



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN McDANIEL

Opinion No. 2014-044

June 23, 2014

The Honorable David Kizzia
State Representative
124 West 2nd Street
Malvern, Arkansas 72104-3708

Dear Representative Kizzia:

You have requested my opinion about the Arkansas Whistle-Blower Act (“WBA”) (codified at A.C.A. § 21-1-601 et seq.) and its relationship to the civil service rules (you specifically cite A.C.A. §§ 14-49-304, 14-50-304, and 14-51-301). I have combined the background information you have provided with your two questions as follows:

1. The WBA authorizes public employees who suffer an “adverse action” to file a lawsuit in the appropriate circuit court. The WBA also states that if the Office of Personnel Management (OPM) has established a mediation program, then the public employee or employer “*may voluntarily participate* in mediation ... if either one *wishes* to resolve a dispute” about adverse action taken against the public employee. Yet the very next subsection of the WBA states that “[v]oluntary mediation *shall occur* before a civil action” has been initiated. (Emphases added.) Do these provisions establish that “voluntary mediation” is a prerequisite to filing a lawsuit under the WBA?
2. Certain public employees are subject to civil service rules that only allow appeals for terminations or for suspensions lasting at least three days. But the WBA allows an employee to appeal an “adverse action,” which includes actions that fall short of a termination or

suspension. Suppose that an employee suffered a disciplinary action that cannot be appealed under the civil service rules but that qualifies as an “adverse action” under the WBA. Does the fact that the civil service rules bar an appeal affect the employee’s ability to file a lawsuit under the WBA?

RESPONSE

In my opinion, the answer to both questions is “no.” Regarding the first question, and for purposes of this opinion, the WBA establishes two rules governing the relationship between mediation and litigation. First, the mediation program offered by OPM is “voluntary” in the sense that an employee is free to initiate it or forgo it. That is why the WBA speaks about the mediation process as “voluntary” and hinges mediation on the “wishes” of the parties. Second, if a lawsuit has already been initiated, then it is too late to agree to enter OPM’s mediation program. That is the meaning of the second part of the WBA where it states that the “voluntary mediation” “shall occur” before the lawsuit is initiated. Regarding the second question, The WBA provides a unique avenue for an employee to seek redress of an alleged wrong. Such an employee has the discretion to choose the WBA as his or her means of redress, regardless of what the civil service rules would otherwise require. There is no provision in either the civil service rules or the WBA that requires otherwise.

DISCUSSION

Question 1: Does the WBA require, as a prerequisite to filing a civil lawsuit, that a public employee first undergo “voluntary mediation”?

No. In section 21-1-604(a), the WBA states that any “public employee who alleges a violation” of the WBA “may bring a civil action for appropriate injunctive relief or actual damages.”¹ Section -604(a) does not condition the right to sue on the occurrence of mediation. Yet subsection -604(f)(2) states that “[v]oluntary mediation shall occur before a civil action in which the public employee and public employer are parties has been initiated in court.” On its face, the phrase “voluntary mediation shall occur” is a bit confusing. But the confusion is easily resolved when we examine what is meant by “mediation” and the sense in which that mediation is “voluntary.” After explaining these two terms, we will be able to clearly answer your question.

¹ A.C.A. § 21-1-604(a) (Repl. 2004).

To understand what subsection -604(f)(2) means by “voluntary mediation,” we need to examine how those terms are used in subsection -604(f)(1), which introduces them. When section -604(f) uses the term “mediation,” it has a specific type of mediation in mind. This is evident by how “mediation” is used in subsection -604(f)(1):

In the event [that OPM] ... implements an employee grievance mediation program, a public employee or public employer may voluntarily participate in mediation under the office’s mediation program if either one wishes to resolve a dispute between them that involves an adverse action taken against the public employee.

The foregoing provision indicates that when section -604(f) uses the term “mediation,” the term is referring to a very specific type of mediation: the mediation program established by OPM. This is evident in two ways. First, the entirety of subsection -604(f) is premised on the existence of the OPM mediation program: “*In the event* the Office of Personnel Management ... implements an employee grievance mediation program...” (Emphasis added.) Second, assuming that the program exists, the “public employee or public employer may voluntarily participate in mediation *under the office’s mediation program*...” (Emphasis added.)

Further, this type of mediation is “voluntary” in the sense that the public employee has the discretion to initiate it or forgo it entirely. This is evident from subsection -604(f)(1)’s statement that the “public employee or public employer may *voluntarily participate* in mediation [in OPM’s] ... program if either one *wishes* to resolve a dispute between them...” (Emphases added.) This provision makes clear that the employee’s “participation” is “voluntary” in the sense that the participation is entirely dependent on the employee’s “wishes.”

Given the foregoing understanding of the term “voluntary mediation,” we must then ask what subsection -604(f)(2) means when it states that “voluntary mediation shall occur before a civil action ... has been initiated in court.” In my opinion, this provision means that if a given public employee wants to enter OPM’s mediation program, he or she must do so *before* filing suit. Once the lawsuit has been filed, the employee no longer has the option to engage in OPM’s mediation program. Section -604(f) does not require public employees to engage in “voluntary mediation” as a precondition to filing a lawsuit under the WBA.

Question 2: Suppose that a public employee suffers an “adverse action” under the WBA. Suppose further that the civil service rules bar an administrative appeal of that employment action. Does the fact that the civil service rules bar an appeal have any impact on the employee’s ability to file a lawsuit under the WBA?

No. The WBA provides a unique avenue for an employee to seek redress of an alleged wrong. When an employee alleges that he or she has suffered “adverse action” as a result of blowing the whistle, then the employee has the discretion to choose (1) whether to have that action reviewed, and (2) the procedure by which the action is reviewed. That is, the employee has the discretion to choose the WBA as his or her means of redress, regardless of what the civil service rules would otherwise require. There is no provision in either the civil service rules or the WBA that requires otherwise.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,



DUSTIN MCDANIEL
Attorney General

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