JOHN SHRIVER,

Grievant,

v. **DOCKET NO. 98-RJA-359**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,
SOUTHWESTERN REGIONAL JAIL,

Respondent.

D E C I S I O N

On August 31, 1998, John Shriver (Grievant) filed a grievance at Level II pursuant to W. Va. Code §§ 29-6A-1, et seq., challenging his dismissal from employment by Respondent Regional Jail and Correctional Facility Authority (RJA). Following denial of his grievance, Grievant appealed to Level III where an evidentiary hearing was conducted on September 9, 1998. The Grievance Evaluator, Todd J. Chafin, denied the grievance in a decision issued on September 11, 1998. Grievant appealed to Level IV on September 18, 1998, and a Level IV hearing was scheduled for October 11, 1998. On October 7, 1998, RJA filed a Motion to Dismiss. Shortly thereafter, the Level IV hearing was continued at the request of Grievant's counsel. (See footnote 1) On November 23, 1998, a telephonic pre-hearing conference was conducted regarding RJA's Motion to Dismiss. (See footnote 2) At the conclusion of that conference, the parties agreed to submit written arguments in support of their respective positions. Grievant's brief was received on December 17, 1998, and RJA's reply brief was received on January 4, 1999. This matter became mature for decision on March 11, 1999, upon receipt of the Level III transcript and exhibits.

BACKGROUND

Through its Motion to Dismiss, RJA contends that, because Grievant is an at-will, classified-exempt employee, and he has not challenged his termination on the grounds that it is contrary to any

established public policy, he has failed to state a claim upon which relief can be granted at Level IV. Grievant was advised that RJA intended to terminate his employment in a letter from RJA Chief of Operations Jimmy B. Plear dated August 20, 1998. Ex 1 to RJA's Motion to Dismiss. This notice contains the following statements pertinent to resolution of this grievance:

> As you are aware, you were recently administered the Reid Public Safety Report, which is used by this Authority to meet the requirements for psychological testing of Correctional Officers (95 CSR1).
>
> We have received the results of your test and, unfortunately, the overall evaluation was “Not Recommended” for employment. As a result of this recommendation, we have no choice but to discharge you from your employment as a Correctional Officer II at the Southwestern Regional Jail, effective at the end of your shift on Friday, September 4, 1998 which represents the required fifteen (15) calendar day notice period. You may work out your notice period, however you are not required to do so. In anyevent, you will be paid for all unused leave to your credit as of your last working day with this agency.
>
> Should you disagree with this action or have documentary evidence to dispute this action, you should contact me in writing or in person no later than 1500 hours on Monday, August 31, 1998.
>
> For any appeal rights that you may have, please refer to West Virginia Code §29-6A-4 (e) or Document #3032 of the West Virginia Regional Jail and Correctional Facility Authority's Policy and Procedure Manual. If you choose to exercise your rights you may submit your written grievance directly to the State Employees Grievance Board at 808 Greenbrier Street, Charleston, West Virginia, 25311, within ten (10) working days of the effective date of this action. Further, as provided in state statute you have the option of initiating your grievance with your Level II Grievance Evaluator, John L. King, Administrator of the Southwestern Regional Jail. Copies of your grievance should be forwarded to the Executive Director, Steven D. Canterbury.

The Procedural Rules of the West Virginia Education and State Employees Grievance Board permit an administrative law judge to dismiss a grievance if no claim upon which relief can be granted is stated. 156 C.S.R. 1 § 4.11 (1995); Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996) (hereinafter “Lottery”). Although the Rules of Civil Procedure do not apply to proceedings before this Grievance Board, this motion will be treated as if it were filed under Rule 12(b)(6). Lottery, supra. Accordingly, 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 without foundation,

and any allegations made by Grievant are true. Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n, 190 W. Va. 214, 438 S.E.2d 6 (1993); Willis v. W. Va. Bureau of Commerce, Docket No. 97-MHST-136 (June 9, 1997). See Arnett v. Kennedy, 416 U.S. 134 (1974). Thus, the sole issue presented at this juncture involves whether Grievant is entitled to proceed to an evidentiary hearing at Level IV to challenge the merits and methodology of the psychological test he allegedly failed. Consistent with this approach, based upon the evidence Grievant presented at the Level III hearing, and any inferences to which Grievant is properly entitled in ruling upon RJA's Motion to Dismiss, the following Findings of Fact are made in this matter.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Regional Jail and Correctional Facility Authority (RJA or Respondent) as a Correctional Officer II on April 1, 1998. All correctional officers are classified-exempt pursuant to W. Va. Code § 31-20-27.

2. Pursuant to the West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails, 95 C.S.R. 1 § 4.2 (1996), all jail facility personnel who have direct contact with inmates are required to undergo psychological testing prior to their employment, and when a justifiable need exists during their employment, to determine their suitability for appointment and retention.

3. West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement No. 3004 provides that all applicants for employment in a facility operated by the Authority for positions which involve direct contact with inmates must undergo a psychological examination as part of the selection process. State's Ex 1 at L III.

4. West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement No. 3027 provides that successful completion of a psychologicalevaluation prior to appointment, and at anytime required during employment, is a condition of employment for all correctional officers. State's Ex. 4 at L III.

5. Grievant was previously employed by the Logan County Jail. On November 20, 1997, Steven D. Canterbury, RJA's Executive Director, advised Grievant, in writing, that he would be granted priority in hiring at the Southwestern Regional Jail, provided he successfully completed a psychological test, physical agility test, physical examination, and a background check, prior to or following his employment. State's Ex. 3 at L III.

6. On August 7, 1998, Grievant was administered the Reid Public Safety Report, a psychological test, and the reported result from that test was “Not Recommended.”

7. On August 20, 1998, Grievant was notified in writing by Jimmy B. Plear, RJA's Chief of Operations, that he was being discharged from employment based upon the results of the psychological test.

DISCUSSION

W. Va. Code § 29-6A-4(e) provides that "[a]n employee may grieve a final action of the employer involving a dismissal . . . ." 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 RJA because he is classified exempt, he is nonetheless an "employee" within the meaning of W. Va. Code §§ 29-6A-2(e) and 29-6A- 4(e). Willis, supra. See Wilhelm v. Dep't of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994) (hereinafter “Wilhelm”), aff'd sub nom Wilhelm v. W. Va. Lottery, 198 W. Va. 92,479 S.E.2d 602 (1996); Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

In suspension or termination 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, 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).

Grievant does not dispute that he was a classified-exempt employee, thereby serving in an at-will employment status. See Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996); Ramos v. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-363 (Jan. 29, 1999); 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. Roach, supra; 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). In this

regard, our Supreme Court of Appeals has declared:

> The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Court 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.

West Virginia 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., 165 W. 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. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at- will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996)].

For purposes of ruling on RJA's Motion to Dismiss, it will be presumed that the Reid Public Safety

Report administered to Grievant is invalid in that it either fails to accurately evaluate candidates for employment, is not a valid testing instrument for purposes of conducting a psychological evaluation, or was not properly administered to Grievant. Grievant asserts that there is a public policy in West Virginia which requires that only correctional staff who can pass a psychological examination may be employed in positions involving direct contact with inmates.

Assuming for the sake of argument that there is a substantial public policy relating to psychological testing of correctional staff, that policy was not established for the benefit of the employees. Rather, after examining the decisions of the West Virginia Supreme Court of Appeals in State ex rel. K.W. v. Werner, 161 W. Va. 192, 242 S.E.2d 907 (1978), and Harrah v. Leverette, 165 W. Va. 665, 271 S.E.2d 322 (1980), it is apparent that this public policy is derived from the prohibition against cruel and unusual punishment in the Eighth Amendment to the Constitution of the United States, and inures to the benefit of inmates, and the general public, but not correctional officers. Thus, if the Reid Public Service Report fails to screen out correctional employees who are inclined to abuse inmates, instead compelling termination of other guards who pose no threat of misconduct, the appropriate party to rely upon this public policy to challenge the validity of the testwould be an inmate with appropriate standing. See generally Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994); Birthisel, supra.

Simply alleging that the psychological test which triggered his termination is flawed or unreliable is insufficient to obtain a post-termination hearing at Level IV on the merits of such a claim. Ramos v. Regional Jail & Correctional Auth., Docket No. 98-RJA-363 (Jan. 29, 1999). See Bishop v. Wood, 426 U.S. 341 (1976); Williams, supra; Willis, supra. However, Grievant also makes the following observation in a footnote in his Brief in Opposition to Motion to Dismiss:

> Correctional officers are also protected from discrimination under West Virginia Code §§ 29-6A-2(d) and (i) as well as West Virginia Code § 5-11-1, et seq, which prohibits discrimination on the basis of race, religion, color, national origin, ancestry, sec (sic), age, handicap or familial status. Without a full hearing to determine the test content, scoring and interpretive data, which (sic) can only **assume**, for argument purposes, that the test unlawfully discriminates against one or more of the protected class of individuals found in the West Virginia Human Rights Act. Better yet, maybe it even discriminates against veterans, like the Grievant. However, since the test has not been produced or the persons administering the tests questioned, it is very difficult to specify other public policies which may have been violated. (emphasis in original)

It is apparent from this statement that, although Grievant would like to allege some form of

prohibited discrimination under one of the public policy statutes cited, Grievant does not presently have a substantial basis upon which to allege a violation of any particular statute. Grievant suggests that if he is allowed to delve deeply enough into the development, makeup, and application of this particular psychological test, he will presumably find some form of disparate impact he can allege. This is substantially similar to the general claim of “discrimination” which this Grievance Board refused to allow inWilhelm, which refusal was upheld by the Supreme Court of Appeals in Lottery. Significantly, Grievant has not alleged that there is any causal connection between his status as a veteran, or any other protected category in which he may fall, and RJA's decision to terminate his employment. See Wilhelm, supra.

Grievant further asserts that the reasons given for his termination place a stigma or other disability upon him for purposes of obtaining future employment, thereby implicating a significant liberty interest which warrants a name-clearing opportunity at Level IV of the grievance procedure. In Waite v. Civil Service Commission, 161 W. Va. 154, 241 S.E.2d 164 (1978), the West Virginia Supreme Court of Appeals discussed what type of allegations may trigger certain due process requirements by impacting on an individual's “liberty interest.” (See footnote 3)

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 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." Syl Pt. 2, Waite, supra. 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 hiscommunity or places a stigma or other disability on him that forecloses future employment opportunities." Waite, supra.

However, as noted in Lottery, the Court in Waite explained that “an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty interest.” Lottery, supra, quoting from Waite, supra. The only “accusation” against Grievant is that he received a score of “Not Recommended” after being administered the Reid Public Safety Report. There was no allegation that this result was disseminated outside the immediate workplace before

this grievance was filed. See Willis, supra. See generally Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985). As a matter of law, the undersigned is unable to conclude that the specific allegation in Grievant's termination notice is likely to have severe repercussions outside Grievant's work world. Lottery, supra; Waite, supra.

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

CONCLUSIONS OF LAW

1. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Ramos v. Regional Jail & Correctional Auth., Docket No. 98- RJA-363 (Jan. 29, 1999); Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). 2. 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).

3. 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); 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).

4. Grievant's dismissal did not violate or contravene any substantial public policy. See Ramos, supra.

5. "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).

6. Grievant did not demonstrate that he had either a protected property interest or liberty interest at stake in this dismissal.

Accordingly, this grievance is **DISMISSED**.

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 transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 29, 1999

Footnote: 1

For administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge on November 4, 1998.

Footnote: 2

Grievant was represented by counsel, Joan G. Hill, with Crandall, Pyles, Haviland & Turner in Logan, West Virginia. Respondent RJA was represented by Assistant Attorney General Chad M. Cardinal.

Footnote: 3

Waite also addressed "property" interests, but no such interests are implicated here because Grievant is an at-will employee.