THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

RAYMOND CHURCH,

Grievant,

v. **Docket No. 06-DOTR-071**

WEST VIRGINIA DIVISION OF TOURISM,

Respondent.

DECISION

Grievant, Raymond Church, filed a grievance on February 27, 2006, claiming: Deputy Commissioner of Tourism was terminated without cause from at-will position by Commissioner Carver at her will and pleasure. Grievant was not provided due process prior to termination and was not given notice of termination. Grievant was never given annual review by Commissioner and has sustained damage of liberty and property rights.

For relief he seeks to be reinstated as Deputy Commissioner of the West Virginia Division of Tourism with full pay and benefits. Grievant is represented by Walt Auvil, Esq., and Respondent is represented by Kelly Goes, Assistant Attorney General. (See footnote 1) On April 19, 2006, Respondent filed a Motion to Dismiss asserting Grievant failed to state a claim upon which relief may be granted. Grievant responded in writing arguing he could not assert a violation of a substantial public policy because he was given no explanation for his termination. A telephone hearing was held April 27, 2006, and oral arguments on thisissue were heard from both parties. Based upon due consideration of the arguments presented by the parties, it is hereby found as follows:

Findings of Fact

1. Grievant was employed as Deputy Commissioner of Tourism. Pursuant to W. Va. Code § 29-6-4(c)(6) this position is classified-exempt.

2. Grievant was informed by letter and exit conference that his services were no longer required by Respondent, and he was discharged without cause.

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). “Employees holding positions *statutorily exempt* from coverage under the classified service . . . are deemed 'at-will' employees for purposes of resolving the employer/employee relationship.” Roach v. Reg'l Jail Auth., 198 W. Va. 694, 699; 482 S.E.2d 679, 684 (1996) (Emphasis in original). An at-will employee may be dismissed for good reasons, bad reasons, or no reasons, unless the employer's motivation for the discharge is to contravene some substantial public policy principle. Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also Wilhelm v. W. Va. Lottery, 198 W. Va.92, 479 S.E.2d 602 (1996). At-will, public employees are not owed a duty of good faith and fair dealing. Imposing such a duty would be contrary to the long-standing principle that grants the appointing authority an unfettered right to terminate an at-will employee. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

Respondent has filed a Motion to Dismiss on the grounds Grievant has failed to allege violation of any substantial public policy. Grievant argues that he was not given a reason for his termination, and as such needs to explore to determine whether a substantial public policy was violated. However, the Supreme Court of Appeals of West Virginia has approved dismissing a grievance brought by a public, at-will employee where the employee “failed to assert that his dismissal contravened some substantial public policy.” Wilhelm, 198 W. Va. at 94; 479 S.E.2d at 604.

Grievant also asserts that he was not afforded procedural due process. The West Virginia Supreme Court in the case of Waite v. Civil Rights Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978)

is instructive regarding Grievant's due process claims, as Waite defines liberty and property interests and discusses how to decide if a violation has occurred.

"A 'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Id. at Syl. Pt. 3, in part. Non-classified, at-will employees do not have a property interest in continued employment because they do not have a legitimate claim of entitlement to the position. Deputy Sheriff's Ass'n v. County Comm'n, 376 S.E.2d 626, 627-29 (W. Va. 1988). Thus, Grievant has no property interest in his continued employment. "A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities." Waite, at Syl. Pt. 2, in part. "[A]n accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty interest." Id. at 167- 168. Simply discharging someone for cause does not deprive Grievant of any liberty interest. 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. Roach v. Reg'l Jail Auth., 198 W. Va. 694; 482 S.E.2d 679 (1996).

2. An at-will employee may be dismissed for good reasons, bad reasons, or no reasons, unless the employer's motivation for the discharge is to contravene some substantial public policy principle. Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996).

3. The burden of proof is upon the at-will employee to demonstrate a violation of a substantial public policy. Washington v. Adjutant Gen. Office/Mountaineer Challenge Acad., Docket No. 05-ADJ-074 (Apr.21, 2005). See Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). 4. Grievant's failure to allege that his dismissal violated a substantial public policy forecloses any possibility of Grievant obtaining relief in this action. Wilhelm, 198 W. Va. at 97, 479 S.E.2d at 607; Permelia v. Regional Jail Auth., Docket No. 05-RJA-116 (Nov. 8, 2005).

5. At-will, public employees are not owed a duty of good faith and fair dealing. Imposing such a

duty would be contrary to the long-standing principle that grants the appointing authority an unfettered right to terminate an at-will employee. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

7. Grievant, a classified-exempt, at-will employee, did not have a property right in his continued state employment, and thus, was not entitled to any procedural due process protection. See Waite, supra.

8. As no reasons were stated for Grievant's dismissal, there was no action by Respondent that belittled or stigmatized Grievant to such an extent that he was deprived of a liberty interest. See Waite, supra; Parker, supra.

10. There is no due process violation.

Based upon the foregoing, the “Motion to Dismiss” is **GRANTED** and the above- styled action is **DISMISSED** for failure to state a claim.

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, and such appeal must be filedwithin 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: June 2, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

This case was originally assigned to ALJ Paul Marteney, but for administrative reasons was reassigned to the undersigned.