THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANTHONY HIGGINS,

Grievant,

v. **Docket No. 07-RJA-020**

Sue Keller

Senior Administrative Law Judge

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/

TYGART VALLEY REGIONAL JAIL,

Respondent.

DISMISSAL ORDER

Anthony Higgins ("Grievant"), employed by the Regional Jail and Correctional Facility Authority ("RJCFA") as a Correctional Officer II at the Tygart Valley Regional Jail filed an expedited grievance at level four, as is permitted by *W. Va. Code* § 29-6A-4 (e), seeking reinstatement following notification of the termination of his employment. RJCFA counsel Chad Cardinal filed a "Motion To Dismiss" the grievance under cover letter dated March 9, 2007. A telephonic hearing on the Motion was scheduled for March 26, 2007. Grievant, acting *pro se*, did not make an appearance, nor did he call at any time to explain his absence. The Grievance Board contacted Grievant by telephone on April 2, 2007, at which time Grievant stated that he had not received the Motion or the scheduling order for the hearing. His address was confirmed, and Grievant was given until April 9, 2007, to file a written response to the Motion. No response has been received by the Grievance Board, and the matter is now mature for decision.

Synopsis

Grievant was an at-will employee at the time of his dismissal by Respondent, for various violations of policies and procedures. As an at-will employee who did not allege his dismissal violated a substantial public policy, Grievant is precluded from using the grievance procedure to challenge his

termination.

The following facts are undisputed.

Findings of Fact

1. Grievant was employed by the RJCFA as a Correctional Officer 2 at the Tygart Valley Regional Jail.

2. By letter dated January 8, 2007, RJCFA Chief of Operations John L. King, II, notified Grievant that his employment was terminated effective immediately. The reasons given for the action were numerous violations of Policies and Procedures, including his failure to report for scheduled overtime and for failing to report for his regularly
assigned shift without notifying his supervisors that he would not be at work, and failing to respond/reply to phone messages inquiring about his absence.

3. Employees of the RJCFA are classified exempt, or “at-will,” and may be terminated for any reason which does not contravene a substantial public policy.

4. Grievant does not allege a violation of any public policy.

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. *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. *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 does not dispute that he was a classified-exempt employee, thereby serving in an at-will employment status. *See Roach v. Regional Jail Auth*., 198 W. Va. 694, 482 S.E.2d 679 (1996); *Ramos v. Regional Jail & Correctional Facility Auth*., Docket No. 98-RJA-363 (Jan. 29, 1999); *Parker v. W. Va. Health Care Cost Review Auth*., Docket No. 91-HHR-400 (June 30, 1992). Grievant's at-will status denotes he could be fired for good reasons, bad reasons, or no reasons, provided he was

not terminated for a reason that 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*. 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*.

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).

In the present matter, Grievant does not allege a violation of a public policy. Neither does he deny the reasons for dismissal, or make any relevant allegations regarding the action. The lack of a viable complaint, together with the failure to respond to the Motion To Dismiss, establishes that Grievant has failed to pursue a claim regarding his the termination of his employment.

The following conclusions of law support this discussion.

Conclusions of Law

1. As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that he is 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 Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978)*; Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995);.

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. RegionalJail & Correctional Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994).

3. 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 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).

4. Grievant has failed to allege a violation of a substantial public policy, or to present any viable complaint regarding the termination of his employment.

Accordingly, the Motion To Dismiss is **GRANTED,** and the grievance is Ordered DISMISSED and stricken from the docket of the Education and State Employees Grievance Board.

This Dismissal Order is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: APRIL 23, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE