THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARL E. BERLIN, JR.,

Grievant,

v. **Docket No. 2012-0681-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Respondent.

DECISION

Grievant, Carl E. Berlin, Jr., filed an expedited Level Three grievance[1] against his employer, West Virginia Regional Jail and Correctional Facility Authority ("RJA"), challenging his termination stating as follows: "[u]nlawful and improper termination, 143csr1, Admin Rule 12.2. On 12-19-11, I was terminated by Wayne Armstrong, HR Director improperly." As relief, Grievant seeks to "[r]egain the Administrators' position, back pay with interest, compensation from loss of employment, and Attorney and Legal fees associated with termination and reemployment of Administrators' position and grievance process."

A Level Three hearing was held on November 30, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia office.[2] Grievant appeared in person, *pro se*. Respondent appeared by counsel, Travis E.

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[1] *See*, W. VA. CODE § 6C-2-4(a)(4).

[2] The Level Three hearing in this matter was originally scheduled to be held on October 23, 2012. On that day, Grievant appeared in person, *pro se.* Respondent appeared by counsel, Mr. Ellison. The undersigned continued this matter as there had been some confusion among the parties as to which party had the burden of proof, and as Respondent filed and served its Motion to Dismiss only the day before the hearing. By Order entered November 7, 2012, the matter was continued and Respondent's Motion to Dismiss was held in abeyance.

Ellison, III, General Counsel. This matter became mature for decision on January 14, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was terminated from a classified-exempt, at-will position he held with the Respondent. Grievant asserted that his termination violated substantial public policy. Respondent denied Grievant's claims, and asserted Grievant's termination was proper under the law. Grievant failed to meet his burden of proving that his termination violated substantial public policy. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. In or about March 2010, Grievant was hired as an Investigator II at the WVRJA.

2. In or about April 2011, Grievant was appointed Acting Administrator of the Southwestern Regional Jail in Logan, West Virginia. He served in that capacity until December 16, 2011.

3. Grievant informed that he was to be returned to the position of Investigator II at the central office in Charleston, West Virginia, effective December 19, 2011.

4. At all times relevant in this matter, Grievant was employed as a classified-exempt, at-will employee.

5. On December 19, 2011, Director of Human Resources, Wayne Armstrong, met with Grievant and informed him that he was terminated effective January 3, 2012. Mr. Armstrong further provided Grievant with a letter of termination also dated December 19, 2011.

6. In the termination letter, Mr. Armstrong explained that he was terminating Grievant because Grievant indicated on his application for employment that he had never been dismissed from a previous position held, but he had been so dismissed. Mr. Armstrong further explained that he had received documentation from one of Grievant's former employers indicating that he had been terminated from that job.

7. The application for employment with the WVRJA that Grievant completed contained the question, "[h]ave you received a disciplinary suspension or been discharged from any position(s) within the last four years?" Grievant's answer to this question was "no."

Discussion

In a grievance regarding a disciplinary action, normally the employer would bear the burden of proving the charges against the grievant by a preponderance of the evidence. However, in the case of a termination of a classified-exempt, at-will employee, the agency need not meet that standard. *See Logan v. W. Va. Regional Jail and Correctional Auth.,* Docket No. 94-RJA-225 (No. 29, 1994). A classified-exempt employee bears the burden of proving, by a preponderance of the evidence that his dismissal violates 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); *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996);

Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992); *Graley v. W. Va. Parkways Economic Dev. &Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). "Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status." *Bellinger v. W. Va. Dep't of Pub. Safety,* Docket No. 95-DPS-119 (Aug. 15, 1995). *See also, Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992); W. VA. CODE § 29-6-2(g) (2012).

Grievant asserts that he was improperly terminated. It is undisputed that Grievant was a classified-exempt employee, thereby serving in an at-will employment status. 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. *Roach v. Regional Jail Auth.,* 198 W. Va. 694, 482 S.E.2d 679 (1996)*; Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993); *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). In this regard, our Supreme Court of Appeals has stated, as follows:

> The 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.

Syllabus, *Harless v. First Nat'l Bank,* 169 W. Va. 673, 246 S.E.2d 270 (1978). "Inherent in the term 'substantial public policy' is the concept that the policy will provide specific guidance to a reasonable person." *Syl. pt. 3, Birthisel v. Tri-Cities Health Services*, 188 W. Va. 371, 424 S.E.2d 606 (1992). "To be substantial, a public policy must not just be

recognizable as such but must be so widely regarded as to be evident to employers and employees alike." *See Feliciano v. 7-Eleven, Inc.,* 210 W. Va. At 745, 559 S. E. 2d at 718. "To 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." *Syl. pt. 2, Birthisel v. Tri-Cities Health Services*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

Grievant acknowledges that as a classified-exempt, at-will employee, he can be terminated for any reason, or no reason, so long as it does not contravene substantial public policy. Grievant asserts that a substantial public policy was violated by his termination. Grievant alleges that he was "fraudulently" terminated because the stated reason for his termination is not factually accurate. In the termination letter dated December 19, 2011, Human Resources Director, Wayne Armstrong, alleged that Grievant had failed to disclose that he had been terminated from the Department of Homeland Security, a prior employer. However, Grievant contends that the employment application asked for the disclosure of prior terminations that had occurred in the last four years, and that his termination from the Department of Homeland Security was outside that time period. Grievant alleges that Mr. Armstrong acted fraudulently and was untruthful in terminating his employment, and that such constitutes a violation of substantial public policy.

West Virginia courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [*Mace v. Charleston Area Medical Ctr. Found*., 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations

[*Lilly v. Overnight Transp. Co.*, 188 W. Va. 538, 425 S.E.2d 214 (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 [*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)], and testifying as a witness in a civil action against the employer [*Page v. Columbia Natural Resources, Inc.,* 198 W. Va. 378, 480 S.E.2d 817 (1996)], as involving substantial public policy interests. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at-will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [*Graley v. W. Va. Parkways Economic Development & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [*Bellinger v. W. Va. Dept. of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [*Hendricks v. W. Va. Dept. of Tax & Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996)].

Based upon the evidence presented and the applicable law, the undersigned cannot find that the Grievant's termination violated substantial public policy. While it appears that Mr. Armstrong's belief that Grievant was untruthful on his employment application is incorrect, such does not meet the definition of "substantial public policy." As a classified exempt, at-will employee, Grievant could be terminated for good reason, bad reason, or no reason, but not for a reason that violates substantial public policy.

While the stated reason for Grievant's termination appears to be somewhat factually inaccurate, it cannot be said to violate substantial public policy. Accordingly, this grievance must be denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. In a grievance regarding a disciplinary action, normally the employer would bear the burden of proving the charges against the grievant by a preponderance of the evidence. However, in the case of a termination of a classified-exempt, at-will employee, the agency need not meet that standard. *See Logan v. W. Va. Regional Jail and Correctional Auth.,* Docket No. 94-RJA-225 (No. 29, 1994). A classified-exempt employee bears the burden of proving, by a preponderance of the evidence that his dismissal violates 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); *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996); *Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992); *Graley v. W. Va. Parkways Economic Dev. &Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991).

2. "Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status." *Bellinger v. W. Va. Dep't of Pub. Safety,* Docket No. 95-DPS-119 (Aug. 15, 1995). *See also, Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992); W. VA. CODE § 29-6-2(g) (2012).

3. 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. *Roach v. Regional Jail Auth.,* 198 W. Va. 694, 482 S.E.2d 679 (1996)*; Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993); *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

4. The 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. Syllabus, *Harless v. First Nat'l Bank,* 169 W. Va. 673, 246 S.E.2d 270 (1978).

5. "Inherent in the term 'substantial public policy' is the concept that the policy will provide specific guidance to a reasonable person." *Syl. pt. 3, Birthisel v. Tri-Cities Health Services*, 188 W. Va. 371, 424 S.E.2d 606 (1992). "To be substantial, a public policy must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike." *See Feliciano v. 7-Eleven, Inc.,* 210 W. Va. At 745, 559 S. E. 2d at 718. "To 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." *Syl. pt. 2, Birthisel v. Tri-Cities Health Services*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

6. Grievant failed to meet his burden of proving by a preponderance of the evidence that he was terminated in violation of substantial public policy.

Accordingly, the 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 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 § 6.20 (eff. July 7, 2008).

DATE: March 14, 2013.

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Carrie H. LeFevre
Administrative Law Judge