

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CALEB CANTON,
Grievant,**

v.

Docket No. 2018-0336-WVBOE

**WEST VIRGINIA STATE BOARD OF EDUCATION/
OFFICE OF INSTITUTIONAL EDUCATION PROGRAMS,
Respondent.**

DISMISSAL ORDER

Caleb Canton, Grievant filed a Level Three Grievance on September 11, 2017, challenging his termination by the West Virginia State Board of Education (“WVBE”), Respondent from the education program at the Ron Mulholland Center in Wheeling, West Virginia. On October 17, 2017, Respondent, through its counsel, Sherri Goodman Reveal, moved for an Order dismissing this Grievance without an evidentiary hearing on the grounds that Grievant had failed to allege or identify a substantial public policy that had been violated by his termination of at-will employment. On October 19, 2017, the Grievance Board directed Grievant to respond to the motion in writing by November 2, 2017. Further, Grievance Board staff on October 20, 2017 by e-mail, directed Grievant to the Board’s website for its complete rules, procedures and copies of published decisions. Grievant did not submit a response to the motion, and this Grievance Board again sent him a reminder by e-mail on November 21, 2017. The Level Three hearing scheduled for this grievance on November 30, 2017, was cancelled. Respondent’s motion for dismissal is ripe for decision.

Synopsis

The West Virginia State Board of Education moved for an Order dismissing this grievance without an evidentiary hearing on the grounds that Grievant has failed to allege or identify a substantial public policy that has been violated by the termination of his at-will employment. Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. Pursuant to relevant case law and pertinent statutes, Grievant, has failed to identify a public policy violation. Grievant has failed to state a claim for which relief may be granted in the West Virginia Public Employees Grievance Procedure. Therefore, Respondent's motion is **Granted**.

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

Findings of Fact

1. Grievant worked as a part-time transition specialist at the Ron Mulholland Center in Wheeling, West Virginia. He was an at-will employee of Respondent¹ who began employment on February 17, 2015.

2. On January 5, 2017, Grievant was placed on administrative leave with pay pending an investigation into allegations of misconduct. See January 9, 2017 letter from Jacob C. Green, Special Assistant to the Chief CTE Officer, to Grievant.

¹W. Va. Code § 18A-4-17(c)(personnel employed to provide education and support services to residents in State Department of Health and Human Resources or juvenile correctional facilities are state employees).

3. Grievant continued to be paid until he was terminated on September 19, 2017. See September 19, 2017 letter from Steven L. Paine to Grievant. The letter stated, in part:

As an at-will employee, you may be terminated without being provided a reason. However, I will share with you that your employment is being terminated for engaging in a pattern of insubordination and for failing to maintain appropriate teacher/student boundaries.

The letter also recited that Grievant had been provided an opportunity to respond to the allegations on August 18, 2017.

4. Grievant filed for a Level Three hearing on September 11, 2017.² His grievance reads:

I believe that I was terminated for reasons that had nothing to do with my job. I was accused of situations that weren't true, and I also feel that my employee rights were violated.

wrongful termination
defamation of character
targeting

Grievant did not list any relief sought.

Discussion

When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. See *Higginbotham v. W. Va.*

²Although Grievant's grievance form claiming wrongful termination was filed more than a week before he was actually terminated, Respondent provided its willingness to apply his grievance claims to the actual date of termination.

Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

Grievant was an at-will employee of Respondent. As an at-will employee, Grievant could be terminated at any time for a good reason, a bad reason or no reason at all. Under West Virginia law, an implied covenant of good faith and fair dealing is not recognized in the context of at-will employment. *McGraw v. Dep't. of Educ.*, Docket No. 2015-0666-DOE (April 24, 2015) (executive director of the Office of Instructional Technology at the WVDE); *Wright & Eve v. Dep't. of Educ.*, Docket No. 07-DOE-072 (June 13, 2007)(WVDE teachers at a juvenile facility); *Dye v. Dep't. of Educ.*, Docket No. 99-DOE-217 (Sept. 16, 1999) (machine operator at WVDE print shop); *Roach v. Regional Jail Authority*, 198 W. Va. 694, 482 S.E.2d 679 (1996) (*per curiam*)(correctional officer); *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (W. Va. 1993)(Assistant Attorney General).

Respondent in its motion to dismiss highlights that in order to state a claim for which relief can be granted by the undersigned, Grievant, as an at-will employee, needed to allege that his discharge contravened some recognized and substantial public policy. In *Dubites v. W.Va Dep't. of Military Affairs and Public Safety/Division of Protective Services*, Docket No. 2010-0032-MAPS (Nov. 9, 2009), the Board held that it was "imperative" for Grievant, an at-will Capitol Police Officer grieving his termination, to identify a substantial public policy that had been violated before any evidentiary inquiry would be made. The Board characterized this issue as a question of law for the Administrative Law Judge to decide.

Examples of public policies that have been appropriately alleged by employees who were terminated from at-will employment are: *Harless v. First National Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978)(retaliation for reporting employer's alleged illegalities to board of directors); *Mace v. Charleston Area Med. Ctr. Foundation*, 188 W.Va. 57, 422 S E.2d 624 (1992)(submitting a claim for back wages under the Veterans Reemployment Rights Act) *Bell v. Ashland Petroleum, Inc.*, 812 F. Supp. 639 (S.D. W. Va. 1993) (refusing to conceal alleged environmental violations committed by the employer); *Powell v. Wyoming Cable Co.*, 184 W. Va. 700, 403 S.E.2d 717 (1991) and *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980) (*filing a workers' compensation claim*); and *Reed v. Sears, Roebuck & Co.*, 188 W. Va.747, 426 S.E.2d 539 (1992) (attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act).

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 disciplinary action against an employee. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). However, in cases involving the dismissal of classified-exempt, at-will employees, state agencies do not have to meet this 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 Respondent. See *Wilhelm, supra*; *Dye v. Dep't of Educ.*, Docket No. 99-DOE-217 (Sept. 16, 1999), *Bellinger v. W. Va. Dep't of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995); *Logan, supra*; *Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992). Grievant's at-will status denotes she could be fired for good reasons, bad reasons, or no reasons, provided she 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*. The burden of proof is on an at-will 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. *Wilhelm, supra*.

This Grievance Board has dismissed grievances against the instant Respondent by at-will employees challenging their suspension or termination for failure to articulate or prove a violation of a substantial public policy: *Morgan v. Bd. of Educ.*, Docket No. 06-RESA-240 (Sept. 11, 2007)(suspension of a RESA executive director for failing to provide oversight to a subordinate employee who embezzled 1.3 million dollars; Grievant complained suspension was discriminatory and in reprisal for criticizing the State Board of Education and that she was denied due process); *Wright and Eve v. Dep't. of Educ.*, Docket No. 07-DOE-072 (June 13, 2007) (teachers suspended for two days for providing inappropriate book to juvenile residents; they complained that their suspension was “unwarranted and extreme” and “too severe for the alleged offense”); *Sharp, et al. v.*

Dep't. of Educ./Cedar Lakes Conf. Ctr., Docket No. 2014-1765-CONS (Nov. 7, 2014) (reduced in force employees alleged RIFs were unnecessary); and *Barnhart v. Dep't. of Educ.*, (science coordinator who was terminated failed to meet burden of proving her claim of retaliation for whistle blowing).

Grievant's claims of "defamation of character," "targeting," "wrongful termination," based upon "situations that weren't true," and violation of unspecified "employee rights" do not meet the requirement of identifying a substantial public policy that has been violated by his termination. This grievance, on its face, does not allege a substantial public policy violation and that, despite notice and opportunity to be heard, Grievant failed to provide any additional information to support the same. Grievant has failed to state a claim for which relief may be granted in the West Virginia Public Employees Grievance Procedure. Accordingly, Respondent's Motion for Dismissal is **Granted**.

Conclusions of Law

1. "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." 156 C.S.R. 1 § 6.11.

2. An at-will State employee is subject to dismissal 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); *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 470 S.E.2d 602 (1996).

3. "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.” *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

4. Because Grievant was an at-will employee at the time of his termination, this dismissal could occur for "no reason" or a "bad reason," unless a substantial public policy is violated. *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). See *Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Higginbotham v. W. Va. Dep't of Pub. Safety/W. Va. State Police*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Myer v. W. Va. Racing Comm'n*, Docket No. 95-RC-290 (May 3, 1996); *Samples v. Glenville State College*, Docket No. 94-BOD-564 (July 28, 1995); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994).

5. The burden of proof is on an at-will 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. *Wilhelm, supra*. See *Young v. W. Va. Dep't of Health and Human Res.*, Docket No. 90-H-541 (Mar. 29, 1991).

6. Grievant did not cite any source of substantial public policy which was violated by Respondent nor allege Respondent had any retaliatory motive for terminating his at-will employment. Consequently, Grievant has failed to state a claim for which relief may be granted in the West Virginia Public Employees Grievance Procedure.

Accordingly, Respondent's Motion for dismissal is hereby **GRANTED**, and this grievance is **DISMISSED** from the docket of the West Virginia Public Employees Grievance Board.

Any party may appeal this Dismissal Order 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-5-2(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: December 1, 2017.

**LANDON R. BROWN
ADMINISTRATIVE LAW JUDGE**