JACK WHITE,

Grievant,

v.

DOCKET NO. 97-DOH-444

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Jack White, protests his dismissal from Respondent West Virginia Department of Transportation/Division of Highways, effective October 1, 1997. Specifically, Grievant alleges:

> . . . I am a classified Civil Service employee from the Planning Division on special assignment to the Commissioner's office serving as Special Assistant for Administration to the Commissioner. As you must be aware, I do not serve at the will and pleasure of the Secretary of Transportation or the Governor of West Virginia.
>
> Relief sought: To keep my Civil Service position, letter of public apology & to be made whole.

The grievance was denied at level one by Jeff Black on October 3, 1997. Levels two and three were waived, and this matter was appealed to level four on October 9, 1997. Hearing was held on December 12, 1997 and January 16, 1998. (See footnote 1) This matter became mature fordecision on February 6, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Respondent's Exhibits

Ex. 1 -

October 1, 1990 Memorandum from Fred VanKirk to All District Engineers, All Division Directors, and All C&H Level.

Ex. 2 -

Form GL-5 effective October 16, 1990.

Ex. 3 -

Form GL-5 effective December 16, 1990.

Ex. 4 -

Form GL-5 effective November 1, 1991.

Ex. 5 -

Division of Highways Classified Exempt Positions.

Ex. 6 -

Form GL-5 effective December 15, 1992.

Ex. 7 -

Classification/Pay Grade Schedule Covered Employees, effective February 1, 1993.

Ex. 8 -

Personnel Action Form WV-11 dated December 16, 1992, for Jack White.

Ex. 9 -

Department of Transportation/Division of Highways Organization Chart, dated January 2, 1997.

Ex. 10 -

West Virginia Blue Book, Vol. 78, p. 147 (1996).

Ex. 11 -

West Virginia Department of Transportation/Division of Highways Directory of Key Personnel, pp. 6, 28 (February 1996).

Ex. 12 -

West Virginia Division of Personnel Transaction Card for Jack White.

Ex. 13 -

Personnel Action Form WV-11 dated April 17, 1989, for Jane Cline.

Ex. 14 -

Personnel Action Form WV-11 dated September 12, 1982, for Fred VanKirk.

Ex. 15 -

Personnel Action Form WV-11 dated March 2, 1995, for Joseph Shelton.

Ex. 16 -

Newspaper Articles dated September 19, 1997.

Grievant's Exhibits

Ex. 1 -

December 3, 1997 Memorandum from Joe E. Smith to Tim Basford, attaching Classified-Exempt Positions Listing.

Ex. 2 -

Executive Assistant to the Commissioner Classification Specification.

Ex. 3 -

Personnel Action Form WV-11 dated July 15, 1987 for Floyd Canfield.

Ex. 4 -

West Virginia Department of Transportation Employee Evaluation for Jack White, dated August 25, 1997.

Ex. 5 -

Division of Highways Classified Exempt Positions.

Ex. 6 -

West Virginia Department of Highways Employment History for Jack White.

Ex. 7 -

September 8, 1997 letter from Secretary Richard W. Jemiola to Jack White.

Ex. 8 -

Newspaper articles dated September 19, 1997.

Ex. 9 -

September 22, 1997 letter from Jack White to Richard Jemiola.

Ex. 10 -

West Virginia Administrative Rule (1995) amended.

Testimony

Respondent offered the testimony of Jeff Black, Joe Smith, and Paul Wilkinson. Grievant testified in his own behalf and offered the testimony of Willard Farley, Fred VanKirk, George Sidiropolis (by telephone), Jeff Black, and Richard Jemiola.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. At the time of his dismissal, Grievant had been an exemplary employee of Respondent for 37 years, serving in a variety of positions.

2. For many years Grievant held the classified civil service title of Highway Assistant Division Director 3 (HYADD3) in the Planning Division of the Division of Highways.

3. On October 1, 1990, Grievant assumed the duties of Special Assistant for Administration to the Commissioner. R. Ex. 1.

4. At the time of his reassignment, the Commissioner of Highways was Fred VanKirk.

5. Grievant had been pulled out of the Planning Division on two previous occasions, in 1976 and 1980, to serve in special assignments for Commissioner VanKirk, and these assignments were temporary in nature, lasting approximately 3-4 years.

6. On October 16, 1990, a Form GL-5, a Department of Transportation form used to change the status of existing employees, transferred Grievant from the Planning Division to the Executive

Division, with a salary increase of approximately 4.6%. R. Ex. 2. Grievant's title was still Highway Assistant Division Director 3. 7. Effective December 16, 1990, a Form GL-5, indicates Grievant received a salary increase of approximately 4.6%. Grievant's civil service classification was Highway Assistant Division Director 3. R. Ex. 3.

8. Effective November 1, 1991, Grievant received a salary increase of approximately 4.7%. Grievant's civil service classification was Highway Assistant Division Director 3. R. Ex. 4.

9. In late 1992, Commissioner VanKirk and Jeff Black, Director of Human Resources, discussed increasing Grievant's salary. Because Grievant was “capped”, i.e., he was at the top of the pay scale for Highway Assistant Division Director 3, Mr. Black told Commissioner VanKirk that the only way to increase his salary would be to place him in a classified-exempt position.

10. Mr. Black provided Commissioner VanKirk with a list of classified-exempt positions which would be suitable for Grievant. R. Ex. 5. The Commissioner told Mr. Black to place Grievant in either a Principal Assistant to the Commissioner or Deputy to the Commissioner position.

11. Effective December 15, 1992, Grievant was promoted to the position of Executive Assistant to the Commissioner, and received a commensurate 10.7% salary increase. R. Ex. 6.

12. Grievant's duties as Executive Assistant to the Commissioner remained the same as his duties as Special Assistant to the Commissioner for Administration. R. Exs. 1, 6.

13. Effective December 16, 1992, a Personnel Action Form WV-11 was prepared which indicated Grievant had separated from the classified service through resignation,and was rehired into the classified-exempt position of Executive Assistant to the Commissioner. R. Ex. 8.

14. The WV-11 requires an employee's signature on either a new employment, separation, or demotion. Grievant did not sign the WV-11.

15. Mr. Black considered this action to constitute a separation of Grievant's employment in the classified service, with new employment as a classified-exempt employee, with no break in service.

16. Mr. Black did not tell Grievant he was being separated from the classified service and placed into a classified-exempt position.

17. Despite Grievant's change in employment status and title, the most recent Division of Highways organization chart, dated January 2, 1997, indicates Grievant was Special Assistant to the Commissioner for Administration. R. Ex. 9.

18. The 1996 West Virginia Blue Book, Vol. 78, indicates Grievant held the position of Special

Assistant to the Commissioner for Administration. R. Ex. 10.

19. The February 1996 Division of Highways Directory of Key Personnel indicates Grievant was the Special Assistant to the Commissioner for Administration. R. Ex. 11.

20. The official Division of Personnel Transaction Card does not show Grievant's change from the classified service to a classified-exempt position in November 1992. The first indication on that card that Grievant was in a different position is November 1993, as a result of the Division of Personnel's Reclassification Pilot Project. R. Ex. 12.

21. Commissioner VanKirk placed Grievant in the classified-exempt position solely for the purpose of increasing his salary. 22. Commissioner VanKirk never told Grievant he was being separated from the classified service and placed into a classified-exempt position.

23. Grievant was not Commissioner VanKirk's principal assistant or deputy. That title belonged to George Sidiropolis, and then, later, Joe Shelton.

24. Grievant had been considered for the Assistant or Deputy Commissioner position, but withdrew because he did not want to be an at-will employee.

25. George Sidiropolis, then Deputy Commissioner, did not know Grievant was separated from the classified service and placed into a classified-exempt position, nor did he inform Grievant of that change.

26. Grievant was not aware that he had been separated from the classified service and placed into a classified-exempt position.

27. In August 1997, Commissioner VanKirk was removed as Commissioner, and replaced by Acting Commissioner Sam Beverage.

28. On September 18, 1997, in a meeting between Grievant and new Transportation Secretary Richard Jemiola, Grievant was informed that his employment would be terminated, and that he was a classified-exempt employee. Grievantsubsequently received written notification to this effect by letter dated September 8, 1997. (See footnote 2) Grievant told Secretary Jemiola he was not the Assistant Commissioner, nor was he an at- will employee at that meeting.

29. The September 8, 1997 dismissal letter does not give a reason for Grievant's dismissal, other than that he is considered an at-will employee who can be discharged for any or no reason.

30. Grievant immediately contacted Joe Smith at the Division of Personnel regarding his status, and Mr. Smith told him that he was a covered employee.

31. Mr. Smith also received a telephone call from Fanny Seiler, a reporter for the Charleston Newspapers, and he also told her that Grievant was a covered employee. Later, Mr. Smith received a telephone call from the Division of Highways informing him that Grievant was a classified-exempt employee. Only after this did Mr. Smith make actual inquiry into Grievant's personnel status, and discovered he had been removed from the classified service in 1992, and placed into a classified-exempt position. There was no documentation in the Division of Personnel's files indicating this status change for Grievant. Mr. Black had to forward to Mr. Smith a copy of the WV-11 showing the action which took place on December 16, 1992.

32. The next day, September 19, 1997, several newspaper articles appeared which indicated that Grievant had been terminated from his position at Division of Highways. Implicit in those articles is the suggestion that Grievant was terminated because of his knowledge of overtime abuse within the Division of Highways. R. Ex. 16; G. Ex. 8.

33. On September 22, 1997, Grievant received in the mail the letter dated September 8, 1997, from Secretary of Transportation Richard Jemiola, informing him that he was being terminated from his employment with the Division of Highways. G. Ex. 7.

34. Grievant responded to Secretary Jemiola on September 22, 1997, that he could not be terminated as an at-will employee because he was a member of the classified service.

35. Secretary Jemiola never spoke with former Commissioner VanKirk regarding Grievant's position with the Division of Highways, but just assumed he was the Assistant Commissioner.

36. Grievant's termination letter does not give a reason for his dismissal, nor does Secretary Jemiola believe that Grievant was guilty of any wrongdoing, specifically with regard to the overtime abuse within the Division of Highways. G. Ex. 7; LIV Test., Jemiola.

ISSUE

Respondent filed a Motion to Dismiss this grievance contending that, as a classified- exempt at-will employee, as provided in W. Va. Code § 29-6-4, Grievant has failed to state a claim upon which relief can be granted, and lacks standing to file this grievance. Grievant acknowledges that, at the time of this dismissal, West Virginia Division of Personnel records reflected he was an at-will employee, but argues that it was improper and unlawful for Respondent and the Division of Personnel to terminate his classified civil service status, and re-employ him as an at-will employee,

without giving notice to him or obtaining his consent to the status change. Thus, the issue to be decided is not whether Grievant was an at-will employee at the time of his dismissal, but whether it was a violation of Grievant's due process rights for Respondent to convert him from classified civil service status to classified-exempt status without notice and consent. Respondent argues that Grievant “should have known” he was a classified-exempt employee because of the nature of his duties, and the fact that he received a 10.7% salary increase at the end of 1992. I am not convinced those facts alone would serve to put a classified employee on unequivocal notice that he was not in the classified service anymore, but was, rather, a classified-exempt employee who could be terminated at will. The idea that a state employer could unilaterally, without notice, transfer a classified employee into a classified- exempt position is disturbing. In fact, it is unlawful.

DISCUSSION

State employees who are in the classified service can be dismissed only for “good cause”, meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Oakes v. W. Va. Dept. of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

A public employee's due process rights are founded upon the extent to which that employee has a property or liberty interest in his employment. If a public employee hasa property right in his employment, he must be accorded due process in termination proceedings; however, if there is no property right, the employer may refuse to renew employment without the requirement of a hearing or any specific reason for dismissal. Roach v. Regional Jail Auth., 198 W. Va. 694 (1996).

A classified civil service employee has a sufficient property interest in his continued uninterrupted employment to warrant the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our Constitution. Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985); Waite v. Civil Service Comm'n., 161 W. Va. 154, 241 S.E.2d 164 (1977).

However, public employees holding positions which are statutorily exempt from coverage under the classified service are deemed at-will employees. As a general rule, the employment at-will doctrine allows an employer to discharge an employee for good reason, no reason, or bad reason

without incurring liability, unless the firing is otherwise illegal under state or federal law. Roach, supra.

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 contravenes some substantial public policy principle, the employer may be liable to the employee for damages occasioned by the discharge. Harless v. First Nat. Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978). Further, the right to discharge an at-will employee is tempered when that discharge effects the employee's liberty interest. A liberty interest is implicated when the state makes a charge against an individual that might seriously damage his standing and association in his community or places a stigma orother disability on him that forecloses future employment opportunities. Wilhelm v. West Virginia Lottery, 198 W. Va. 192 (1996).

“Civil service laws are designed to afford covered employees security of tenure. To permit the executive authority of the state, or an appointing authority, to remove employees from such coverage without following the statutory procedures, or to allow such authorities, without judicial determination, to interpret the laws and by such interpretation to hold void the procedures employed to bring such employees within the classified service would defeat the basic purpose of civil service.” Zigmond v. Civil Service Comm'n.,155 W. Va. 641, 186 S.E.2d 696 (1972), citing State ex rel. Karnes v. Dadisman, 153 W. Va. 771, 172 S.E.2d 561 (1970). See also, Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

Although this unique issue appears to be one of first impression in West Virginia, at least one other jurisdiction has addressed a similar instance of a classified employee being placed into a classified-exempt position without notice or consent.

The Colorado high court acknowledged in Salas v. State Personnel Board., 775 P.2d 57 (Colo. App. 1988), that, once a protected interest in employment is implicated, there is a right to notice and opportunity to be heard. Before there is any valid determination that an employee is exempt from that system, he is entitled to notice and an opportunity to be heard.

In Salas, the employee was hired as a graphic artist, which position was not on the list of exempt positions. Later, the Director added Salas' position to the list of those he considered to be exempt. No notice of this determination was given to Salas, and no documentation existed to evidence a discussion of the change in position with Salas. Salas had no notice and, therefore, when he was

dismissed, he had nothing to appeal - he was not a member of the classified service at the time of his dismissal. The Colorado Court held that no procedural rights were afforded Salas when he was removed from the classified service, that his termination was therefore invalid, and reinstatement to his classified service position was the appropriate relief. Id., at 59.

Likewise, Grievant herein was afforded no notice when he was removed from the classified service and placed in a classified-exempt position. Thus, as in Salas, when Grievant was dismissed, he had nothing to appeal, because his procedural safeguards as a classified employee had been removed.

Respondent's argument that Grievant “should have known” is unavailing. Respondent's duty to provide him with notice of his change in employment status cannot be avoided by such arguments. Respondent offered no concrete evidence to demonstrate that Grievant had any inkling that his classified service status had been terminated in 1992. Respondent's argument that Grievant's 10.7% raise in 1993 should have been adequate notice is weak. While indeed Grievant, as a state civil service employee, would have been aware that his raise was quite significant by state standards, this alone would not lead an employee to conclude he was no longer in the civil service. Grievant testified that, at the same time he received his large raise, all Division of Highways engineers had also been granted substantial raises. He thought he was just receiving the same raise they were receiving at the time. Grievant's explanation is not implausible. Respondent offered no evidence to contradict Grievant's explanation.

Respondent also contends that Grievant's duties as Special Assistant to the Commissioner were policy-making duties and within the scope of at-will employment. Thisdoes not alter the fact that Grievant was never told he was being offered a policy-making, at-will position with the Division of Highways. Grievant had been placed in special assignments in the past with Commissioner VanKirk, and taken on more duties, and his classified status had not changed. He had no reason to suspect that this special assignment would be any different.

Without notice or an opportunity to be heard, the simple fact is Grievant had no knowledge he had unilaterally been removed from the classified service, and placed in a classified-exempt position from which he could be terminated at any time for any or no reason. Thus, just as in Salas, supra, the appropriate remedy is reinstatement into his classified service position, Highway Division Director 3. Because Grievant did benefit from his change in employment status through the resulting 10.7%

raise, Grievant's back pay award will be offset by the difference in salary from the date of that salary advancement through the date of his termination.

Finally, there is no evidence that Respondent dismissed Grievant for cause or because of any alleged wrongdoing. To the extent that Grievant's name appeared in the newspapers in conjunction with articles about overtime abuse within the Division of Highways, it must be attributed to the newspapers and not to Respondent. Indeed, Secretary Jemiola testified under oath that he did not believe Grievant was guilty of any wrongdoing, and that he was not terminated for cause, but simply due to the fact that he was an at-will employee. Secretary Jemiola was only acting upon information provided to him by Jeff Black, and had no independent knowledge that Grievant had improperly been placed into a classified-exempt position.

CONCLUSIONS OF LAW

1. State employees who are in the classified service can be dismissed only for “good cause”, meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Oakes v. W. Va. Dept. of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

2. A public employee's due process rights are founded upon the extent to which that employee has a property or liberty interest in his employment. If a public employee has a property right in his employment, he must be accorded due process in termination proceedings; however, if there is no property right, the employer may refuse to renew employment without the requirement of a hearing or any specific reason for dismissal. Roach v. Regional Jail Auth., 198 W. Va. 694 (1996).

3. A classified civil service employee has a sufficient property interest in his continued uninterrupted employment to warrant the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our Constitution. Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985); Waite v. Civil Service Comm'n., 161 W. Va. 154, 241 S.E.2d 164 (1977).

4. Public employees holding positions which are statutorily exempt from coverage under the classified service are deemed at-will employees. As a general rule, the employment at-will doctrine allows an employer to discharge an employee for good reason, no reason, or bad reason without

incurring liability, unless the firing is otherwise illegal under state or federal law. Roach, supra. 5. 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, that the employer may be liable to the employee for damages occasioned by the discharge. Harless v. First Nat. Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

6. The right to discharge an at-will employee is tempered when that discharge effects the employee's liberty interest. A liberty interest is implicated when the state makes a charge against an individual that might seriously damage his standing and association in his community or place a stigma or other disability on him that forecloses future employment opportunities. Wilhelm v. W. Va. Lottery, 198 W. Va. 192 (1996).

6. “Civil service laws are designed to afford covered employees security of tenure. To permit the executive authority of the state, or an appointing authority, to remove employees from such coverage without following the statutory procedures, or to allow such authorities, without judicial determination, to interpret the laws and by such interpretation to hold void the procedures employed to bring such employees within the classified service would defeat the basic purpose of civil service.” Zigmond v. Civil Service Comm'n., 155 W. Va. 641, 186 S.E.2d 696 (1972), citing State ex rel. Karnes v. Dadisman, 153 W. Va. 771, 172 S.E.2d 561 (1970).

7. Once a protected interest in employment is implicated, there is a right to notice and opportunity to be heard. Before there is any valid determination that an employee is exempt from that system, he is entitled to notice and an opportunity to be heard. 8. Respondent has violated Grievant's property interest in his continued employment as a civil service employee with the State of West Virginia.

Accordingly, this grievance is **GRANTED**, and Respondent is hereby **ORDERED** to reinstate Grievant into his classified service position of Highway Division Director 3 at the same rate of pay he was receiving at the time of his separation from the classified service, and to restore any seniority he would have accumulated in that position until the effective date of his discharge, October 1, 1997. However, as Grievant benefitted in a substantial way from Respondent's violation, by receiving a 10.7% salary increase, no back pay can be properly awarded.

Any party or the West Virginia Division of Personnel 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 11, 1998

Footnote: 1

Due to an equipment failure, Tape 3 of the December 12, 1997 hearing was blank. Therefore, the hearing was reconvened on January 16, 1998, for the limited purpose of taking the testimony of Mr. White and Secretary of Transportation Richard Jemolia, the only two witnesses whose testimony was recorded on Tape 3.

Footnote: 2

Secretary Jemiola explained that the letter was drafted for his signature on September 8, 1997, but due to scheduling conflicts and other matters that needed attending to, he did not meet with Grievant until September 18, 1997. Grievant and Secretary Jemiola disagree regarding the date on which Grievant received this letter. While both agree that Grievant saw the letter during their September 18th meeting, Secretary Jemiola believes Grievant took possession of the letter during that meeting, but could not be absolutely certain of this. Grievant recalls that he did not take the letter with him on that date, but received a copy of the letter on September 22, 1997. In either case, although the delayed delivery is unusual, no timeliness issues have been raised with regard to the date of receipt of his termination letter, therefore, no further inquiry is necessary.