

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MARTIN KELLER,  
Grievant,**

**v.**

**Docket No. 2018-0763-BOE**

**BOARD OF EDUCATION,  
Respondent.**

**DISMISSAL ORDER**

Grievant, Martin Keller, was employed by the West Virginia State Board of Education as the Superintendent of the West Virginia Schools for the Deaf and Blind. On November 27, 2017, Grievant, by counsel, filed this grievance protesting the termination of his employment. The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). Grievant attached the following Statement of Grievance to his grievance form:

The West Virginia State Board of Education and Steven L. Paine, State Superintendent of Schools has violated multiple federal and state laws and West Virginia State Board of Education policies in regard to Dr. Martin Keller. Specifically, Dr. Keller has been the recipient of an ongoing pattern and practice of having Steven L. Paine, the State Superintendent treat him in an unfair manner and differently from similarly situated superintendents in the county and the state.

The improper and inappropriate treatment was discriminatory, harassing, and retaliatory in nature and had the effect of impeding Dr. Keller's ability to perform his superintendent responsibilities and resulted in his termination of employment on November 17th, 2017 by the West Virginia Board of Education.

On November 16, 2017, counsel for Dr. Keller requested that the matter be continued as counsel had not had the opportunity to speak with the client. Counsel was informed that the agenda was set and that the matter would not be continued. Counsel was also instructed to inform Dr. Keller

that he understood that he had to vacate the premises by November 26, 2017.

Specific laws and policies which the West Virginia State Board of Education and Steven L. Paine, State Superintendent of Schools is in violation include the following: 1) State Board Policy 4373: Expected Behavior in Safe and Supportive Schools; 2) State Board Policy 5902: Employee Code of Conduct (and corresponding Hampshire County Schools Policy 3210 ); 3) WV Code §18A-5-1c Bill of Rights and Responsibilities for Students and School Personnel; 4) Hampshire County Policies 5517, 3362, and 1662: Anti-Harassment and Violence; Hampshire County Policy 3122: Americans with Disabilities Act of 1990, Nondiscrimination and Equal Employment Opportunity: West Virginia Human Rights Act, WV Code 51-11-1 et seq. ; 5) State Board Policy 5310: Performance Evaluation of School Personnel; and 6) W.Va Code § 18-4-3, § 6-9-4 (b)(2)(A); § 6-9A-6, and § 6-9A-7(b).

As relief, Grievant requested as follows:

Dr. Keller respectfully requests that West Virginia Board of Education, in accordance with federal and state laws, the WV Code and approved state and county policies, be directed to 1) provide Dr. Keller with meaningful due process by conducting a quasi-judicial hearing in person, without, bias, prejudice, or arbitrariness; 2) recuse the members of the WVBOE due to evident bias, arbitrariness, and prejudice; 3) grant injunctive relief compelling compliance with the Open Governmental Proceedings Act as authorized by W. Va. Code § 6-9A-6 and an order annulling the WVBE's November 17, 2017 vote of termination and eviction of the plaintiff from his dwelling place; 4) pursuant to W. Va. Code § 6-9A-7(b), pay his reasonable legal fees and costs incurred; 5) reinstate Dr. Keller as Superintendent of the West Virginia Schools for the Deaf and Blind; 6) allow him to perform his duties and responsibilities absent harassment and bullying; 7) afford him a safe and supportive work environment; 8) have him supervised and evaluated by an administrator that is professional, supportive, and non-biased; and 9) take whatever steps are necessary to correct the inappropriate and unprofessional conduct of the West Virginia Board of Education and State Superintendent, Steven L. Paine.

On December 8, 2017, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed for failure to state a claim upon which relief can be granted as Grievant, an at-will employee, had failed to allege his termination was in violation of a substantial public policy. On December 11, 2017, Grievance Board staff, by email, notified Grievant and his counsel that any response to the motion must be made by December 26, 2017, and that a decision would be made on the motion based on the submissions of the parties, without hearing. On December 26, 2017, Grievant, by counsel, filed his *Response to Respondent's Motion to Dismiss* asserting that Grievant could not be terminated without good cause, that his due process rights were violated, that he was discriminated against, and that his discharge was retaliatory. Grievant is represented by counsel, Christine L. Glover and David M. Hammer, Glover Law Firm PLLC. Respondent is represented by counsel, Kelli D. Talbott, Senior Deputy Attorney General.

### **Synopsis**

Grievant, an at-will employee, alleges he was improperly dismissed from his employment as the Superintendent of the West Virginia Schools for the Deaf and Blind with the West Virginia State Board of Education. Respondent moved for the grievance to be dismissed for failure to state a claim upon which relief can be granted as Grievant had failed to allege his termination was in violation of a substantial public policy. Grievant's mere conclusory statements and citation of inapplicable sources of public policy failed to properly allege his dismissal violated substantial public policy. Therefore, the grievance must be dismissed.

## **Findings of Fact<sup>1</sup>**

1. Grievant was employed by Respondent as the Superintendent of the West Virginia Schools for the Deaf and Blind. Grievant was provided housing on campus as a condition of his employment.

2. Steven L. Paine, Ed.D, the State Superintendent of Schools, was Grievant's supervisor.

3. Grievant was an at-will employee whose employment term was "261 days (Twelve month employment, on campus housing available)."

4. On November 9, 2017, Respondent published notice that a special session would be held by teleconference "to take action regarding West Virginia Schools for the Deaf and the Blind personnel matter(s)" and that the agenda for the meeting would be posted on the internet at least three business days prior to the meeting.

5. On November 16, 2017, counsel for Dr. Keller requested that the matter be continued as counsel had not had the opportunity to speak with the client. Counsel was informed that the agenda was set and that the matter would not be continued. Counsel was also instructed to inform Grievant that he understood that he had to vacate the premises by November 26, 2017.

6. On November 17, 2017, at a telephonic special meeting, Respondent voted to terminate Grievant's employment.

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<sup>1</sup> As the Grievance Board's dismissal rule is similar to a Rule 12(b)(6) motion under the West Virginia Rules of Civil Procedure, that standard should be applied, which requires the undersigned construe the grievance in the light most favorable to Grievant and consider his allegations as true. See *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (per curiam).

7. Respondent did not provide Grievant with prior written notice that his termination from employment would be voted upon at the November 17, 2017 meeting.

8. At some unspecified time, Superintendent Paine instructed Grievant to “cease from any potential relationship with the Department of Defense Innovative Readiness Training Program.”

### **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. “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 Grievant failed to state any claim upon which he may be granted relief because he was an at-will employee and failed to allege that Respondent violated any substantial public policy in terminating his employment. Grievant was provided the opportunity to respond to Respondent's motion in writing, and has done so. “[T]here is no requirement for the holding of a hearing on a motion to dismiss for failure

to state a claim upon which relief may be granted.” *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 544, 729 S.E.2d 860, 866 (2012) (per curiam). In this matter, a hearing on the motion is not necessary as the parties have been given ample opportunity to address the issues in the motion by submitting written pleadings.

It has been consistently held that an at-will 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). See also *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (per curiam); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (per curiam). However, the Supreme Court has held that “[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. Pt., *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

In Syllabus Point 2 of *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Supreme Court held that, “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.” 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 dispute he was an at will employee. As such, he could be terminated for any reason unless his termination was motivated to contravene some substantial public policy. In his statement of grievance, Grievant alleged violation of various State Board and County Board policies and federal and state statutes. In his response to the motion to dismiss, Grievant also specifically alleged Respondent had violated his constitutional right to due process.

The majority of the statutes Grievant cites are simply not applicable to him. Grievant was the Superintendent of the West Virginia Schools for the Deaf and Blind, which is governed by W. VA. CODE § 18-17-1 *et seq.* Grievant was employed by the State Board of Education. W. VA. CODE § 18-17-1. Two of the statutes Grievant cites are not applicable to him because they relate to employees of county boards of education, not the State Board of Education. W. VA. CODE § 18A-5-1c is not applicable to Grievant as it governs the school personnel of county boards of education. “School personnel” is defined in that chapter as “all personnel employed by a county board. . . .” W. VA. CODE § 18A-1-1(a). W. VA. CODE § 18-4-3 relates to the removal of a county superintendent, as it is contained in the article for “County Superintendent of Schools.”

W. VA. CODE § 6-9A-4(b)(2)(A)<sup>2</sup>, W. VA. CODE § 6-9A-6, and W. VA. CODE § 6-9A-7(b) all relate to open governmental proceedings. W. VA. CODE §§ 6-9A-6 and 6-9A-7(b) are not applicable to the grievance. W. VA. CODE § 6-9A-6 provides for the enforcement of the statute in the circuit court and W. VA. CODE § 6-9A-7(b) provides for the award of fees and costs in a civil action for violation of the statute. These provisions do not mandate a duty of Respondent that could be violated, but rather fashion remedies for such a violation as are available in circuit court. W. VA. CODE § 6-9A-4(b)(2)(A) relates to the procedure for holding an executive session, which requires a majority vote to go into executive session. The only allegation Grievant made regarding the board meeting was that the Meeting Notice Detail did not provide him notice that his termination would be voted upon at the special meeting. The Code section Grievant cites does not apply to this contention, and Grievant cites no Code section that would have been violated by Respondent's alleged failure to notify Grievant that his termination would be contemplated during the special meeting.

Grievant also cites alleged violation of various administrative policies. Administrative policies do not constitute substantial public policy. Administrative policies are not included in the accepted sources of public policy: "established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions" that have been contemplated by the West Virginia Supreme Court of Appeals.

This leaves Grievant's allegations of violation of the West Virginia Human Rights Act, W. VA. CODE § 51-11-1 *et seq.*, the Americans with Disabilities Act of 1990, and his

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<sup>2</sup> W. VA. CODE § 6-9-4 (b)(2)(A) appears to be a typographical error as this Code section does not exist and the article deals with supervision of local government.



allegation of violation of his due process rights. In his grievance statement, Grievant offered no explanation of how these rights were violated other than to say the State Superintendent treated him in “an unfair manner and differently from similarly situated superintendents” and that the Board refused to continue the hearing on Grievant’s termination when counsel requested. Despite the motion to dismiss specifically raising Grievant’s lack of factual allegation as part of the grounds for dismissal, in his response to the motion to dismiss, Grievant only additionally alleged that Superintendent Paine did not treat Grievant the same as similarly-situated superintendents because Grievant was instructed to “cease from any potential relationship with the Department of Defense Innovative Readiness Training Program.” Grievant “cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated. There must be some elaboration upon the employer’s act jeopardizing public policy and its nexus to the [grievant’s] discharge. ‘The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates.’” *Herbert J. Thomas Mem’l Hosp. Ass’n v. Nutter*, 238 W. Va. 375, 386, 795 S.E.2d 530, 541 (2016) (citing *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 696 S.E.2d 1 (2010)). “It is not enough to make conclusory statements about the violations.” *Armstrong* 229 W. Va. At 545, 729 S.E.2d at 867. Grievant provides no explanation whatsoever how his termination would have violated the West Virginia Human Rights Act or the Americans with Disabilities Act of 1990.

Grievant further asserts that state employees cannot be fired without cause and that they are entitled to due process before termination. As stated above, an at-will

employee may be fired for any cause, and Grievant does not dispute he was an at-will employee. “The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). Grievant does not appear to allege a liberty interest in this matter. “A “property” interest protected by due process must derive from private contract or state law, and must be more than the unilateral expectation of continued employment.’ *Major v. DeFrench*, 169 W.Va. 241, 286 S.E.2d 688, 695 (1982).” Syl. Pt. 3, *Orteza v. Monongalia County. Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984). “A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). The statutes Grievant cited regarding due process do not prove his statutory entitlement to continued uninterrupted employment because they are not applicable to him, as discussed above. Although the applicable statute, West Virginia Code Chapter 18 Article 17, extends protections to the teachers, auxiliary personnel, and service personnel of the West Virginia Schools for the Deaf and Blind, it does not do so for the position of Superintendent. Grievant further cites *State ex rel. Blackwell v. Wyoming County Bd. of Educ.*, 180 W. Va. 1, 375 S.E.2d 25 (1988) in support of his right to due process, however, this case is also not applicable as it interprets the Code section governing county superintendents, which is not applicable to Grievant.

Therefore, Grievant has failed to state a claim for which relief may be granted and this grievance should be dismissed.

## 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. “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. “[T]here is no requirement for the holding of a hearing on a motion to dismiss for failure to state a claim upon which relief may be granted.” *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 544, 729 S.E.2d 860, 866 (2012) (per curiam).

3. It has been consistently held that an at-will 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). See also *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (per curiam); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (per curiam). However, the Supreme Court has held that “[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. Pt., *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

4. In Syllabus Point 2 of *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Supreme Court held that, "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." 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 "cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated. There must be some elaboration upon the employer's act jeopardizing public policy and its nexus to the [grievant's] discharge. 'The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates.'" *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 386, 795 S.E.2d 530, 541 (2016) (citing *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 696 S.E.2d 1

(2010)). “It is not enough to make conclusory statements about the violations.” *Armstrong* 229 W. Va. At 545, 729 S.E.2d at 867.

6. “The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). Grievant does not appear to allege a liberty interest in this matter. “A “property” interest protected by due process must derive from private contract or state law, and must be more than the unilateral expectation of continued employment.’ *Major v. DeFrench*, 169 W.Va. 241, 286 S.E.2d 688, 695 (1982).” Syl. Pt. 3, *Orteza v. Monongalia County. Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984). “A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977).

7. Grievant failed to state a claim upon which relief can be granted as he failed to properly allege that his termination was motivated to contravene a substantial public policy.

Accordingly, Respondent’s motion to dismiss is granted, and the grievance is DISMISSED.

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 Dismissal Order. 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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

**DATE: February 7, 2018**

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**Billie Thacker Catlett  
Chief Administrative Law Judge**