**WILLIAM R. WILLIS,**

**Grievant,**

**v.** **DOCKET NO. 97-MHST-136**

**WEST VIRGINIA BUREAU OF COMMERCE, OFFICE OF MINER'S HEALTH, SAFETY AND TRAINING,**

**Respondent.**

**D E C I S I O N**

On March 17, 1997, William R. Willis (Grievant) filed this grievance directly at Level IV pursuant to W. Va. Code § 29-6A-4(e), contesting his dismissal from employment by Respondent Office of Miner's Health, Safety and Training (OMHST), effective March 18, 1997. On March 26, 1997, OMHST submitted a Motion to Dismiss this grievance pursuant to § 4.11 of the Procedural Rules of the W. Va. Education & State Employees Grievance Board, 156 C.S.R. 1 (1996), alleging Grievant had not stated a cause of action upon which relief can be granted. See Wilhelm v. W. Va. Lottery, 479 S.E.2d 602 (W. Va. 1996) (hereinafter Wilhelm v. Lottery). Pursuant to an Order dated April 2, 1997, Grievant responded to the Motion to Dismiss, alleging that his "liberty" interests have been affected through the effect upon his reputation from the allegations upon which his dismissal was based.

On April 24, 1997, a hearing was conducted in this Grievance Board's office in Charleston, West Virginia, allowing the parties to develop the record in regard to OMHST's Motion to Dismiss. Evidence admitted at that hearing was limited to the issue of Grievant's right to an evidentiary hearing on the merits of his grievance. See Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. W. Va. Lottery, supra (hereinafter Wilhelm v. T & R). The merits of the allegations were not addressed. As agreed at the conclusion of the hearing, the parties were afforded an opportunity to file written arguments in support of their respective positions. Timely

pleadings were received from both parties by May 9, 1997. (See footnote 1)

**BACKGROUND**

Grievant was advised of his employer's intent to terminate his employment in a letter from OMHST Director Stephen F. Webber dated March 3, 1997. J Ex 1. This notice was sent to Grievant's home address by certified mail as Grievant was then on sick leave. The letter contains the following statements pertinent to resolution of this grievance:

> The purpose of this letter is to advise you of my decision to dismiss you from employment and to provide you with a fifteen (15) day advance notification of dismissal. Your dismissal will be effective March 18, 1997. Though you are exempt from the classified service and administrative rules pertaining to dismissal, I nevertheless wish to advise you of my reasons for this action and to provide you with an opportunity to respond to the matters addressed within the corners of this letter.
>
> The specific reasons for this action are your insubordination, and your not meeting a reasonable standard of conduct by violating state purchasing procedures, the ethics act, and your use of fraudulent schemes or fraudulent devices addressed by the criminal provisions of the West Virginia Code. Each of the reasons will be addressed individually in the following so that you may discern the seriousness and extent of your misconduct:
>
> * * *
>
> In evaluating the degree of deviation of your conduct from acceptable behavior, I note the following: you converted 1995 and 1996 State Mine Rescue Contest funds to your and other's use, you failed to account for the funds and you attempted to divert public funds, which were appropriated for the purchase of safety equipment, to the use of others by use of fraudulent schemes or devices. I have discovered language in the West Virginia Code that appears to describe your conduct. The Code referenced is shown on the attached chart along with an example of what I believe to be related misconduct.
>
> * * *
>
> You have the opportunity to either meet with me in person or present me with a written explanation of the reasons why you think the facts contained in this letter are in error and why you may think this action is inappropriate, providing you do so within the fifteen (15) day notice period.
>
> For any appeal rights you may have, please refer to W.Va. Code §29- 6A-4(e). If you choose to exercise your appeal rights, you must submit your grievance directly to

> the State Employee's Grievance Board at 808 Greenbrier Street, Charleston, WV, 25311, within ten (10) working days of the effective date of this action. Copies of your grievance should be forwarded to my office and the Director of the Division of Personnel.

J Ex 1. (See footnote 2)

As indicated in the Order setting the hearing on Respondent's Motion to Dismiss, the merits of these allegations are not presently before the undersigned. Indeed, for purposes of ruling on Respondent's Motion to Dismiss, it may be presumed that the allegations contained in the foregoing notice of termination are false and withoutfoundation. See Arnett v. Kennedy, 416 U.S. 134 (1974). Thus, the sole issue presented at this juncture involves whether Grievant established an entitlement to pre-termination or post-termination due process to accommodate his "liberty" interests. Accordingly, based upon a preponderance of the evidence presented at the hearing, the following Findings of Fact are made in this matter.

**FINDINGS OF FACT**

1. Beginning in January 1989, Grievant was employed by Respondent Office of Miners' Health, Safety and Training (OMHST) in the West Virginia Bureau of Commerce as its Administrator of Mine Rescue and Training.

2. Grievant's position is classified exempt making him an "at-will" employee of OMHST.

3. Stephen Webber is the Director of OMHST, and serves as Grievant's immediate supervisor.

4. Following completion of the 1996 West Virginia State Mine Rescue Contest, Mr. Webber began conducting an investigation in late November 1996 regarding some irregularities relating to finances and unauthorized purchases.

5. In the course of his investigation, Mr. Webber met with Grievant on December 30, 1996, and questioned him regarding the allegations contained in the notice of termination, with the exception of the allegation that Grievant had authorized purchase of hunting clothes with funds earmarked for safety equipment and apparel. Mr. Webber explained the charges which had arisen to that point, and gave Grievant an opportunity to respond. Prior to that meeting, Mr. Webber had not decided whether or not Grievant's termination was warranted. Grievant denied any wrongdoing. 6. At the conclusion of their December 30, 1996 meeting, Grievant was instructed by Mr. Webber to provide an accounting for certain funds that had been expended in regard to the contest. On January 7, 1997, Grievant provided written documentation which partially accounted for the funds in question.

Mr. Webber completed his investigation in late January 1997.

7. Sometime prior to March 3, 1997, Mr. Webber informed members of the Governor's Transition Team that he was conducting an investigation into alleged illegal and unethical conduct involving Grievant and mine safety contest funds.

8. On March 3, 1997, Mr. Webber sent the termination letter reprinted in Appendix A to Grievant by certified mail.

9. Prior to March 18, 1997, a copy of the termination letter was given to Arthur Shumate, OMHST's Administrator for Finance and Personnel, Robert Reintsema, Secretary of the West Virginia Bureau of Commerce, and Mr. Webber's immediate supervisor, and Joe Smith, Assistant Director for Employee Relations in the West Virginia Division of Personnel, who assisted Mr. Webber in drafting the termination notice. Otherwise, only state employees with a "need to know" were shown a copy of the termination letter. See R Ex 2.

10. Prior to receiving his termination letter on March 6, 1997, Grievant received telephone calls from two individuals who advised that they had heard he had been discharged. One of those persons, Boyd Vance, had been told by other employees of OMHST that Grievant was being terminated. Mr. Vance was reprimanded by Mr. Webber for conduct related to the allegations against Grievant involving the purchase of hunting clothes. 11. On March 17, 1997, Grievant submitted a grievance contesting his termination to the West Virginia Education and State Employees Grievance Board.

12. Grievant's dismissal became effective on March 18, 1997. See J Ex 1; R Ex 2.

13. On March 29, 1997, the following article appeared in Fanny Seiler's column in the Charleston Gazette:

> Bolts Willis, who brought embarrassment to the Caperton Administra tion from time to time, left the Miners' Health Safety and Training Office on March 18. He was an environmental resource program manager and was making $56,724 in the Civil Service-exempt position. (R Ex 1.)

14. OMHST will retain indefinitely the termination letter with Grievant's personnel records maintained by the agency.

15. If, at some point in the future, an inquiry about Grievant's prior employment were received by Mr. Webber, he would advise that Grievant was terminated for not following state purchasing policies and improper handling of state funds.

16. Although Grievant was on authorized sick leave between March 3 and March 18, 1997, he was not physically or mentally incapacitated so as to be unable to respond appropriately to the termination notice.

**DISCUSSION**

W. Va. Code § 29-6A-4(e) provides that "[a]n employee may grieve a final action of the employer involving a dismissal . . . directly to the hearing examiner." W. Va. Code § 29-6A-2(e) defines "employee" as "any person hired for permanent employment . . . by any department, agency, commission or board of the state created by an act of the Legislature . . . ." Thus, although Grievant serves at the will and pleasure of OMHST because he isclassified exempt, he is nonetheless an "employee" within the meaning of W. Va. Code §§ 29-6A-2(e) and 29-6A-4(e). See Wilhelm v. T & R, supra; Bonnell v. W. Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

Grievant stipulates that he is a classified-exempt employee, thereby serving as an at-will employee. See Roach v. Regional Jail Auth., 482 S.E.2d 679 (W. Va. 1996); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). Grievant argues that his "liberty" interests represent a substantial public policy entitling him to protection under the ruling of the West Virginia Supreme Court of Appeals in Harless, supra.

Nothing in the pleadings or evidence presented indicates that Grievant has articulated a claim that his termination was motivated by any conduct protected by a "liberty" interest, such as political expression or freedom of association. See, e.g., Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967). Instead, Grievant is asserting that his "liberty" interest in his reputation is protected by a substantial public policy which warrants a post- termination hearing to clear his name. See Bishop v. Wood, 426 U.S. 341 (1976); Norton v. Macy, 417 F.2d 484 (D.C. Cir. 1969); Wilhelm v. Lottery, supra; Waite v. Civil Service Comm'n, 161 W. Va. 159, 241 S.E.2d 164 (1978). A liberty interest is grounded in the due process clauses of the United States Constitution, and the West Virginia Constitution, which prohibit deprivation of a person's life, liberty or property without due process of law. U.S. Const., Amendment

5; W. Va. Const., Art. III, Sec. 10. A liberty interest has been further defined as "the interest an individual has in being free to move about, live and work at his chosen vocation without the burden of an unjustified label of infamy." Waite v. Civil Service Comm'n, 161 W. Va. 159, 241 S.E.2d 164, 167 (1978). See Bd. of Regents v. Roth, 408 U.S. 564 (1972). Moreover, "a liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities." Waite, supra, at 167-68.

In Wilhelm v. Lottery, supra, the West Virginia Supreme Court of Appeals dealt with an employee who was discharged because of a "loss of confidence in your ability to effectively [sic] discharge the duties and responsibilities of your position." Id. The Court concluded that this reason did not "reach the level of stigmatization which would foreclose future employment opportunities or seriously damage . . . [the individual's] standing and associations in the community." Id., citing Waite, supra. In Wilhelm, there was extensive public disclosure of the stated reason for the employee's dismissal. However, that reason was determined not to implicate any liberty interest. Id.

OMHST relies on the holding of the West Virginia Supreme Court of Appeals in Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985), that "an unexplained termination or discharge from employment does not create a sufficient stigma to invoke a liberty interest protection." Id. In Freeman, several at-will sheriff's deputies were replacedby deputies of the new sheriff's choosing. The court noted that there were "no charges against any of the appellants that might seriously damage their associations in the community or place a stigma or other disability on them that would foreclose future employment opportunities." Id. at 423. OMHST contends that since the reasons contained in the termination letter were only shared with Grievant and other state agencies, such as the Division of Personnel, on a need-to-know basis, there has been no "public disclosure" which would allow Grievant to invoke any right to post-termination due process based upon any purported "liberty" interests. See Freeman, supra, at 423. See also Bishop v. Wood, 426 U.S. 341 (1976); Bunting v. City of Columbia, 639 F.2d 1090 (4th Cir. 1981).

The undersigned administrative law judge concludes that under the current state of the law in this state, a grievant must demonstrate that any reasons given for his termination implicating his liberty interests were disseminated to an extent that the accusations would be "likely to have severe repercussions outside his work world." Wilhelm v. Lottery, supra, citing Waite, supra (emphasis in

original). In particular, the United States Supreme Court's holding in Bishop v. Wood, supra, is persuasive. In that case, the reasons for the plaintiff's termination were communicated to the employee, but not otherwise disseminated until after a civil action was filed. The court specifically noted that simply because the employee alleged that the charges were false did not entitle him to a hearing. Bishop, supra, at 348- 49. Indeed, Poling suggests that the charges must be made public before the individual's reputation can be significantly affected. Accord, Ratliff v. City of Milwaukee, 795 F.2d 612, 626 (7th Cir. 1986); Hogue v. Clinton, 791 F.2d 1318, 1322 (8th Cir. 1986); Wells v. Doland, 711 F.2d 670 (5th Cir. 1983). But see Guard v. Kilburn, 5 Ohio St.3d 21, 448 N.E.2d 1153, cert denied, 464 U.S. 893 (1983). In this matter, the reasons stated for Grievant's dismissal include fraudulent diversion and misappropriation of state funds which OMHST indicates could be treated as criminal felonies. See J Ex 1. Thus, the reasons given for discharge are substantially different from the reason stated in Wilhelm. General dissemination of those reasons to the public would unquestionably implicate Grievant's liberty interests. However, there is no evidence that OMHST made the reasons for Grievant's dismissal public prior to March 17, 1997, when this grievance was filed. (See footnote 3)

Grievant testified that two people became aware of his impending termination before he received his termination notice. However, Grievant did not demonstrate that these individuals were aware of the specific reasons for his termination, nor that their information regarding his termination came from someone in authority at OMHST. Indeed, Grievant refused to identify one of the individuals sufficiently to permit a determination of whether this individual might have legitimate access to such information. This so-called dissemination would not support a defamation action, and does not rise to the level of dissemination required to conclude that OMHST's actions have impacted Grievant's liberty interests. See Stalnaker v. Only One Dollar, Inc., 188 W. Va. 744, 426 S.E.2d 536 (1992).

It must be noted that in Wells v. Doland, supra, at 676-77, the Court made it clear that reinstatement and/or back pay would not be appropriate remedies for a claimed infringement of a liberty interest. Given the prior holding of the West Virginia Supreme Court of Appeals in Williams v. Brown, supra, it does not appear that this Grievance Boardis the proper forum for Grievant to pursue his claimed liberty interests in any event. At best, Grievant might "prevail" by obtaining a determination that the charges against him were without merit; however, as that would simply represent "no reason" for his termination, he may nonetheless be terminated without cause as he is

an at-will employee. Id.

Notwithstanding this reservation regarding this Grievance Board's authority to adjudicate this element of the parties' dispute, it is hereby concluded that the notice issued to Grievant on March 3, 1997, provided an appropriate pre-termination opportunity to respond to the charges sufficient to satisfy the requirements for pre-termination due process. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994). As a public employee whose position is terminable at the will of the employer, Grievant is not entitled to post-termination due process as his liberty interests were not harmed in the context of his termination by OMHST. See Bishop, supra; Wilhelm v. Lottery, supra; Freeman, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

## CONCLUSIONS OF LAW

1. Unless an at-will employee alleges a "substantial contravention of public policy," his termination cannot be challenged through the grievance procedure. Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. W. Va. Lottery, 479 S.E.2d 602 (W. Va. 1996). See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16,1994); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

2. "Courts are rather uniform in holding that an unexplained termination or discharge from employment does not create a sufficient stigma to invoke a liberty interest protection." Syl. Pt. 5, Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985).

3. Although the reasons provided Grievant for his termination involve allegations of fraudulent diversion and misappropriation of state funds, those reasons were not disseminated to the public prior to the filing of this grievance so as to implicate Grievant's legitimate "liberty" interests under the United States and West Virginia Constitutions. See Bishop v. Wood, 426 U.S. 341 (1976); Wells v. Doland, 711 F.2d 670 (5th Cir. 1983); Wilhelm v. W. Va. Lottery, 479 S.E.2d 602 (W. Va. 1996); Freeman, supra.

4. Grievant was provided the required level of pre-termination due process. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402

(1994).

Accordingly, this grievance is **DISMISSED**.

Any party 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. Any appealing party must advise this office of theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: June 9, 1997**

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*Footnote: 1*

*On May 14, 1997, Grievant submitted "Grievant's Supplemental Brief in Support of Administrative Hearing." On May 15, 1997, OMHST filed "Respondent's Reply to Grievant's Supplemental Brief," properly objecting to Grievant's pleading relating to matters which transpired after the hearing, and without a proper request to supplement the record after the close of the agreed briefing period. Accordingly, none of the information contained in these pleadings will be considered in ruling upon Respondent's Motion to Dismiss.*

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*Footnote: 2*

*The full text of this document is attached hereto as Appendix A.*

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*Footnote: 3*

*Disclosures compelled in this or other proceedings of a judicial or quasi-judicial nature are not considered in this analysis, because Grievant must have suffered some "injury" to his liberty interest as of the time his action is initiated. See Bishop v. Wood, 426 U.S. 341, 348 (1976); Laureano-Agosto v. Garcia-Caraballo, 731 F.2d 101, 104 (1st Cir. 1984).*