JODI WASHINGTON,

Grievant,

v. **Docket No. 05-ADJ-074**

ADJUTANT GENERAL'S OFFICE/
MOUNTAINEER CHALLENGE
ACADEMY,

Respondent.

DECISION

Jodi Washington ("Grievant") filed this grievance directly at level four on February 28, 2005, challenging the termination of her employment from the Mountaineer Challenge Academy ("MCA"). A hearing was conducted in Westover, West Virginia, on April 15, 2005. Grievant represented herself, and Respondent was represented by Steven R. Compton, Assistant Attorney General. The parties elected not to file written fact/law proposals, so this matter became mature for consideration at the conclusion of the level four hearing. (See footnote 1)

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. On an unspecified date, Grievant was hired for employment at MCA as a Youth Service Worker I, an at-will position. Grievant's position involved 24-hour care and supervision of the at-risk youth ("cadets") who attend MCA, along with providing militarytraining to the cadets.

2. MCA is operated pursuant to a federal program whereby high-school dropouts attend a training program designed to motivate them to complete their education. It operates as a quasi-military facility, and cadets are rewarded with educational funding after completing the program.

3. Grievant attended MCA as a cadet in 1993 for only four weeks. She voluntarily dropped out of the program without completing it.

4. During her interview for employment at MCA, Grievant did not inform Commandant Willard Tasker that she had been a cadet.

5. Shortly after Grievant was hired, she informed coworkers at MCA that she had been a cadet in 1993. This information was passed on to Mr. Tasker and to Director Hugh P. Dopson.

6. On February 22, 2005, Mr. Dopson informed Grievant that her employment was being terminated, due to the fact that she had previously been a cadet, but had not completed the program. Mr. Dopson believed that Grievant's past would interfere with her ability to be a positive role model for the cadets and to encourage them to persevere in the program. He advised her that her at-will employment at MCA was being terminated immediately. (See footnote 2)

7. Grievant was informed during her initial interview for employment at MCA that she would be an at-will employee. 8. Brian Bischoff is employed at MCA in a “logistics” position, which involves procurement of materials and supplies for the facility. He does not have a direct custodial or instructional relationship with the cadets. Mr. Bischoff attended MCA as a cadet and completed the program with honors.

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 terminating 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. Dye v. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999). See Wilhelm, supra; Logan, 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 denotes she could be fired for good reasons, bad reasons, or no reasons, provided she was not terminated for a reasonthat violated 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. A general assertion of discrimination, harassment, retaliation, and/or favoritism, without identifying a violation of a substantial public policy, is insufficient as a claim for relief in an at-will employment grievance. Wilhelm, supra.

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. Id. "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 Res., Docket No. 92-HHR-486 (May 17, 1993). 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 policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syl.,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 that substantial public policy interests are implicated in such actions as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Med. 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)). See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994).

Grievant has not argued any specific public policy principle which has been violated in this case. Her only argument at the level four hearing in this matter was the unfairness of her termination, especially in light of the fact that MCA does not have any written policy prohibiting former cadets from being employed as instructors. She also argued that it was not fair for Mr. Bischoff to be allowed to work at the facility after having been a cadet, while she was terminated for that reason.

While Grievant's arguments are well taken, and it is certainly not difficult to understand her frustration at the seeming “unfairness” of the situation, the fact remains that she was an at-will employee who has failed to establish that her termination violated a substantial public policy principle. Moreover, Respondent has justified its reasoning for hertermination, in that her failure to complete the MCA as a cadet reflects poorly on her status as a role model and instructor for current cadets. Under these circumstances, Grievant's termination must stand.

The following conclusions of law support this Decision.

Conclusions of Law

1. 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).

2. Grievant was an at-will employee of the Mountaineer Challenge Academy. As such, she bears the burden of proof 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.

3. Grievant has only alleged that her termination was unfair, and she has failed to allege or establish any violation of a substantial public policy.

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 thegrievance 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.

Date: April 21, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Respondent's counsel elected to rely upon the arguments asserted in his previously filed "Motion to Dismiss", which motion was denied during a telephonic conference conducted on April 6, 2005.

Footnote: 2

Although Grievant's exact date of hire was not included in the record, the undersigned was left with the impression that she was terminated within a few weeks of the beginning of her employment.