COMMONWEALTH OF VIRGINIA

PERRY W. SARVER, JUDGE
CIRCUIT COURTHOUSE
112 SOUTH MAIN STREET
WOODSTOCK, VIRGINIA 22664-1423
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CIRCUIT COURTS OF
CLARKE, FREDERICK, PAGE
ROCKINGHAM, SHENANDOAH
AND WARREN COUNTIES
AND CITY OF WINCHESTER

TWENTY-SIXTH JUDICIAL CIRCUIT

December 9, 1993

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Re: Wallace v. Page County School Board and Virginia Employment Commission
At Law No. 6821
In the Circuit Court of Page County

Dear Counsel:

This is an appeal from a decision of the Virginia Employment Commission (VEC), dated December 28, 1992. Leonard L. Wallace (Wallace) filed a claim for unemployment benefits on August 27, 1992 after his employment by the Page County School Board (School Board) had been terminated at the conclusion of the school year in June, 1992. N. Bodkin, a Deputy of VEC, found on September 14, 1992, that Wallace was qualified for benefits under the Virginia Employment Compensation Act (the Act). School Board noted a timely appeal to the Deputy's decision and there was a hearing before an appeals' examiner on October 14, 1992. John Taylor, appeals' examiner for VEC, reversed the determination of N. Bodkin, ruling that Wallace had left work voluntarily, without good cause. Thereafter, Wallace filed his appeal of Taylor's decision, and, after a review of the record by Charles A. Young, special examiner, the decision of the appeals' examiner was affirmed, thus, disqualifying Wallace for unemployment compensation.

The issues before the Court with respect to this appeal are:

(1) Whether the findings of fact of VEC were supported by the evidence?

(2) Whether VEC correctly interpreted and applied the law in ruling that claimant voluntarily left his employment without good cause?

The findings of fact of VEC are supported by the evidence and support the ruling that Wallace voluntarily left School Board's employment without good cause.

FINDINGS OF FACT

Wallace was employed by School Board during the '91-'92 school year between the dates of August 18, 1991 and June 30, 1992 (the conclusion of the school year). He was an assistant principal at the Luray Elementary School and his employment was subject to the provisions of Code § 22.1-294 which provides, in part, that a person employed as an assistant principal shall serve three years in such position in the same school division before acquiring continuing contract status. His immediate supervisor was the school principal, Donna Whitley (Whitley).

Wallace testified that he was first made aware of Whitley's dissatisfaction with his work performance sometime in early October when she gave him a list containing, "areas of concern with regard to job performance," (Tr. 19-24). At the same time she further advised him that she would not recommend to the superintendent that his contract be renewed for the following year, (Tr. 24). He attempted to discuss the contents of the list with Whitley, at the time of delivery, but she advised that she had other appointments and they could be discussed the following Monday. Wallace stated that the problems were never discussed and he tried to correct the problems (seven in number), and that Whitley never called him back.

While Wallace mentioned that the list was given to him in October, it must have been in November as two of the incidents mentioned occurred on November 6 and 8.

By letter of January 10, 1992 Whitley confirmed to Wallace that her negative recommendation was being forwarded to the superintendent. Within two or three days, "or maybe a week" (Tr. 27) Wallace contacted his Uniserve representative, Gloria Wilson

Miller (Miller). He made no contact with school authorities at that time. In Wallace's words, "... I was just hoping that someone would come to Leonard Wallace and say sit down, what's happening, put all the cards on the table..." (Tr. 25,26). I also note that when he received the notification in October of Whitley's concerns he went to Miller and had three or four conversations with her to get information, (Tr. 27).

Wallace received a letter from David A. Nagy, Superintendent, dated January 14, 1993 advising him that a recommendation was being forwarded to the School Board that his contract not be renewed as provided in Code §22.-294. Nagy further advised that under Virginia law, Wallace could, within five (5) days, request the reasons for and supporting documents for such recommendation and that if a timely request was not received then the superintendent's recommendation would be forwarded to School Board without any further notice. Wallace requested a meeting by letter of January 15 and a meeting was scheduled with Nagy's designee, Mason Lockridge, Assistant Superintendent, Personnel (Lockridge).

Wallace and Miller went to the meeting and immediately upon arriving, Lockridge asked Wallace what he wanted to do and he replied, "I want to resign." Lockridge asked him to put it in writing and he did so (Tr. 28). Wallace stated that he resigned in order to get a good recommendation. He was not tenured (Code §22.1-294), and according to Wallace and Miller, nonrenewal would be fatal to his teaching career. Whitley had previously advised him, apparently in November when he was given the list of concerns, that if he resigned he would receive a favorable recommendation. (Tr. 28). He ultimately received the favorable recommendation by letter from Whitley dated June 12, 1993, a copy being filed with the papers in this cause. He also received a favorable recommendation from Lockridge, (Tr. 39).

It appears, from a review of the record, that Wallace's primary reason for resigning was based upon the advice of Miller. She advised that School Board was not required to give him any reasons for nonrenewal so, "why go through the hassle, why go through the steps?" (Tr. 36). See also Miller's affidavit filed with the papers in this cause, (Tr. 25).

APPLICABLE LAW

This Court's jurisdiction is limited by the provisions of Code § 60.2-625 which provides in part that:

> In any judicial proceedings under this chapter, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.

Thus, VEC's findings of fact, supported by evidence, and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court is confined to questions of law. VEC v. City of Virginia Beach, 222 Va. 728, 284 S.E.2d 595 (1981). The General Assembly has determined that so long as the factual findings of VEC are supported by the evidence, those findings are conclusive. Robinson v. Virginia Employment Commission, et al, No. 1114-85-4 (Ct. of App., September 3, 1996.

An individual is disqualified for benefits if he leaves work voluntarily without good cause (Code § 60.2-618). A "good cause" determination is a mixed question of law and fact and subject to review on appeal. Before relinquishing his employment, the claimant must have made every effort to eliminate or adjust with his employer the differences or conditions of which he complains. He must take those steps that could be reasonably expected of a person desirous of retaining his employment before hazarding the risks of unemployment. A claimant-employee must take all reasonable steps to resolve his conflicts with his employer and retain his employment before voluntarily leaving that employment. Umbarger v. VEC, 12 Va. App. 431, 435 (1991).

When determining whether good cause existed for a claimant to voluntarily leave employment, the Commission and the reviewing courts must first apply an objective standard to the reasonableness of the employment dispute and then to the reasonableness of the employee's efforts to resolve that dispute before leaving the employment; in making this two-part analysis, the claim must be viewed from the standpoint of a reasonable employee. Umbarger v. VEC, 12 Va. App. 431, 435, 404 S.E.2d 380 (1991).

The employee must pursue every available avenue open to him to alleviate or correct the condition of which he complains before relinquishing his employment. Lee v. VEC, 1 Va. App. 82 (1985).

In fact, Wallace did not pursue any of the avenues open to him to alleviate or correct the condition. Starting back in November, his position in response to Whitley's expressed con-

cerns was to wait until someone came to him, (Tr. 25, 26). Instead of approaching school officials, he went to Miller.

In response to the Nagy letter he went to the meeting with Lockridge for the sole purpose of offering his resignation and not to discuss ways to alleviate or correct the problem. Miller had convinced him that to do otherwise was a waste of time. Lockridge, to the contrary, stated that there had been instances when School Board overruled the superintendent's recommendations (Tr. 8).

The facts in this case and the actions of School Board representatives are substantially different from those found in Garner v. Accomack County School Board, Commission Dec. No. 30974-C (1988). In Garner, both the principal and division superintendent recommended that he resign his position. The principal indicated to him that the school board always followed through with the recommendations for retention of teachers which were presented to it. Id 2. The Commission found that the evidence showed a concerted effort on the part of a number of officials (the principal and the division superintendent) to convince claimant that it would be in his best interest to resign since the principal was not 100 percent sure about his abilities and the school board always accepted the recommendations of nonrenewal made to it.

The Commission also stated that had claimant simply been sent a letter indicating that it would be recommended to the school board that his contract not be renewed and had he then immediately resigned, this would have represented a voluntary action on his part since, under normal circumstances, a mere recommendation does not amount to an actual notice of a discharge.

Commission's position in this case is consistent with its decisions in Commission Decision No. UI-9114100 (1991) and No. UI-84-5912 (1984). In the former case, prior dismissal proceedings had been instituted, there was a settlement agreement, and then the instant dismissal proceedings were instituted. Given the posture of the parties at this time, Commission stated that it was reasonable for the claimant to assume that any further proceedings would be fruitless under the circumstances and that the she left her employment with good cause.

In the latter case, No. UI-84-5912, employee, (still in the initial three year period and without continuing contract rights) after having given notice that he wished to be reinstated was

told to withdraw his request and to submit a second form indicating that he did not wish to be reappointed, and such would be accepted as a resignation of employment. He was further advised by the principal and assistant superintendent of personnel that he had no chance of winning an appeal to the school board for reinstatement. Evidence was also presented at the hearing that a teacher or instructor who is not recommended for reappointment by the school superintendent is rarely reappointed by the school board.

The situation with respect to Wallace is different. Miller is the only person who told Wallace that a challenge to Whitley and Lockridge's position would be fruitless. Wallace's position at all times had been to sit back and see what happened, except to contact Miller. When afforded an opportunity to discuss his job status and the nonrenewal of his contract with Lockridge, he declined to pursue the opportunity and instead offered his resignation, which was immediately accepted effective at the end of the school year. Lee v. VEC, 1 Va. App. 82, requires more of the employee.

Ms. Kirkland is requested to prepare a final order of dismissal, incorporating this letter opinion therein by reference, and secure Mr. Ritchie's endorsement. Any objections to the rulings contained herein shall be in writing attached to the final order.

Sincerely,

Perry W. Sarver

PWS/rm

cc: Court File