SUSAN RAMOS,

Grievant,

v. **Docket No. 98-RJA-363**

REGIONAL JAIL AND CORRECTIONAL FACILITY

AUTHORITY/SOUTHWESTERN REGIONAL JAIL,

Respondent .

D E C I S I O N

Grievant, Susan Ramos, grieves her termination from the Southwestern Regional Jail for failure to pass the required psychological exam. The requested relief was reinstatement to her prior position. This grievance proceeded through the lower levels where it was denied. This grievance was appealed to Level IV, and Respondent filed a Motion to Dismiss asserting Grievant was a classified-exempt employee, and her termination had not violated any substantial public policy, thus she was not entitled to a grievance hearing. In response to this Motion, a phone conference was held on November 6, 1998, and the parties were allowed to argue their positions both verbally, and later, in writing. The last of these written arguments was received on December 1, 1998, at which time this case became mature for decision. (See footnote 1)

After a complete review of the record in its entirety and the detailed arguments of the parties, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Prior to her classified-exempt, probationary employment with the West Virginia Regional Jail and Correctional Facility Authority ("RJA ") Grievant was employed by the Mingo County Sheriff's Department for seven years. All correctional officers are classified-exempt pursuant to W. Va. Code § 31-20-27. Grievant was a probationary employee at the time of her termination.

2. On November 20, 1997, Grievant received a letter from Steven Canterbury, Executive Director of RJA notifying her that by March 1998, the Mingo County inmates would be part of RJA.

He also noted non-probationary correctional officers in good standing would be "offered priority employment within the approved staffing plan at the new facility . . . the Southwestern Regional Jail." He noted that all applicants were required to meet certain conditions of employment, including successfully completing a psychological test before they would be qualified for employment. (See footnote 2)

3. RJA's Policy No. 3004 states:

> All applicants for employment in a facility operated by the Authority for positions which involve direct contact with inmates shall undergo a psychological examination as part of the selection process. The examination is designed to determine an applicant's integrity, honesty, propensity for dependence upon alcohol or drugs, potential for violence and general aptitude for correctional employment.

4. RJA's Policy No. 3027 contains the Job Descriptions for the employees at

RJA, and one of the conditions of employment for correctional officers is:

> Successful completion of a psychological evaluation prior to appointment and at anytime required during employment.

5. The West Virginia Minimum Standards for the operation of jails found in 95 C.S.R. 1 mandates that all employees who have direct contact with inmates are required to pass successfully a psychological examination.

6. The West Virginia Supreme Court of Appeals has mandated the psychological testing of correctional officers in Harrah v. Leverette, 165 W. Va. 665, 271 S.E.2d 322 (1980). See Goad v. W. Va. Div. of Corrections, Docket No. 95-CORR-068 (Mar. 20, 1995).

7. On April 1, 1998, Grievant was employed by RJA as a classified-exempt, probationary correctional officer.

8. On August 20, 1998, Grievant was given the psychological examination utilized for employees at RJA, the Reid Public Safety Report.

9. Grievant did not successfully pass the psychological examination and was rated as "Not Recommended" for employment with RJA pursuant to the test results.

10. On August 21, 1998, Mr. Jimmy Plear, Chief of Operations, wrote Grievant notifying her of the test results and her resulting discharge from employment. She was given the required fifteen day notice.

11. Grievant agrees the only reason she was dismissed from employment was her failure to pass successfully the psychological examination.

Issues and Arguments

Respondent's Motion to Dismiss points out Grievant was a classified-exempt employee who was discharged due to her failure to meet a condition of employment, the successful completion of the psychological examination. He notes that Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993), held that an at-will, classified-exempt employeemay be discharged for "no reason" or a "bad reason" unless a substantial public policy is violated. He asserts that no substantial public policy has been violated here; thus, the case should be dismissed without a Level IV hearing, pursuant to the holding in Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, 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).

Grievant agrees she is a classified-exempt employee, but argues she should be allowed to have her own expert in Williamson, West Virginia, review the test to see if it could be in some way discriminatory. Grievant agrees there was no violation of a substantial public policy, and that Grievant was not fired because of whistle-blowing, race, religion, or any of the other improper reasons stated below.

Discussion

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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). How ever, 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). Indeed, an at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. 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). See also Wilhelm, supra. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public 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). At-will employees may be terminated for good cause, bad cause, or no cause. Williams, supra.

However, even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia 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, supra. Subsequently, in Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 377, 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.

Courts have recognized such actions 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 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 (Powell v. Wyoming Cable Co., 184 W. Va. 700, 403 S.E.2d 717 (1991)); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)); and attempting to enforce warranty rights granted under the WestVirginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)), as involving substantial public policy interests. See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994). Moreover, this Grievance Board has recognized that reporting alleged violations of the West Virginia Governmental Ethics Act warrants application of a Harless-type analysis to dismissal of an at-will state employee. Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Here, Grievant has not alleged her termination contravened any substantial public policy. She has only indicated she should have the right to attack the results of the test, if her expert finds it is a "bad" test. This argument does not rise to the level of a substantial public policy. Additionally, Grievant

states she has been harmed by RJA's action and should have a right to grieve her termination, because her future employment opportunities will be affected by her failure to pass the psychological examination.

Grievant indicated there may be a property interest and a liberty interest involved. "A 'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Id. at Syl. Pt. 3, in part. Non-classified, at-will employees do not have a property interest in continued employment because they do not have a legitimate claim of entitlement to the position. Deputy Sheriff's Ass'n v. County Comm'n, 180 W. Va. 43, 376 S.E.2d 626, 627-29 (1988). Thus, Grievant has no property interest in her continued employment.

"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,at Syl. Pt. 2, in part. "[A]n 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." Id. at 167- 168.

Respondent has not accused Grievant of wrongdoing. The dismissal letter stated Grievant had failed to meet the conditions of employment set out prior to hiring. Using the standard outlined in Waite, this language does not belittle Grievant's worth and dignity so as to foreclose future employment opportunities. See, Parker, supra. The West Virginia Supreme Court of Appeals in Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985), held that "an unexplained termination or discharge from employment does not create a sufficient stigma to invoke a liberty interest protection." Further, this Grievance Board has ruled that 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." Willis v. Office of Mining, Health, and Safety, Docket No. 97-MHST-136 (June 9, 1997). See also Wilhelm v. Lottery, supra, citing Waite, supra (emphasis in original). Respondent did not disseminate information about Grievant's discharge to anyone else.

Since there has been no contravention of a substantial public policy, Grievant ,as an at-will employee, is not entitled to a grievance hearing. The reason for her discharge was failure to pass the

psychological examination.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In cases involving the suspension or dismissal of classified-exempt, at-will employees, state agencies do not have to meet the burden of proof for the disciplinary action. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. 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). See also Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, 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).

3. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public 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).

4. 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).

5. Grievant's dismissal did not violate or contravene any substantial public policy.

6. Grievant did not demonstrate that she had either a property interest or a 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. 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.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: January 29, 1999

Footnote: 1

Grievant was represented by Attorney Jane Moran, and Respondent was represented by Chad Cardinal, Assistant Attorney General.

Footnote: 2

Grievant testified she had taken and passed a psychological examination in 1993, and RJA would have accepted these results if they could be verified. Despite the efforts of both parties, these test results could not be found, and therefore could not be considered.