KIMBERLY WALKER,

Grievant,

v. **DOCKET NO. 98-DPS-056**

DEPARTMENT OF PUBLIC SAFETY/

WEST VIRGINIA STATE POLICE,

Respondent.

DECISION

This grievance was filed at Level IV on February 27, 1998, by Grievant Kimberly Walker against Respondent, Department of Public Safety/West Virginia State Police ("DPS"), following notification on February 20, 1998, of her dismissal from employment effective that date. She seeks as relief reinstatement to her position. (See footnote 1)

Respondent asserted in the dismissal letter and at the Level IV hearing that Grievant was an at-will employee, who could be discharged at any time without cause. The dismissal letter states that she is an at-will employee, but further states that her termination"stems from your giving false information to the United States Marshall Service." While it appears from Respondent's post-hearing written argument that it may have abandoned the argument that its legislative rule which provides for progressive discipline of its employees, thus affecting the at-will status of its employees to that extent, is not applicable to Grievant, this issue will be addressed so that it is clear that this Grievance Board's previous ruling on this issue is applicable to all employees of DPS. (See footnote 2)

Grievant did not contest Respondent's assertion that she was hired as an at-will civilian employee. (See footnote 3) See John C. v. Dep't of Public Safety, Docket No. 95-DPS-497 (Jan.31, 1996). At-will employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. Wilhelm v. Dep't of Tax and Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd per curiam, Wilhelm v. W. Va. Lottery, 198 W. Va. 93, 479 S.E.2d 602 (1996). See Harless v. First National Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). However, this Grievance Board has previously determined that the West Virginia State Police altered

the at-will status of civilian employees, and extended additional rights to those employees, when it promulgated a legislative rule providing for progressive discipline, among other things (81 C.S.R. 10), pursuant to W. Va. Code §§ 15-2-21 and 15-2-25. (See footnote 4) By the definition of employees found in § 2.10, (See footnote 5) this rule was made applicable to civilian employees as well as members of theState Police. Patterson v. Dep't of Public Safety, Docket No. 95-DPS-572 (May 28, 1996). See Health Care Cost Review Auth. v. Boone Memorial Hosp., 196 W. Va. 326, 472 S.E.2d 411 (1996) (when legislative rules have the effect of a statute). The rule was effective April 1, 1996, and has not been modified.

> W. Va. Code § 15-2-6 creates a grievance procedure recom-mendation board to hear "[a]ppeals of transfers, suspensions, demotions in rank and discharges. . ." of members of DPS. It is clear from reading the above Code Sections [15-2-21 and 15-2-6], in pari materia, that those Sections were designed to deal with discipline and resulting appeals of members of the uniformed service, the troopers, within DPS, not civilian employees. However, the enactment of the Rules [81 C.S.R. 10), Respondent's reliance on W. Va. Code § 15-2-21 for their authority, and the subsequent application of those Rules to civilian employees, clearly evidences an intent on the part of DPS to apply W. Va. Code § 15-2-21 to those employees, resulting in authority to only discharge those employees for "cause".

Patterson, supra.

Respondent argued at the Level IV hearing that the holding in Patterson was grievant specific, and 81 C.S.R. 10 §§ 1, et seq., were not applicable to this case, because Grievant was dismissed by a letter signed by Major Robert D. Blankenship, "[b]y Direction of the Superintendent," which did not reference either this legislative rule or Code § 15-2- 21 as authority for the dismissal, rather than by an order from the Superintendent of the West Virginia State Police. Indeed, Grievant was discharged by a letter signed by Major Blankenship. The legislative rule defines discharge as, "an involuntary dismissal from employment ordered by the Superintendent and effected by written State Police Special Order." The finding in Patterson is grounded in a reading of the plain language used in the legislative rule, not upon the facts surrounding the dismissal of that particular grievant. DPS has not changed the language of the legislative rule in response to the Patterson decision. Respondent's argument is that if it uses a letter signed by someone other than the Superintendent it can make the legislative rule inapplicable to the discharge; that is, Respondent can choose when it wants the rule to be applicable to any employee, and when it does not want the rule to be applicable. Respondent cannot affect the applicability of the legislative rule in this manner. Either it is applicable to all employees, or it's not. Patterson found that it was applicable to all employees.

This Grievance Board follows the principle of stare decisis, meaning that, in deciding a grievance, it follows the rulings of the Supreme Court of Appeals of West Virginia as the law of the jurisdiction, and also prior Grievance Board decisions unless a reasoned determination is made that the prior Grievance Board decision was clearly in error. Chafin v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-132 (July 24, 1992). "This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied." Townsend v. Mercer County Bd. of Educ., Docket No. 97-27-093 (Nov. 4, 1997). The undersigned has been presented with no reason to vary from the precedent set in Patterson.

"It is well-established that a governmental agency must comply with all properly enacted rules and regulations. Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977)." Patterson, supra. All employees are entitled to the progressive discipline provided for in81 C.S.R. 10 §§ 1, et seq. If Respondent chooses to use a letter signed by someone other than the Superintendent, rather than a Superintendent's Order, one could argue that the discharge has not been properly carried out, in accordance with 81 C.S.R. 10 § 2.7.

Finally, an investigation into this matter was performed by Sergeant Gordon Ingold. On page nine of the investigative report Sergeant Ingold began listing the allegations against Grievant. The first allegation listed is, "Violation of West Virginia Legislative Rule 81, CSR 1.10.10 `No member shall knowingly and intentionally violate the laws of the United States or the State of West Virginia, or municipalities.'" 81 C.S.R. 10 § 2.12 identifies 81 C.S.R. 1 as the State Police Code of Conduct. Clearly, up until the dismissal letter was issued, Grievant was treated like a member of the State Police.

Grievant's at-will status has been altered by the legislative rule, and she is entitled to the protection afforded by it to all employees of DPS. The burden of proof is, therefore, upon Respondent to prove the charges against Grievant by a preponderance of the evidence, and to prove that the legislative rule allows for Grievant's dismissal under these circumstances. "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. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both

sides, the employer has not met its burden. Id.

The following Findings of Fact necessary to the decision reached, are made based upon the evidence presented at the Level IV hearing.

Findings of Fact

1. At the time her employment was terminated, Grievant was employed by the Department of Public Safety, West Virginia State Police in South Charleston, West Virginia, as a civilian employee, an Office Assistant II, in the Traffic Records Section. Her daily job duties were data entry of accident report information, assisting in selling and mailing accident reports, assisting in all aspects of the motor vehicle inspection program, answering the telephone, and dealing with the public. She did not work with other law enforcement agencies in the course of performing her duties.

2. Grievant's employment was terminated at approximately 4:00 p.m. on February 20, 1998, by a letter of that same date, signed by Major Robert D. Blankenship, and handed to Grievant at that time by him. Grievant was not told the results of the internal investigation or the substance of the sustained allegations. She was simply told by First Lieutenant W.D. Totten that she needed to go to Major Blankenship's office, and that he would accompany her. When she arrived at Major Blankenship's office she was simply handed the dismissal letter. The dismissal letter states that as Grievant is an at-will employee, "the State Police is not required to state a reason for your termination, however, I will state that this action stems from your giving false information to the United States Marshall Service."

3. Grievant became aware on December 10, 1997, that Sergeant Gordon Ingold was conducting an investigation into allegations of wrongdoing on her part, when Sergeant Ingold interviewed her and informed her of this. Sergeant Ingold did not tell Grievant what the allegations were, but asked her about her acquaintance with Raymond D'Arco; her conversations with Deputy United States Marshall John Gainer on February 7, 1997, regarding Mr. D'Arco's whereabouts and the last time she had seen him; Mr. D'Arco'scriminal record; her conversations with Fred Taylor on February 7, 1997, regarding Mr. D'Arco; her acquaintance with Raymond Steward which related to an earlier conversation with a United States Marshall; and a conversation regarding marijuana on February 6, 1997, which did not involve the United States Marshall Service.

4. Grievant received a copy of the investigative report prepared by Sergeant Ingold, on April 16, 1998. The report stated the charges Sergeant Ingold was investigating, his findings, and his

conclusion as to whether the charges were sustained.

5. On February 6, 1997, Grievant attended a court hearing as a potential witness for Raymond D'Arco. Mr. D'Arco was charged with kidnapping his ex-girlfriend. Mr. D'Arco pled guilty to three lesser non-felony charges, and was free to leave. Later that afternoon, Mr. D'Arco's parole on an earlier unrelated charge was revoked, and a warrant was issued for his arrest. Sometime after the hearing, Mr. D'Arco got in a car with Grievant and went to her home, where he spent the night.

6. Before she left for work on February 7, 1997, Grievant called an acquaintance, Fred Taylor, and asked him to come and stay with Mr. D'Arco or come and get him.

7. Early in the morning on February 7, 1997, Mr. Gainer began looking for Mr. D'Arco to arrest him. He learned from a neighbor of Mr. D'Arco that he had gotten in a car with Grievant sometime after the hearing the previous day, and that Grievant worked for the State Police. He proceeded to Grievant's residence, and called her home telephone number and knocked on the door, receiving no response. Grievant did not know at this time that a warrant had been issued for Mr. D'Arco's arrest. Mr. Gainer then called Grievant at work, identified himself, and asked her when she last saw Raymond D'Arco. Grievant told Mr. Gainer she had last seen Mr. D'Arco at the hearing the previous day. He also asked her if she knew where Mr. D'Arco was, and she said no.

8. Mr. Gainer spoke to Grievant's mother who lived next door to Grievant, and was told that a white van had picked up Mr. D'Arco earlier that morning.

9. Mr. Gainer called Grievant again at work and asked her again if she knew where Mr. D'Arco was, and Grievant again said she did not know. Mr. Gainer told Grievant he knew Mr. D'Arco had gotten in a car with her sometime after the hearing the preceding day, and she admitted he had, and that he had spent the night at her home. She repeated that she did not know where he was, but did not volunteer that she had called Fred Taylor.

10. Mr. Gainer informed First Lieutenant Totten of his conversations with Grievant, and her association with a fugitive.

11. On February 10, 1997, Sergeant Ingold was assigned to investigate the allegations made by Mr. Gainer, as well as two other complaints against Grievant. He did not work on the investigation until November 18, 1997. He did not interview Grievant until December 10, 1997, and did not complete the investigation until January 9, 1998.

12. Grievant admitted to Sergeant Ingold that she had lied to Mr. Gainer on February 7, 1998,

when she told him she had not seen Mr. D'Arco since the preceding day. She likewise admitted this at the Level IV hearing.

13. From February 7, 1997, through 4:00 p.m. on February 20, 1998, Grievant continued to work in the same position, performing the same duties she had prior to February 7, 1997. Grievant's supervisor, Larry K. Williams, stated on her most recent evaluation, for the year ended December 31, 1997, that Grievant "is responsible and very dependable and meets the expectations of this supervisor. . . . Note: this employee isabove successful in all categories and should obtain excellent in most or all categories." Her evaluation did not address the allegations against her. Grievant's act of lying to Mr. Gainer did not affect her ability to perform her assigned duties in an excellent manner.

14. On February 19, 1998, Grievant met with her supervisor for two hours while he went over her job description with her to assist her in her efforts to have her position reallocated so she could receive a higher salary.

Discussion

The charges against Grievant are that she gave false statements to the United States Marshall Service. Grievant admitted she had lied to Deputy United States Marshall Gainer. She also admitted that she withheld information from him.

The legislative rule discussed previously lists three levels of offenses, and examples of each, and the discipline which may be imposed for each level of offense. "Group III offenses include acts and behavior of such a serious nature that a first occurrence would warrant the Superintendent discharging an employee." 81 C.S.R. 10 § 11.3.3.33. Respondent did not indicate in the dismissal letter or at the Level IV hearing the specific listed Group III offense under which Grievant's action fell. In its post-hearing written argument, Respondent cited three listed Group III offenses under which Grievant's conduct could be categorized: "11.3.3.19. Engaging in criminal conduct on or off the job"; "11.3.3.20. Engaging in dishonest or immoral conduct that undermines the effectiveness of the State Police's activities or employee performance, whether on or off the job"; and "11.3.3.23. Taking any action which shall impair the efficiency and/or reputation of the State Police or its employees." The undersigned sees no other Group III offense under which Grievant's action could fall. This Grievance Board has found that a board of education need not identify which of the statutory causes for dismissal is applicable, so long as it states what the employee has done which has caused the

action. Walker v. Kanawha County Bd. of Educ., Docket No. 89-20-384 (Oct. 26, 1989). See Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). While it is preferable that the specific violation be identified, the undersigned sees no reason to apply a different rule in this case.

The charges against Grievant are found in two documents. The first is the dismissal letter, which simply states Grievant gave false information to the United States Marshall Service. The other document is Sergeant Ingold's investigative report which states two allegations, one of which was sustained. The sustained allegation is stated as a violation of the State Police Code of Conduct found at 81 C.S.R. 1 § 10.10, "[n]o member shall knowingly and intentionally violate the laws of the United States or the State of West Virginia, or municipalities." Sergeant Ingold concluded that Grievant violated Title 18, U.S.C., Section 1001, which, according to Respondent, states:

> Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Grievant was not charged by anyone other than Respondent with violating this law. Grievant, however, did not dispute Sergeant Ingold's conclusion, except to point out in her post-hearing written submission that her lack of candor did not impede a federal agent in his efforts to locate Mr. D'Arco. While the facts of this case may not be sufficient to sustain a criminal charge of violation of Title 18, U.S.C., Section 1001, the facts before theundersigned show that Grievant knowingly and willfully made a false statement to a Deputy United States Marshall in the course of the performance of his official duties. Grievant's action may properly be characterized by Respondent as criminal conduct, a Group III offense.

There was no evidence presented that Grievant's action did in fact undermine "the effectiveness of the State Police's activities or employee performance," or impair the efficiency of the State Police or its employees. Rather, the fact that the investigation into the allegation was not given priority, and Grievant was allowed to remain in her position for over a year after the incident, and continued to receive glowing evaluations, tends to indicate her action had no effect whatsoever on the State Police or its employees. There was some indication from Mr. Gainer that in his mind the reputation of the State Police or its employees was affected by Grievant's action at the time it occurred. However, he also testified that he did not see a need to pursue federal charges against her after he became

aware of Grievant's personal background. Grievant's act of lying to Mr. Gainer did not affect the reputation of the State Police. It did not fall within §§ 11.3.3.20 or 11.3.3.23. Grievant argued the notice of her discharge was inadequate. (See footnote 6) "Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977). The reason for this rule is so the employee will have sufficient notice of the charges in order to prepare a response. Grievant, however, was an at-will employee, who, absent the legislative rule previously discussed, could be fired for noreason; thus, Respondent would not be required to state any reason for discharge, and Grievant's notice argument would simply not be applicable. Even if it were applicable, Grievant received a copy of the investigative report well before the Level IV hearing, so she was on notice of the charges in time to prepare a defense.

However, the legislative rule previously discussed also provides what is to occur once an internal investigation is completed. The legislative rule requires that the employee be informed of the charges, and be allowed the opportunity of a pre-termination meeting with the Superintendent, if she chooses.

> 8.13. Upon completion of the investigation and review by the Unit Coordinator and the Superintendent or his designee, the Superintendent shall notify the employee that the investigation is complete. If no disciplinary action is forthcoming, the employee shall be so notified and advised that the matter is closed. If disciplinary action is forthcoming, the employee shall be notified, in writing, by the Superintendent. The employee will be given a written statement detailing the charges attendant to the disciplinary action with appropriate citations to codes, policies, procedures or accepted operating practices. The employee shall also be given a written notice of the form of the disciplinary action.

> 8.14 When an employee is notified by the Superintendent concerning pending disciplinary action, the Superintendent shall inform the employee of the results of the internal investigation, the substance of the sustained allegations, and the scope of the prospective discipline. The employee will be given a copy of the investigation case file upon request . . ..

> 8.15 The employee will be given at least ten calendar days to review the case file and will be permitted to appear before the Superintendent to present a defense in the

> matter; provided, that the Superintendent receives the request within the ten day period. The employee may seek redress for any disciplinary action through the State Police employee grievance process.

None of the above occurred in this case, as Respondent took the position that the legislative rule was not applicable to Grievant. While an agency is required to abide by its own lawfully established policies, its actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that `a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). In this case, Grievant testified that both her supervisor and her second level supervisor told her when she received her dismissal letter that her dismissal had nothing to do with her work, and she was a good worker. They seemed apologetic. Neither of these gentlemen was called as a witness. Major Blankenship was not called to explain why he chose to dismiss Grievant, or if he even made the decision. Likewise, the Superintendent was not called as a witness.

Further, Grievant argued the doctrine of laches prevented her dismissal, in that Respondent waited for over a year to fire her, she continued in the same position for that entire time, and continued to receive excellent evaluations. "`Laches is a delay which operates prejudicially to another person's rights.'" Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998). Grievant failed to demonstrate a key element to trigger the doctrine of laches: that her rights were prejudiced in some manner. Although the passage of time resulted in the witnesses forgetting some of the detail of what occurred, Grievant does not dispute that she lied to Mr. Gainer, and that she did not disclose that she had talked to Fred Taylor about watching Mr. D'Arco. However, the State Police have also recognized the importance of timely completion of an investigation in the legislative rule previously addressed, which states, "[t]he Investigators assigned to either internal investigations and/or inquiries shall prepare accurate and complete reports within thirty (30) working days of the day the investigation or inquiry is received by the investigator unless an extension is granted by the Superintendent for just cause." 81 C.S.R. 10 § 3. Respondent violated its own policy regarding investigations by not completing it within 30 working days. There was no evidence that any extensions were granted by the Superintendent.

Finally, Grievant argued that Respondent was estopped from firing Grievant because her last evaluations documented that she was an exemplary employee, and did not mention the investigation. "As a rule, the equitable theory of estoppel cannot be invoked to preclude a governmental body from claiming legal error in the representations of its agents. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991)." Daniels v. Greenbrier County Bd. of Educ., Docket No. 96-13-132 (July 31, 1996). Even if this theory were applicable, Grievant has not demonstrated that she suffered any injury or detriment as the result of being misled by this evaluation. (See footnote 7) Importantly, however, Respondent's legislative rule provides that when an employee is charged with a Group III offense, "[t]he Superintendent may demote or suspend the employee for up to thirty working days in lieu of discharge if mitigating circumstances exist." 81 C.S.R. 10 § 11.3.3.34. The record does not reflect whether the Superintendent considered Grievant's nine year employment record and her work record during the year since the incident, including her most recent evaluation. While the rule does not require that the Superintendent take lesser action, even if mitigating circumstances do exist, Grievant should have been given the opportunity to review the investigative report and present her plea to the Superintendent, if she so chose.

Accordingly, the undersigned concludes that Respondent's failure to follow any of the procedural requirements of 81 C.S.R. 10 §§ 1, et seq., which are designed to provide some measure of notice and opportunity for the employee to plead her case directly before the Superintendent so he may hear the employee's side of the story before he exercises his broad discretion, is sufficiently egregious that Respondent should be directed to reinstate Grievant; and if it chooses to reinstate the charges against her, it must do so in strict compliance with 81 C.S.R. 10 §§ 1, et seq., so that the Superintendent makes the decision on Grievant's employment, and Grievant is given the opportunity to present her defense to him before he makes a decision, should she choose to do so.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Civilian employees of the Department of Public Safety are at-will employees, who may be discharged for good cause, bad cause, or no cause, unless the termination contravened some substantial public policy. Wilhelm v. Dep't of Tax and Revenue, DocketNo. 94-L-038 (Sept. 30, 1994), aff'd per curiam, Wilhelm v. W. Va. Lottery, 198 W. Va. 93, 479 S.E.2d 602 (1996); John C. v. Dep't

of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996). However, the Department of Public Safety promulgated a legislative rule, effective April 1, 1996 (81 C.S.R. 10), which sets forth, among other things, three levels of offenses, and the discipline which may be imposed for these offenses, thereby creating additional rights for employees of the Department, which alters the at-will status of all employees. Patterson v. Dep't of Public Safety, Docket No. 95-DPS-572 (May 28, 1996).

2. "It is well-established that a governmental agency must comply with all properly enacted rules and regulations. Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977)." Patterson, supra.

3. "The promulgation of Rules providing that employees can only be discharged for `cause', serves to shift the burden of proof in disciplinary matters to Respondent to prove the charges against an employee by a preponderance of the evidence." Patterson, supra.

4. Respondent proved Grievant committed a Group III offense under the applicable legislative rule, for which she could be dismissed immediately. However, Respondent violated its own legislative rule by failing to provide Grievant with a written statement detailing the charges from the Superintendent; by failing to inform Grievant of the results of the internal investigation, the substance of the sustained allegations, and the scope of the prospective discipline; and by failing to allow Grievant at least ten calendar days to request an audience before the Superintendent to present a defense.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position. No backpay will be granted as Grievant did not request it. If Respondent chooses to reinstate the charges against Grievant, it must do so in strict compliance with 81 C.S.R. 10 §§ 1, et seq., so that the Superintendent makes the decision on Grievant's employment, and Grievant is given the opportunity to present her defense to him before he makes a decision, should she choose to do so.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 11, 1998

Footnote: 1

Grievant was represented at the Level IV hearing held on April 27, 1998, by Timothy N. Barber, Esquire, and Respondent was represented by Delores A. Martin, Esquire. After an extended briefing schedule, as agreed to by the parties, Ms. Martin filed her written argument, and Mr. Barber filed his written argument late. Ms. Martin declined to submit a response to Mr. Barber's late-filed written argument, and over her objection, Mr. Barber's late-filed written argument was accepted. This matter became mature for decision on August 13, 1998, upon notification by the parties that neither wished to submit any further argument.

Footnote: 2

Both Respondent and Grievant changed their arguments substantially from those made at the Level IV hearing, apparently abandoning some, and adding some. While parties are certainly free to abandon any issue they deem appropriate, what occurred in this case is unusual. Respondent apparently abandoned its entire theory. Grievant's counsel asserted several arguments at the hearing, then abandoned some of them in the late-filed written argument, and asserted new arguments at that time, which Respondent had no idea Grievant would be asserting. These tactics make this case somewhat confusing, and it is difficult to determine exactly what the parties perceive the issues to be at this point. This Grievance Board does not allow a party to wait until the post-hearing written argument to ambush the other side with an entirely new argument. Accordingly, the undersigned has carefully reviewed the record of the Level IV hearing to determine what arguments were made at that time. The undersigned specifically cautioned the parties at the hearing in this matter that they needed to make clear at the hearing what their arguments would be.

Footnote: 3

Grievant argued at the Level IV hearing that, regardless of the legislative rule which will be addressed next in the text, she had acquired a property interest in her continued employment by virtue of having been employed nine years by DPS and could only be dismissed for cause, supporting her position by asserting it would make no sense to have a grievance hearing if she had no right to continued employment. This argument was not addressed in Grievant's post-hearing written argument, and is deemed abandoned. Even if it were to be addressed, it is without merit. An at-will employee has no property interest in her continued employment, but may utilize the grievance procedure to pursue a claim that her dismissal affected a substantial public policy, in violation of her liberty interest. Wilhelm v. Dep't of Tax and Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd per curiam, Wilhelm v. W. Va. Lottery, 198 W. Va. 93, 479 S.E.2d 602 (1996). The undersigned is unaware of any theory under which an at-will employee may attainprotected status merely by length of service.

Grievant also asserted at the Level IV hearing, a right to protect her good name. Likewise, this argument was not

addressed in Grievant's post-hearing written argument, and must be deemed abandoned. Further, "[a] liberty interest is implicated when the state makes a `charge against him [the employee] that might seriously damage his standing and associations in his community.'" Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 160, 241 S.E.2d 164, 167 (1977), citing Bd. of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). "An accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one's liberty interest. Moreover, an individual has an interest in avoiding `a stigma or other disability' that forecloses future employment opportunities." Id. No evidence was offered which would support a finding that the charge in the dismissal letter reaches "the level of stigmatization which would foreclose future employment opportunities or seriously damage [Grievant's] standing and associations in the community." Id.

Footnote: 4

These Code Sections apply to "members" of the State Police.

Footnote: 5

"Employee: Any employee of the West Virginia State Police." 81 C.S.R 10 § 2.10. Section 1.1, entitled "Scope," states, in pertinent part, "[t]his legislative rule explains the processes employed by the West Virginia State Police in dealing with allegations ofemployee misconduct, . . . progressive employee discipline, ..." The progressive discipline outlined in § 11.3 refers to actions which may be taken against "employees."

Footnote: 6

Grievant also argued for the first time in her post-hearing written argument, that her due process rights had been violated because she was not afforded a pre-deprivation hearing, that there was no rational nexus between the action and her job, and that her right to privacy was violated. As these issues were not properly raised at the hearing so that Respondent would be on notice that it needed to defend against them, they will not be addressed. Rush v. Bd. of Directors, Docket No. 97-BOD-369 (Apr. 3, 1998). At any rate, an at-will employee has no property interest in her continued employment, and is not entitled to a pre-deprivation hearing. Wilhelm, supra. Whether the legislative rule created a property interest was not addressed by either party. However, the legislative rule also creates a procedure for a pre-deprivation meeting with the Superintendent, if the employee requests it. 81 C.S.R. 10 § 8.15. Respondent's failure to follow its own procedures will be addressed in a subsequent section.

As to the nexus argument, obviously, if an at-will employee may be discharged for any reason or no reason, the concept of "rational nexus" cannot be applicable. Grievant's at-will status was altered only as set forth in the legislative rule, which does not require a rational nexus.

Finally, it is unclear to the undersigned how Grievant's right to privacy was affected in this case. Her argument seems to be another way to argue nexus. Respondent made no effort to intrude into Grievant's private conversations, as is discussed in Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958), cited by Grievant. First Lt. Totten became aware of Grievant's action when Mr. Gainer, a party to the conversation, called him; and then Grievant herself informed First Lt. Totten of what had occurred.

Footnote: 7

It could be argued that had Grievant realized this investigation could lead to her dismissal, she may have been able to look for other employment, and possibly landed another job before she ended up with a firing on her employment record. Grievant, however, did not indicate that she would have taken these steps, but was lulled into believing she should not be concerned about the investigation, and the undersigned will not engage in speculation on this issue. However, Respondent's failure to advise Grievant of the potential consequences of an adverse finding from the investigation, even though her work was excellent, is not consistent with what one would expect of an employer dealing with an otherwise excellent employee.