

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DUSTIN PARSONS,  
Grievant,**

**v.**

**Docket No. 2020-0074-DOT**

**PARKWAYS AUTHORITY,  
Respondent.**

**DECISION**

Grievant, Dustin Parsons, was employed by Respondent, Parkways Authority. On August 2, 2019, Grievant filed this grievance against Respondent protesting his termination from employment. For relief, Grievant seeks reinstatement.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on May 4, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant did not appear in person but was represented by Terry Parsons. Respondent appeared by Tyrone Gore, Director of Operations, and was represented by counsel, A. David Abrams, Jr., Abrams & Byron. This matter became mature for decision on June 7, 2021, upon final receipt of the Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant did not file written Proposed Findings of Fact and Conclusions of Law.

**Synopsis**

Grievant was employed by Respondent as an at-will Radio Operator. Grievant also served as a volunteer firefighter. Grievant's employment was terminated after he missed five consecutive shifts of work, including failing to call in at all on one day. Grievant failed to prove that the termination of his employment was motivated to contravene a 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. Grievant was employed by Respondent as an at-will Radio Operator.
2. From July 10, 2019 through July 16, 2019, Grievant missed five consecutive shifts of work.
3. Grievant called in sick for the first two days, failed to report without calling in on the third day, and then called in sick for two more days, without providing a doctor's excuse.
4. Respondent's Personnel Policy II-3, *Rules of Conduct*, prohibits "excessive or unauthorized absence from work."
5. Grievant had previously been disciplined for tardiness in 2011 and for unexcused absence in 2017 and had received verbal counseling for unexcused absence in 2017 and for sleeping at work in 2018.

### **Discussion**

Ordinarily in grievance cases, 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 classified-exempt, 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).

Although Grievant previously disputed his at-will status during a telephone status conference, he presented no evidence during the level three hearing to prove his status was other than at will. "Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence." Syl. Pt 3, *Adkins v. Inco Alloys Int'l*, 187 W. Va. 219, 220, 417 S.E.2d 910 (1992). "Employees of the West Virginia Parkways Authority are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. VA. CODE § 29-6-10. *Oakes v. Parkways Economic Dev. & Tourism Auth.*, Docket No. 00-PEDTA-337 (Sept. 25, 2002); *Boyd v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 00-PEDTA-243 (Feb. 28, 2001) . . . Public employees in positions which are exempt from coverage under the classified service are deemed at-will employees. *Roach v. Regional Jail Auth.*, 198 W. Va. 694, 482 S.E.2d 679 (1996); *Stelling v. W. Va. Parkways, Economic Dev. & Tourism Auth.*, Docket No. 01-PEDTA-507 (Mar. 21, 2002)." *Hensley v. Parkways Auth.*, Docket No. 2016-0897-DOT (June 15, 2016).

"[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)). "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." Syl. Pt. 3, *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)). "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 Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

Therefore, a grievant employed at will alleging he was wrongfully terminated has the burden to prove by a preponderance of the evidence that the termination of his employment was motivated to contravene some substantial public policy. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant appears to argue that his employment was terminated because of his service as a volunteer firefighter. It is unclear if Grievant's service as a firefighter would involve a substantial public policy but it is unnecessary to make that determination, as Grievant provided no evidence that the termination of his employment was related to his service as a firefighter. Grievant's employment was terminated when he missed five consecutive shifts of work. Grievant called in sick for two days, failed to report without calling in on the third day, and then called in sick for two more days without providing a doctor's excuse. Grievant provided no evidence that his illness or failure to call in to

work was related in any way to his service as a firefighter. Grievant failed to prove that the termination of his employment was motivated to contravene a substantial public policy.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. Ordinarily in grievance cases, 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 classified-exempt, 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).

2. “Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer’s personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence.” Syl. Pt 3, *Adkins v. Inco Alloys Int’l*, 187 W. Va. 219, 220, 417 S.E.2d 910 (1992).

3. “Employees of the West Virginia Parkways Authority are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. VA. CODE § 29-6-10. *Oakes v. Parkways Economic Dev. & Tourism Auth.*, Docket No. 00-PEDTA-337 (Sept. 25, 2002); *Boyd v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 00-PEDTA-243 (Feb. 28, 2001) . . . Public employees in positions which are exempt

from coverage under the classified service are deemed at-will employees. *Roach v. Regional Jail Auth.*, 198 W. Va. 694, 482 S.E.2d 679 (1996); *Stelling v. W. Va. Parkways, Economic Dev. & Tourism Auth.*, Docket No. 01-PEDTA-507 (Mar. 21, 2002).” *Hensley v. Parkways Auth.*, Docket No. 2016-0897-DOT (June 15, 2016).

4. “[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)). “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.” Syl. Pt. 3, *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat’l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)). “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 Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

5. A grievant employed at will alleging he was wrongfully terminated has the burden to prove by a preponderance of the evidence that the termination of his employment was motivated to contravene some substantial public policy. “The

preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

6. Grievant failed to prove that the termination of his employment was motivated to contravene a 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 W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: July 19, 2021**



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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**