WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MARK HEPLER,

Grievant,

v. Docket No. 2008-0705-MAPS

REGIONAL JAIL AND CORRECTIONAL

FACILITY AUTHORITY/TYGART

VALLEY JAIL,

Respondent.

DISMISSAL ORDER

Mark Hepler ("Grievant") filed this grievance directly at level three on October 25, 2007, following the termination of his employment as a correctional officer for the Regional Jail and Correctional Facility Authority ("RJA"). On February 1, 2008, the undersigned received a Motion to Dismiss from RJA General Counsel Chad M. Cardinal, arguing that Grievant was an at-will employee and had not alleged a cognizable claim. By correspondence dated February 11, 2008, the undersigned notified Grievant and his representative, Jack Ferrell of the Communications Workers of America, that a written response to this motion should be filed by February 25, 2008. The only response received was a letter from Mr. Ferrell, dated February 15, 2008, stating "on behalf of the Grievant, Mark Hepler, I object to Mr. Cardinal's motion and would respectfully request that a Level IV Hearing be scheduled."

Synopsis

Grievant was an at-will employee at the time of his dismissal by Respondent for allowing inmates out

of their cells after lock-down and failure to maintain proper and required documentation. As an at-will employee, who did not allege his dismissal violateda substantial public policy, Grievant is precluded from using the grievance procedure to challenge his termination.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by the RJA at the Tygart Valley Jail as a Correctional Officer 1. He was initially employed on an unspecified date in the fall of 2006.

2. By certified letter dated October 12, 20007, John L. King, RJA Chief of Operations, informed Grievant that he was being dismissed from his “at-will Correctional Officer 1 position” for allowing inmates out of their cells after normal lock-down hours, utilizing group release to allow inmates out of their cells, and failure to maintain proper logs and documentation of inmate and staff movements.

3. Prior to January 1, 2008, all correctional officers employed by the RJA were classified-exempt pursuant to W. Va. Code § 31-20-27. (See footnote 1)

4. In explaining his grievance, Grievant has stated the following:

   1. Training was not adequate _ no follow up. The training has recently been changed indicating past problems with the procedures.
   2. Never sent to the academy to get additional training.
   3. Never had a reprimand.
   4. No opportunity to correct the problem was given.
   5. No verbal or written indication that logs were improperly maintained.

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. 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). “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). (See footnote 2)

RJA has filed a motion to dismiss this grievance on the grounds that Grievant has failed to identify any substantial public policy violated by his discharge from employment as a Correctional Officer 1. The Supreme Court of Appeals of West Virginia has approved dismissing a grievance brought by a public, at-will employee where the employee “failedto assert that his dismissal contravened some substantial public policy.” *Wilhelm*, 198 W. Va. at 94; 479 S.E.2d at 604. 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).

Grievant has defended himself by alleging that his dismissal was not justified, but this does not amount to a specific public policy violation. Indeed, 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*. RJA is thus correct that this grievance is subject to dismissal, pursuant to the Grievance Board's Procedural Rules, 156 CSR 1 § 6.11 (2007), which provides that “[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." Grievant's failure toallege violation of a substantial public policy forecloses any possibility that he could obtain relief from the Grievance Board. Accordingly, this grievance must be dismissed. *See Creasy v. Regional Jail Auth.* 07-RJA-035 (Apr. 30, 2007); *Permelia v. Regional Jail Auth.*, Docket No. 05-RJA-116 (Nov. 8, 2005).

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). 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.

Accordingly, this grievance is **DISMISSED** from the dockets of this Grievance Board.

This 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 Order. This Order 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: March 19, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Effective January 1, 2008, the legislature amended W. Va. Code § 31-20-27(a) to state that all regional employees "shall be placed in the civil service system as covered employees." Acts 2007, c. 51. However, Grievant's termination occurred prior to the effective date of this provision.

Footnote: 2

The version of W. Va. Code § 31-20-27(a) in effect prior to January 1, 2008, stated that "[a]ll correctional officers employed under this subsection shall . . . be covered by . . . the classified-exempt protection policies of the Division of Personnel."