WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

FREDRICK ARMSTRONG,

Grievant,

v. Docket No. 2008-0761-DEA

DIVISION OF CULTURE AND HISTORY,

Respondent.

DISMISSAL ORDER

This matter comes before the undersigned pursuant to Respondent's “Renewed Motion to Dismiss,” filed on April 30, 2008. Prior to a discussion of the issues raised in Respondent's motion, a brief procedural history is deemed to be appropriate.

Procedural Background

This grievance was initiated on November 16, 2007, as a result of the termination of Fredrick Armstrong's (“Grievant's”) employment as Director of Archives and History for the Division of Culture and History (“DCH”). Respondent filed a Motion to Dismiss on January 7, 2008, alleging that, due to Grievant's status as an at-will employee, he had failed to state a claim upon which relief could be granted. This motion also alleged that the level three grievance form had been completed incorrectly, and the requested relief was unavailable. On January 22, 2008, Grievant responded to that motion and filed an amended statement of his grievance. By Order dated February 15, 2008, Acting Chief Administrative Law Judge Janis I. Reynolds denied the Motion to Dismiss, stating that “the issues asserted in Grievant's amended grievance are sufficient to raise the possibility of a substantial policy

issue or issues." Due to the retirement of Judge Reynolds, this grievance was reassigned to the undersigned on March 16, 2008. On April 29, 2008, Respondent filed its Renewed Motion to Dismiss, based upon the renewed statement of grievance and further analysis of factual information obtained during discovery. Grievant's response was received on May 31, 2008, and Respondent filed a reply to that response on June 3, 2008.

Based upon the information contained in the pleadings filed by the parties, the undersigned makes the following findings of fact:

Findings of Fact

1. Prior to his termination, Grievant was employed as Director of Archives and History ("A&H") by the DCH, which is a division of the Department of Education and the Arts ("DEA"). Grievant was appointed to this at-will position by the Commissioner of DCH, with the advice and consent of the A&H Commission. Grievant's immediate supervisor was the Commissioner, and the Commissioner's supervisor is the Secretary of DEA.

2. On November 16, 2007, Grievant was terminated from his position. Apparently, no specific reason for the termination was stated.

3. Grievant's Amended Grievance, dated January 22, 2008, alleges his termination was related to three specific matters:

> -- Grievant expressed his disagreement with a decision made by Kay Goodwin, Secretary of DEA, to enter into an agreement with the West Virginia University Press for the purpose of publishing the *West Virginia History Journal*. The *Journal* had previously been published, on an annual basis, by Grievant and his staff at A&H. On April 10, 2006, Grievant was issued a written reprimand by Secretary Goodwin for insubordination, for his failure/refusal to transfer the publication materials to the West Virginia University Press, due to his belief that A&H was required by statute to publish this particular journal.
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> -- Several months prior to his termination, Grievant voiced his objection to the merger of A&H's documents into the existing State Library, where an eating establishment would also be placed in the same building. Grievant believed this should not be done and thought that "the introduction of a restaurant in the vicinity of a historical archive is merely asking for rodent and pest problems." With regard to this incident, Grievant states "[i]t is clear to me that in my attempt to voice legitimate and professional concerns . . . so as to insure the statutory law of West Virginia was fulfilled, I was viewed by my superiors as insubordinate."
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> -- In his capacity as Director, Grievant was responsible for reviewing applications for highway historical markers, which he would then forward to the A&H Commission, which would formally approve or disapprove the markers, in accordance with

> regulations the Commission has promulgated regarding such markers. In 2006, Wayne County had requested approval of highway markers, which request was considered twice and ultimately rejected by the Commission.
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> The Wayne County request was reconsidered and approved in mid- 2007, which Grievant alleges occurred after members of the House of Delegates asked Randall Reid-Smith, Commissioner of the DCH, to "make it happen." With regard to this incident, Grievant alleges "I believe my attempt to adhere to the published rules and regulations of the placement of historical markers . . . and . . . to insure that the process did not devolve into a political system was met with strong disapproval by my superiors."

4. One of the duties of the A&H section is to "edit and publish a historical journal devoted to the history, biography, bibliography and genealogy of West Virginia." *See* W. Va. Code § 29-1-6.

5. In September of 2004, the previous Commissioner of the DCH had sought the legal advice of an employee of the West Virginia Attorney General's office, who had opined that the transfer of the publication of the *West Virginia History Journal* to another publisher would violate West Virginia law. (See footnote 1) However, in 2006, upon learning of this previous opinion, Secretary Goodwin again sought the advice of an attorney regarding the transfer and was assured that it would not violate any law. 6. There is no West Virginia law that would prohibit the merging of the reading rooms of DCH with the State Library, nor is there any legal prohibition against having an eating establishment in the same building as these libraries.

7. Only the Commissioner of DCH has the statutory authority to approve the placement of historical markers. However, it appears that approval of markers had been delegated to the A&H Commission at some time in the past by a previous Commissioner. Grievant's role in this process was to review the application and make a recommendation, but the ultimate decision was in the hands of the Commission, pursuant to the authority given to it by the Commissioner.

Discussion

Grievant does not dispute that he is an at-will employee. 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. Rules of Practice and Procedure of the W. Va. Public Employees Grievance Bd., 156 CSR 1 § 3 (2007); *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*, 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).

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. Pursuant to the Grievance Board's Rules of Practice and Procedure, a grievance may be dismissed “in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” 156 CSR 1 § 6.11 (2007). As explained by the Court in *Wilhelm*, *supra*, the Grievance Board's standard for dismissals is similar to the granting of a Rule 12(b)(6) motion under the West Virginia Rules of Civil Procedure. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl., *Flowers v. City of Morgantown*, W.Va., 166 W. Va. 92, 272 S.E.2d 663 (1980). In such cases, the complaint or allegations are viewed in the light most favorable to the claimant. In *Wilhelm,* the Court concluded that Grievant “failed to state a valid claim because he, as an at-will employee, could be discharged with or without cause by the Lottery Director unless such a discharge violated a substantial public policy,” and the grievance, as alleged, did not state a claim which, if proven, would establish a violation of such public policy. *Wilhelm*, 198 W. Va. at 97; 479 S.E.2d at 607.

As a preliminary issue, Grievant has argued that, due to Judge Reynolds' previous denial of Respondent's initial Motion to Dismiss, reconsideration of the issue is prohibitedby the doctrine of *res judicata*. The doctrine of *res judicata* may be applied to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 03-19-018 (May 27, 2003); *Liller v. W. Va. Human Rights Comm'n*, 376 S.E.2d 639, 646 (W. Va. 1988). However, one threshold element of any claim that a particular issue has been litigated is “a final adjudication *on the merits*.” Syl. pt. 4, *Blake v. Charleston Area Med. Center*, Inc. 201 W. Va. 469; 498 S.E.2d 41 (1997).

The February 15, 2008, Order contains no discussion of the specific issues alleged in the Amended Grievance; therefore, there was no “adjudication” of the merits of Grievant's claim. Moreover, Judge Reynolds' Order merely states that Grievant had raised the “possibility” of a substantial public policy issue, and it contains no ruling that Grievant had, in fact, alleged a substantial public policy violation which would, if proven, prevent the termination of his at-will employment. Accordingly, the undersigned is not precluded from ruling upon the issue at this time.

"A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact[.]" Syl. pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). Identification of the types of issues that constitute substantial public policy is often difficult, but the Supreme Court of Appeals has provided guidance on many occasions. In *Wounaris v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003), the Court noted that previous efforts had been made “to describe why a 'public policy' exception to the 'at-will' doctrine is necessary:”

> The basic rule that an employer has an absolute right to discharge an at-will employee has been subjected to several exceptions by this Court, one ofwhich is that where an employer's motivation for the discharge is to contravene a substantial public policy, then the employer may be liable to the employee for damages. A review of these exceptions indicates that generally they were created to protect the public from threats to its health, financial well-being, or constitutional rights, or to guarantee the effective operation of the legal system. The rationale underlying each exception is that protecting the employee from discharge is necessary to uphold a substantial public interest.

217 W.Va. at 247 (*citing Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 751, 559 S.E.2d 713, 724 (2001) (Maynard, J., *dissenting*)).

Also as noted in *Wounaris*, *supra*, examples of cases in which it has been held that terminations violated a substantial public policy interest include termination of an employee who refused to take a polygraph test (*see Cordle v. General Hugh Mercer Corp*., 174 W. Va. 321, 325 S.E.2d 111 (1984) (right to privacy)), terminating a dog warden who made a claim for overtime wages not paid to him (*see McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987) (right to seek redress of grievances and seek access to the courts), and terminating a convenience store employee for defending himself against a robber (*see Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 559 S.E.2d 713 (2001) (right to self defense)).

Grievant alleges, in his response to the Renewed Motion to Dismiss, that “he was terminated

because he was attempting to abide by the statutory laws, rules and regulations relevant to his position and for voicing legitimate and professional concerns[.]" He further asserts that it is a violation of substantial public policy for a state employee to be terminated for attempting to comply with such laws, rules and regulations, and state employees are required to voice legitimate and professional concerns regarding proposedstate actions. Each of the three incidents identified by Grievant as the reasons for his termination will be examined in light of the standards set forth above.

Publication of the *West Virginia History Journal*

The statute which discusses the purpose of the A&H section of the DCH states that "the purpose and duties [of A&H] are . . . to edit and publish a historical journal devoted to the history, biography, bibliography and genealogy of West Virginia," among many other things. W. Va. Code § 29-1-6. Prior to 2007, the A&H section, under Grievant's direction, published the *West Virginia History Journal* on an annual basis in order to meet the requirements of this provision. When Secretary Goodwin decided to enter into an agreement with the West Virginia University Press to take over the publication, Grievant disagreed and apparently refused to turn over the materials, for which he was ultimately disciplined. Therefore, the question to be decided by the undersigned is whether or not a substantial public interest was implicated with regard to this issue.

Grievant contends that he was obligated to voice his objection to the changes regarding the publication of the journal, because he believed his employer was in violation of the law, due to his obligation to "publish a *yearly* history journal." However, reasonable minds can clearly differ as to whether or not the arrangement actually violated W. Va. Code § 29-1-6, which does not name a specific publication that would meet the statutory requirements, nor does it require the publication to be issued annually.

Grievant's disagreement with a management decision made by his employer does not constitute a substantial public interest. While Grievant might have had some responsibility, as Director of A&H, to point out a statutory provision which would potentially apply to matters handled by his division, he was not asked to personally violate any law. (See footnote 2) Once the issue was raised by Grievant, and the Secretary had sought legal advice on the subject, it was not Grievant's "right" to continue to protest his superiors' decision.

The instant case must be distinguished from the situation which gave rise to the opinion in *Harless*, *supra*. In that case, the employee had been terminated for complaining about his employer's

intentional violations of the West Virginia Consumer Credit and Protection Act contained in W. Va. Code § 46A-1-101. Because the Act contains both civil and criminal penalties for violations of a law which regulates various consumer and credit practices, it was deemed to serve as protection of a substantial public policy interest. The Court noted that the Act "represents a comprehensive attempt . . . to extend protection to the consumers and persons who obtain credit in this State and who obviously constitute the vast majority of our adult citizens." 246 S.E.2d at 275-276. Accordingly, the termination of an employee who challenged his employer's violations of that law was determined to be in contravention of the substantial public policy interests contained in that statute. By comparison, Grievant's challenge to his employer's decision regarding a contract for publication of a historical journal, whether or not it violated the statute addressing his agency's duties, does not implicate any law designed to protect important public interests.

While the source of publication of the *West Virginia History Journal* might be interesting to some members of the public, it certainly does not rise to the level ofimplicating a threat to the public's "health, financial well-being, or constitutional rights." *Wounaris, supra*. Although the Supreme Court has recognized that an at-will employee should not be fired when that termination would violate "important rights of the employee," disagreement with management decisions is not a right which is comparable to rights such as self defense or privacy. If Grievant was terminated as a result of his refusal to cooperate with Secretary Goodwin's decision regarding the publication of the *West Virginia History Journal*, even if Grievant's allegations are true, this does not implicate a substantial public right which is protected by law or policy.

Merger of the Libraries

Although the Amended Grievance states that, in this regard, his termination was related to "my attempt to voice legitimate and professional concerns regarding this proposal so as to insure the statutory law of West Virginia was fulfilled," Grievant has identified no law applicable to this issue. The provisions of W. Va. Code § 29-1-6 state that one of the purposes and duties of A&H is "to operate and maintain a state library for the preservation of all public records, state papers, ..." However, the Commissioner of DCH is charged with the responsibility to "assign and allocate space in all facilities assigned to the division and all space in the building presently known as the West Virginia science and culture center, and any other buildings or sites under the control of the commissioner." W. Va. Code § 29-1-2.

Once again, Grievant's voicing of what amounts to a concern regarding the advisability of a decision which he was not responsible for making does not amount to a substantial right or interest of the public. The expression of “legitimate and professionalconcerns,” as Grievant describes them, are not public rights entitled to legal protection. Otherwise, pursuant to this theory, even employees who are not at-will would be given unlimited license to refuse to comply with the lawful directives of their superiors under the guise of protecting such “concerns,” resulting in insubordinate conduct. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *Day v. Morgan County Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). If at-will employees have an unlimited right to disagree with their superiors, under the guise of protecting substantial public rights, then the concept of “at-will employment” would be stripped of its purpose and meaning.

Grievant's disagreement with the location of A&H documents, or the placement of an eating establishment in their vicinity, does not raise an issue involving a substantial public policy.

Approval of Historical Markers

One of the statutory duties of the Commissioner of DCH is to “advance, foster, promote, identify, register, acquire, mark and care for historical, prehistorical, archaeological and significant architectural sites, structures and objects in the state.” W. Va. Code § 29-1-1. Apparently, at some point in time the approval of historical markers had been delegated to the A&H Commission, with the initial applications being reviewed by Grievant. Therefore, when Commissioner Reid-Smith decided to approve the WayneCounty Markers, after the Commission had previously rejected them, Grievant believed the decision violated established procedure.

Grievant contends that he was terminated for “attempting to adhere to established rules and regulations of the placement of historical markers[.]” (See footnote 3) However, once again, Grievant was not personally asked or directed to violate any law, rule or regulation. Regardless of whether the Wayne County markers complied with any existing rules governing the placement of such markers, by statute this decision ultimately rested with the Commissioner. As discussed above, Grievant's personal disagreement with the decisions of his superiors regarding issues that do not implicate substantial public interests is not a legally protected right which would usurp the principles allowing

termination of at- will employees. Just as with the publication of a historical journal or the location of the A&H library, the placement of historical markers is something that might be interesting to some members of the public, but it does not involve any policies or laws designed to protect important public rights or interests.

Therefore, for all of the reasons discussed above, the undersigned finds that Grievant has failed to assert a substantial public policy that has been violated by his termination, if the claims asserted in his grievance statement are viewed as true. Accordingly, as an at-will employee, Grievant was subject to termination with no justification, and his grievance must be dismissed for failure to state a claim for which relief may be granted. *See Wilhelm, supra*.

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. Grievant has failed to allege a claim upon which relief can be granted, because his statement of grievance does not allege violations of substantial public policy. *See Wilhelm*, *supra*; *Permelia v. Regional Jail Auth.*, Docket No. 05-RJA-116 (Nov. 8, 2005).

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

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. 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. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.19 (eff. Dec. 27, 2007).

Date: June 17, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

This was not a formal opinion of the Attorney General's office.

Footnote: 2

The undersigned also feels compelled to note that, even if Grievant had been directed to "violate" any of the provisions regarding the responsibilities and purpose of A&H, his termination still would not have violated any substantial public policy.

Footnote: 3

From the statements in the parties' motions and responses, the undersigned has gleaned that the A&H Commission had promulgated some sort of rules regarding standards for placement of historical markers, but they were not legislative rules adopted by the West Virginia Legislature.