ responded, "Although the grievant may have a cause of action under Baker, this agency is not the proper forum for adjudication of such claim. . . ."

In October 1992, the undersigned forwarded a copy of Sowa to the parties, notified them that Sowa may be controlling in the instant matter and requested that Grievant consider withdrawing her grievance on the basis of Sowa. When Grievant had not responded by November 17, the undersigned issued a Notice of Pending Dismissal, and allowed the parties thirty days to file an objection thereto. On December 16, 1992, Grievant filed a request that her case not be dismissed. She was thereupon given until January 15, 1993, to file a brief and, in effect, to address the holdings in Sowa as relates to her own case.

Grievant complied with the directive to file her brief by that deadline.

Apparently, Grievant accepted Sowa's applicability because she did not address the holdings in that case in her January 15, 1993, brief. In fact, Grievant advanced no argument at all with respect to the jurisdictional question already decided in Sowa. Her submission began with "Grievant's Fact/Law Proposals" which included, among other things, the new charges she raised subsequent to the March 1992 inception of her grievance and the June 1992 level four appeal, i.e., those contained in her letters of July 14 and August 10, 1992.

In the following sections of the multiple-page brief, Grievant first argued that, under the grievance statutes, the Grievance Board had jurisdiction to "make a finding of misapplication or violation regarding terms and conditions of employment or change in employment status, discrimination and/or harassment" and that a level four ALJ "could make a finding that the employer has acted in such a way as to constitute a substantial detriment to or interference with effective job performance."² She tied all of this to her loss of civil service status and concluded with yet more debate about her perceptions of the cause and effect of the "abolishment" of her civil service

²In the ensuing portions of her Brief, Grievant also raised yet a new issue; that her employer had now developed an evaluation process for her which had not been approved by the West Virginia Division of Personnel and which "is not used for the classified employees of the Child Advocate Office." She claimed that "these actions which stem from the loss of civil service status are discriminatory."

status and a request for "full restoral of. . .full civil service protection, right and privileges."³

Grievant's arguments do not go to the heart of the jurisdictional problems that were fully discussed in Sowa. Hence, for all of the reasons set forth in Sowa, Grievant's case on the issue of her present, at-will employment status must be dismissed. Any other issues raised by Grievant, which may constitute a separate grievance(s), were not contained in her pleadings at the lower levels or, initially, at level four, and none have been considered or decided by the respondent herein at the lower grievance levels. Since those issues are not properly at level four, the undersigned cannot address them herein.⁴

Findings of Fact

1. Grievant has been a Children's Advocate for over five years, said position initially a part of the classified service, i.e., a civil service position. Upon the of passage of W.Va. Code §48A-2-6(b) (1992), on March 7, 1992, all Children's Advocates, including Grievant herein, were effectively removed

³As Grievant had done in her previous letters of July 14 and August 10, 1992, she included a series of documents or "exhibits" in her January 15, 1993, Brief. Under the circumstances, the undersigned cannot construe any of these submissions as evidence in this grievance, especially in light of the fact that much of what was contained in the documents had nothing whatsoever to do with Grievant's primary claim and request for reinstatement in the classified service which were contained in her originally filed pleadings.

⁴That is not to say that Grievant is precluded from filing a grievance about her present working conditions.

from the civil service system and subsequently designated as at-will employees.

2. In April 1992, Grievant filed a level one grievance in which she protested the passage of the statute in question as being directed solely at her for retaliatory motivation and requested restoration of her civil service status.

3. Subsequent to the adjudication of Grievant's complaint at the lower grievance levels and the formal appeal of the case to level four, Grievant raised new issues about aspects of her employment as an at-will employee and related actions of Respondent herein.

Conclusions of Law

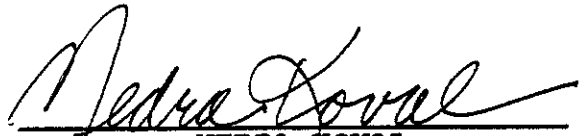
1. "[T]he Grievance Board lacks jurisdiction over the grievant's various claims relating to the passage of an amendment to W.Va. Code, §48A-2-6(b) (1992), which removed child advocate positions from the classified service." Sowa v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-159 (Sept. 14, 1992).

2. Grievant failed to demonstrate that the charges brought forth in her grievance with respect to her altered employment status differed materially from those set forth in Sowa.

3. Grievant's additional complaints about her working conditions as an at-will employee constitute a new grievance and are not properly before the Grievance Board.

Accordingly, based on the factual and legal determinations herein, this grievance is **DENIED** and **STRUCK** from the docket of the West Virginia Education and State Employees Grievance Board.

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. And 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.



NEDRA KOVAL
Administrative Law Judge

Date: January 29, 1993