

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER BLAKE,

Grievant,

v.

Docket No. 2023-0105-DOE

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant, Christopher Blake, was employed by Respondent, West Virginia Department of Education (WVDE). On August 8, 2022, Grievant, by counsel, filed a grievance against Respondent protesting his termination from employment stating, “Grievant files this Grievance as a result of his termination from employment which occurred on July 25, 2022. Grievant argues that his termination is disproportionate to any alleged wrongdoing and is therefore in violation of policies, procedures, and/or laws, including, but not limited to WVSDT Employee Handbook and WV Dept. of Education Policy 5300.” For relief, Grievant seeks “to be reinstated into his position; to receive all applicable backpay and benefits; have the termination removed from his personnel file; to be made whole; and any other relief that the Administrative Law Judge deems appropriate.”

The grievance was scheduled for level three hearing on October 26, 2022. On August 29, 2022, Respondent, by counsel, filed *Respondent’s Motion to Dismiss* asserting the grievance must be dismissed because Grievant was an at-will employee and had failed to allege the violation of a substantial public policy. Grievant submitted *Grievant’s Response to Respondent’s Motion to Dismiss* on September 9, 2022. On September 13, 2022, Respondent submitted *Respondent’s Reply to Grievant’s Response*

to Respondent's Motion to Dismiss. Later that same day, Grievant submitted *Grievant's Reply to Respondent's Reply to Grievant's Response to Respondent's Motion to Dismiss.* The motion became mature for decision on September 13, 2022. Grievant appears by counsel, Anthony Brunicardi, Esquire, The Employment Law Center, PLLC. Respondent appears by counsel, Kelli D. Talbot, Esquire, West Virginia Department of Education.

Synopsis

Grievant was employed by Respondent, West Virginia Department of Education, as the Principal of the West Virginia Schools of Diversion and Transition at Mt. Olive Correction Center. Grievant was an at-will employee. Respondent terminated Grievant's employment. Grievant did not allege that Respondent was motivated to terminate his employment to contravene some substantial public policy. As such, Grievant failed to state a claim upon which relief can be granted and the grievance must be dismissed. Accordingly, the Respondent's Motion to Dismiss is granted and this grievance is dismissed.

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

Findings of Fact

1. Grievant was employed by Respondent WVDE as the Principal of the West Virginia Schools of Diversion and Transition at Mt. Olive Correction Center.
2. It is undisputed that Grievant was an at-will employee.
3. Respondent terminated Grievant's employment on February 18, 2022.
4. Grievant does not allege that Respondent's motivation for terminating his employment was to contravene some substantial public policy.

Discussion

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11.

Respondent argues that this grievance must be dismissed because Grievant, an at-will employee, has failed to state a claim upon which relief can be granted because Grievant has not alleged that his dismissal from employment was motivated to contravene some substantial public policy principle. Grievant does not dispute that his position was at-will, or that he has not alleged that Respondent's motivation for terminating his employment was to contravene substantial public policy. In his original statement of grievance and subsequent filings in response to Respondent's Motion to Dismiss, Grievant argues that his dismissal “is disproportionate to any alleged wrongdoing and is therefore in violation of policies, procedures, and/or laws, including but not limited to WVSDT Employee Handbook and WV Dept. of Education Policy 5300,” and that “his

protections before the Grievance Board are not limited to *Harless* public policy discharge claims.” Further, Grievant asserts that, “[t]he legislative intent expressed in W. Va. Code § 18-29-1 (1992) is to provide a simple, expeditious and fair process for resolving problems regarding employment disputes in public educational institutions. The grievance process contained in W. Va. Code § 18-29-1, *et seq.*, advances a substantial public purpose, and public policy considerations demand that an employer not be permitted to violate the rights of an employee enjoys under this process. *Wounaris [v. W. Va. State College]*, 214 W. Va. 241, 243, 588 S.E.2d 406, 408 (2003)].”¹ Therefore, the grievance process “would meet the requirement of *Harless*, if it was ultimately decided that meeting the *Harless* elements were necessary in this situation.” Lastly, Grievant argues that despite his at-will status, Respondent dismissed him for alleged “insubordination” and that Respondent was required to follow the “Disciplinary and Grievance Procedures” as set forth in the WVSDT Handbook. Therefore, it appears that Grievant argues that there is a question of fact as to whether he engaged in an offense “of a magnitude to warrant” his dismissal pursuant to the WVSDT Handbook.

An at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause. *Wright v. Standard Ultramarine and Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955). It is undisputed that employees of the West Virginia Department of Education are employed at-will. While Grievant admits this, he appears to argue that the WVSDT Handbook prevents

¹ W. VA. CODE §§ 18-29-1, *et seq.*, was repealed in 2007, and replaced by W. VA. CODE §§ 6C-2-1, *et seq.*, effective June 6, 2008. Since that time, the Grievance Board’s statute was amended once in 2014 to add W. VA. CODE § 6C-2-8, “Employee organizations may not be compelled to disclose certain communications; exceptions.” No substantial revisions have been made to W. VA. CODE §§ 6C-2-1, *et seq.*, since 2008.

Respondent from terminating Grievant's employment without following certain procedures, but he does not argue in any of his responsive pleadings referenced herein that the handbook created a contract. "Contractual provisions relating to discharge or job security may alter the at will status of a particular employee." Syl. Pt. 3, *Cook v. Heck's, Inc.*, 176 W. Va. 368, 370, 342 S.E.2d 453, 455 (1986). "An employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons." *Id.* at Syl. Pt. 6. The provisions of the handbook Grievant cited in his responsive pleading do not alter the at-will nature of Grievant's employment, nor has he argued such. As discussed in *Cook*, a handbook must contain a definite promise not to discharge an employee except for specified reasons. Grievant has not argued that his cited handbook provisions contain any such promise. Grievant states that the handbook provides "examples of reasons for suspensions and dismissals to be effective immediately," and that insubordination appears in that list. Grievant has not mentioned, described, or alleged any violations of substantial public policy in his filings to date, including those specifically submitted in response to Respondent's motion to dismiss, nor has he clarified his general claims that Respondent violated policies, procedures, and laws.

Grievant has continued to assert that a substantial public policy violation is not required in the grievance procedure, stating, in part, that, Respondent's arguments would improperly impose the "Harless standard" on those filing grievances with the Grievance Board. Grievant further argues that it would be contrary to a substantial public policy to dismiss his grievance based on his at-will status because such would deny him a statutory right of address through the grievance process. However, an employer has a right to

discharge an at-will employee unless the employer was motivated to terminate the employee to contravene a substantial public policy. Further, in the grievance process, normally, the burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). However, in cases involving the dismissal of at-will employees, state “agencies do not have to meet this legal standard.” *Logan v. Reg’l Jail & Corr. Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994) *aff’d*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996). “[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg’l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). However, “[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 v. First Nat’l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978).” Syl. Pt. 4, *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*). “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 Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). Where no specific public policy source is cited, the Supreme

Court has “refused to impose a duty on the State of good faith and fair dealing with its at-will employees” because to grant that right would be contrary to the principle that the appointing authority has an unfettered right to terminate an at-will employee barring a violation of substantial public policy. *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996)(citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)).

Grievant does not have a statutory right to employment so Grievant’s right to grieve the termination of his employment as an at-will employee is limited to challenging his termination on the ground that such violated substantial public policy. Grievant has failed to do so. Therefore, Grievant has failed to state a claim upon which relief can be granted and the grievance must be dismissed.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

2. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11.

3. “[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg’l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). However, “[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 v. First Nat’l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978).” Syl. Pt. 4, *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*).

4. “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 Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). Where no specific public policy source is cited, the Supreme Court has “refused to impose a duty on the State of good faith and fair dealing with its at-will employees” because to grant that right would be contrary to the principle that the appointing authority has an unfettered right to terminate an at will employee barring a violation of substantial public

policy. *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)).

5. Grievant has not alleged that Respondent was motivated to terminate his employment to contravene some substantial public policy.

6. As Grievant failed to state a claim upon which relief can be granted the grievance must be dismissed.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: October 27, 2022

Carrie H. LeFevre
Administrative Law Judge

² On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.