VINCENT S. HENDRICKS,

Grievant,

v. Docket No. 96-T&R-215

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE,

Respondent.

D E C I S I O N

This is a grievance by Vincent S. Hendricks (Grievant), submitted directly to Level IV in accordance with W. Va. Code § 29-6A-4(e), challenging the action of Respondent Department of Tax and Revenue (T&R), which has suspended him without pay since October 11, 1995. An evidentiary hearing in this matter was conducted at this Board's office in Charleston, West Virginia, on August 7, 1996. Following receipt of timely post- hearing submissions from both parties, this case became mature for decision on August 23, 1996. Consistent with W. Va. Code § 29-6A-4 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision. Grievant is employed by T&R as a Criminal Investigator. On October 11, 1995, James H. Paige, III, State Tax Commissioner, notified Grievant in writing of his decision to suspend him, stating in pertinent part, as follows:

> The purpose of this letter is to advise you of my decision to suspend you without pay from your at-will position of Investigator with the West Virginia Department of Tax and Revenue, pending the results of an investigation and pending the outcome of the charges filed against you by a Charleston City Police Officer. The charges filed against you on September 30, 1995, in Kanawha County Magistrate Court are: DUI, Red Light Violation, Turning Improperly, and Obstructing. Your suspension from work will begin on October 11, 1995.

> Considering that your position is one of public trust involving enforcing state law, I believe the public interest is best served by suspend ing you from employment, without pay, until this matter is more fully investigated and/or the charges are resolved. I believe that the nature of these charges to be sufficient to conclude that if true that you will be ineffectual in your assigned duties as a Criminal Investigator. Furthermore, a drivers license is required for the performance of your assigned duties. Obviously if your drivers license should be revoked, then you will apparent ly be unable to perform your duties and such revocation may be cause for your dismissal.
>
> As an at-will employee, officials of the Department of Tax and Revenue may decide to administratively dismiss you from employment at any point during the investigation or the period pending the outcome of the charges.

J Ex 1.

In support of these charges, T&R presented documentary evidence that Grievant was apprehended by a City of Charleston Police Officer on September 30, 1995, and was charged in the Magistrate Court of Kanawha County with driving under the influence of alcohol (DUI), running a red light, improper turning and obstructing. (See footnote 1) See R Ex 1. Based on these charges, Lydia McKee, T&R Deputy Tax Commissioner, recommended Grievant's suspension to Mr. Paige, who approved suspending Grievant without pay, pending the outcome of the charges. See J Ex 1.

Ms. McKee testified that Grievant's immediate supervisor, Jim Earls, notified her of Grievant's arrest for DUI and obstructing justice on the first workday after the incident. After obtaining a copy of the police report, and consulting with the West Virginia Division of Personnel, the decision was made to suspend Grievant without pay. She explained that Grievant is a Criminal Investigator assigned to the Criminal Investigation Division. Criminal Investigators are charged with enforcing the tax laws and have authority to arrest and issue warrants. Indeed, they have the same powers as a member of the division of public safety, except they do not carry firearms. See W. Va. Code § 11-9-2a(e) (1995).

Ms. McKee was concerned that the charge of obstructing justice could compromise Grievant's ability to carry out his duties effectively. (See footnote 2) In particular, she expressed concerns based upon the narrative in the Police Report which indicated that Grievant failed to stop for the police, continued driving at a high rate of speed with the police in pursuit, ran a red light, and was ultimately involved in an accident after which he refused to: (1) get out of his car; (2) submit to a sobriety test; (3) be fingerprinted; or (4) be photographed. See R Ex 1. Nonetheless, T&R elected to suspend Grievantwithout pay, rather than terminate his employment, so he would have an opportunity to

resolve these charges before a final decision on his employment status was made.

Grievant complains that this action represents disparate treatment prohibited by W. Va. Code § 29-6A-2(d) in that two other T&R employees (See footnote 3) who committed similar offenses received no punishment from the employer. Employee A, a classified employee, serves as Director in charge of T&R's Compliance Division. Employee B, also a classified employee, is Assistant Director of the Compliance Division. Employees A and B are administrators responsible for collection of taxes due the State of West Virginia. They are not charged with enforcing the criminal provisions of the tax code and do not have law enforcement powers.

Ms. McKee was aware that Employees A and B had been convicted of DUI and neither employee received any formal disciplinary action. (See footnote 4) Ms. McKee was not aware that Employee A had been charged with obstruction of justice at the time he was arrested in 1993. See G Ex B. Ultimately, that charge was dismissed. In the course of the Level IV hearing, Ms. McKee and Mr. Paige became aware, for the first time, that Employee A had been convicted of a second offense of DUI in early 1996. See G Ex C. As they were not previously aware of this circumstance, they had not yet determined what disciplinary action, if any, might be appropriate. Grievant presented preponderant evidence that prior to his arrest, he was the victim of discrimination and harassment in the workplace, based upon his Native American national origin. Grievant's immediate supervisor, Mr. Earls, admitted that he referred to Grievant as "Tonto" on occasion, but opined that this was just a "joke" between them, and Grievant was not offended. In addition, there was credible testimony that Mr. Earls would ask for "Geronimo" when looking for Grievant and would ask Grievant to "send up a smoke signal" when he needed something while working in the field. There was additional, credible evidence that Grievant was perceived as a homosexual by Mr. Earls and some of his co-workers, and that Mr. Earls would refer to Grievant as a "he-she-it" when speaking to other employees outside Grievant's presence.

Grievant waived his right to silence under W. Va. Code § 29-6A-6, testifying that he and Mr. Earls had a good working relationship when Grievant first came to work in the Criminal Investigation Division. He believed that they began to part ways when Mr. Earls discussed the possibility of establishing a Bingo operation under the auspices of an Indian tribe, and Grievant acknowledged that he was part Cherokee. Grievant took offense at Mr. Earls' suggestion but attempted to be polite. It was shortly after this conversation that Mr. Earls began calling Grievant "Tonto." Grievant stated that

he politely informed Mr. Earls that he found this reference offensive. Grievant noted that Mr. Earls nonetheless persisted with this and similar references, such as "how's your squaw."

Grievant also testified regarding an incident where another Criminal Investigator accosted Grievant in the lobby of the Revenue Center in September 1995, remarking that Grievant's hair style was related to the "Gay Rights Movement." A verbal altercationensued and the other employee, who was determined to be the instigator of the incident, received a one-day suspension, while Grievant was issued a written reprimand. Grievant initiated a grievance regarding this matter but it has not yet been processed beyond Level I. (See footnote 5)

Grievant further presented uncontradicted evidence that, following his suspension, he was not paid the salary earned prior to his suspension, until December 29, 1995, nor has T&R reimbursed him for travel expenses which he incurred prior to his suspension. Ms. McKee testified that certain time records were not provided to T&R until mid- November, delaying payment of Grievant's wages to some extent. Mr. Earls indicated that he had no recollection of disapproving any of Grievant's travel reimbursement claims.

DISCUSSION

In suspension cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for suspending an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). How ever, in cases involving the suspension of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). Indeed, an at-will employee is subject to disciplinary action for any reason which does not contravene somesubstantial public policy principle. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

Grievant is employed in one of twelve investigator positions expressly created by the Legislature and specified as being "exempt from the classified service." W. Va. Code § 11-9-2a(a) (1995). Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995). See W. Va. Code § 29-6-2(g) (1992); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

Even at-will employees are not 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, supra. Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 377, 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. 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. Moreover, this Grievance Board has 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).

Here, Grievant alleges his suspension constitutes unlawful discrimination under W. Va. Code § 29-6A-2(d) in that two other employees at T&R who committed similar offenses were treated much more leniently. It must first be determined if Grievant's allegations assert an interest protected by a substantial public policy. In this regard,

state employees are specifically protected from "discrimination," defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d) (1988). Grievant further contends that this discrimination wasmotivated by his national origin (See footnote 6) as a Native American and his perceived sexual preference. (See footnote 7) Employers are prohibited from discriminating in terms and conditions of employment because of national origin under the West Virginia Human Rights Act, W. Va. Code § 5-11-2. In addition, national origin-based employment discrimination is prohibited under Title VII of the federal Civil Rights Act of 1964 as amended, 42

U.S.C. § 2000e- 2(a)(1). (See footnote 8) Accordingly, the undersigned finds that Grievant's specific allegations of national origin-based discrimination raise an issue of substantial public policy which, if true, would prohibit Grievant's suspension, notwithstanding his at-will employment status. See Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992); Graley, supra. (See footnote 9)

An at-will employee seeking to establish that his suspension was motivated by unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), by demonstrating the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Bellinger, supra. See Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). See also Graley, supra. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non- discriminatory reason for the suspension. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley, supra.

Grievant established a prima facie case of discrimination by demonstrating that he and two other employees at T&R have been charged with DUI, and only Grievant wassuspended without pay, pending the outcome of his criminal case. (See footnote 10) See Parsons, supra. T&R explained that Grievant was treated differently because he has also been charged with obstruction and Grievant's job responsibilities are more directly involved with law enforcement than employees A and B. The record in this case indicates that neither Mr. Paige nor Ms. McKee were aware of any obstruction charge against employee A. Thus, T&R's decision to distinguish Grievant's situation on the basis of the pending obstruction charge does not appear to be a pretext to discriminate against Grievant. Moreover, not only are the differences in job responsibilities between Grievant and the two administrators apparent from their position descriptions (See R Exs 2 & 3.), but the Legislature has acknowledged the different nature of Grievant's duties by expressly declaring Criminal Investigators

to be classified-exempt employees. See W. Va. Code § 11-9-2a(a). Thus, T&R has presented legitimate, non-pretextual, job- related reasons for the suspension at issue in this grievance. See Graley, supra.

Grievant's evidence relating to a hostile work environment based upon his national origin does not refute T&R's articulated reasons for suspending him without pay, primarily because this action was taken by Mr. Paige on the recommendation of Ms. McKee, and there is no persuasive evidence that either of these officials participated in, had specific knowledge of, or in any way condoned the discriminatory conduct of Mr. Earls or Grievant's peers in the Criminal Investigation Division. While Grievant'sallegations of discrimination may form the basis for a separate grievance, (See footnote 11) they do not refute T&R's reasons for the suspension at issue here. Indeed, although it is not necessary for a public employer to establish a nexus to discipline an at-will employee for off-duty misconduct, Respondent did establish a sufficient nexus between Grievant's law enforcement duties and the pending obstruction of justice charge to support the action taken. Accordingly, T&R had the legal authority to suspend Grievant, an at-will employee, without pay, until resolution of the pending criminal charges. See John C. v. Dept. of Pub. Safety, Docket No. 95-DPS-497 (Jan. 31, 1996). See also Kidd v. W. Va. Dept. of Tax & Revenue, Docket No. 91-T-127 (June 30, 1993).

Finally, Grievant complains that he did not receive proper notice of his suspension in compliance with Section 12.03 of the West Virginia Division of Personnel's Administra tive Rule, 143 C.S.R. 1 (1995). That regulation was adopted to implement W. Va. Code § 29-6-1. § 1.01, 143 C.S.R. 1 (1995). This Code provision applies only to employees in the classified service. As Grievant is a classified-exempt employee by statute, this regulation does not apply to this action. Moreover, even if the Administrative Rule did apply, Respondent established that the public interest exception contained in the Rule is served by suspending Grievant without advance notice, given Grievant's job duties and the nature of the pending criminal charges. 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 is employed by the West Virginia Department of Tax and Revenue (T&R) as a Criminal Investigator.

2. Grievant's position is classified-exempt. W. Va. Code § 19-9-2a(a).

3. On September 30, 1995, Grievant was arrested by a City of Charleston Police Officer and subsequently charged in the Magistrate Court of Kanawha County with DUI, running a red light, improper turning, and obstructing. See R Ex 1.

4. Criminal Investigators employed by T&R "have all the lawful powers delegated to members of the department of public safety except the power to carry firearms" and general authority to enforce the provisions of the tax code statewide. W. Va. Code § 11- 9-3(e).

5. On or about October 11, 1995, James H. Paige, III, State Tax Commissioner, suspended Grievant without pay, pending resolution of the criminal charges described in Finding of Fact Number Three.

6. Prior to his suspension, Grievant was subjected to discrimination and harassment in the workplace from some of his peers and his immediate supervisor based upon his Native American national origin.

7. Subsequent to his suspension, Grievant did not receive the salary to which he was entitled for work performed prior to his suspension in a timely manner. Likewise,the employer did not process Grievant's claims for reimbursement for travel expenses incurred prior to his suspension in a timely manner.

8. Prior to Grievant's suspension, a classified employee serving as Director of T&R's Compliance Division was convicted of DUI. Another classified employee serving as Assistant Director of the Compliance Division was also convicted of DUI prior to Grievant's suspension. Neither of these employees, whose duties are primarily of an administrative nature, received any disciplinary action.

9. At the time Grievant was suspended by Commissioner Paige, he was aware that the two classified employees had each been convicted of DUI on one occasion and neither employee had ever been suspended from employment.

10. At the time Grievant was suspended, Commissioner Paige was not aware of any discrimination or harassment of Grievant resulting from Grievant's Native American national origin. Commissioner Paige based his decision to suspend Grievant solely upon the nature of the charges pending before the Magistrate Court, and Grievant's statutory duties as a Criminal Investigator.

CONCLUSIONS OF LAW

1. In suspension cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause

for suspending an employee. W. Va. Code § 29- 6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the suspension of classified-exempt, at-will employees, state"agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995). See W. Va. Code § 29-6-2(g); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

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, supra; 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. The prohibition against "discrimination" set forth in W. Va. Code § 29-6A-2(d) does not necessarily limit or restrict the right of a public employer to decide which at-will employee it wishes to dismiss. In other words, a discharged state employee cannot challenge her dismissal on the basis of discrimination under the grievance procedure, unless that discrimination rises to the level of a "substantial contravention of public policy." Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994).

5. Where a grievant sets forth a specific allegation of national origin-based discrimination which, if true, would violate the state Human Rights Act, W. Va. Code §§ 5-11-1, et seq., and Title VII of the federal Civil Rights Act, 42 U.S.C. § 2000e, as well as the discrimination provision of the grievance procedure, W. Va. Code § 29-6A-2(d), such grievant has articulated a substantial public policy interest, and is entitled to a hearingon the question of the employer's actual motivation in suspending his or her employment. See Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 424 S.E.2d 606 (1992); Bellinger, supra; Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

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

supra.

7. A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

8. An employer may rebut a grievant's prima facie case by demonstrating that a legitimate, non-discriminatory reason was the controlling motivation in the termination decision. See Frank's Shoe Store v. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley, supra.

9. Although Grievant established a prima facie case of national origin-based discrimination in regard to his suspension from employment by T&R, the Respondentestablished legitimate non-discriminatory reasons for the suspension by demonstrating that the pending charge of obstruction of justice was closely related to Grievant's job duties as a Criminal Investigator. See Frank's Shoe Store, supra.

10. In demonstrating that Grievant was arrested by a City of Charleston police officer and charged with DUI and obstruction of justice on September 30, 1995, T&R established a sufficient basis for suspending Grievant without pay, pending resolution of the criminal charges. See Bellinger, supra; Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also John C. v. Dept. of Pub. Safety, Docket No. 95- DPS-497 (Jan. 31, 1996); Kidd v. W. Va. Dept. of Tax & Revenue, Docket No. 91-T-127 (June 30, 1993).

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: September 24, 1996

Footnote: 1

As of the date of the Level IV hearing in this matter, these charges had not yet beenadjudicated. See R Ex 1.

Footnote: 2

It was also noted that Criminal Investigators are required to have a valid drivers license as a condition of their employment. However, there was no evidence that Grievant's license has been suspended at any time pertinent to this matter.

Footnote: 3

For purposes of this decision, it is not necessary to identify these individuals by name. See generally State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993); Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 494 (1987).

Footnote: 4

Mr. Paige testified he believed that Employees A and B had been reprimanded or received a written warning as a result of their DUI convictions. However, the record is clear that neither employee received any documented disciplinary action.

Footnote: 5

Indeed, it appears that, for whatever reason, this grievance has been ignored by Grievant's immediate supervisor, Mr. Earls.

Footnote: 6

Grievant cites his "Native American heritage" in support of this claim. Grievant's Memorandum in Support of Finding of Improper Suspension, Aug. 23, 1996. In this context, Grievant's Native American status appears to be more closely linked to his national origin than to his race or religion. Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, or the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1, et seq., prohibit discrimination on the basis of "heritage."

Footnote: 7

Discrimination on the basis of sexual preference or sexual orientation is not prohibited by Title VII of the Civil Rights Act of 1964. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978). The West Virginia Human Rights Act mirrors Title VII, with no indication that discrimination on the basis of "sex" can exist without a difference in gender. See generally Hanlon v. Chambers, 464 S.E.2d 741 (W. Va. 1995). However, this distinction is not important here because W. Va. Code § 29-6A-2(d) prohibits discrimination on any basis which is unrelated to an employee's job responsibilities. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Footnote: 8

Due to the broader definition of "discrimination" contained in W. Va. Code § 29-6A- 2(d), it is not necessary to analyze Grievant's claim of national origin discrimination under either the Human Rights Act or Title VII, as such claims are subsumed by the § 29-6A- 2(d) claim. See Vest, supra. However, it is noted that these are statutes under which Grievant works as defined in the grievance procedure for state employees. W. Va. Code § 29-6A-2(i). See generally Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

Footnote: 9

Guevera v. K-Mart Corp., 629 F. Supp. 1189 (S.D.W. Va. 1986), which found no Harless-type cause of action for national origin discrimination, is distinguished in that Grievant's claim of discrimination under W. Va. Code § 29-6A-2(d) is directed to the same forum in which he is seeking a remedy. See generally, Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Price v. Boone County Ambulance Auth., 175 W. Va. 676, 337 S.E.2d 913 (1985). Likewise, Wilhelm v. Department of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994), is distinguished in that Grievant here specifically identified at least two similarly situated employees who committed similar offenses without being suspended. Accord, Bellinger, supra.

Footnote: 10

This finding results from a presumption that all off-duty conduct is necessarily unrelated to the actual job responsibilities of an employee, unless a clear nexus is established.

Footnote: 11

Under W. Va. Code § 29-6A-3(j), the undersigned is not permitted to address issues at Level IV which have not been properly elevated through the appropriate levels of the grievance procedure. See W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Wells v. Bd. of Directors, Docket No. 94-MBOD- 334 (Aug. 22, 1996).