GEORGE MAYHEW,

Grievant,

v. **Docket No. 01-DEP-516**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

D E C I S I O N

Grievant, George Mayhew, filed this grievance on October 1, 2002, after his termination from the Department of Environmental Protection ("DEP"). His Statement of Grievance reads:

> I was fired in violation of my federal and state statutory & constitutional rights in general and as a result of my political affiliation in particular.
>
> Relief sought: To be restored to my position at full pay and to be reimbursed all backpay, interest and costs.

As this was a termination, Grievant filed directly to Level IV, and a Level IV hearing was held on November 16, 2001, December 7, 2001, and May 23, 2003. (See footnote 1) This case became mature for decision on July 29, 2003, after receipt of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant, an at-will employee, asserts he was terminated for political reasons, and, as he was not in a policymaking role, this is a violation of a substantial public policy. Respondent avers Grievant, an at-will employee, was terminated because he was notqualified for the position, the position was not needed, and Grievant, because of his

lack of qualifications, had created problems for the agency.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 2)

Findings of Fact

1. In March 1999, Randy Huffman, Assistant Secretary of DEP was told by then Director Mike Miano to hire Grievant with a salary of $30,000. Grievant was to report directly to Mr. Miano.

2. Grievant was told by Director Miano that he was to serve as a Community Liaison for eight counties in the southern part of the state, and this was an at-will position. This position was created for Grievant, and a funded position was downgraded to pay for this position.

3. No other Community Liaisons were hired in any other part of the state.

4. Grievant worked out of his home, and was reimbursed travel and other expenses. 5. Grievant's job description (See footnote 3) indicated he was to act as a facilitator in the local community for environmental issues, provide feedback and recommendations to the Director, and attempt to resolve disputes before they reached the level of formal complaints. He was not to engage in any enforcement activities. Grt. Exh. No. 1. Grievant had no experience in the environmental area. This position was not a policy making position.

6. Don Hill, Assistant Chief Inspector for the Enforcement Division, did not know Grievant was working in his area until he heard Grievant introduce himself at a meeting. Mr. Hill had no vacancies in his area, and he had not asked for a Community Liaison. Mr. Hill was assigned the task of "babysitting" Grievant, but was not his supervisor. Mr. Hill did not know what Grievant did.

7. From August 1, 2000, to November 16, 2000, Grievant took a leave of absence to campaign for then Governor Underwood at the request of Director Castle and one of Governor Underwood's aides. Grievant was promised he would have civil service

protection when he returned to work, if he did this campaigning.

8. Assistant Secretary Huffman was directed by then Director Castle to place Grievant in a covered position. Assistant Secretary Huffman had difficulty accomplishing this task because Grievant lacked the qualifications needed to receive a classified position that paid $30,000 a year. Additionally, because of time constraints, the option of Governor Underwood designating Grievant in an at-will position was no longer available. 9. Because Assistant Secretary Huffman could not find a classified position for which Grievant was minimally qualified and paid the required amount, he decided to place Grievant in a position with Air Quality Control, as all their positions are classified-exempt.

10. On December 7, 2000, a position for an Environmental Resource Specialist II was posted. This employee would be assigned to the Small Business Ombudsman Office and would assist in resolving environmental complaints in nine counties in the southern region of the state. (See footnote 4) Several people applied and interviews were conducted to give the posting some semblance of credibility, even though it was predetermined that Grievant would receive the position. This was a non-policy making position. Test. Huffman and Bassage; Resp. No. 5.

11. Grievant did not meet the listed qualifications for the classification, but because this was a classified-exempt position he could be hired anyway. Assistant Secretary Huffman picked this classification because it would pay Grievant the required salary.

12. Dave Bassage, the Director of the Small Business Ombudsman Office, had not asked for the position. He participated along with Assistant Secretary Huffman in the interviews, and he ranked Grievant fifth of seven candidates. He did not believe Grievant was qualified for the position.

13. Assistant Secretary Huffman turned in Grievant's name for the position, and Grievant started his new duties in January 2001. 14. When Grievant first started

at the Small Business Ombudsman Office, Mr. Bassage called Grievant into the office, said he needed to clear the air, and told Grievant he was not his first choice for the position. After that time, nothing else was ever said about how Grievant got the position, and Mr. Bassage spent quite a bit of time trying to get Grievant trained for the position.

15. Initially, Mr. Bassage directed Grievant to continue the duties he had performed while he worked as a Community Liaison for DEP.

16. Helping Grievant learn how to perform the duties of the position, and directing him to the proper resource personnel, was time-consuming for Mr. Bassage.

17. In January 2001, Michael Callaghan was appointed by Governor Wise to be Cabinet Secretary for DEP. Secretary Callaghan analyzed the needs of the agency, and he sought to decrease the amount of political influence in this regulatory agency. He demoted and terminated several people.

18. Noting Secretary Callaghan's goals, Assistant Secretary Huffman believed Secretary Callaghan should be informed about how Grievant was hired. Secretary Callaghan investigated the situation, and he asked various supervisors and managers if Grievant was an asset to the agency, and, if not, could he be made into an asset. He received negative responses from Assistant Secretary Huffman, Mr. Bassage, and Mike Zeto, Enforcement Coordinator. Mr. Zeto noted Grievant had given incorrect advice regarding permitting, and someone else was sent to correct the problem. (See footnote 5)

19. Toward the end of Grievant's tenure in the Small Business Ombudsman Office, Mr. Bassage did not spend as much time assisting Grievant to become acclimated to the position because he had been told Grievant would be terminated.

20. Grievant was never able to perform the duties of an Environmental Resource Specialist II.

21. Secretary Callaghan decided to terminate Grievant and use the funds for another position that was needed by DEP. (See footnote 6)

22. Secretary Callaghan's decision to terminate Grievant's position was based on

a lack of need for the position and Grievant's lack of qualifications.

23. On April 3, 2001, Secretary Callaghan delivered a termination letter to Grievant which stated Grievant served in an at-will position, his position and services were not needed, his immediate separation was required, and he would be paid 15 days of severance pay. Resp. No. 2.

24. Also on April 3, 2001, Secretary Callaghan dictated a letter to Grievant's file noting his decision and retracing the steps he had taken to assess whether Grievant was, or could become, a quality employee for DEP. Secretary Callaghan concluded Grievant was not able to become the type of employee DEP wanted to retain and terminated his services and the position he held. Resp. No. 1.

25. Shortly thereafter, Secretary Callaghan received a call from Governor Wise's office requesting that Secretary Callaghan put Grievant's termination on hold while the Governor's office looked for a position Grievant was qualified to perform. 26. Secretary Callaghan did not want Grievant to work at DEP and wanted to keep Grievant on administrative leave and just pay him while Grievant stayed at home, but was he informed by Assistant Secretary Huffman that this plan would violate the Division of Personnel's regulations.

27. While a different position was sought for Grievant, he was assigned back to the first position he had held. Mr. Hill was upset by this assignment and refused to be Grievant's supervisor, as he felt Grievant was not qualified to be out in the field.

28. In mid-April 2001, when Secretary Callaghan's confirmation hearing came before the Senate, Grievant opposed this approval. Secretary Callaghan found out about Grievant's opposition at the time of the confirmation, and was not surprised to find an employee he had terminated approximately two weeks before the hearing was opposed to his placement into the position.

29. Grady Lowe, Inspector, worked with Grievant in the field and found his political connections helpful in opening doors, arranging meetings, and making initial

assessments of problems.

30. A different position was found for Grievant in the Department of Natural Resources ("DNR"). This new position was in the classified service and earned approximately $10,000 less than the classified-exempt position Grievant held at DEP.

31. Assuming Grievant would accept this position, Secretary Callaghan again terminated Grievant by letter dated September 6, 2001, with an effective date of September 14, 2001. Resp. No. 3. 32. When Assistant Secretary Huffman discussed Grievant's second termination with him, Assistant Secretary Huffman expressed his opinion that all at-will positions were political, and Grievant's termination as an at-will employee was political.

33. Grievant did not accept the DNR position, and instead filed this grievance.

34. The positions Grievant held at DEP did not exist before he was placed into them, and they do not exist now.

Discussion

In 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 suspending an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the 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 disciplinary action 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).

Grievant was a classified-exempt employee and as such served at the will and pleasure of Respondent. Logan, supra. See Wilhelm, supra; Bellinger v. W. Va. Dep't 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). Grievant's at-will status denoteshe could be fired for good reasons, bad reasons, or no reasons, provided he was not terminated for a reason that violates a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Wilhelm, supra; Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless, supra.

The burden of proof is upon an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Wilhelm, supra. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). See Loundman-Clay v. Higher Educ. Policy Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 26, 2002).

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 policyprinciple, 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 discussed sources of public policy and stated:

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 West Virginia 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). Grievant alleged he was terminated from his position solely because of his political affiliation. If this is true, his termination

would contravene a substantial public policy. Grievant has the burden of proof to establish his termination was for political reasons.

"While government officials may terminate at-will relationships, unmodified by any legal constraints, without cause, it does not follow that this discretion can be exercised to impose conditions on expressing or not expressing, specific political views," but a government agency may terminate services if the provider is "unreliable." O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (June 28, 1996) (See footnote 7) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972) and Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977)). An employee should not be discharged upon the sole grounds of his political beliefs, if he is satisfactorily performing the duties of the position. O'Hara, supra. Further, in Elrod v. Burns, 427 U.S. 347 (1976), the Court declared that, in order to prevail, it was sufficient for employees to prove that their discharge was solely for the reason that they were not affiliated with the party of their employer. See also Branti v. Finkel, 445 U.S. 507 (1980); White v. Div. of Highways, 89-DOH-137 (Mar. 7, 1990).

An overall review of O'Hara indicates an agency may offer a "satisfactory justification" for the termination of services that is unrelated to the suppression of speech or associated rights. The burden of proof is on a grievant to demonstrate that his conduct was "a substantial factor" in the employer's decision to discipline him. Orr v. Crowder, 315 S.E.2d 593, 602 (W. Va. 1983)(citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968) and Mt. Healthy, supra). "The employer may defeat the employee's claim by showing that thesame decision would have been reached even in the absence of the protected conduct." Orr, Syl. Pt. 4, in part. In Mt. Healthy, the Supreme Court noted the conduct must be of a substantial nature; to rule otherwise would be to:

place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing . . .. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct . . .. [An employee]

ought not to be able to, by engaging in such conduct, prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 286.

"The fact that the government may have considered an employee's protected speech or conduct in reaching an adverse decision does not necessarily render that decision constitutionally infirm." Mazaleski v. Trensdell, 562 F.2d 701, 715 (D. C. Cir. 1977). In making that adverse decision, the key is "to consider the employee's job performance in its entirety." Id.

Accordingly, the key question here is if the agency has offered a "satisfactory justification" for Grievant's termination, and did Grievant demonstrate his party affiliation was "a substantial factor" in DEP's decision to dismiss him. Orr, supra.

This case is similar to one recently denied by this Grievance Board, Miano v. Department of Transportation/Division of Highways, Docket No. 02-DOH-008 (June 27, 2002). In that grievance, Director Miano resigned from his position with DEP and accepted an at-will position with the Division of Highways as a Transportation Services Manager III, at a salary of $70,000. When the new Commissioner, Fred VanKirk, reviewed the operations of the agency he determined a reorganization was needed, and he examinedall the at-will positions. Commissioner VanKirk determined the duties performed by Grievant Miano could be preformed more efficiently and with less cost to the agency by classified employees. Pursuant to Grievant Miano's request, Commissioner VanKirk did not process Grievant Miano's separation from employment for almost two months to allow him time to find employment in the classified service. When Grievant Miano was unable to find a position, he filed a grievance.

Administrative Law Judge Mary Jo Swartz found Grievant Miano had failed to prove

his allegation that he was terminated for political patronage reasons. She stated that "while this [allegation] may, under some circumstances, be found to sufficiently state a violation of a public policy", . . . "Grievant has presented no evidence or testimony which supports his theory, while DOH has presented ample evidence to demonstrate that Grievant's duties and responsibilities could easily be assumed by low-ranking, and thus, lower paid, classified employees." In order to decrease costs "it made economic sense to remove Grievant from a high-paid, high-ranking position, and assign the duties associated with that position to classified employees." Administrative Law Judge Swartz further noted Grievant Miano had apparently "failed to recognize that perhaps the reason he got his high- paying, high-ranking position at DOH in the first place was due to political influence," and he failed to prove his subsequent removal from that position was politically motivated.

This same reasoning can be applied to this case. Grievant received his position because of political influence, and his delivered promise to work for the Underwood campaign. There was no need for either position Grievant held, and Grievant was not qualified for the positions, as Grievant had no training or experience in environmental issues. An agency should not be prevented from assessing an employee's performanceand qualifications, and then dismissing him if he is not needed or is not an asset to the agency. While Grievant's political affiliation may not have been an advantage to him with the current management, that was not the "substantial factor" that resulted in his termination. Orr, supra.

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

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 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. In cases involving the dismissal of classified-exempt, at-will employees, state agencies do not have the burden of proof to establish reasons for the termination and do not have to establish good cause for discharging an employee. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

3. Because Grievant was an at-will employee at the time of his termination, this dismissal could occur 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 Pub. 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. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Wilhelm, supra.

5. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993); Black's Law Dictionary, 5th ed. at 1064.

6. Where the evidence equally supports both sides, the employee has not met his burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). See Loundman- Clay v. Higher Educ, Policy Comm'n/Bluefield State College,

Docket No. 02-HEPC-013 (Aug. 26, 2002).

7. Grievant has the burden of proof to establish his conduct was "a substantial factor" in the employer's decision to terminate him. Orr v. Crowder, 315 S.E.2d 593, 602 (W. Va. 1983)(citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968) and Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

8. "The employer may defeat the [employee's] claim by showing that the same decision would have been reached even in the absence of the protected conduct." Orr, Syl. Pt. 4, in part.

9. "The fact that the government may have considered an employee's protected speech or conduct in reaching an adverse decision does not necessarily render thatdecision constitutionally infirm." Mazaleski v. Trensdell, 562 F.2d 701, 715 (D. C. Cir. 1977).

10. In assessing an agency's decision to terminate an employee who engaged in protected conduct, the key is "to consider the employee's job performance in its entirety." Id.

11. Grievant has not met his burden of proof and established his political affiliation was a "substantial factor" in his termination.

Accordingly, this grievance is DENIED.

Any party 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 27, 2003

Footnote: 1

The delay between the second and third day of hearing was to take the testimony of a witness who had been called up for military service.

Footnote: 2

Grievant was represented by Attorney Henry Wood III, and DEP was represented by Assistant Attorney General Steven Dragisich.

Footnote: 3

This Job Description was a one page document, was not a Division of Personnel class specification, and did not identify any minimum qualifications for the position. Grievant believed it was written by Director Miano.

Footnote: 4

No other positions of this type were posted for other parts of the state.

Footnote: 5

No exact details were given about this situation.

Footnote: 6

Secretary Callaghan indicated if there was an excess of funds, Community Liaison positions would be helpful to have.

Footnote: 7

This case dealt with independent contractors, but considered similar issues as this grievance.