GLORIA HOLMES,

Grievant,

v. **Docket No. 99-BOD-044**

BOARD OF DIRECTORS/WEST VIRGINIA

STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Gloria Holmes, alleges she was improperly terminated by West Virginia State College ("WVSC") and states:

> Grievant's employment with West Virginia State College in the Health Center was terminated by Orlando W. Lewis, Assistant VP of Student Affairs Administration "no later that June 30, 1998". This termination was handled in a highly irregular manner, was not authorized by the proper W. Va. State College officials and does not satisfy the administrative and legal requirements for such a termination. This grievance is addressed to Dr. Hazo W. Carter, Jr. and said Orlando W. Lewis. By filing of this grievance, Grievant does not relinquish any other legal rights she may have in the matter. Grievant is requesting she be reinstated and made whole in every way.

This grievance was filed on July 10, 1998, and a Level I response denying the grievance, was issued by Mr. Lewis on July 21, 1998. (See footnote 1) A Level II hearing was held on December 4, 1998, and this grievance was denied at Level II on January 13, 1999. Level

III was waived, and Grievant appealed to Level IV. A hearing was held on March 10, 1999, at which time only testimony and evidence to address Respondent's Motion to Dismiss was received, as a decision on this issue could be dispositive of the grievance. This casebecame mature for decision on April 27, 1999, after receipt of Respondent's

proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent argues the grievance should be dismissed on two grounds: 1) the grievance was untimely filed; and 2) as Grievant was an at-will employee, she could be terminated at any time with or without reasons, with thirty days notice. Grievant argues that because she was treated during her employment like a classified employee, she in essence became a classified employee, and thus, she was improperly terminated and is entitled to a grievance hearing. Additionally, Grievant avers Mr. Lewis could not dismiss her because the contract she signed was with President Carter, and he was the only individual who could terminate her employment. (See footnote 3) She also argues she did not know she was a classified exempt or at-will employee.

Findings of Fact

1. Grievant began employment with WVSC in April of 1995 as a Nurse/Health Educator. R. Ex. No. 1. In order for Grievant to receive a higher salary than allowed by the classification, she was hired as a classified-exempt employee. (See footnote 4)

2. In July 1996, Grievant signed her yearly Notice of Appointment. This Notice of Appointment stated Grievant's appointment was as an " Interim Registered Nurse as a non-classified employee for the period July 1, 1996 through June 30, 1997 at an annualized salary of $26,903 . . . ." This Notice of Appointment also noted her position was "an Administrative appointment to serve at the will and pleasure of the President and the appointment can be terminated by either party on thirty (30) days written notice." This Notice of Appointment also indicated

Grievant was expected to be knowledgeable about the rules and polices of the college system. Level IV, G. Ex. No. 1. Emphasis in the original.

3. On June 27, 1997, Grievant signed her next yearly Notice of Appointment. This Notice of Appointment stated Grievant's appointment was as a " Registered Nurse at West Virginia State College as a non-classified employee effective July 1, 1997. Your annualized base salary will be of $28,353 . . . ." This Notice of Appointment also noted her position was "an Administrative appointment to serve at the will and pleasure of the President and the appointment can be terminated by either party on thirty (30) days written notice." This Notice of Appointment again indicated Grievant was expected to beknowledgeable about the rules and polices of the college system. Level III, R. Ex. No. 18. Emphasis in the original.

4. Grievant was a classified-exempt employee at WVSC, and she served at the will and pleasure of her employer.

5. During her tenure with WVSC Grievant received two letters of warning. Neither of these was grieved. On May 5, 1998, after receiving complaints about an incident in the Health Center, Dr. Ervin Griffin, Vice-President of Student Affairs, notified Grievant she would be placed on paid administrative leave, while he conducted an investigation into the alleged problems. Grievant was informed she would be given an opportunity to respond prior to any personnel action being taken.

6. On May 5, 1998, Grievant was personally handed this notice by Dr. Griffin, and Grievant discussed several other issues of concern with him.

7. Before the termination of any employee can take place, the employee's supervisor must discuss the situation with President Carter.

8. On May 8, 1998, Dr. Griffin, Grievant's third level supervisor, discussed the results of his investigation with President Carter, recommended Grievant's dismissal, and received President Carter's permission to terminate Grievant's

employment with WVSC. (Post hearing submission by agreement of parties. Marked as Level IV, R. Ex. No. 4).

9. On May 13, 1998, Mr. Lewis wrote Grievant stating this is "your official letter of intent to terminate your employment at West Virginia State College no later then June 30, 1998. In your notice of appointment you were advised that either party (West Virginia State College or you) could terminate your appointment on a thirty (30) day written notice." Several reasons for Grievant's termination were listed, and Grievant was informed she would have the opportunity to meet with Mr. Lewis to refute all charges on May 18, 1998. Level II, R. Ex. No. 42V.

10. Grievant did not meet with Mr. Lewis on May 18, 1998.

11. On May 20, 1998, Mr. Lewis wrote Grievant a second letter informing her that this second letter was her "official notification to terminate your employment at West Virginia State College no later than June 30, 1998." (See footnote 5) **Grievant received the dismissal letter on May 23, 1998.**

14. This grievance was filed on July 10, 1998.

Discussion

The issues raised by the Respondent's Motion will be dealt with one at a time.

1. Timeliness

WVSC contends this grievance is untimely filed, as it was not initiated within the timelines contained in W. Va. Code § 18-29-4. Where an employer seeks to have a grievance dismissed on the basis it was untimely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't,

Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code §18-29-4(a) requires a grievance to be filed:

> **within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant . . . .**

Respondent's argument centers around the fact that Grievant did not file this grievance when she originally received the May 20, 1998 letter, and avers this is the date from which the statute begins to run.

"Spahr [v. Preston County Bd. of Educ., 182 W. Va. 203, 382 S.E.2d 40 (1989)] and Duryutta [sic][v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40, 181 W. Va. 203 (1989)], teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997), n. 11. But cf., Rose v. Raleigh Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (per curiam1997) (Employees filed grievance fifteen days after the occurrence of the event upon which the grievance was based.). Although Grievant could have filed this grievance as soon as shereceived the letters of May 13 or 20, 1998, she is not required to file then and has until fifteen days after her termination to file pursuant to statute. While the date for filing a grievance could start on the date Grievant received the first letter, it is also possible that the date to file this grievance could run from the date of her

termination. Grievant filed this grievance within the statutory time frame of fifteen days from the date the grievable event occurred; her termination, and it is found to be timely filed. See Hale v. Dep't of Health and Human Resources, Docket No. 98-HHR-130 (Jan. 29, 1999).

2. Effect of Classified-exempt status

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 §18-29- 6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). However, in cases involving the suspension or dismissal of classified-exempt, at-will employees, "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). 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).

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 v. First National Bank, 169 W. Va. 673, 2898 S.E. 2d (1982).

Grievant did not allege a violation of any substantial public policy.

In this case, Grievant was a classified-exempt employee and served at the will and pleasure of her employer. These facts were indicated in her yearly Notice of Appointment, which she signed and returned. This Notice of Appointment indicated Grievant was expected to be knowledgeable about the institution's policies, and rules. If Grievant did not understand her Notice of Appointment, she had a duty to request information prior to signing. It must be noted that the reason Grievant's position was changed to an at-will appointment was to increase the salary that she could be paid. Grievant received thousands of dollars more each year as the result of this change. Grievant's alleged non- understanding of her status does not change that status.

Grievant also argues that because she was treated as a classified employee, she became a classified employee. Grievant maintains that because she was given letters of warning instead of being fired when there were problems, that she must have been a classified employee. There is certainly no reason why an at-will employee could not receive discipline as opposed to termination; in fact, these actions seem to have been in Grievant's best interest. This type of treatment does not change Grievant's status as an at-will employee. See 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) and cases cited therein.

Conclusions of Law

1. 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

Authority, Docket No. 91- HHR-400 (June 30, 1992).

2. Given the specific facts of this case this grievance was timely filed.

3. Because Grievant was an at-will employee at the time of her termination, she could be discharged for "no reason" or a "bad reason", unless a substantial public policy is violated. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Higginbotham v. W. Va. Dep't of Public Safety, W. Va. State Police, Docket No. 97-DPS-018 (Mar. 31, 1997); Myer v. W. Va. Racing Comm'n, Docket No. 95-RC-290 (May 3, 1996); Samples v. Glenville State College, Docket No. 94-BOD-564 (July 28, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

4. Grievant's receipt of two letters of warning did not change her at-will status.

5. Grievant did not allege the violation of any substantial public policy.

6. Because Grievant is a classified-exempt employee, and no substantial public policy has been violated, the case must be dismissed without a Level IV hearing on the merits of the case, pursuant to the holding in Wilhelm v. Dep't of Tax and Revenue/LotteryComm'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).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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. 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1999

Footnote: 1 ***Mr. Lewis was Grievant's second level supervisor.***

Footnote: 2 ***Grievant was represented by Attorney H.H. Roberts, and Respondent was represented by Assistant Attorney General Kristi Rogucki.***

Footnote: 3 ***As it is clear President Carter could and did delegate the authority to terminate Grievant's employment after discussion with Dr. Ervin Griffin, Grievant's third level supervisor, this issue will not be discussed further. See Finding of Fact No. 6.***

Footnote: 4 ***Apparently, at the time Grievant was hired by WVSC, the starting salary for nurses in this area was substantially higher than the amount approved for the classification.***

Footnote: 5 ***Dr. Griffin sent a copy of Grievant's dismissal letter to President Carter on May 21, 1998, indicating that if President Carter had no objections he would direct Mr. Lewis to send the letter "ASAP." Level IV, R. Ex. No. 1. No explanation for this potential discrepancy in dates was given by the parties, and indeed this issue was not addressed or raised by the parties. It is possible the letter was dated on May 20, but not sent until later.***