SONNY MASSEY,

Grievant,

v. **Docket No. 99-PSC-313**

WEST VIRGINIA PUBLIC SERVICE COMMISSION,

Respondent.

D E C I S I O N

On July 28, 1999, Sonny Massey (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 29-6A-4(e)(2), challenging his dismissal by Respondent West Virginia Public Service Commission (WVPSC). Following a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on September 28 and 29, 1999. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on November 9, 1999, following receipt of the last of the parties' written post- hearing arguments. Consistent with the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

Grievant was employed by WVPSC as a Utility Inspector I. Grievant was hired on November 1, 1997, and placed in a classified-exempt position. Grievant generally performed his assigned duties in a satisfactory manner, and had not been the subject of any disciplinary action until the events which gave rise to this grievance came to the attention of WVPSC management. On July 16, 1999, (See footnote 2) WVPSC Chairman Charlotte Lane notified Grievant, in writing, that he was being suspended without pay. The pertinent portion of that correspondence stated the following:

> The purpose of this letter is to advise you of my decision to suspend you without pay from your position of Utility Inspector I with the West Virginia Public Service

> Commission. This suspension is being issued pending the outcome of an investigation into allegations that you solicited and accepted bribes from several commercial motor vehicle drivers and/or carriers, and until an administrative determination is made concerning your fitness to serve as a utility inspector, at which time your employment may be terminated. Your suspension from work is effective immediately.
>
> Considering that your position is one of public trust, I believe the public interest is best served by suspending you from employment, without pay, until these allegations are resolved.
>
> If the allegations contained within this letter are determined to be unfounded, or if an administrative determination finds you fit to serve as an inspector, you will be compensated for the period of suspension and the record purged of any documentation thereof; however, if it is determined that the allegations are true, or you are otherwise found not to be fit to serve as an inspector, then disciplinary action may be taken. You will be advised of further action, if any, that may be taken regarding your employment with the Public Service Commission.

J Ex 1. Subsequently, on July 22, 1999, Chairman Lane notified Grievant that his employment was being terminated. The portion of that notice pertinent to this grievance stated as follows:

> The purpose of this letter is to inform you of my decision to dismiss you from your employment with the Public Service Commission.
>
> The dismissal will be effective August 13, 1999, providing you with a fifteen day calendar notice period. The reason for this personnel action is your inappropriate solicitation of money from several commercial motor vehicle drivers and/or carriers. Specifically, several drivers for various companies have alleged that you requested and took, or tried to take, money from them in lieu of issuing citations or inspection reports relating to various problems which you alleged existed concerning their vehicles.
>
> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the Public Service Commission, thus warranting this dismissal.
>
> I wish to offer you an opportunity to either meet with me in person or present to me

> a written explanation of why you believe this action is unwarranted. If you choose either to meet with me or present a written response, please contact me prior to the effective date of this dismissal.

J Ex 2.

In disciplinary 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 disciplining an employee. W. Va. Code § 29-6A-6(e); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the suspension or dismissal of classified-exempt, at-will employees, stateagencies do not have to meet this legal standard. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

Although the majority of WVPSC's employees are in the classified service, the Legislature has given WVPSC authority to hire a limited number of employees into classified-exempt positions. See W. Va. Code § 24A-6A-14(b). Grievant was hired outside regular civil service procedures and occupied one of those positions up until the time of his dismissal. R Ex 3. Grievant suggests he was unlawfully placed in a classified- exempt position, because WVPSC had no authority to place him in such a position. Although Grievant made no effort to challenge his classified-exempt status until after his employment was terminated, (See footnote 3) Grievant's claim that WVPSC should have assigned him to the classified service will be briefly addressed.

W. Va. Code § 24A-6A-14(b) provides: “The commission is further authorized to employ ten persons, who shall be in the classified-exempt service, to facilitate enforcement of duties imposed upon the commission in this chapter.” W. Va. Code, Chapter 24A, is entitled “Motor Carriers of Passengers and Property for Hire.” W. Va. Code § 24A-1-1 provides:

> It is hereby declared to be the purpose and policy of the Legislature in enacting this chapter to confer upon the public service commission of West Virginia, in addition to all other powers conferred and duties imposed upon it by law, the power, authority and duty to supervise and regulate the transportation of persons and property for hire by motor vehicles upon or over the public highways of this state so as to: (a) Protect the safety and welfare of the traveling and shipping public in their use of transportation agencies by motor vehicle; (b) preserve, foster and regulate transportationand permit the coordination of transportation facilities; (c) provide the traveling and shipping public transportation agencies rendering stabilized service at just and reasonable rates. This chapter shall apply to persons and motor vehicles engaged in interstate commerce and to private commercial carriers by motor vehicle as defined in section two [§ 24A-1-2] of this article, to the extent permitted by the constitution and laws of the United States.

As argued by Respondent, this language is sufficiently broad to cover Grievant, a Utility Inspector I charged with enforcing “laws governing private commercial carriers and commercial motor vehicles,” as well as “federal motor carrier safety regulations.” R Ex 1. There is no indication in the statute that one or all of the ten classified-exempt positions authorized is reserved for personnel hired in a policy-making or supervisory capacity. Moreover, the authority of the Legislature to establish classified-exempt positions is not restricted to those employees who have policy-making responsibilities, or function solely in a supervisory capacity. See, e.g., W. Va. Code § 31-20-27. Therefore, Grievant's complaint that he was improperly hired and retained (See footnote 4) in a classified-exempt status is without merit.

Of course, Grievant's status as a classified-exempt employee has significant implications on his legal rights under the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., because employees holding positions which are exempt from coverage under the classified service are considered “at-will” employees. Roach v.Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996). In West Virginia, the legal doctrine of at-will employment generally allows an employer to discharge an employee “for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). This doctrine also applies to state employees. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996); Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

Nonetheless, an employee's firing may be illegal if it was done for a reason that contravenes a substantial public policy. 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). In Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the West Virginia Supreme Court of Appeals identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d

624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations [Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992)], refusing to conceal alleged environmental violations committed by the employer [Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)], filing a workers' compensation claim [Shanholtz v. Monongahela Power Co., 165W. Va. 305, 270 S.E.2d 178 (1980)], attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act [Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)], and testifying as a witness in a civil action against the employer [Page v. Columbia Natural Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996)], as involving substantial public policy interests. Moreover, this Grievance Board has recognized that reporting alleged violations of the West Virginia Governmental Ethics Act [Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA- 225 (Dec. 23, 1991)], or specific allegations that the termination decision was based on a prohibited consideration such as the employee's sex [Bellinger v. W. Va. Dep't of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996)], will warrant application of a Harless-type analysis to the dismissal of an at-will state employee.

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 served at the will and pleasure of WVPSC because he was classified-exempt, he was nonetheless an "employee" within the meaning of W. Va. Code §§ 29-6A-2(e) and 29-6A-4(e). Willis v. W. Va. Bureau of Commerce, Docket No. 97-MHST-136 (June 9, 1997). See Wilhelm v. Dep't of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. W. Va. Lottery, supra; Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). At-will employeesmay grieve their termination on the basis that some substantial public policy has been violated. Hendricks, supra; Bellinger, supra.

Beyond his claim that he should have been employed in the classified service, (See footnote 5) the only substantial public policy interest which Grievant has articulated is his liberty interest under Article 3, § 10 of the West Virginia Constitution. Grievant correctly notes that the West Virginia Supreme

Court of Appeals has ruled that “[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 v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978).

In Wilhelm v. W. Va. 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.

WVPSC contends that because no evidence was presented that the employer publicly disclosed the fact that Grievant had been terminated, or the reasons for histermination, there has been no public disclosure of the charges, which is an essential element for establishing a protected “liberty” interest. See Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). Accord, Bishop v. Wood, 426 U.S. 341 (1976). This Grievance Board has previously determined that a grievant must demonstrate that any reasons given for his termination which would implicate his liberty interests must have been disseminated to an extent that the accusations would be "likely to have severe repercussions outside his work world." Willis, supra, citing Wilhelm v. Lottery, supra. (emphasis in original). Accord, Carter v. W. Va. Dep't of Tax & Revenue, Docket No. 98- T&R-038 (July 20, 1998), aff'd, Cir. Ct. of Kanawha County, No. 98-AA-118 (Oct. 14, 1999). In reaching this conclusion, the United States Supreme Court's holding in Bishop, supra, was particularly compelling. 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 the charges were false, this did not entitle him to a hearing. Id. Indeed, Freeman suggests 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).

Based upon Grievant's failure to establish the required element of dissemination, no “liberty”

interest protected by the due process clause of the West Virginia Constitution, or the United States Constitution, has been implicated by this dismissal action, and thisGrievance Board has no legal basis on which to review the merits of Grievant's termination from employment. (See footnote 6)

Grievant also complains he was denied due process of law in that he was not provided adequate notice of the charges against him and an opportunity to respond, before he was suspended without pay, and subsequently terminated. However, as an at-will employee, WVPSC was not obligated to give Grievant any reason for his dismissal. Roach, supra; Williams, supra. Indeed, given the suspension notice (J Ex 1), the termination notice (J Ex 2), and his two-day post-termination hearing before this Grievance Board, Grievant has been provided all the due process to which he is reasonably entitled as an at-will employee. See Roach, supra; Wilhelm, supra. Similarly, Grievant's complaint that he was not afforded notice in accordance with the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 12 (1998), is without merit because this Grievance Board has concluded that those procedures governing disciplinary actions do not apply to at-will state employees. Dye v. W. Va. Dep't of Educ., Docket No. 99-DOE- 217 (Sept. 16, 1999).

Because Grievant contends that he should have been included in the classified service as of the time he was terminated, and the parties presented extensive evidence on the merits of the charges against Grievant, this decision will also address these matters. For purposes of reviewing the merits of the charges, WVPSC will be treated as having the burden of establishing the charges by a preponderance of the evidence, as ifGrievant were in the classified service. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievant's version of events substantially differed from the events described by several other witnesses. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate,

reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the ALJ should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Therefore, it is necessary to discuss certain aspects of this matter in detail. As noted earlier, since he was hired by WVPSC in the classification of Utility Inspector I on November 1, 1997, Grievant had been a productive and trusted employee, successfully completing his six-month probationary period and receiving satisfactory evaluations for his work performance. Grievant's working title was “PSC Motor Carrier Enforcement Officer,” a uniformed law enforcement officer who carried a firearm in the course of his duties of enforcing state laws and federal safety regulations governing private commercial carriers and commercial motor vehicles. Grievant was generally considered a model inspector until June 18, 1999.

It was on June 18 that Grievant's immediate superior, Bobert L. Hatfield, a Supervisor in the WVPSC Motor Carrier Section, returned a phone call to Sgt. S. A. Lawrence with the West Virginia State Police in Huntington, West Virginia. Sgt. Lawrence had received a telephonic complaint from James Blackwood, Safety Director for Malone Van Lines, reporting that one of his drivers, Bobby Newberry, had alleged that he was solicited for a $20 bribe by Grievant at the westbound Department of Transportation (DOT) weight station on Interstate Highway 64 (I-64) near Winfield, West Virginia, on June 16, 1999.

On June 18, 1999, Mr. Hatfield spoke with Messrs. Blackwood and Newberry by telephone, and confirmed the details of their allegations against Grievant. Subsequently, on June 22, 1999, Mr. Hatfield returned a call from Kevin P. Mullen, Director of Safety for Advanced Distribution System, Inc., of Columbus, Ohio. Mr. Mullen advised that one of his truck drivers, Bobby Hall, had reported being solicited for a $100 bribe by Grievant, while being inspected at the westbound scales on I-64 on June 19, 1999. On June 24,1999, Mr. Hatfield met with Sgt. Lawrence in Huntington to discuss the allegations received to date.

On July 2, 1999, Mr. Hatfield returned a call from Elijah Rapp, owner of Warehouse Services Plus in Lebanon, Ohio. Mr. Rapp relayed a complaint from one of his drivers, Kenneth Foster. Mr. Foster

alleged that Grievant inspected his truck at the Bluestone Plaza on the West Virginia Turnpike segment of I-77, and solicited a $75 bribe not to place Mr. Foster “out of service.” When Mr. Foster gave Grievant a $100 bill, Grievant was alleged to have said, “You won't be getting any change,” keeping the $100 bill as a bribe. Mr. Hatfield requested a written statement from Mr. Foster, which was subsequently provided.

Prior to these allegations surfacing, Mr. Hatfield believed Grievant was an honest person and a good worker. As Grievant's immediate supervisor, Mr. Hatfield had frequently told Grievant he was doing a good job. However, Mr. Hatfield did recall that another Inspector, Bob Mathis, had told him Grievant had requested food and refreshments from an unidentified trucking company when they were conducting an on-site motor carrier inspection. (See footnote 7) Ordinarily, WVPSC policy prohibits solicitation or acceptance of any gratuities from companies or individuals being inspected. There was no effort to follow up on this report.

On July 7, 1999, Frank Crabtree, Director of the WVPSC Transportation Division, directed Charles N. Cook, a retired State Police Officer currently employed as a UtilityInspector III in the WVPSC Transportation Division, to investigate the allegations against Grievant. (See footnote 8) Mr. Cook interviewed the complaining individuals either in person or by telephone, and obtained notarized statements from a number of witnesses, including Shannon Newberry, Bobby J. Newberry, and Bobby Hall. The statement of one other complaining driver, Kenneth Foster, was witnessed, but not sworn and notarized. A fourth driver who made a verbal complaint, Ray Moreland, did not provide Mr. Cook with a written statement.

Mr. Cook reported the results of his inquiry to Mr. Crabtree on July 15, 1999. R Ex 4. Based on this report, WVPSC Chairman Lane suspended Grievant without pay the following day. J Ex 1.

Bobby Hall, a resident of Grayson, Kentucky, testified at the Level IV hearing that he was the owner-operator of a tractor-trailer leased to Advanced Distribution Systems of Columbus, Ohio, to haul a variety of commodities. On June 19, 1999, he stopped at the Winfield Scales on the westbound side of I-64, where his rig was inspected by Grievant. After a cursory look at Mr. Hall's vehicle, Grievant asked Mr. Hall to get in his cruiser. After Mr. Hall sat down in the front passenger seat of Grievant's vehicle, Grievant told Mr. Hall that he was going to be there for a while, and asked Mr. Hall what it would be worth to get out of there. Mr. Hall responded by stating that Grievant appeared to have him“between a rock and a hard place,” and for Grievant to tell him what it would

take. Grievant asked Mr. Hall if he could stand $100, and Mr. Hall paid Grievant with a $100 bill.

Mr. Hall then returned to his truck, and tied down some loose boards which Grievant had appropriately noted as a violation, while Grievant inspected under the hood of the truck. Grievant placed a new truck inspection sticker on the windshield of Mr. Hall's truck, and told Mr. Hall he was free to go, but he should tear up the paperwork he had been issued, and keep his mouth shut about what had transpired. Despite this admonition, Mr. Hall reported the incident to Kevin Mullen, Director of Safety for Advanced Distribution Systems, the company to which Mr. Hall's rig was leased.

On July 15, 1999, Jarrell Sargent, a Utility Inspector I with WVPSC, was working at the Winfield scales with Grievant. Mr. Sargent observed a truck driver for Rex N Don Van Lines, James Parm, in the process of strapping down a trailer being transported upon another trailer, and offered his assistance in securing the tie-down straps. The driver asked Mr. Sargent how long he had been working as an Inspector. Mr. Sargent replied, “Long enough.” The driver said, “What would you say if I told you this guy offered to let me go for $100?” Mr. Sargent responded, “You must be mistaken. You must have misunderstood.” The driver replied, “You guys stick together.” The driver then reiterated that Grievant had told him that if the Department of Transportation employees in the weight station had observed his insecure load, he could be fined up to $100 for that violation. At that point, Mr. Sargent just walked away.

A short time later, Grievant approached Mr. Sargent and asked him what he had been talking about with the truck driver. Mr. Sargent told Grievant that the driver had saidGrievant had attempted to obtain a bribe. Grievant responded that the driver was crazy, and all that he had said to the driver was, “If those scale people saw that your load is not secure, it could cost you up to $100.” Thereafter, Grievant informed the driver in Mr. Sargent's presence that he was mistaken about what Grievant had said. However, Mr. Sargent observed that the driver still appeared to be visibly upset.

Later that day, Mr. Sargent reported the incident to his supervisor at the WVPSC. Based upon this report, Mr. Crabtree directed Mr. Cook to conduct another investigation. In addition to the incident involving Grievant and Mr. Parm on July 15, Mr. Cook looked into a complaint from David Carroll of Dublin, Ohio, that an unidentified Inspector solicited a $50 bribe from him on July 13, 1999, at the Winfield scales, and a more specific complaint against Grievant by Steven Adkins. Mr. Adkins' allegation involved a $20 bribe Grievant supposedly obtained from him at the Winfield scales on June 17, 1999. Mr. Cook obtained sworn and notarized statements from Messrs. Parm, Carroll and Adkins.

Mr. Cook submitted his report on these additional incidents to Mr. Crabtree on July 21, 1999. R Ex 5. Consistent with instructions from Mr. Crabtree, Mr. Cook did not interview Grievant to obtain his response to any of the allegations. Following receipt of Mr. Cook's report, Chairman Lane issued Grievant's termination notice on July 22, 1999. J Ex 2.

WVPSC presented testimony from Steven Adkins, the truck driver from Rupert, West Virginia, who was stopped for inspection on June 17, 1999, on the westbound side of I-64 at the Winfield Scales. Mr. Adkins described how Grievant inspected his vehicle. When Mr. Adkins got out of his truck after the inspection was completed, Grievant showedhim that his truck inspection sticker was expired, and he had a worn tire on his trailer. Grievant invited Mr. Adkins to get in his cruiser.

Once they were seated in the cruiser, Grievant explained to Mr. Adkins that the expired inspection sticker would cost “a lot of money,” and he did not know what the tire would cost, but it should all “be worth a steak dinner.” Grievant completed the inspection forms and told Mr. Adkins to put $20 in the map pouch built into the door on the passenger side of the cruiser. Mr. Adkins put $20 in the pouch, got back in his truck, and drove away. While attending church services near his home the following Sunday, Mr. Adkins reported the incident to First Sergeant L. P. Mullins, a West Virginia State Trooper who attends the same church. Mr. Adkins was subsequently interviewed by Mr. Cook.

Robert Mathis, called as a witness by Grievant, testified that he worked extensively with Grievant, as he was assigned to train Grievant in his duties at the time of his initial employment. Mr. Mathis described Grievant as an individual who performed his duties in a dedicated manner, and asserted that he saw no conduct which would suggest Grievant might do anything improper. Nonetheless, on cross-examination he acknowledged that truck drivers had approached him on two separate occasions, and reported that Grievant had solicited a bribe. The most recent incident involved a claim that Grievant had solicited a quantity of anti-freeze in exchange for letting the driver go. Mr. Mathis reported this allegation to Mr. Hatfield. However, this complaint was not received until after Grievant had been terminated.

Ordinarily, formal rules of evidence, excepting the rules of privilege recognized by law, are not applied in grievance proceedings. Therefore, hearsay evidence is generallyadmissible. Lanham, supra; Perdue, supra. See W. Va. Code § 29-6A-6; Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administra tive law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. Cook v. W. Va. Div. of

Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997). See Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96- 24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarants' out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). See Borninkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

WVPSC presented hearsay statements from five truck drivers who alleged that they were victims of Grievant's efforts to solicit bribes. Although these statements were generally not in formal affidavit form, they were sworn and notarized. None of these witnesses are residents of West Virginia. Therefore, they are outside the subpoenaauthority of this Grievance Board and were not reasonably available to testify in person in behalf of WVPSC. Their statements were consistent with other objective facts, including the inspection forms which Grievant completed and signed when he checked over their vehicles. R Ex 2. In addition, the statements were internally consistent, and described encounters with Grievant which were generally similar to the situations described by Messrs. Hall and Adkins, without being so alike as to create an inference of conspiratorial cooperation. In fact, the hand-written statements are extremely detailed, and are written in independent styles which supports WVPSC's contention that the authors were genuine victims of Grievant's misconduct as a public official.

Further, the one complaint that was different was that of Mr. Parm, who refused to pay Grievant anything. This incident was also unique in that the complaint was initially and contemporaneously directed to a co-worker, Mr. Sargent. Although Grievant claimed this was all a misunderstanding, Mr. Sargent, who was called as Grievant's witness, recalled Grievant stating that he told the driver he could be fined by Department of Transportation personnel working at the scales, substantially the

same statement attributed to Grievant by Mr. Parm. Grievant testified at Level IV that he told Mr. Parm that he could issue a citation for the missing tie-down straps. Mr. Sargent noted that Department of Transportation employees at the scales had no authority to issue a citation for such an infraction. Indeed, in the absence of a state, county, or local law enforcement officer at the scales, Grievant, or some other WVPSC Inspector, were the only ones who had the proper authority to issue a citation for such an infraction. In regard to the specifics of this incident, Mr. Sargent's testimony at Level IV was consistent with the statement he provided to Mr. Cook on July 19, 1999, four days following the alleged incident. Grievant recalled that, when he was called to the Charleston office on July 16, 1999, Mr. Sargent told him, “If you need anything about yesterday's incident with that trucker, let me know. I will back you.” Mr. Sargent has been employed as an Inspector long enough to recognize the limits of authority for Department of Transportation personnel. The undersigned finds that Mr. Sargent's version of the facts surrounding the July 15 incident at the Winfield scales was more credible than Grievant's version of those events. Further, this leads to an inference that Grievant was being less than honest with the truck driver about the situation, and this was part and parcel of an effort to solicit a bribe from the driver.

Beyond denigrating truck drivers generally as having animosity toward WVPSC inspectors, there was no evidence that any of these particular witnesses was generally untruthful, or had any specific motive to fabricate evidence against Grievant. Accordingly, the undersigned finds that the hearsay statements of other alleged victims may properly be considered for purposes of corroborating the Level IV testimony of Messrs. Hall and Adkins. In addition, the testimony of Mr. Sargent, relating the complaint of Mr. Parm, tends to support WVPSC's allegations.

As for Messrs. Hall and Adkins, their Level IV testimony was completely candid and forthright. The version of events they described at the hearing was substantially consistent with their previous written statements. Their demeanor was appropriate for someone in their situation. There was no credible evidence that they had any prior involvement withGrievant so as to have a motive to falsely accuse him of misconduct. Likewise, it was not shown that either of them had any previous contact with any WVPSC officials who might hold a grudge against Grievant.

Grievant responded to the termination notice in correspondence dated August 4, 1999. Grievant questioned the adequacy of the notice issued on due process grounds. G Ex D. Grievant denied having committed any act that was illegal or dishonest. At Level IV, Grievant testified in his own

behalf, denying all of the allegations. In addition, he presented the testimony of a friend and fellow church member, Heber H. Vealey, who vouched for Grievant's reputation for truth and veracity, as well as his own opinion that Grievant was completely honest and trustworthy. This opinion was consistent with the testimony of Grievant's superiors and co-workers who indicated that they were genuinely surprised that he would engage in misconduct of this nature.

Grievant's testimony at Level IV was particularly emphatic that he was not being treated fairly by his employer. Grievant was candid and animated in discussing his belief that the employer was motivated to grasp any opportunity to terminate him because he had gone directly to Chairman Lane, jumping the chain of command, when he was not issued appropriate uniforms and equipment after he was employed in 1997. Likewise, Grievant was very forthright in contending that he had not been given proper notice and an impartial investigation before he was fired. Indeed, Grievant asserted that, until WVPSC presented its evidence at the Level IV hearing, he had “assumed” that the only reason he was being terminated was the July 15, 1999 incident with Mr. Parm, as witnessed by Mr. Sargent, at the Winfield Scales. However, when it came to addressing the merits of the actual charges, Grievant responded in a more reserved manner, making only brief denials in answer to specific questions from his counsel. When compared with the completely credible testimony of Messrs. Hall and Adkins, as corroborated by the testimony of Messrs. Sargent and Mathis, as well as the admissible hearsay statements of Mrs. Newberry and Messrs. Parm, Newberry, and Carroll, the undersigned finds that Grievant's denial of soliciting and accepting bribes is not credible. WVPSC established by a preponderance of the evidence that Grievant solicited and accepted bribes from Bobby Hall and Steven Adkins while acting in the course of his law enforcement duties as a Utility Inspector I.

Grievant's actions in soliciting and accepting bribes from individuals working in the industry he was responsible for inspecting constitutes “misconduct of a substantial nature directly affecting the rights and interest of the public.” Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). Accordingly, even if Grievant is entitled to treatment as an employee in the classified service, or is entitled to a hearing on the merits of the allegations to protect his “liberty” interests, WVPSC established by a preponderance of the evidence that it had good cause to terminate his employment.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Public Service Commission [WVPSC] as a Utility Inspector I. 2. Grievant was initially employed on November 1, 1997, in a classified-exempt position. Prior to his dismissal on August 13, 1999, Grievant did not take any action to challenge his status as a classified-exempt employee.

3. As a Utility Inspector I, Grievant's working title with the WVPSC was “PSC Motor Carrier Enforcement Officer.” In that capacity, Grievant was a uniformed officer, carrying a firearm and driving a state vehicle equipped as a police cruiser. Grievant's duties included responsibility for enforcing state and federal laws and regulations regarding regulation of commercial motor vehicle safety.

4. On June 17, 1999, Grievant, while acting in the scope of his duties as a WVPSC Utility Inspector I at the Winfield Scales on Interstate Highway 64 (I-64), solicited and received $20 from Steven Adkins, a self-employed tractor-trailer operator, after observing that Mr. Adkins had an expired inspection sticker on his truck and a worn tire on his trailer.

5. On June 19, 1999, Grievant, while acting in the scope of his duties as a WVPSC Utility Inspector I at the Winfield Scales on I-64, solicited and received $100 from Bobby Hall, an owner-operator of a tractor trailer leased to Advanced Distribution Systems of Columbus, Ohio, after threatening Mr. Hall with an indefinite detention for failing to secure some loose boards on his trailer.

6. Prior to June 18, 1999, when the first allegation of solicitation of a bribe was conveyed to Grievant's immediate supervisor, Robert L. Hatfield, by Sergeant S.A. Lawrence of the West Virginia State Police, Grievant's supervisors and co-workers had no reason to question Grievant's work habits and integrity. Up until that time, allindications were that he was completing his duties in a highly satisfactory manner. G Exs A, B, & C.

7. On July 16, 1999, following an investigation by Charles Cook, a WVPSC Utility Inspector III, into allegations by Mr. Hall and three additional truck drivers that Grievant had solicited bribes from them in exchange for overlooking various infractions, WVPSC Chairman Charlotte Lane issued written notice to Grievant suspending him without pay for soliciting and accepting bribes “from several commercial vehicle drivers and/or carriers.” R Ex 4; J Ex 1.

8. On July 22, 1999, after a supplemental investigation by Mr. Cook into allegations by Mr.

Adkins and two other truck drivers, one of whom, James Parm, had complained to a co-worker, Utility Inspector I Jarrell Sargent, Chairman Lane issued written notice to Grievant advising that he was being terminated, effective August 13, 1999, for “inappropriate solicitation of money from several commercial motor vehicle drivers and/or carriers.” R Ex 5; J Ex 2.

9. In her correspondence dated July 22, 1999, Chairman Lane offered Grievant an opportunity to respond in writing or to meet in person for the purpose of providing an explanation as to “why you believe this action is unwarranted.” J Ex 2. Prior to the correspondence advising Grievant of his suspension and proposing his dismissal, Grievant was not questioned by Mr. Cook or any other WVPSC employee. Grievant responded in writing to the dismissal notice, denying the charges, but did not request a personal meeting with Chairman Lane. G Ex D. 10. At no time prior to this appeal did WVPSC disseminate to the public that Grievant had been dismissed, or the reasons for Grievant's dismissal.

CONCLUSIONS OF LAW

1. In suspension and 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 suspending or terminating the employee. Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). See W. Va. Code § 29-6A-6. However, in cases involving the suspension or termination of classified-exempt, at-will employees, state “agencies do not have to meet this legal standard.” Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. Classified-exempt employees are not covered under the civil service system and serve in an at-will employment status. Shriver v. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-359 (Mar. 29, 1999); Hendricks, supra; Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

3. At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

4. Unless an at-will employee alleges a "substantial contravention of public policy," his termination cannot be challenged through the grievance procedure. Wilhelm v. Dep't of Tax &

Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996). See Harless v. First Nat'l Bank,169 W. Va. 673, 246 S.E.2d 270 (1978); Willis v. W. Va. Bureau of Commerce, Docket No. 97-MHST-136 (June 9, 1997).

5. The provisions in Section 12 of the Administrative Rule promulgated by the West Virginia Division of Personnel, 143 C.S.R. 1 § 12 (1998), are not applicable to disciplinary actions taken against classified-exempt employees. Dye v. W. Va. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999).

6. Harm is a prerequisite before an at-will employee can require a due process hearing to protect the employee's liberty interest in his or her good name. Carter v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-038 (July 20, 1998), aff'd, Cir. Ct. of Kanawha County, No. 98-AA-118 (Oct. 14, 1999). See Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978).

7. To show a requisite degree of harm to implicate his or her liberty interests, a grievant must demonstrate that the reasons given for his or her termination were disseminated to an extent that the accusations would be “likely to have severe repercussions outside [his or her] work world.” Wilhelm v. W. Va. Lottery, supra, citing Waite, supra; Carter, supra; Willis, supra.

8. Although the reasons for Grievant's termination involve allegations of solicitation and acceptance of bribes in the course of performing his official duties inspecting public motor carriers, 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); Carter, supra; Willis, supra.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 13, 1999

Footnote: 1

Grievant was represented by counsel, Cynthia Evans. Respondent was represented by its General Counsel, Richard E. Hitt.

Footnote: 2

Although the suspension letter is dated July 15, 1999, testimony at the Level IV hearing indicated that the letter was not given to Grievant until the following day, July 16, 1999.

Footnote: 3

The ultimate logic of Grievant's position is that he was hired illegally. Thus, his standing to challenge his termination for any reason is open to question.

Footnote: 4

There was some evidence presented to indicate that WVPSC is in the process of converting classified-exempt Utility Inspector I's to the classified service, and that many of Grievant's co-workers were initially hired into the classified service, or had since been augmented into the classified service. It was not established that Grievant was not eligible for assignment to the classified service. However, there was no probative evidence that Grievant was improperly denied classified status under the procedures WVPSC was following to convert its Utility Inspector I's.

Footnote: 5

This allegation does not involve any recognized substantial public policy. See Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). See generally, Birthisel, supra.

Footnote: 6

Given the holding of the West Virginia Supreme Court of Appeals in Williams, supra, the issue of whether this Grievance Board represents the appropriate forum for an at-will employee to vindicate his "liberty" interests has yet to be clearly resolved.

Footnote: 7

Although Mr. Mathis was subsequently called as a witness by Grievant, he was not questioned about this hearsay statement related by Mr. Hatfield.

Footnote: 8

At the time Grievant was hired by the WVPSC in 1997, Mr. Cook conducted a routine "background investigation" into Grievant's suitability for employment in a law enforcement position. That investigation revealed no information to indicate that Grievant was not a proper candidate for employment in that capacity.