THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANNETTE WRIGHT and
TONYA EVE,
Grievants,

v.

Docket No. 07-DOE-072
Denise M. Spatafore
Administrative Law Judge

DEPARTMENT OF EDUCATION,

Respondent.

DISMISSAL ORDER

Annette Wright and Tonya Eve ("Grievants"), employed by the Department of Education ("DOE") as teachers at the Industrial Home for Youth, a state juvenile detention facility, filed separate grievances at level four on March 2, 2007 and March 9, 2007, respectively. Grievants challenge their two-day suspensions without pay for allegedly distributing inappropriate literature to students. Respondent filed a Motion to Dismiss on April 5, 2007, due to Grievants' at-will employment status, which was discussed during a telephonic hearing conducted on April 25, 2007. Subsequently, the parties were allowed to file additional written arguments with regard to this motion, the last of which were received by the undersigned on May 22, 2007. Grievant Wright was represented in this matter by Owens Brown of the West Virginia Education Association, and Respondent was represented by counsel, Sherri D. Goodman. Grievant Eve was represented at the telephone conference by Christine Barr of the American Federation of Teachers ("AFT"),

but a subsequent appearance on her behalf, along with written argument, was filed by counsel, Jeffrey G. Blaydes.[1]

Synopsis

Grievants, employed as special education teachers by the Department of Education, are assigned to provide education services at the Industrial Home for Youth, a Division of Juvenile Services facility. They were suspended for providing inappropriate reading material to juvenile residents in their classes. Respondent moved to dismiss the grievances on the basis of Grievants' at-will employment status and their failure to allege a substantial public policy violation. Pursuant to previous case law and pertinent statutes, Grievants are considered at-will employees, and they did not allege a public policy violation. Therefore, Respondent's motion is granted.

Findings of Fact

1. Grievants are special education teachers at the Industrial Home for Youth ("IHY"), a maximum security facility for juvenile offenders, which is operated by the Division of Juvenile Services ("DJS"). Although assigned to IHY, Grievants are employed by the West Virginia Department of Education ("DOE"), through programs provided by the Office of Institutional Education Programs ("OIEP").

2. In February of 2007, it came to the attention of DOE officials that Grievants brought a fictional novel, entitled *The Coldest Winter Ever*, into their classrooms as part of their classroom libraries, from which students can check out reading material. Upon

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[1]Mr. Blaydes' brief also purports to have been filed on behalf of "The American Federation of Teachers – West Virginia, AFL-CIO, [and] Judy Hale, its President", along with Grievant. However, it should be noted for the record that neither Ms. Hale nor the AFT as an entity are parties to this grievance.

investigation, DOE officials determined that the book contained objectionable, profane, and sexual subject matter, which was deemed inappropriate for students at IHY.

3. By correspondence dated February 21, 2007, Grievants were notified by State Superintendent Steven Paine that they were being suspended for two days without pay for providing inappropriate material to IHY students, in violation of various provisions of the OIEP Handbook.

4. On March 2, 2007, Grievant Wright filed a grievance at level four, alleging "My 2 day suspension for improper literature was unwarranted and extreme. There was no violation of WV Code 18A-2-8 or any policy."

5. On March 9, 2007, Grievant Eve filed a grievance at level four, alleging "Grievant's two day suspension without pay for allegedly providing [students] access to inappropriate reading material was not appropriate, was not progressive in nature, and was too severe for the alleged offense."

6. *West Virginia Code* §18-2-13f provides that DOE is responsible for educational programs for school-age juveniles housed within correctional institutions. The statute is silent regarding any specific procedures for the operation or implementation of such educational programs. However, DOE Policy 1471 provides that the state superintendent of schools has the authority to develop written implementation procedures to accomplish DOE's mission and goals for education in state correctional facilities.

7. The Employee Handbook for OIEP employees states that "Staff working in [juvenile] facilities are non-contractual employees. The employment relationship between the employer and the employee may be terminated by either party." Handbook at page 3.

It also states that "Department of Education staff are state employees." Handbook at page 2.

Discussion

The basis of Respondent's Motion to Dismiss is that, because of Grievants' at-will employment status, they may be disciplined for any reason which does not contravene a substantial public policy. *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). However, Grievant Eve contends that, for a variety of reasons, she is not an at-will employee and is entitled to the protections afforded to classified state employees. Conversely, Grievant Wright admits that she is at-will, but argues that this status should not prevent her from exercising her grievance rights.

This Grievance Board also has long ago established, through lengthy analysis and discussion of applicable laws, that DOE employees are not covered by the classified service. As discussed in *Dye v. West Virginia Department of Education*, Docket No. 99-DOE-217 (Sept. 16, 1999), this is evidenced by the fact that " WVDOE has adopted its own system for classifying its employees, rather than following the DOP classification scheme. *See Begley v. W. Va. Dep't of Educ.*, Docket No. 91-DOE-281 (Oct. 24, 1991). The administrative law judge in *Dye* concluded that DOE employees are not included in the classified civil service system, as further evidenced by the provisions of *W. Va. Code* § 18-

29-2(a), specifically authorizing these employees to use the grievance procedure for education employees.

Grievant Eve contends that the conditions of her employment are addressed by the provisions of *West Virginia Code* § 49-5E-5A, which states, in pertinent part:

> (a) Notwithstanding any provision of this code to the contrary, the division, when employing any persons to complete the approved staffing plan of any of its juvenile detention or corrections facilities, shall employ any person otherwise qualified who applies for a position at the juvenile detention or corrections facility who was also employed in good standing at a county or local jail facility, at the time of its closing, that was closed due to the completion of a regional jail.
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> (b) *All persons employed at a juvenile detention or corrections facility shall be employed at a salary and with benefits consistent with the approved plan of compensation of the division of personnel*, created under section five, article six, chapter twenty-nine of this code; *all such employees shall also 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.

(Emphasis added.) However, Article 5E is entitled "Division of Juvenile Services," meaning that the provisions of the above statute refer to DJS' responsibilities regarding *its* employees, who are clearly covered by the classified service. There is no dispute here, even by Grievants, that they are actually *employed by* DOE, and are merely assigned to work *at* a DJS facility. They are not covered by the provisions of *West Virginia Code* § 49-5E-5A.

As noted in Grievant's brief, *West Virginia Code* § 18-2-13f, which establishes the responsibility of the DOE to provide and administer educational programs for institutionalized juveniles, states that "[e]ducational personnel employed at and by correctional facilities and institutions shall be permitted to transfer to comparable positions

as school personnel of the [DOE]." Accordingly, there is clearly a difference between employees who are employed *by* DJS, and those are employed *by* DOE and assigned to provide services at facilities operated by DJS.

The following reasoning contained in *Canfield v. Department of Education*, Docket No. 97-DOE-508 (March 31, 1998) is informative regarding the unusual status of DOE teachers assigned to state facilities:

> The statute upon which Grievant relies is contained in Chapter 18A of the W. Va. Code entitled "School Personnel." W. Va. Code § 18A-1-1(a), at the beginning of the chapter, defines "school personnel" to mean "all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise. School personnel shall be comprised of two categories: professional personnel and service personnel." The record in this matter establishes that Grievant is employed by WVDOE, not a county board of education.
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> This determination is reinforced by W. Va. Code §§ 18-2-13h (which authorizes WVDOE to provide educational programs in institutions such as the Barboursville School) and 18A-4-17 (which governs the compensation of WVDOE employees such as Grievant). See Carpenter v. W. Va. Dept. of Educ., Docket No. 93-DOE-372 (Dec. 30, 1993). In pertinent part, W. Va. Code § 18A-4-17(c) states as follows:
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>> Nothing contained in this section shall be construed to mean that professional personnel and service personnel employed by the department of education to provide educational and support services to residents in state department of health and human resources facilities, corrections facilities providing services to juvenile and youthful offenders and the West Virginia schools for the deaf and blind are other than state employees. (Emphasis added.)
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> This specific language, in addition to Grievant's failure to come within the definition of "school personnel" contained in W. Va. Code § 18A-1-1(a), establishes that the terms of Grievant's employment are not subject to the provisions of [Chapter 18A of the *Code*].

Accordingly, pursuant to past determinations of this Grievance Board and a review of the statutory provisions involved, the undersigned concludes that Grievant, as with other teachers employed at state juvenile facilities, is a classified exempt state employee.

Grievants' at-will status denotes they could be disciplined for good reasons, bad reasons, or no reasons, provided the reason for the discipline did not violate 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 on an at-will employee to establish a violation of substantial public policy. *Wilhelm, supra*.

As to what constitutes a substantial public policy, Courts have recognized that these 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).

Neither Grievant has alleged a substantial public policy violation in her statement of grievance. Grievant Wright alleged her suspension was "unwarranted" and "extreme" and her conduct did not violate statute or policy. Grievant Eve claimed that her suspension was "not appropriate," "not progressive," and "too severe." There can be no dispute that

Grievants are at-will state employees, and they have failed to allege their suspensions violated substantial public policy. Accordingly, Respondent's motion must be granted.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. At-will employees may be disciplined for any reason which does not contravene a substantial public policy. *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. Department of Education employees are at-will state employees who are not in the classified civil service, and they are not entitled to the statutory protections afforded county board of education employees. *See Dye v. West Virginia Department of Education*, Docket No. 99-DOE-217 (Sept. 16, 1999); *Alaeddini v. Div. of Envt'l Protection*, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998); *Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992).

3. Neither Grievant has alleged that her suspension violated a substantial public policy.

Accordingly, this matter is hereby **DISMISSED** from the docket of the Education and State Employees Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Harrison County. Any such appeal must be filed within thirty (30) days

of receipt of this decision. W. VA. CODE § 18-29-7. 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 13, 2007

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DENISE M. SPATAFORE
Administrative Law Judge