MYRON LOGAN, .

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Grievant, .

.

v. . DOCKET NO. 94-RJA-225

.

WEST VIRGINIA REGIONAL .

JAIL AND CORRECTIONAL AUTHORITY, .

.

Respondent. .

D E C I S I O N

This is a grievance by Myron Logan (hereinafter "Grievant"), submitted directly to Level Four of the grievance procedure in accordance with W. Va. Code § 29-6A-4(e), challenging his dismissal from employment by the Regional Jail and Correctional Facility Authority ("RJA"). An evidentiary hearing was conducted at the Board's branch office in Elkins, West Virginia, on July 19, 1994. (See footnote 1) Having carefully reviewed all matters of record and the arguments of the parties, the undersigned concludes Grievant's dismissal must be upheld.

I.

There is little dispute about the salient facts. Because of the legal determinations reached in this case, a complete review of the evidence of record need not be undertaken. Based upon the documentary evidence and testimony elicited at the Level Four hearing, the undersigned administrative law judge makes the following findings of fact.

1. Grievant was employed by the RJA as a Correctional Officer II at the Eastern Regional Jail located in Martinsburg, West Virginia.

2. By letter dated April 5, 1993, Grievant was notified that he had completed his probationary period, that he had met all the requirements of RJA Policy Number 3026, and that he had been granted permanent employee status effective February 18, 1993. Gr. Exh. 1.

3. The RJA adopted a policy governing negative personnel actions in order to promote professionalism and to protect it from liability. RJA Exh. III, Policy Number 3008, effective July 10, 1992. This policy provides, in pertinent part, that the Regional Jail Authority may dismiss or demote a permanent employee for "cause," fifteen days after giving specific written notice of the reasons therefor. The fifteen day notice is not required by the policy when the cause for dismissal is gross misconduct.

4. It was conceded at the Level Four hearing that neither the Policy Manual nor Policy Number 3008 contains a disclaimer stating that the RJA was not bound to adhere to its personnelpolicies.

5. In the early morning hours of February 16, 1994, Grievant was involved in an automobile accident in Hagerstown, Maryland. At that time Grievant was arrested and charged with driving while intoxicated and driving the wrong way on a one-way street. RJA Multiple Documents Exh. No. 6 at pg. 8 (Arresting officer's statement of probable cause). About an hour later Grievant took a type of breath test, the results of which were stated as follows: "Breath specimen was found to contain an alcohol concentration of 0.15 grams of alcohol per 210 liters of breath." RJA Multiple Documents Exh. No. 6 at pg. 6.

6. On May 5, 1994, Grievant submitted an Incident Report to an administrator of the Eastern Regional Jail. This report, paraphrased for readability, stated as follows: On April 21, 1994, I was charged with driving under the influence and going the wrong direction on a one way street in Hagerstown City Court by the city police, after I left a club and had been stopped. I now have to see a probation officer in Hagerstown. I did not get a D.U.I. in court. The judge gave me a PBS to which there is no record of a D.U.I. on my driver's license. The probation officer will send a letter in the mail to the Regional Jail. RJA Exh. No. 4 at pg. 4.

7. By letter dated May 23, 1994, the RJA notified Grievant of his dismissal effective June 10, 1994. The letter lists the rationale and the specific grounds for Grievant's dismissal:

> On May 5, 1994 you submitted an incident report to the Administrator, Mr. Detrick. In your incident report you reported that you had been arrested for driving under the influence and that the date of your arrest for D.U.I.was April 21, 1994. As a result of First Sergeant Wensell's investigation, however, it was found that the actual date of your arrest was February 16, 1994. This represented a seventy-eight (78) day time lapse from when the D.U.I. violation occurred to when it was reported in your incident

report.

Your unprofessional conduct violates the following procedure of the WV Regional Jail & Correctional Facility Authority's Policy and Procedure Statement No. 3010:

Procedure

17. "All employees shall submit required or requested reports in a timely manner and in accordance with applicable regulations. No employee shall falsify reports or documents, or knowingly allow inaccurate or incorrect material or information to be submitted as valid."

18. "All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority or public service."

21. "No employee shall wilfully violate any federal, state, or local law or ordinance."

Additionally, your incident report was not only "untimely" but contained misleading inaccuracies that failed to show the full seriousness of your State law violation.

I feel that your actions and attitude during your tenure at the Eastern Regional Jail demonstrates a apparent disdain for Policy and Procedure, which is reflected is (sic) your disciplinary history. Your prior disciplinary history is described below:

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On 18 April 1992, you reported to work twenty-five minutes late, and had the distinct odor of alcohol on your breath. You were counseled for this conduct.

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On 4 September 1992, you reported to work thirty minutes late, and

> later on that date, you were found asleep at your duty station. You were suspended from duty for five-days for this violation of policy and procedure.
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> .
>
> On 3 December 1992, you were counseled and given aletter of reprimand regarding the improper use of sick leave.
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> The State and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit upon the abilities and integrity of their employees, or create suspicion with reference to their employee's capability in discharging their duties and responsibilities. I believe the nature of your unprofessional conduct is sufficient to conclude that you do not meet a reasonable standard of conduct as an employee of the Eastern Regional Jail, thus warranting this action.

II.

The applicable law governing the dismissal of state employees is now largely free from ambiguity. In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). State employees who are in the classified service (See footnote 2) can 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. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

At the level four hearing and in its post-hearing brief, the RJA contends its correctional officers are classified-exemptemployees who can be dismissed from employment for any reason not violative of public policy or for no reason at all. Grievant does dispute that he is in a classified-exempt position (See footnote 3) or the legal significance of holding such a position. Because Grievant, as discussed below, asserts the RJA's policy manual alters his at-will status, it is necessary to briefly review the legal framework governing the employer-employee relationship in state government. The job

protection rights of state employees who hold positions not within the classified service was discussed at length in Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). (See footnote 4) In Parker, it was recognized that classified exempt employees are at-will employees, meaning they may be dismissed for any reason not contrary to public policy or for any reason at all. Good cause need not be shown. The Court explained the difference between classified employees who hold positions in the merit system and those who do not in Guine, 149 W. Va. at 467, 141 S.E.2d at ___:

> "The basic purpose of the civil service law is to afford to covered employees security of tenure. This protection is offered in our civil service laws and in theregulations adopted ... by the Civil Service Commission [now State Personnel Board]. Employing authorities must comply with such statutes and regulations. Otherwise, the protection intended becomes a nullity and employees supposedly covered are in no better position than those outside of such coverage. They may be required to serve at the whim and will of the employer."

A reading of the law reveals that there are only two ways positions in state government can be added to the classified service. W. Va. Code §§ 29-6-1,2,3,4. First, the legislature can place positions in the classified service or remove positions from such service. Baker v. Civil Service Comm'n, 245 S.E.2d 908 (W. Va. 1978); See Sowa v. W. Va. Dept. of Health and Human Resources, 92-HHR-159 (Sept. 14, 1992)(legislature removed child advocate positions from classified service by passage of W. Va. Code § 48A-2-6(b)(1992)). Second, W. Va. Code § 29-6-4(b) provides a procedure by which the Governor, by executive order, can add (but not remove) positions to the classified service. (See footnote 5) State ex rel. Karnes v. Dadisman, 153 W. Va. 771, 172 S.E.2d 561 (1970). (See footnote 6)

The RJA correctly argues that the legislature has not afforded classified service job protection to its correctional officers. The general powers and duties of the RJA are set forth in W. Va. Code § 31-20-5. Subsection(i) authorizes the RJA to make bylaws for the management and regulation of its affairs pursuant to the State Administrative Procedures Act, W. Va. Code § 29-3A-1 et seq. Subsection (j) simply provides that the RJA has the power "to appoint officers, agents and employees." Obviously, neither provision expressly includes RJA correctional officers in the classified service. The only other pertinent statutory provision is W. Va. Code § 31-20-27(a),(b) (1992), which affords a preference in filling regional jail positions in favor of correctional officers employed in good

standing at a county or local jail facility. It provides that "all correctional officers employed under this subsection shall also be covered by ... the classified-exempt service protection policies of the division of personnel." These statutory provisions do not evince any legislative intent to include RJA correctional officers in the classified service. Indeed, just the opposite deduction follows from the limited status afforded to corrections officers employed under the hiring preference statute.
It therefore must be concluded, consistent with prior rulings of the Grievance Board and the RJA's argument, that Grievant holds a classified-exempt position, rather than a classified position in the merit system, and thus serves at the will and pleasure of the appointing agency. Thompson v. W. Va. Regional Jail and Correctional Facility Auth., Docket No. 94-RJA-139 (July 22, 1994); Roach v. Regional Jail Auth., Docket No. 92-RJA-107 (Oct. 8, 1993). See Wilhelm v. Dept. of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994).

Grievant contends, however, as noted earlier, that the RJA Policy and Procedures Manual, i.e., Policy Number 3008, creates anemployment contract protecting him from dismissal in the absence of "cause," thereby giving him job protection not provided by state personnel laws and regulations, citing Suter v. Harsco Corp., 403 S.E.2d 751 (W. Va. 1991) and Cook v. Heck's Inc. 342 S.E.2d 220 (W. Va. 1977). Grievant also relies on Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977) and Heatwole v. W. Va. Eastern Regional Jail and Correctional Auth., Docket No. 93-RJA-238 (May 31, 1994), for the proposition that governmental agencies must comply with their own rules and policies. (See footnote 7)

The RJA responds by arguing that it fully complied with the policy and established good cause for Grievant's dismissal and, therefore, it is unnecessary to address any policy manual issues. In other words, the RJA contends that even if its policy creates an exception to the at-will status of its correctional officers, the grievance must still be the denied. (See footnote 8)

It is understandable that the RJA would not seek a determination whether it is bound by the policy and would argue that this issue need not be reached. However, because this is a recurring issue of considerable importance to the RJA and its correctional officers, and perhaps other classified-exemptemployees employed by the RJA, the policy manual issues will be addressed.

It is well-established law that a governmental agency must comply with all properly enacted rules and regulations. E.g., Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977). The critical inquiry here is whether Policy Number 3008 is valid and binding. (See footnote 9) The legal structure discussed

earlier and the clear and unmistakable import of the decision by the Supreme Court of Appeals in Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993), necessitates a conclusion that the policy is invalid. In Williams, an assistant attorney general who had served in that capacity for more than twenty-five years was terminated without any stated reason by the newly-elected Attorney General, Charles G. Brown. The Court upheld his dismissal on the basis that assistant attorneys general, by statute, serve at the will and pleasure of the attorney general, and therefore, could be dismissed at any time for any reason. (See footnote 10) The Court also rejected the contention that receipt of fringe benefits, such as health insurance and retirement benefits, altered the at-will employment status of an assistant attorney general.

As germane in this case, the Court concluded that where the appointing authority has the unlimited power of removal, the right to dismiss may not be contracted away so as to bind the appointingbody to retain the employee for a definite period of time. This rationale, that a government agency cannot enter into employment contracts with its employees contrary to the law under which it is authorized to hire and fire employees, is fatal to Grievant's implied contract claim.

The Court also quoted approvingly from cases in other jurisdictions where the question presented was whether a personnel handbook or regulation could give a public employee a property interest in continuing employment. (See footnote 11) Particularly apt here is the following quote from Fiorentino v. United States, 221 Ct.Cl. 545, 552, 607 F.2d 963, 968 (1979):

> It is unfortunately all too common for government manuals, handbooks, and in house publications to contain statements that were not meant or are not wholly reliable. If they go counter to governing statutes ...,they do not bind the government, and persons relying on them do so at their peril. (Emphasis added).

The teaching of Williams is that job protection for state employees is essentially a matter of legislative grace. It is therefore concluded, under the governing statutes and the reasoning in Williams, that the RJA's personnel policy is invalid to the extent it protects correctional officers from dismissal without cause, contrary to the statutes which do not extend such protection. Accordingly, Grievant's policy manual arguments must be rejected.

In view of the foregoing determinations, it is inappropriate to consider whether the RJA established cause under its invalid policy to dismiss Grievant from employment. Grievant makes a

number of additional arguments that have no merit and will be addressed in a summary fashion in the legal conclusions made below. Grievant has made no assertion that his dismissal was precipitated by the exercise of his constitutional rights or that it was motivated by reasons violative of a substantial public policy.

The undersigned administrative law judge reaches the following conclusions of law.

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan.22, 1990); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). In cases involving the dismissal of classified-exempt employees, state agencies do not have to meet this legal standard.

2. Classified-exempt state employees may be dismissed from employment for any reason not violative of the Constitution or a substantial public policy. A classified-exempt employee bears the burden of proving his dismissal was unlawful. Parker, supra.

3. Only the Legislature has the authority to add positions to, and remove positions from, the classified service. Thegovernor, by executive order, may add positions to the classified service pursuant to and subject to the limitations contained in W. Va. Code § 29-6-4(b).

4. The legislature has not included correctional officers employed by the RJA in the classified service. RJA correctional officers are in the classified-exempt service and may be dismissed without cause, or for any reason not prohibited by law or violative of a substantial public policy.

5. A governmental agency must comply with all properly enacted rules and regulations, see e.g., Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977).

6. RJA Policy Number 3008 is, however, invalid to the extent that it is in conflict with the legislative status accorded correctional officers employed by the RJA. It is legally defective and unenforceable at least to the extent that it prohibits the RJA from dismissing correctional officers except for cause.

7. Grievant, not being in the classified service, did not have a property right in his continued state employment and thus was not entitled to any procedural due process protection. See Waite v.

Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977). Grievant was thus not deprived of due process by the RJA raising his at-will status at the beginning of the Level Four hearing, even though his employment status was not referred to in the letter of dismissal.

8. The RJA did not violate any provision of the state employees grievance procedure statute, W. Va. Code § 29-6A-1 etseq., in dismissing Grievant from employment and in defending that action in this proceeding.

9. The "rational nexus" requirement established in Syllabus Point 2 of Golden v. Bd. of Educ. of Harrison County, 285 S.E.2d 665 (W. Va. 1981), and adhered to in subsequent cases, is not applicable to, and does not limit or constrain, the right of a government agency to dismiss an at-will state employee for off-duty misconduct. (See footnote 12)

10. Grievant, as an at-will employee, cannot challenge his dismissal on the grounds of "discrimination" under W. Va. Code §29-6A-2(d), by attempting to show other employees who engaged in substantially similar misconduct were not disciplined or were not disciplined so severely as he. Wilhelm v. Dept. of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994)

11. The RJA did not act arbitrarily or capriciously in dismissing Grievant from his employment.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal mustbe 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. Any 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.

RONALD WRIGHT

Administrative Law Judge

Dated: November 29, 1994

Footnote: 1 This case became mature for decision on August 31, 1994, upon receipt of the post-hearing briefs from the parties. In addition to the testimony adduced at the hearing, the Authority introduced eight exhibits and Grievant

introduced four exhibits. After the hearing the RJA, at the direction of the undersigned, submitted most of its Policy and Procedures Manual, which has been marked as Grievant's exhibit Number 6.

Footnote: 2 "Classified service" is defined by W. Va. Code § 29-6-2(g) as "an employee whose job satisfies the definition for 'class' and 'classify' and who is covered under the civil service system[.]"

Footnote: 3 W. Va. Code § 29-6-2(g) defines "classified-exempt service" to mean an employee whose position satisfies the definitions for "class" and "classify" but who is not covered under the civil service system.

Footnote: 4 As noted in Parker, "[i]n West Virginia, the law presumes employment to be terminable at will... . The burden is on the party contending that the relationship [is] other than terminable at will to rebut the presumption of employment terminable at will." Suter v. Harsco Corp., 403 S.E.2d 751 (W. Va. 1991). Accordingly, it appears that Grievant in this case bears the burden of proving that his employment status falls within some exception to the general at-will rule.

Footnote: 5 Subsection 4(c), however, specifically exempts numerous offices and positions from coverage in the classified service, such as employees of the governor, the legislature and constitutional officers.

Footnote: 6

Footnote: 7 Heatwole is distinguishable from the instant case. There, certain disciplinary procedures established by the RJA were not complied with, but the procedural violations were found to be harmless error. Here, in contrast, the validity of RJA's policy is the critical issue.

Footnote: 8 The RJA frames the issue as being whether "the procedure of a state agency is superseded by subsequent state law." It does not appear that W. Va. Code § 31-20-27 (1992) was enacted after Policy Number 3008 was adopted, but this would not seem to have any legal significance.

Footnote: 9 There was no allegation or evidence of an executive order extending civil service protection to correctional officers.

Footnote: 10 The Court did note that at-will government employees cannot be terminated for exercising certain constitutional rights.

Footnote: 11 It has been long recognized that State employees in the classified service have a property interest arising out of their legal entitlement to continued uninterrupted employment such that they are vested with certain constitutional rights. Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977).

Footnote: 12 Syllabus Point 2 of Golden contains the following standard:

> *In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of*

the job and the duties the employee is to perform."