WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID M. DUBITES,
Grievant,

v. **Docket No. 2010-0032-MAPS**

WEST VIRGINIA DEPARTMENT OF
MILITARY AFFAIRS AND PUBLIC SAFETY/
DIVISION OF PROTECTIVE SERVICES,
Respondent.

DECISION

David M. Dubites ("Grievant") filed this grievance against his employer, Respondent West Virginia Department of Military Affairs and Public Safety/Division of Protective Services ("Division") on July 8, 2009. His "Statement of Grievance" provides as follows:

> I, David M. Dubites, was dismissed from my position as a Capitol Police Officer on Thursday[,] June 25, 2009 with no prior indications of any discrepancies and no opportunity to respond to anyone prior to the action being taken. More to follow.

As relief, the Grievant seeks "[r]einstatement and wages lost from the time of dismissal [un]til time of reinstatement. More to follow."

As this is a disciplinary matter, the Grievant filed directly to Level Three. *See* W.VA. CODE § 6C-2-4(a)(4). A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on September 14, 2009, at the Grievance Board's office in Charleston, West Virginia.[1] Grievant appeared in person and through his counsel

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[1] Respondent Division filed a *Motion to Dismiss* and a telephonic hearing was held on said motion on September 2, 2009. Grievant, who had recently obtained counsel, appeared by his counsel. Respondent moved to dismiss because Grievant failed to allege a violation of a substantial public policy. Thereafter, in recognition of the "more to follow" language contained in the "Statement of Grievance," leave was granted for the Grievant's

Richard J. Lindroth, Esquire. Respondent Division appeared by and through its counsel, Anthony D. Eates, II, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 20, 2009.

Synopsis

Grievant, an at-will employee, was discharged from his position as a Capitol Police Officer after leaving his "duty belt" in an unsecured location after work. Grievant's "duty belt" contained his firearm, handcuffs and cap-stun "pepper" spray.

At-will employees may be dismissed for any reason or no reason, so long as the dismissal does not violate a substantial public policy. Grievant alleges that the Division failed to follow its own policy/procedure and this failure constitutes a violation of substantial public policy. Grievant has not established that the agency's policy/procedure is a substantial public policy. The policy/procedure confers no additional rights beyond those provided in the law. Accordingly, this grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. The Grievant was hired as a Capitol Police Officer with the Division in 2002.

2. On June 24, 2009, at the end of his shift, Grievant left his duty belt unsecured laying on a chair in a Division office in the basement of Building 6 on the State Capitol

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newly involved counsel to identify a substantial public policy, and he did so prior to the Level Three hearing. The legal arguments contained in the Respondent's Motion are addressed herein.

Complex. The Grievant's duty belt includes his firearm, ammunition, hand cuffs and cap-stun "pepper" spray.

3. On June 24, 2009, Grievant drove a motorcycle to work and was unable to transport his duty belt to his home. Level Three, Testimony of David M. Dubites.

4. The Division's Building 6 office is accessible to anyone with card access, including custodial personnel. *See generally* Level Three, Grievant's Exhibit 2. In addition, the area is used by Division officers to detain individuals whom the officers stop and need to question on the Capitol Complex.[2]

5. Mr. Jay Smithers is the Director of Protective Services. On June 24, 2009, Director Smithers received a call at his home reporting the incident involving the Grievant's unsecured duty belt. The next day, June 25, 2009, Director Smithers met with the Grievant. Level Three, Testimony of Jay Smithers. During the meeting, Grievant gave Director Smithers no indication that he understood or appreciated the seriousness of leaving his duty belt unsecured in the Building 6 office. *Id*.

6. After speaking with the Grievant, Director Smithers dismissed the Grievant from his employment. He did so by letter dated June 25, 2009. The letter states that the dismissal is "due to the Division's loss of confidence in your ability to effectively discharge the duties and responsibilities of your position as law enforcement officer." Level Three, Joint Exhibit 1.

7. One other officer had also left his handgun unsecured in the Building 6 office.

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[2] In fact, on the evening of June 24, 2009, while the Grievant's duty belt lay unsecured on the chair in the Building 6 office, officers stopped a man on the Capitol grounds carrying an axe. The officers were able to question and clear the man without having to take him to the office.

This officer was suspended because, unlike the Grievant, he had little to no disciplinary history with the Division. Level Three, Testimony of Jay Smithers.

8. Grievant has a history of inappropriate conduct that has warranted past disciplinary action. In June, 2003, the Division suspended the Grievant for forty (40) hours after discovering that while he was on duty, he allowed his children to remove coins from the fountain on the State Capitol Complex. Level Three, Joint Exhibit 1. Grievant did not grieve this disciplinary action.

9. In March, 2008, the Division demoted the Grievant from assistant sergeant to officer. The March 26, 2008 demotion letter states that the demotion is "effective immediately and due to the Division's loss of confidence in your ability to effectively discharge the responsibilities of your position." *Id.* Grievant did not grieve this disciplinary action.

10. In October, 2008, the Division verbally counseled the Grievant due to Grievant abandoning his post. *Id.* Grievant did not grieve this disciplinary action.

11. In May, 2009, the Division verbally counseled the Grievant due to the Grievant's excessive personal telephone calls while on duty. *Id.* Grievant did not grieve this disciplinary action.

12. Grievant was an at-will employee.

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. *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 was a classified-exempt employee and as such served at the will and pleasure of the Director of the Division. W. VA. CODE § 15-2D-3(c)(1). *See Dye v. Dep't of Educ.*, Docket No. 99-DOE-217 (Sept. 16, 1999). 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 violates a substantial public policy. *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995); *Harless*, *supra*. At-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

> [t]he rule that an employer has an absolute right to discharge an at-will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syl., *Harless*, *supra*. A general assertion of discrimination, harassment, retaliation, and/or favoritism, without identifying a violation of a substantial public policy, is insufficient as a claim for relief in an at-will employment grievance. *Wilhelm*, *supra*.

Once an at-will employee identifies the substantial public policy that is violated, the burden of proof is on the 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. *Id*. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). *See Loundman-Clay v. Higher Educ. Policy Comm'n/Bluefield State College*, Docket No. 02-HEPC-013 (Aug. 26, 2002).

Foremost, before any evidentiary inquiry, it is imperative for the at-will employee to identify the substantial public policy he or she alleges has been violated. In *Birthisel v. Tri-Cities Health Serv.*, 188 W. Va. 371, 377, 424 S.E.2d 606, 610 (1992), the West Virginia Supreme Court of Appeals discussed sources of public policy and stated:

> [t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

"A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. Pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). *Accord Page v. Columbia Natural Res., Inc.*, 198

W. Va. 378, 480 S.E.2d 817 (1996). "No fixed rule can be given to determine what is public policy. It is sometimes defined as that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community--the public good." *Yoho v. Triangle PWC, Inc.*, 175 W. Va. 556, 561, 336 S.E.2d 204, 209 (1985)(citations omitted).[3] *See also* 82 AM. JUR. 2D WRONGFUL DISCHARGE § 57.

Grievant argues that the failure of the Division to "stand by or follow its Internal Operating Policy while expecting its employees to do so is a contravention of [substantial] public policy in the nature of fraud[4] on the employees." *Grievant's Proposed Findings of*

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[3] West Virginia courts have recognized that substantial public policy 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)); 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)); truth-telling during investigations (*Kanagy v. Fiesta Salons, Inc.*, 208 W. Va. 526, 541 S.E.2d 616 (2000); *Page v. Columbia Natural Res., Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996)); refusing to operate a truck with defective brakes (*Lilly v. Overnight Transportation Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992)); expressing concern over hospital staffing and patient care (*Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997)); refusing to take a polygraph test (*Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984)); refusing to take a random drug test where no safety exception existed (*Twigg v. Hercules Corp.*, 406 S.E.2d 52, 406 S.E.2d 52 (1990)); making a claim for overtime wages not paid (*McClung v. Marion County Comm'n*, 178 W. Va. 444, 360 S.E.2d 221 (1987)); and defending oneself against a robber (*Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 559 S.E.2d 713 (2001)).

[4] In *Stanley v. Sewell Coal Co.*, 169 W. Va. 72, 77, 285 S.E.2d 679, 683 (1981), our Supreme Court recognized that the *Harless*, *supra*, rationale is compatible with the general principles of fraud in West Virginia. *See also Nye v. Dep't of Livestock*, 196 Mont. 222, 639 P.2d 498 (1982)(seemingly recognizing an agency policy may alter the employment relationship, impose a "good cause" dismissal standard and constitute a substantial public policy).

Fact and Conclusions of Law, ¶ 10. "It is well-established that a governmental agency must comply with all properly enacted rules and regulations. *Powell v. Brown*, 238 S.E.2d 220 (W. Va. 1977)." *Patterson v. Dep't of Public Safety*, Docket No. 95-DPS-572 (May 28, 1996). While an employee may be at-will, the promulgation of Legislative rules may alter the employment relationship and grant an employee additional rights under the law. *See Walker v. Dep't of Public Safety/W.Va. State Police*, Docket No. 98-DPS-056 (Sept. 11, 1998). In some instances, a mere policy established by an agency may create and grant an employee additional rights beyond those provided in the law. *Rhodes v. Educ. Broadcast Authority*, Docket No. 89-EBA-622 (July 16, 1990), *aff'd* Cir. Ct. of Cabell County, Civil Action No. 90-C-1086 (Oct. 23, 1990).

When examining the Division's Internal Operating Procedure it becomes plainly obvious that the Procedure is not mandatory, but rather a guide. The Division's Procedure does not constitute a substantial public policy. The Procedure plainly states on page two that:

> . . . it is not the intent of this policy to diminish the authority of the Division Director, or his or her designee, when terminating an employee due to the Division's loss of confidence in the employee's ability to effectively discharge the duties and responsibilities of his or her position, and/or due to the Director's, or his or her designee's, determination that an employee no longer meets the expectations required of the position. Upon initial employment, employees are advised that the Division of Protective Services is a classified-exempt service agency. At-will employees are subject to dismissal for any reason which does not contravene some substantial public policy principle.

Level Three, Joint Exhibit 1. The Procedure goes on to state that "the stages of discipline can vary **depending on the nature and seriousness of the infraction.**" *Id.* (emphasis

in original). On page three under "Dismissal," the Procedure echoes the above-quoted section from page two by stating:

> [d]ismissals may be issued when: (1) infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction; (2) the employee commits a singular offense of such severity that immediate dismissal is warranted; or (3) the Division Director, or his or her designee, has lost confidence in the employee's ability to effectively discharge the duties and responsibilities of his or her position and/or has determined that the employee no longer meets the level of expectations required of the position. Upon initial employment, employees are advised that the Division of Protective Services is a classified-exempt service agency. *At-will employees are subject to dismissal for any reason which does not contravene some substantial public policy principle*.

Id. (Emphasis added). Agencies are bound to follow their own policies and procedures. *Patterson*, *supra*. In recognition of the language of the Procedure, this ALJ finds that the Division's Operating Procedure, as a matter of law, does not constitute a substantial public policy. The Procedure adopts and cites the traditional rule governing at-will employment. It does not confer any additional rights upon the Grievant or modify his at-will status. The Procedure does not establish or create a substantial public policy. Accordingly, Grievant has not alleged or established a violation of a substantial public policy and this grievance must be denied.[5]

The following conclusions of law are appropriate in this matter:

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[5] Assuming *arguendo* Grievant does have some right to progressive discipline, this grievance still must be denied. The preponderant evidence establishes that on June 24, 2009, Grievant left his duty belt, which included his Division issued .45 caliber handgun, in an unsecured area after work. Grievant has a significant disciplinary history. He has been given verbal warnings, demoted and suspended. Even if the Division's operating policy created a substantial public policy, this grievance must still be denied.

Conclusions of Law

1. An at-will employee may be fired for a good reason, bad reason or no reason so long as there is no violation of a substantial public policy. *Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993).

2. An employer is not required to apply progressive discipline policies in situations involving the dismissal of an at-will employee. *Biggie v. Division of Juvenile Servs./Industrial Home for Youth*, Docket No. 05-DJS-289 (Apr. 28, 2006).

3. Grievant's position was at-will. W. VA. CODE § 15-2D-3(c)(1). As such, he bears the burden of proof to establish a violation of substantial public policy. *Washington v. Adjunct General's Office/Mountaineer Challenge Academy*, Docket No. 05-ADJ-074 (Apr. 21, 2005). If this burden is not met, the reasons for the termination are not at issue, and the termination stands. *Wilhelm*, *supra*.

4. Grievant has only alleged that his dismissal was in violation of agency policy/procedure. He has failed to allege or establish a violation of a substantial public policy.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 WEST VIRGINIA 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 § 6.20 (2008).

Date: November 9, 2009

Mark Barney
Administrative Law Judge