

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENDA KAY McCARTHY,
Grievant,

v.

Docket No: 2019-0550-DOE

DEPARTMENT OF EDUCATION
Respondent.

DISMISSAL ORDER

Grievant, Brenda Kay McCarthy, was employed by Respondent, West Virginia Department of Education ("WVDE"), as a Secretary IIIA in the Office of Special Education. On November 2, 2018, Grievant filed a level three grievance against Respondent protesting her termination from employment on October 26, 2018. Her statement of grievance reads, "Unjust termination as of October 23, 2018. There are no known unsatisfactory personnel evaluations and/or disciplinary actions. Was not provided a safe and healthy environment, free from harassment, intimidation...and bullying as stated in the State Board of Education Policy 5902 *Employee Code of Conduct*. For relief, Grievant seeks reinstatement to the same position and work location and all lost wages and benefits.

On January 14, 2019, 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 that her termination violated a substantial public policy. On January 31, 2019, Grievant filed a *Response to the Respondent's Motion to Dismiss*. Grievant listed 15 instances of conduct that she contends violated West Virginia Board of Education Policy 5902, *Employee Code of Conduct*, W. Va. CODE ST. R. § 126-162-1

et. seq. and WVBE Policy 2421, *Harassment*.¹ Grievant also listed 11 instances she contends violated various portions of Respondent's *Your Employee Handbook*, such as ensuring fairness and consistency in personnel decision making, providing a climate and culture of high expectations which fosters optimal staff performance and high morale, establishing and maintaining communication with and among employees and equal employment opportunity.² On February 7, 2019, Respondent filed *Respondent's Reply to Grievant's Response re: Motion to Dismiss*.

A telephonic hearing was held on February 13, 2019. Grievant, appeared *pro se*.³ Respondent appeared by legal counsel Heather L. Hutchens and Sherri Goodman Reveal. The parties were provided opportunity to fortify their position regarding the motion and their respective opinions regarding the proper disposition of this grievance. Respondent and Grievant had the opportunity to address the motion, theory of the grievance and/or any other perceived outstanding relevant issue(s). Grievant was further given until February 18, 2019, to submit any additional written information or argument she wanted the undersigned to consider. She did not do so, and the matter is mature for decision. The Level Three hearing scheduled for this grievance on March 24, 2019, is cancelled.

¹ Policy 2421, *Racial, Sexual, Religious/Ethnic Harassment and Violence*, W. Va. CODE ST. R. § 126-18-1 *et. seq.*, was repealed effective July 1, 2012. However, the substance of the policy was merged into Policy 4373, *Expected Behavior in Safe and Supportive Schools*, W. VA. CODE ST. R. §126-99-1 *et. seq.*

² Under this last heading, Grievant alleged that the ratio between secretaries and professionals was unbalanced.

³ "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Synopsis

The West Virginia State Department 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 her at-will employment. Grievant was employed by Respondent, WVDE, as a Secretary IIIA in the Office of Special Education. Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. Respondent dismissed Grievant from employment without stating any cause for terminating her at-will employment. Pursuant to relevant case law and pertinent statutes, Grievant, has failed to identify a public policy violation. Grievant failed to state a claim on which relief can be granted, because the alleged conduct she identified, if true, were not identified as substantial policies violations linked to her termination. 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 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 a Secretary IIIA in the Office of Special Education. She began part-time employment with Respondent on October 1, 2003 and full-time employment on July 1, 2004.
2. Grievant's employment was at-will.

3. On October 23, 2018, State Superintendent of Schools, Dr. Steven L. Paine, notified Grievant by certified mail that her employment was being terminated effective at the close of business, October 26, 2018, and that she was being immediately placed on administrative leave through her last day of employment. The letter did not state any cause for the termination.

4. Grievant's statement of grievance reads, "Unjust termination as of October 23, 2018. There are no known unsatisfactory personnel evaluations and/or disciplinary actions. Was not provided a safe and healthy environment, free from harassment, intimidation. . .and bullying as stated in the State Board of Education Policy 5902 *Employee Code of Conduct*."

5. In response to Respondent's Motion to Dismiss for failure to allege a substantial public policy contravened by her termination, Grievant detailed multiple instances of conduct by co-workers and supervisors, some occurring years ago. Grievant acknowledged during the telephonic hearing that she never grieved any of these events or filed a formal complaint. Grievant did not contend that Respondent terminated her in retaliation for filing grievances or reporting misconduct as a whistle-blower.

6. Grievant did not make a connection between her termination and a substantial public policy, as she conceded during the telephonic hearing.

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.*

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). An administrative law judge may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. W. VA. CODE ST. R. § 156-1-6.6.1. A grievance may be disposed of by an appealable dismissal order for failure to state a claim for which relief can be granted. W. VA. CODE ST. R. § 156-1-6.11 (2018). 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.

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). 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*).

The Supreme Court of Appeals of West Virginia has specifically found that an at will employee's grievance challenging his/her termination of employment may be dismissed without hearing when the employee fails to allege a contravention of

substantial public policy. *Wilhelm v. W. Va. Lottery*, 198 W.Va. 92, 479 S.E.2d 602 (1996); *Armstrong, supra*.

“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, supra* (citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)).

The Supreme Court has found that the termination of an at-will employee contravenes substantial public policy when it violates an important right of the employee. *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984) (employee’s right to privacy violated when discharged for refusing to take a polygraph test); *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987) (employee’s right to seek redress of grievances and seek access to the courts violated when discharged for making a claim for overtime wages not paid); *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 559 S.E.2d 713 (2001) (employee’s right to self-defense violated when discharged for defending self against robber in violation of employer’s policy). The Supreme Court has also found that the termination of an at-will employee contravenes substantial public policy when it is in retaliation for an employee’s actions

regarding a matter of substantial public interest. *Kanagy v. Fiesta Salons, Inc.* 208 W. Va. 526, 541 S.E.2d 616 (2000) (employee terminated in retaliation for cooperating with the investigation of an employer by state regulatory agency); *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997) (employee terminated in retaliation for expressing concern that employer was violating a state regulation); and *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996) (employee terminated in retaliation for truthfully testifying in a legal action against employer).

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 argues that the grievance must be dismissed for failure to state a claim upon which relief may be granted because Grievant, an at-will employee, was unable to articulate a substantial public policy that her termination contravened. Her detailed complaints about low morale, secretary to professional ratio and co-worker

rudeness do not relate to important public policies nor necessarily even relate to her termination. “It is not enough to make conclusory statements about the [alleged public policy] violations.” *Loy v. Board of Education*, Docket No. 2018-1206-CONS, *quoting Armstrong, supra*, 229 W. Va. at 545, 729 S.E.2d at 867. Although the undersigned does not doubt the sincerity with which Grievant believes her allegations are serious and important, they do not serve to protect her from an at-will termination.

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.⁴ *Wilhelm, supra*.

With regard to this grievance, Grievant has failed to identify a substantial public policy that was violated in relation to her dismissal. The allegations Grievant made of inappropriate conduct by other WVDE staff over a period of prior years, even if true, have not been established to contravene a substantial public policy regarding Grievant's 2018

⁴ 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).

discharge. Despite multiple opportunity to be heard, Grievant has failed to provide any additional information to support such a contention. 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**.

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. "Nonappealable dismiss 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 (2008); *Wilhelm v. W. Va. Lottery*, 198 W.Va. 92, 479 S.E.2d 602 (1996); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (per curiam).

3. “An administrative law judge may, in the judge’s discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made....” W. VA. CODE ST. R. § 159-1-6.6.1. But “there 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, supra*.

4. Grievant was an at-will employee of Respondent, who could be terminated at any time for a good reason, a bad reason or no reason at all, unless her termination contravened some recognized and substantial public policy. *Loy, supra; McGraw v. Dept. of Ed.*, Docket No. 2015-0666-DOE (April 24, 2015); *Canton v. West Virginia State Board of Education/Office of Institutional Education Program*, Docket No. 2018-0336-WVBOE (December 1, 2017); *Wright & Eve v. Dept. of Ed.*, Docket No. 07-DOE-072 (June 13, 2007); and *Dye v. Dept. of Ed.*, Docket No. 99-DOE-217 (Sept. 16, 1999).

5. The Supreme Court has found that the termination of an at-will employee contravenes substantial public policy when it violates an important right of the employee. *Cordle supra*, (employee’s right to privacy violated when discharged for refusing to take a polygraph test); *McClung v. Marion County Commission, supra*, (employee’s right to seek redress of grievances and seek access to the courts violated when discharged for making a claim for overtime wages not paid); *Feliciano v. 7-Eleven, Inc., supra*, (employee’s right to self-defense violated when discharged for defending self against robber in violation of employer’s policy).

6. The Supreme Court has also found that the termination of an at-will employee contravenes substantial public policy when it is in retaliation for an employee’s actions regarding a matter of substantial public interest. *Kanagy, supra*, (employee terminated in

retaliation for cooperating with the investigation of an employer by state regulatory agency); *Tudor v. Charleston Area*, *supra*, (employee terminated in retaliation for expressing concern that employer was violating a state regulation); and *Page v. Columbia Natural Resources, Inc.*, *supra*, (employee terminated in retaliation for truthfully testifying in a legal action against employer).

7. 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).

8. 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).

9. Grievant failed to identify a substantial public policy violated by her dismissal. Grievant failed to state a claim on which relief can be granted, the grievance must be dismissed.

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 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* W. Va. Code St. R. § 156-1-6.20 (2018).

DATE: February 22, 2019.

Landon R. Brown
Deputy Chief Administrative Law Judge