THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAWRENCE EDWARD CHRISTIAN, II,

Grievant,

v. **Docket No. 2022-0679-DHS**

**DEPARTMENT OF HOMELAND SECURITY/
EMERGENCY MANAGEMENT DIVISION,**

Respondent.

DISMISSAL ORDER

Grievant, Lawrence Edward Christian, II, was employed by Respondent, Department of Homeland Security, within the Emergency Management Division. On March 11, 2022, Grievant, by counsel, filed a grievance against Respondent protesting his termination from employment stating, "Grievant terminated on 2/18/22 based on job performance outside of probationary period. Employer did not follow Performance Evaluation Procedure, Ratings System, Improvement Plan, or Progressive Discipline steps. Grievant was not given opportunity to show due diligence." For relief, Grievant seeks reinstatement and back pay.

The grievance was scheduled for level three hearing on June 9, 2022. On June 7, 2022, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed as Grievant was an at-will employee and had failed to allege the violation of a substantial public policy. As it was too late to address the motion prior to the scheduled hearing, the undersigned allowed the parties to argue the motion in lieu of the level three hearing on June 9, 2022, and permitted the parties to file written Proposed Findings of Fact and Conclusions of Law. The motion became mature for decision upon final receipt of the parties' written Proposed Findings of Fact and

Conclusions of Law on June 21, 2022. Grievant appears *pro se*.[1] Respondent appears by counsel, Jodi Tyler, Assistant Attorney General

Synopsis

Grievant was employed by Respondent, Department of Homeland Security, within the Emergency Management Division as an Information Systems Manager. Grievant's employment was at will pursuant to statute. Respondent terminated Grievant's employment. Respondent's employee handbook did not create a contract that would prevent the termination of Grievant's employment. Grievant did not allege that Respondent was motivated to terminate his employment to contravene some substantial public policy. As Grievant failed to state a claim on which relief can be granted the grievance must be dismissed. Accordingly, the 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

Grievant was employed by Respondent, Department of Homeland Security, within the Emergency Management Division as an Information Systems Manager.

Grievant's employment was at will.

Respondent's employee handbook states, "The immediate supervisor shall evaluate the performance of a probationary employee at least 45 days prior to the end of the probationary period. Upon the written recommendation of the

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

hiring unit, the [employer] shall determine if the services of the probationary employee are to be retained."

The handbook further states, "If at any time during the probationary period the agency determines that the services of the employee are no longer required in the position, the agency shall terminate the employee without a stated reason and without right of appeal."

Respondent did not conduct handbook review of Grievant's probationary employment.

Grievant's employment was terminated on February 18, 2022.

Grievant was no longer a probationary employee when his employment was terminated.

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 the grievance must be dismissed because Grievant, an at-will employee, does not allege that his dismissal from employment was motivated to contravene some substantial public policy principle. Grievant does not dispute that his position was at will, but essentially asserts that Respondent's employee handbook created an implied contract. Grievant does not allege that Respondent's motivation for terminating his employment was to contravene some substantial public policy, however, Grievant asserts that "denial based on solely on at will employment would create a clause that renders the [Grievance Board] obsolete through the ability to bypass any plausible grievance remedy with an at will termination of any probable Grievant which certainly pertains to substantial public policy through denying a statutory right."

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). Employees of the Division of Emergency Management are employed at will pursuant to statue. "Each employee hired shall be deemed an at-will employee who may be discharged or released from his or her respective position without cause or reason." W. VA. CODE § 15-5-3(g)(3).

Although Grievant admits his position was at will, he essentially argues that Respondent's employee handbook created a contract which would prevent Respondent from terminating Grievant's employment without following certain procedures.

"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.

Grievant argues that Respondent's handbook created a contract that would require Respondent to review Grievant's employment within 45 days of the end of his probationary employment period. This provision of the handbook does not alter the at-will nature of Grievant's employment. As discussed in *Cook*, a handbook must contain a definite promise not to discharge an employee except for specified reasons. This handbook provision does not contain any such promise. In fact, although it states that the probationary employee's performance would be evaluated prior to the end of the probationary period, the provision also states that the probationary employee may be terminated at any time, without stated reason, and with no right of appeal. Further, Grievant was no longer a probationary employee at the time his employment was terminated. When his probationary period passed without the handbook review, Grievant simply became a permanent employee. Respondent's employee handbook did not create a contract that would prevent the termination of Grievant's employment.

"'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., *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 argues that it would be contrary to a substantial public policy to dismiss his grievance based on his at will status because that would deny him a statutory right of address through the grievance process. 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. 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 that ground. Grievant has admitted that Respondent's termination of his employment was not motivated to contravene a substantial public policy. 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. 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).

4. "Each employee hired [by the Division of Emergency Management] shall be deemed an at-will employee who may be discharged or released from his or her respective position without cause or reason." W. VA. CODE § 15-5-3(g)(3).

5. Grievant was an at-will employee pursuant to statute.

6. "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.

7. Respondent's employee handbook did not create a contract that would prevent the termination of Grievant's employment.

8. "'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., *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).

9. "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)).

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

11. As Grievant failed to state a claim on 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: August 3, 2022

Billie Thacker Catlett
Chief 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.