LARRY HAMRICK,

Grievant,

v.

DOCKET NO. 01-DOH-026

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Larry Hamrick, filed this grievance against his former employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on January 24, 2001, protesting his dismissal, effective January 16, 2001. A level four hearing was held in the Grievance Board's Charleston, West Virginia office on April 12, 2001, and this case became mature for decision on May 1, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Bernard L. Spaulding, Esq., and DOH was represented by Jennifer E. Francis, Esq., and Krista Duncan, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

List of Mingo County orphan road projects.

Ex. 2 -

January 11, 2001 letter from John T. Mattern, Superintendent, to Mr. Sam Beverage, Commissioner of Highways.

DOH Exhibits

Ex. 1 -

Personnel Action Form WV-11 for Larry Hamrick, dated December 6, 2000.

Ex. 2 -

Post-it Note from “Corky” re: Larry Hamrick start date.

Ex. 3 -

Application for Examination of Larry Hamrick, dated October 28, 2000.

Ex. 4 -

November 30, 2000 letter from Thomas F. Badgett to Larry C. Hamrick.

Ex. 5 -

Membership Enrollment Form, Public Employees Retirement System, dated December 18, 2000.

Ex. 6 -

Newspaper articles.

Ex. 7 -

DOH Form GL-4, dated December 6, 2000.

Testimony

Grievant testified in his own behalf. DOH presented the testimony of Thomas Badgett, Janet Lemon, Samuel Beverage, Fred VanKirk, and Jeff Black.

FINDINGS OF FACT

Upon a careful review of the testimony and evidence introduced in this grievance, I find that the following facts have been established by a preponderance of the evidence.

1. Grievant was employed effective December 6, 2000, by DOH as a Special Assistant to the

Commissioner of the Division of Highways. R. Exs. 1, 4, 7.

2. The particular statutory designation which Grievant was hired to fill is the “one principal assistant” position set forth in W. Va. Code § 29-6-4(c)(6). Black, LIV Tr., pp. 216- 217.

3. Grievant was hired as a classified-exempt employee. R. Exs. 4, 7.

4. Grievant was fully aware that as a classified-exempt employee, his service was at-will, and could be terminated at any time by either party. Hamrick, LIV Tr., pp. 86- 89. 5. As Special Assistant to the Commissioner, Grievant was assigned to and reported directly to the then-Commissioner, Sam Beverage, and acted independently on projects assigned to him, particularly the Orphan Roads project.

6. Grievant had previously been convicted of the offenses of racketeering, jury tampering, and obstruction of justice, stemming from defrauding a federally-funded program and a drug conspiracy. Hamrick, LIV Tr. 105-106.

7. Grievant's criminal record became the subject of several newspaper articles following his employment by DOH. R. Ex. 6.

8. In November 2000, Governor Cecil Underwood was defeated in the gubernatorial election by Bob Wise.

9. Governor Wise subsequently appointed Fred VanKirk as Commissioner of Highways, succeeding Mr. Beverage.

10. One of Mr. VanKirk's first official acts was to terminate Grievant's employment, effective January 16, 2001. Mr. VanKirk's letter to Grievant gave no reason for Grievant's termination of employment.

11. Mr. VanKirk hired Phyllis Holmes and Jack White, aged 58 or 59, and 64, respectively, as Assistant Commissioners following his appointment as Commissioner. Black, LIV Tr., pp. 231-32.

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 DOH 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. Dept. 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. Dept. 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)].

In the instant case, Grievant first alleges he was terminated as a result of his political affiliation. DOH argues that Grievant occupied a statutorily identified classified- exempt position, and that his political affiliation was not a factor in Commissioner VanKirk's decision to terminate him. The First and Fourteenth Amendments of the United States Constitution protect state and local government employees from discharge or other significant employment actions taken because of their political affiliations, see Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990); Elrod v. Burns, 427 U.S. 347,360 (1976), unless their public employer “can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved,” Branti v. Finkel, 445 U.S. 507, 518 (1980), or can prove that even if the action was motivated in part by political considerations, it would have been taken in any event for reasons unrelated to political affiliations. See O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 725 (1996)(applying “mixed-motive principles of Mt.

Healthy City Bd. of Edu. v. Doyle, 429 U.S.274 (1977) to patronage termination of service provider's contract with municipality). See Wiley v. W. Va. Dept. of Transp., Docket No. 99-DOH-109 (Aug. 3, 1999).

West Virginia Code § 29-6-4(d) lists certain positions declared to be classified- exempt positions. They are:

> (1) All judges, officers and employees of the judiciary;
>
> (2) All members, officers and employees of the Legislature;
>
> (3) All officers elected by popular vote and employees of the officer;
>
> (4) All secretaries of departments and employees within the office of a secretary;
>
> (5) Members of boards and commissions and heads of departments appointed by the governor or such heads of departments selected by commissions or boards when expressly exempt by law or board order;
>
> (6) Excluding the policy-making positions in an agency, one principal assistant or deputy and one private secretary for each board or commission or head of a department elected or appointed by the governor or Legislature; (7) All policy-making positions;. . .

West Virginia Code § 29-6-2 defines "policymaking position" as

> a position in which the person occupying it (1) acts as an advisor to, or formulates plans for the implementation of broad goals for an administrator or the governor, (2) is in charge of a major administrative component of the agency and (3) reports directly and is directly accountable to an administrator or the governor; . . .

Jeff Black, Director of Human Resources for DOH, credibly testified that Grievant was hired into the statutorily-exempt position of “one principal assistant or deputy”, and that he reported to and was directly accountable to Commissioner Beverage. Grievant's own testimony reflects that he reported directly to the Commissioner, and did not answer to anyone else at DOH in the performance of his job duties and responsibilities relating to the Orphan Roads program. Hamrick, LIV Tr., pp. 42, 56, 170. In fact, Janet Lemon, the coordinator of the Orphan Roads program testified she did not even know Grievant washired for, nor did she supervise him in any capacity, with respect to the program. She only answered questions he asked, and provided him with lists of orphan roads upon his request. Lemon, LIV Tr., pp. 133-37; Hamrick, LIV Tr., pp. 120-21.

Former Commissioner Beverage testified he had known Grievant peripherally from his activities

and attendance at meetings in Southern West Virginia. At one of those meetings, Grievant expressed an interest in employment, and Mr. Beverage suggested he submit an application to the Division of Personnel. Grievant submitted his application on or about October 28, 2000. Mr. Beverage testified he considered Grievant for employment because he was friendly, he smiled a lot, he had a college education, and “he just looked like a person who could handle the job.” Beverage, LIV Tr., p. 152.

When Mr. Beverage asked Mr. Black to look for a position for Grievant, Mr. Black found that the only available position was the “first principal assistant to the Commissioner” position, a classified-exempt position. Mr. Beverage directed Mr. Black to place Grievant in that position, and Mr. Black proceeded with the hiring process, and Grievant's employment was approved by former-Governor Underwood's office.

While working for Mr. Beverage, Grievant reviewed various orphan road projects in Southern West Virginia, primarily Mingo County. His primary responsibility was establishing contacts and acting as a liaison between Commissioner Beverage and the local officials.

In November 2000, then-Governor Underwood lost the gubenatorial election and the Democratic candidate, Robert Wise, was elected. Governor Wise appointed Commissioner Fred VanKirk to replace Mr. Beverage at DOH. Commissioner VanKirktestified he was aware of Grievant's hiring, and his past criminal record, through newspaper articles, and knew that one of his first acts as Commissioner would be to terminate Grievant's employment. Mr. VanKirk testified he “didn't want a person like that” working for him, that Grievant did not “have the public trust,” and that Grievant's “integrity” was questionable. VanKirk, LIV Tr., pp. 182-83, 186, 187-190. Mr. VanKirk testified that it was important to him who was placed in the position occupied by Grievant because that person had to be trusted. VanKirk, LIV Tr., pp. 187-89.

It is clear that, as the “one principal assistant to the Commissioner”, Grievant, as a classified-exempt employee, would be subject to discharge upon the appointment of a new DOH Commissioner. Further, it is clearly anticipated by the Legislature that individuals selected to fill such positions would be selected. at least to some significant degree, because of their political and/or personal affiliations with the in-coming Commissioner. Despite Grievant's contention that he barely knew Commissioner Beverage when he was hired, and that political affiliation played no part in his hiring, there can be no dispute but that Grievant was selected by Commissioner Beverage to act as his right-hand man in dealing with the local communities affected by the Orphan Roads program, and

that the position Grievant filled was the “one principal assistant to the Commissioner” position.

With regard to his termination, Commissioner VanKirk had every right to select his own principal assistants, and furthermore, his reasons for not wanting to retain Grievant, i.e., his criminal past, are unrelated to Grievant's political affiliation. Therefore, I find that Grievant has failed to prove he was dismissed because of his political affiliation or association, and his constitutional claims in that regard must fail. Grievant also alleges he was terminated due to age discrimination. DOH denies this charge. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R- 215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).

In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996);

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burdenshifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In the instant case, Grievant has failed to establish a prima facie case of discrimination. Grievant has failed to show that he was similarly situated in a pertinent way to another employee who was treated differently than he was in a significant particular. Further, the individuals Grievant identified who replaced him in Assistant positions under Commissioner VanKirk are Phyllis Holmes and Jack White. Mr. Black credibly testified that Ms. Holmes is approximately 59 years old, and Mr. White is 64 years old. Grievant's application with the Public Employees Retirement System shows that at the time he was discharged, he was 60 years old. R. Ex. 5. Therefore, Grievant has failed to establish a claim of age discrimination.

CONCLUSIONS OF LAW

1. State employees who are in the classified service can be dismissed only for “good cause”, meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Oakes v. W. Va. Dept. of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

2. A public employee's due process rights are founded upon the extent to which that employee has a property or liberty interest in his employment. If a public employee has a property right in his employment, he must be accorded due process in termination proceedings; however, if there is no property right, the employer may refuse to renewemployment without the requirement of a hearing or any specific reason for dismissal. Roach v. Regional Jail Auth., 198 W. Va. 694 (1996).

3. A classified civil service employee has a sufficient property interest in his continued uninterrupted employment to warrant the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our Constitution. Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985); Waite v. Civil Service Comm'n., 161 W. Va. 154, 241 S.E.2d 164 (1977).

4. Public employees holding positions which are statutorily exempt from coverage under the

classified service are deemed at-will employees. As a general rule, the employment at-will doctrine 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. Roach, supra.

5. 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, that the employer may be liable to the employee for damages occasioned by the discharge. Harless v. First Nat. Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

6. The First and Fourteenth Amendments protect state and local government employees from discharge or other significant employment actions taken because of their political affiliations unless their employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved or can prove that even if the action was motivated in part by political considerations, it would have been taken in any event for reasons unrelated to political affiliations. See O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996); Akers v. W. Va. Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992); Wiley v. W. Va. Dept. of Transp., Docket No. 99- DOH-109 (Aug. 3, 1999).

7. W. Va. Code § 29-6-4(d) lists certain positions where political affiliation is deemed essential to an individual's effective performance, and thus, is an appropriate hiring requirement, and those positions have been statutorily declared to be classified- exempt positions, including Grievant's position as “(6) . . . one principal assistant or deputy and one private secretary for each board or commission or head of a department elected or appointed by the governor or Legislature”.

8. Grievant failed to establish that his firing by incoming Commissioner VanKirk was a result of his political affiliation.

9. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

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that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

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that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

10. Grievant failed to establish that his firing was the result of age discrimination or discrimination as defined in W. Va. Code § 29-6A-2(d).

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 24, 2001