

**JEANETTE MILLS,**

**Grievant,**

**v.**

**DOCKET NO. 96-AGR-153**

**WEST VIRGINIA STATE SOIL**

**CONSERVATION AGENCY and GUYAN**

**SOIL CONSERVATION DISTRICT,**

**Respondents.**

### **DECISION**

This is a grievance by Jeanette Mills (Grievant), submitted directly to Level IV in accordance with W. Va. Code § 29-6A-4(e), challenging her termination as Assistant District Coordinator by Respondent Guyan Soil Conservation District (GSCD) on March 21, 1996. Grievant also challenges the action of the West Virginia State Soil Conservation Agency (WVSSCA) in failing to select her for the position of District Coordinator assigned to GSCD. This grievance was submitted on April 16, 1996. [\(See footnote 1\)](#) An evidentiary hearing in this matter was conducted at this Board's office in Charleston, West Virginia, on June 21, 1996. This case became mature for decision on July 5, 1996, upon timely receipt of post-hearing arguments from both parties. [\(See footnote 2\)](#)

W. Va. Code § 19-21A-3 defines "soil conservation district" as "a subdivision of this State." Accordingly, GSCD does not contest that it is a "department, agency, commission, or board of the state created by an act of the Legislature" whose employees may file grievances under the statutory grievance procedure for state employees. W. Va. Code § 19-6A-2(e). See Wamsley v. W. Va. Farm Mgmt. Comm'n, Docket No. 91-FMC- 333 (Mar. 25, 1992). GSCD acknowledges that it hired Grievant as Assistant District Coordinator, for the specific purpose of assisting then District Coordinator Patty Meadows in accomplishing her duties. Further, Grievant demonstrated by a preponderance of the evidence that GSCD and Ms. Meadows provided training to Grievant for over two years, anticipating that Grievant would be hired to replace Ms. Meadows upon her retirement.

However, GSCD notes that WVSSCA employs District Coordinators for the benefit of each soil conservation district in West Virginia, including GSCD. Moreover, it was WVSSCA which selected someone other than Grievant to replace Ms. Meadows. GSCD hired Grievant in a part-time capacity to assist Ms. Meadows. [\(See footnote 3\)](#) Ms. Meadows was experiencing unspecified "health problems" which impacted on her ability to perform her duties. When WVSSCA hired a new District Coordinator to replace Ms. Meadows following her retirement, GSCD no longer required Grievant's services and her employment was terminated.

W. Va. Code § 19-21A-7 sets forth the powers and duties of the supervisors elected to govern each soil conservation district created in accordance with W. Va. Code § 19-21A-5 as follows:

The supervisors may with the approval of the state committee employ a secretary, technical experts, and such other officers, agents, and employees, permanent and temporary, as they may require, and shall determine their qualifications, duties and compensation.

This provision grants specific authority to GSCD to determine matters which have been entrusted to the Division of Personnel by W. Va. Code §§ 29-6-1, et seq. Because § 19-21A-7 applies specifically to soil conservation districts, it supersedes any general statute applying generally to employees of state agencies. Therefore, it is apparent that Grievant's position is not included in the classified service, and she served in an at-will capacity. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95- DPS-119 (Aug. 15, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). This is not to say that at-will employees are completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

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.

Syllabus, Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Court identified

sources of public policy as follows:

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. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Birthisel at 377 (footnotes omitted).

Courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)), refusing to conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)), filing a workers' compensation claim (Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)), and attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)), as involving substantial public policy interests.

This Grievance Board has previously recognized that reporting alleged violations of the West Virginia Governmental Ethics Act warrants application of a Harless-type analysis to dismissal of an at-will state employee. Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). Likewise, an at-will employee alleging that her termination was motivated by unlawful sex discrimination has been permitted to challenge that action. Bellinger, *supra*. But see Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994).

Grievant has not identified any motivation by GSCD to terminate her which would rise to the level of a substantial public policy interest contemplated by Harless. Indeed, it is clear that, to the extent Grievant contends there was any impropriety, her allegations are directed against WVSSCA, the agency which hired another person to replace Ms. Meadows. Grievant presented no evidence that GSCD had any further requirement for her services after WVSSCA employed a new District Coordinator. GSCD demonstrated by a preponderance of the evidence that it no longer needed Grievant's services, once the new District Coordinator was in place. Accordingly, Grievant was properly terminated by GSCD.

As for Grievant's complaint against WVSSCA, Grievant was never employed by that agency. She

was only an applicant for employment. W. Va. Code § 29-6A-2(e) defines "employee" as "any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state." Further, W. Va. Code § 29-6A-2(g) defines "employer" as the "state department, board, commission or agency utilizing the services of the employee covered under this article." Finally, W. Va. Code § 29-6A-2(i) explicitly excludes from the grievance procedure any "matter in which authority to act is not vested with the employer." When these provisions are read in pari materia, it is clear that Grievant's complaint regarding her non-selection for the District Coordinator's position is outside the jurisdiction of this Grievance Board because WVSSCA never hired her for full or part-time employment and was not her "employer." Likewise, her statutory employer, GSCD, demonstrated that WVSSCA's selection of someone other than Grievant for the District Coordinator's position was a matter outside its control. Accordingly, Grievant may not grieve her non-selection for employment by WVSSCA, as such decisions are not subject to review through the grievance procedure provided for state employees, W. Va. Code §§ 29-6A-1, et seq. See Calvert v. W. Va. Dept. of Commerce, Docket No. 92-CLER-094 (Mar. 23, 1993); Litman v. W. Va. Racing Comm'n, Docket No. 90-RC-181 (Oct. 25, 1990). See also Trahern v. Bd. of Trustees, Docket No. 94-BOT-026 (June 22, 1994); Mahon v. Bd. of Directors, Docket No. 91-BOD-394 (Oct. 2, 1991).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

### **FINDINGS OF FACT**

1. Grievant was hired by the Guyan Soil Conservation District (GSCD) in July 1993 as a part-time, temporary employee.
2. Patty Meadows was employed by the State Soil Conservation Agency (WVSSCA), assigned to GSCD as District Coordinator, reporting to Lance Tabor, WVSSCA Executive Secretary, as her immediate supervisor.
3. Due to health problems which Ms. Meadows and her parents were experiencing, GSCD hired Grievant in the capacity of Assistant District Coordinator, to assist Ms. Meadows in accomplishing her duties.
4. Grievant performed her duties as Assistant District Coordinator in a "totally satisfactory manner." At the time Grievant was hired, she was told by Patty Meadows, and two other GSCD officials, that she would be trained to replace Ms. Meadows.

5. While Grievant was employed by GSCD, Mr. Tabor and WVSSCA Program Coordinator Mitchell Bryant made statements to Grievant which led her to believe that she would be replacing Ms. Meadows upon her retirement.

6. Ms. Meadows retired from her position as District Coordinator on or about February 1, 1996.

7. The District Coordinator's position was advertised and Grievant submitted a timely application for the position. Grievant and five other applicants were interviewed for the WVSSCA position by a committee which included GSCD Supervisors Bill Duty and Robert Neal, Natural Resources Conservation Service (NRCS) employee (See footnote 4) Michael Marks, and Mitchell Bryant. GSCD Chairman Boyd Meadows was assigned to the interview committee but did not participate in the interviews. By a 3-1 vote, the committee recommended a Ms. Masters to WVSSCA for the District Coordinator's position. See G Ex A.

8. On February 28, 1996, GSCD held a special meeting and voted to advise WVSSCA that either Grievant or Ms. Masters would be acceptable to GSCD as the new District Coordinator. See G Ex A.

9. After WVSSCA hired Ms. Masters to replace Ms. Meadows as District Coordinator, GSCD determined that it no longer required Grievant's services, and notified her that she was being terminated. See R Ex 3.

### **CONCLUSIONS OF LAW**

1. As Grievant was not an "employee" of WVSSCA as defined by W. Va. Code § 29-6A-2(e), any grievance which she may have against WVSSCA regarding her non-selection for the position of District Coordinator is excluded from the grievance procedure provided for state employees under W. Va. Code §§ 29-6A-1, et seq. See *Calvert v. W. Va. Dept. of Commerce*, Docket No. 92-CLER-094 (Mar. 23, 1993); *Litman v. W. Va. Racing Comm'n*, Docket No. 90-RC-181 (Oct. 25, 1990). See also *Trahern v. Bd. of Trustees*, Docket No. 94-BOT-026 (June 22, 1994); *Mahon v. Bd. of Directors*, Docket No. 91-BOD-394 (Oct. 2, 1991).

2. As GSCD demonstrated that the decision to hire someone other than Grievant to replace Patty Meadows as the District Coordinator supporting GSCD was made by WVSSCA, that decision was a matter outside GSCD's control and, therefore, is not subject to review through the grievance procedure provided for state employees. See W. Va. Code § 29-6A-2(i).

3. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. *Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270

(1978); Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95- DPS-119 (Aug. 15, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. A terminated at-will employee must establish by a preponderance of the evidence that the employer's controlling motivation in his or her termination was a factor protected by a substantial public policy. Bellinger, supra. See Graley, supra.

5. GSCD established a sufficient basis for terminating Grievant's part-time, at-will employment. See Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: July 30, 1996**

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[Footnote: 1](#)

Although W. Va. Code § 29-6A-4(e) requires such a grievance to be filed "within ten days of the date of the final action," GSCD did not raise this defense at Level IV and it is deemed to have been waived by Respondent.

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[Footnote: 2](#)

It is noted that Respondent included additional documentary evidence with its undated post-hearing argument, which was received by this Grievance Board on July 5, 1996. Inasmuch as these documents were not presented at the Level IV hearing, and Grievant did not have an opportunity to cross-examine Respondent's witnesses with regard to the documents, or to present evidence in rebuttal, none of these documents have been considered in rendering this decision. See Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995); Woo v. Putnam County Bd. of Educ., Docket No. 93- 40-420 (June 2, 1994).

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[Footnote: 3](#)

GSCD also contended that Grievant was only hired as a "temporary" employee. Under W. Va. Code § 29-6A-2(e), discussed infra, only "permanent" employees may avail themselves of the state employee grievance procedure. Because GSCD employed Grievant continuously for over two years, as of the time Grievant was terminated, her status appears to have evolved into what would generally be considered permanent, albeit at-will, employment. See Watts v. W. Va. Dept. of Health & Human Resources, 465 S.E.2d 887 (W. Va. 1995). See also F.N. 2, supra.

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[Footnote: 4](#)

Mr. Marks' position was not clearly identified in the record. The NRCS is a federal agency.