MATTHEW BIGGIE,

Grievant,

v. Docket No. 05-DJS-289

DIVISION OF JUVENILE SERVICES/

INDUSTRIAL HOME FOR YOUTH,

Respondent.

D E C I S I O N

Matthew Biggie ("Grievant"), employed by the Division of Juvenile Services ("DJS") filed an expedited grievance directly to level four, as is permitted by *W. Va. Code* § 29-6A- 4(e), seeking reinstatement as Superintendent of the Industrial Home for Youth ("IHY"). As an alternative form of relief, Grievant requests assignment to another position of equal pay and status. Additionally, he requests back pay with interest, benefits, and attorney fees. (See footnote 1) **An evidentiary hearing was conducted in the Grievance Board's Westover office on November 1 and 7, 2005. Grievant was represented by Kelly J. Kimble, Esq., of Reed and Kimble, PLLC, and DJS was represented by Steven R. Compton, Assistant Attorney General. The grievance became mature for decision upon receipt of final post-hearing submissions on March 2, 2006.**

The following facts have been derived from a preponderance of the credible evidence made part of the level four record.

Findings of Fact

1. Grievant was first employed by DJS as a Unit Manager at IHY in September 1996. He was promoted to Program Manager, and then to Assistant Superintendent of Operations, prior to accepting the position of Superintendent at IHY in February 2004. 2. On June 1, 2005, an incident occurred in the IHY gymnasium involving Assistant Superintendent Crystal Hall allegedly improperly touching a male employee. There was no incident report filed at the institutional level; however, an anonymous letter erroneously reporting what had occurred, was sent to the DJS central office.

3. Grievant learned of the incident on June 6, 2005, when DJS Acting Director Cynthia

Largent-Hill called and requested that he investigate the matter. After meeting with the two individuals involved, Grievant reported that nothing improper had occurred.

4. Grievant was directed by Ms. Largent-Hill to place a letter of reprimand in Ms. Hall's file as a result of the June 1, 2005, incident. Because he believed that it would be unethical and unlawful to impose discipline for which no factual basis existed, Grievant instead placed a letter of counseling in Ms. Hall's file, and sent a copy to the central office.

5. On June 15, 2005, DJS Ms. Largent-Hill issued a memorandum advising Grievant:

It has come to my attention that there have been several incidents of inappropriate conduct of staff toward or against residents. These include ice water being thrown on a resident during shower, a resident's room being trashed, a CD with porn being in the facility and shown to a resident, and a resident being assaulted. I consider all of these to be of a serious nature.

These incidents have not been reported directly to me by your office. Nor have you made arrangements for the Division's investigative service to research and establish findings for each of these incidents. As we discussed during Administrator's meetings, I asked that my office be notified and that we would coordinate the investigation; especially when IIU is being notified.

It appears that once again, I have to remind you of the protocol expected from my office. I trust that I will not have to address this with you again. Please take the necessary measures to ensure that you and your key management staff are prepared to adhere to my expectations.

6. Grievant responded to Ms. Largent-Hill on the same date, stating that he understood incidents were to be handled through paralegal Brenda Hoylman, whoconfirmed to him that she had notified Ms. Largent-Hill of all the cited occurrences. Grievant assured Ms. Largent-Hill that he would contact her personally regarding any incidents "[he felt] may require investigation."

7. July 6, 2005, Ms. Largent-Hill advised Military Affairs and Public Safety (MAPS) Secretary James Spears by e-mail that there were continued leadership issues at IHY, citing Grievant, the Assistant Superintendent of Treatment and Programs, and the Deputy Superintendent. Ms. Largent-Hill listed her concerns specific to Grievant as:

-Lack of understanding and support of juvenile treatment issues (i.e., continuously refers to WVIHY as 'my jailhouse'.)

-Practices selective supervision - minimizes supervision of those who are 'loyal' to him; but does closely supervise those who question him.

-Tends to coddle those who have come up through the ranks with him or under his supervision.

-Delays or refuses to take an action when he doesn't agree with the request.

-Undermines the progress of the training academy and department because he wanted control of it - which was denied by Central Office.

To summarize, Mr. Biggie often places his personal agenda for his 'jailhouse' above that of the division - even after confronted or challenged. Therefore, I am recommending that as a classified exempt employee, he be terminated without cause.

8. July 11, 2005, Ms. Largent-Hill sent Secretary Spears a second e-mail regarding Grievant, stating:
The Superintendent maintains a difference of opinion with treatment staff, especially those with advanced degrees. This undermines the effectiveness of the treatment. On occasion, he has moved troublesome residents at the request of favored unit managers to the units of less favored managers. He also takes similar action with difficult employees.
The Superintendent is inconsistent in his supervision of employees based upon favoritism and his perception of loyalty. The Building and Maintenance Supervisor requested a meeting to resolve an old disciplinary matter. The Acting Director made three requests for the Superintendent to have the meeting. He did not - until the day the Acting Director was on site and brought up the matter.

The Superintendent repeatedly minimizes, covers up, or excuses misconduct of those favored employees. Training Coordinator refused to assist with an academy and he supported her refusal. The Assistant Superintendent of Programs & Treatment is chronically late and/or absent and/or works from home - this has not been addressed by the Superintendent even

though the now Acting Director has repeatedly requested that he do so. The Acting Director learned about an inappropriate touching incident which occurred between the Assistant Superintendent and her subordinate. The Superintendent denied knowledge of this event, even though Central Office was notified by several staff. The Superintendent was instructed to interview those involved and submit an unbiased report. He only did so after being asked twice - and the objectively [sic] is questionable. He was instructed to issue a written reprimand - and he instead issued a letter of counseling. He admitted to legal staff that he didn't feel there was enough evidence to warrant a written reprimand, so he did what he wanted.

On several occasions the Superintendent failed to report staff misconduct; Central Office discovered through a third party (i.e. situation with a resident during intake have his nipples twisted by an officer.)

The Superintendent does not encourage his training staff to follow the instructions of the Training Department Director - tends to do things 'his way' vs. the DJS way (i.e., training schedules, report writing, use of force).

The Superintendent holds himself to a different standard than that of his employees. For example, he wears colored jeans and uses smokeless tobacco products in his office.

On a personal note, I have spoken with Mr. Biggie on several occasions about stepping up to the plate and changing his way of supervising. He voices an understanding, but continues to do as he wishes. The most recent example is his mishandling of the incident involving the Asst. Superintendent and her subordinate. The above listed actions interfere with his ability to manage the West Virginia Industrial Home for Youth and conflicts with the Division and its Acting Director.

9. By letter dated July 25, 2005, Ms. Largent-Hill memorialized a conversation she had with Grievant on July 17, 2005, at which time she had advised him that he would be suspended without pay pending the investigation of a number of incidents at IHY.

10. Ms. Largent-Hill notified Grievant verbally, and by letter, on August 4, 2005, that his employment as Superintendent at IHY was terminated effective that date. Ms. Largent-Hill

reminded Grievant that he served at the will and pleasure of the Director, and could be released from employment without cause, but stated that she had lost confidence in his ability to effectively discharge the duties and responsibilities of the position.

Discussion

Initially, DJS presented a Motion to Dismiss, citing Grievant's at-will status, and his failure to allege a violation of any substantial public policy. Grievant asserts that he is a classified employee, entitled to the rights and protections afforded under the Division of Personnel Administrative Rule. If determined to be an at-will employee, Grievant argues that DJS engaged in retaliation, a substantial public policy, and that he was entitled to the contractual rights and protections afforded by DJS's own policies. Grievant's final argument is that termination of his employment was excessive and in violation of applicable uniformity principles.

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 dismissal. *W. Va. Code* § 29-6A-6; *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). By comparison, 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. Reg. Jail & Corr. 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. *See Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978).

Prior to June 2004, all employees at juvenile detention or corrections facilities were classified-exempt, as provided by *W. Va. Code* § 49-5E-5a. However, during the 2004 legislative session, that statute was amended to state:

All employees employed at a juvenile detention or corrections facility shall be . . . covered by the policies and procedures of the education and state employees grievance board, created under section five, article six-a, chapter twenty-nine of this code and the classified service protection policies of the division of personnel.

This amendment was signed by Governor Joe Manchin on April 5, 2004, to be effective

June 1, 2004. However, the Governor's office issued Executive Order 4-04 on Mar. 1, 2004, in which the DJS Superintendents assigned to the Davis Center, the Industrial Home for Youth, and the Donald Kuhn Center were designated as classified- exempt, policy-making positions. Grievant is also considered an at-will employee by the Division of Personnel. This determination is consistent with the provisions of *W. Va. Code* § 29-6-4(c) which lists offices and positions exempt from coverage under the classified service, including "[a]ll policy-making positions". **(See footnote 2)**

Grievant argues that because "policy-making positions" are not defined in the statute or elsewhere, the rules of statutory construction dictate that his position not fall within thepurview of that category, as such interpretation would result in conflicting statutes. Grievant urges that the general rule be followed that the statute last in time prevails as the most recent expression of the legislative will.

Administrative notice is taken that the amendment to *Code* § 49-5E-5a, reallocating all employees at juvenile detention or corrections facilities as classified employees was passed by the Senate on March 3, 2004, and the House on March 12, 2004. Passage of the bill undoubtedly prompted the Executive Order designating three employees exempt from the provision based upon their role as policy makers. There is no inconsistency when the statutes are read together; *i.e.,* all employees at DJS facilities, with the exception of the designated superintendents who engage in policy making, are now classified personnel. Therefore, it is determined that Grievant is an at-will employee.

Merits

Grievant's at-will status denotes he could be fired for a good reason, bad reason, or no reason. However, 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, then the employer may be liable to the employee for damages occasioned by this discharge.

Harless, supra*; *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). *See Wilhelm, v. Tax

***& Revenue/Lottery Comm.,*198 W. Va. 92, 479 S.E.2d 602 (1996); *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995). 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*. "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).

Grievant asserts that public policy dictates against forcing him to bear false witness or defame another employee, resulting in disciplinary action against that employee. DJS argues that Grievant failed to offer any evidence to prove that it was unethical or improper for the employee to be disciplined, other than his own personal feelings. DJS further argues that the failure to comply with a directive from the Acting Director with no notification or explanation justifies termination.

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, andjudicial 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).**

Ms. Largent-Hill testified at level four that she had repeatedly spoken with Grievant regarding issues and her expectations of him as Superintendent of the largest DJS institution because as fully one-third of the agency, IHY is subject to constant scrutiny. Because Grievant had performed well in other assignments, Ms. Largent-Hill stated she supported his placement at IHY, but that she quickly began to lose confidence in his ability to effectively manage at that site. She expressed concern regarding Grievant's failure to communicate with her directly, resulting in her receiving information from other employees. One example cited was that the Internal Investigative Unit ("IIU") of the Department of Health & Human Resources was onsite conducting an investigation, and she had not been made aware of any abuse or neglect claims. Other resident care issues of which she was aware increased her concern regarding Grievant's ability. Most importantly, Grievant hadconsciously ignored her directive to place a letter of reprimand in another employee's personnel file. Following Grievant's suspension, Ms. Largent-Hill testified that other issues were brought to her attention for the first time, including the fact that a state vehicle had been driven to Florida for a meeting, and a Unit Director was involved in an IIU issue.

Contrary to Grievant's perception that his termination was the result of his refusal to issue a reprimand, Ms. Largent-Hill stated that she had lost confidence in Grievant's ability to supervise IHY for a number of reasons. Grievant's failure to comply with her directive to issue a disciplinary letter, and to modify the action as he saw fit, constitutes insubordination. Although Grievant disagreed with Ms. Largent-Hill, following her directive would have caused the employee no immediate harm, and she could have filed a grievance to have the letter removed. Grievant's refusal to impose discipline based on his personal moral standards does not constitute a substantial public policy.

Grievant next raises due process concerns. First he asserts that DJS did not afford him a predetermination conference prior to his suspension or termination. This requirement was substantially met by the conversations Ms. Largent-Hill had with Grievant to advise him of her

decisions. As a second issue, Grievant asserts that DJS failed to follow its progressive discipline policy. These policies serve only as guidelines and are not mandatory. In any case, dismissal may be appropriate in matters that are substantial, and not trivial in nature.

Finally, Grievant argues that termination was excessive and in violation of applicable uniformity principles. Grievant notes that other superintendents were transferred rather that dismissed when removed from the position. Notwithstanding the actions taken by theprior Director to demote or reassign employees, Grievant has no right to retain employment in another capacity.

In addition to the foregoing findings of fact and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. An at-will employee be fired for a good reason, bad reason, or no reason so long as there is no violation of a substantial public policy. *Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993).

2. The Superintendent of IHY is classified-exempt as a policymaking position under the provisions of *W. Va. Code* § 29-6-4(c), and serves as at-will employee.

3. Discipline imposed upon an employee who did not comply with a supervisor's directive based on his personal moral standards does not constitute a violation of a substantial public policy.

4. DJS substantially complied with any predetermination due process to which Grievant was entitled.

5. An employer is not required to apply progressive discipline policies in situations involving the dismissal of an at-will employee.

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. Neither the WestVirginia 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 28, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Attorney fees may not be granted by the Grievance Board.***

Footnote: 2

[2]It is also likely that Grievant would be classified exempt under the provisions of the Federal Labor Standards Act, in the "executive" category. In particular, 29 C.F.R. § 541.1(f) defines bona fide executive employees to include an employee compensated at a rate of not less than $250 per week "and whose primary duty consists of the management of the enterprise in which the employee is employed ... and includes the customary and regular direction of the work of two or more other employees therein...."