CINDY K. ADAMS,

Grievant,

v. **Docket No. 00-DPS-029**

DEPARTMENT OF PUBLIC SAFETY/MOUNTAINEER CHALLENGE ACADEMY,

Respondent.

D E C I S I O N

Grievant, Cindy K. Adams, employed by the Department of Public Safety as a Youth Service Worker II at the Mountaineer Challenge Academy (MCA or Respondent), filed a grievance directly to level four, as is permitted by W. Va. Code §29-6A-3(e), on January 25, 2000, following the termination of her employment. An evidentiary hearing was held at the Grievance Board's Morgantown office on March 30 and April 20, 2000. Grievant was represented by Kelly R. Reed, Esq., of Wilson, Frame, Benninger & Metheny. Respondent was represented by Dolores A. Martin, Esq., Assistant Attorney General. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by the parties on or before July 17, 2000.

Background

Grievant was employed by MCA in August 1993, as a Youth Service Worker II, with the working title of Senior Squad Leader. MCA Director Hugh P. Dopson notified Grievant of her dismissal by letter dated January 11, 2000. That letter stated in pertinent part: The purpose of this letter is to inform you of my decision to immediately terminate you from your position as a Youth Service Worker II (Senior Squad Leader), a classified-exempt position, who serves at the will and pleasure of the Director of the West Virginia **Mountaineer Challe*NG*e Academy**. You have the opportunity to provide me with a written explanation of the reason why you may think this action is inappropriate, providing that you do so within five (5) days of receipt of this letter.

The **Mountaineer Challe*NG*e Academy** is a program for “at risk” youth that gives them a second

chance to develop life coping skills and to get a GED in a disciplined, caring, compassionate, and drug and chemical free environment. The role of the Youth Service Worker at the **Academy** is to provide twenty-four hour residential care, instruction in basic military skills, and to provide a positive role model. Therefore, this aspect of the job is very important.

Between the dates of January 3, 2000 and January 6, 2000 you made false statements and lied about the actions of a senior member of the staff. To wit you stated that the deputy had cursed at the staff during staff training approximately two years ago. An informal investigation revealed that the allegation was unfounded. Additionally, you made a false statement and indicated that you were told to call the Adjutant General's office, when in fact you misrepresented and took out of context the information you were given. In fact you were told that you should use the chain of command and go through the director. Lastly, through your actions to get your supervisor terminated you have polarized the staff, created disharmony and generally have had a very negative impact on the staff of the Academy at a very critical time.

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit upon the abilities and integrity of their employees or create suspicion with reference to their employee's capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia **Mountaineer Challe*NG*e Academy**, thus warranting your dismissal. For the reason stated above your “at will”employment with the **Academy** is terminated effective immediately. . . .

Discussion

Generally, the burden of proof in a disciplinary matter is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6. Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). However, in cases involving the termination of classified-exempt, at-will employees, state agencies do not have to meet this legal standard. John C. v. Dep't of Public Safety, Docket No. 95-DPS- 497 (Jan. 31, 1996); Logan v. W. Va. Regional Jail and Correctional Auth., Docket No. 94- RJA-225 (Nov. 29, 1994). At-will employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. Massey v. W. Va. Public Service Comm'n, Docket No. 99-PSC-313 (Dec. 13, 1999); Dufficy v.

Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Bellinger v. W. Va. Dep't of Public Safety/Mountaineer Challenge Academy, Docket No. 95-DPS-119 (Aug. 15, 1995). See Harless v. First Nat'l Bank 169 W. Va. 673, 246 S.E.2d 270 (1978).

It is undisputed that Grievant was a classified-exempt, at-will employee who served at the will and pleasure of the employer. Respondent denies that the employee handbook produced by the Adjutant General's Office altered Grievant's classified-exempt status, but asserts that to the extent the contents may be interpreted to be in conflict with the legislative status accorded employees of the office, it is invalid. Based upon her classified- exempt, at-will status, MCA argues that Grievant could be terminated for good reason, no reason or even a bad reason, provided it did not violate a substantial public policy, and Grievant did not allege any violation of public policy. Grievant asserts that the employee handbook produced by the office of the Adjutant General and the State Armory Board provides that employees may grieve any disciplinary action through the Education and State Employees Grievance Board. She further asserts that the handbook provides a list of offenses for which immediate dismissal is warranted, and provides for lessor corrective action including verbal or written reprimands, and suspension without pay. Grievant argues she did not engage in any behavior warranting dismissal, and the pretextual reasons given by MCA for the dismissal violate the employee handbook. Grievant concedes that while her at-will status could not be altered by a personnel policy or manual where there is explicit authority to discharge, but avers that there is no explicit statutory authority to discharge her in this case. Therefore, she concludes, in this case the employee handbook alters her at-will status by creating an implied contract.

In the nature of a secondary argument, Grievant asserts that her at-will status was altered by a defect in the employee handbook, i.e., that it did not specifically notify her that her employment could be terminated at any time. In support of this claim, Grievant cites Suter v. Harsco Corp., 184 W. Va. 734, 403 S.E.2d 751 (1991) and Dent v. Fruth, 192 W. Va. 506, 453 S.E.2d 340 (1994). In Suter, the Court held that an employer may protect itself from being bound by statements made in an employee handbook by having the employee acknowledge on the employment application that the term is for no definite period, and by stating in the employee handbook that the handbook's provisions are not exclusive. The decision followed the earlier holding in Dent that a disclaimer in an employee handbook should inform an employee (1) of his or her at-will status which allows termination at any time, and, (2) that the handbook is not a contract. While an

employee's at-will status cannot be altered by a personnel policy or manual where there is explicit statutory authority to discharge, it does not appear that such authority exists in this case. See Williams v. Brown, 190 W. Va. 202,437 S.E.2d 775 (1993). The Grievance Board has previously recognized that in situations where the employer lacks statutory authority to discharge, the provisions of an employee handbook may be sufficient to amend an individual's at-will status. Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). In both Collins v. Elkay Mining Co.,179 W. Va. 549, 371 S.E.2d 46 (1988), and Cook v. Heck's Inc., 176 W. Va.368, 342 S.E.2d 453 (1986), the West Virginia Supreme Court of Appeals held that contractual provisions relating to discharge or job security may alter the at-will status of a particular employee. Specifically, a promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable. Further, an employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.

In this case, the Employee Handbook does not contain any language promising job security which might be interpreted as contractual. First, the handbook provides that employees of the Office of The Adjutant General and the State Armory Board are categorized as either classified-exempt or temporary-exempt, and notes that classified- exempt employees “serve in those positions which are not subject to merit system standards.” The “Disciplinary Procedures” section of the Employee Handbook providesthat corrective disciplinary action “may include verbal or written reprimands, suspension without pay, or dismissal.” It further provides that in some instances the employee may be dismissed immediately, and provides the following examples of these types of instances:

Intoxication or use of controlled substances while on duty: Willful insubordination;
Willful destruction or theft of property;
Conviction of a felony involving moral turpitude;
A violation which endangers the health and safety of the employee and others;(may range from uncontrolled verbal abuse to physical action); and
Gross misconduct other than those listed above.

Finally, the Employee Handbook provides that “[e]mployees who are covered by the Grievance

Procedure may grieve any disciplinary action. Dismissal or suspension of more than 20 days can be grieved directly to a Level Four hearing examiner through the Education and State Employees Grievance Board."

These provisions not only do not contain any language which promises classified- exempt employees job security, but clearly places them on notice that they are subject to immediate dismissal under certain circumstances. The fact that some examples of instances in which an employee is subject to immediate termination does not limit Respondent to the reasons enumerated therein. Further, the "Introduction" section of the Handbook confirms that conclusion in a paragraph titled "The Fine Print", which states:

THIS HANDBOOK IS NOT TO BE CONSIDERED A CONTRACT OF EMPLOYMENT AND IS PROVIDED AS A MATTER OF INFORMATION ONLY. EACH DEPARTMENT, DIVISION, AGENCY, BOARD, COMMISSION, OR SPENDING UNIT RESERVES THE RIGHT TO EXERCISE ITS JUDGMENT DEPENDING ON EACH PARTICULAR SITUATION. ADHERENCE TO THE GUIDELINES IN THIS HANDBOOK IS NOT TO BE CONSIDERED BINDING.

It cannot be determined that Grievant's employment status at the time of her dismissal had been altered by the handbook. Therefore, the general rule for at-will employees must be applied, i.e., Respondent may dismiss Grievant for a good reason, a bad reason, or for no reason. Although specific reasons for the dismissal were given in this case, Respondent is not required to prove the charges against Grievant by a preponderance of the evidence. Grievant does not allege that the reason for her dismissal was in violation of any public policy, therefore, no consideration of the merits is required in this case.

In addition to the foregoing discussion, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by Respondent as a Youth Service Worker II, and served as a Senior Squad Leader at the MCA since its inception in 1993.

2. Grievant is a classified-exempt employee and serves at the will and pleasure of Respondent.

3. Respondent has published an employee handbook which provides a general overview of employee rights and responsibilities. There is no language in the handbook which creates an implied

contract of employment; however, it does provide that classified- exempt employees are not subject to merit system standards, and are subject to immediate dismissal in certain circumstances.

4. Grievant was dismissed for cause, effective January 11, 2000.

Conclusions of Law

1. Generally, the burden of proof in a disciplinary matter is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6. Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). However, in cases involving the termination of classified-exempt, at-will employees, state agencies do not have to meet this legal standard. John C. v. Dep't of Pub. Safety, Docket No. 95-DPS- 497 (Jan. 31, 1996); Logan v. W. Va. Regional Jail and Correctional Auth., Docket No. 94- RJA-225 (Nov. 29, 1994).

2. At-will employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. Massey v. W. Va. Pub. Serv. Comm'n, Docket No. 99-PSC-313 (Dec. 13, 1999); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Bellinger v. W. Va. Dep't of Pub. Safety/Mountaineer Challenge Academy, Docket No. 95-DPS-119 (Aug. 15, 1995). See Harless v. First Nat'l Bank 169 W. Va. 673, 246 S.E.2d 270 (1978).

3. Under certain circumstances the provisions of a personnel handbook may give rise to an implied contract of employment and provide an exception to the general rule that at-will employees may be terminated for good, bad, or no cause. Collins v. Elkay Mining Co.,179 W. Va. 549, 371 S.E.2d 46 (1988); Cook v. Heck's Inc., 176 W. Va. 368, 342 S.E.2d 453 (1986); Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Grievant failed to prove that the employee handbook altered her at-will status.

Accordingly, the grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any 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. However, the

appealing party is required by W. Va. Code §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: August 10, 2000 _____

Sue Keller

Senior Administrative Law Judge