MARK COWLES,

Grievant,

v. **Docket No. 01-HEPC-570**

HIGHER EDUCATION POLICY COMMISSION/

SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Grievant, Mark Cowles, employed by Shepherd College (Shepherd or Respondent) as a Campus Police Officer, filed an expedited grievance at level four, pursuant to W. Va. Code § 29-6A-4(e), on November 7, 2001, following the termination of his employment. Grievant seeks reinstatement with back pay. An evidentiary hearing was conducted on the campus of Shepherd College on March 7, April 17, and August 5 and 6, 2002, at which time Grievant was represented by Lawrence Schultz, Esq., and Respondent was represented by Kristi McWhirter, Esq., Assistant Attorney General. The matter became mature for decision upon receipt of replies to proposed findings of fact and conclusions of law on November 25, 2002.

The following findings of fact are made based upon the evidence of record.

Findings of Fact

1. Grievant was continuously employed by Shepherd as a College Police Officer I from January 15, 1997. In this capacity, Grievant was required to keep accurate dutylogs, patrol the campus, and assist the Shepherdstown Police Department when requested.

2. Grover Boyer, Chief of Shepherd's campus police department, advised college counsel K. Alan Perdue in October 2001, that he had concerns regarding Grievant's work habits. These concerns included reporting to duty late, failure to assist the city police officers, inaccurate log keeping, and not being able to locate Grievant during his shifts. (See footnote 1)

3. After consulting with Shepherd President, Dr. David Dunlop, Mr. Perdue and Chief Boyer determined that Grievant would be observed, without his knowledge, during one of his shifts. Chief

Boyer was to conduct the observation, but due to health concerns, Mr. Perdue undertook the assignment.

4. Mr. Perdue conducted his surveillance on Sunday, October 28, 2001. Grievant was scheduled to work night shift, from 11:00 p.m. to 7:00 a.m., and this was the night that clocks were turned back one hour, from Daylight Savings Time (DST) to Eastern Standard Time (EST).

5. Sometime prior to October 28, 2001, Grievant had been given a key by a Residence Life staff member to a vacant apartment in Moler Hall, a student apartmentbuilding. Grievant was to sleep in the apartment when he changed from a day to a night shift, eliminating a lengthy commute to and from his home. He also used the apartment to store some personal belongings, and sometimes ate lunch or changed clothes there after his shift.

6. Mr. Perdue began his observation at approximately 12:20 a. m. DST, equipped with a scanner to monitor campus police radio traffic. Mr. Perdue's log for the evening memorializes his activities throughout the night:

-12:40 observed Grievant unloading items from his personal vehicle and taking them in to the Moler Hall apartment.

-1:00 -1:45 walked to Ikenberry Hall and then to Sara Cree Hall. Found police car cold, office door open and lights on. Proceeded to the Creative Arts Center and fitness center. Secured open doors at both locations

-1:55 returned to car parked to observe Moler Hall.

-1:10 (EST) heard radio transmission from Grievant responding to a call, stating that he was near Butcher Hall and could not respond. Checked area but did not find Grievant.

-1:40 observed Grievant exit the apartment and move his truck to a parking lot behind the CAC. Continued to patrol campus.

-5:00 activated emergency call box and hung up. (Grievant answered by telephone, but did not appear.)

-5:30 placed a bicycle in front of apartment door.

-5:45 call from city police regarding Farmers' Market. (No response from Grievant.)

7. Grievant exited the apartment in response to a call from Chief Boyer at 7:30 a.m. Mr. Perdue met Grievant at the sidewalk and advised him that he had been observinghim. Mr. Perdue proceeded with Grievant to Chief Boyer's office. Mr. Perdue then advised Grievant that he believed Grievant had not patrolled the campus, and that he had not responded to the emergency call box. A pretermination conference was scheduled for October 31, 2001.

8. On the advice of counsel Grievant did not offer a defense at the pretermination hearing, at which time he was verbally advised that his employment was terminated, effective immediately.

Discussion

Shepherd initially asserts that Grievant is an at-will employee, and may be dismissed for any reason which does not contravene public policy. In support of this position, Shepherd relies upon W. Va. Code § 18B-4-5, which states in pertinent part:

The governing boards are hereby authorized to appoint bona fide residents of this state to act as campus police officers upon any premises owned or leased by the state of West Virginia and under the jurisdiction of the governing boards, subject to the conditions and restrictions hereinafter imposed.

* * *

The governing boards may at their pleasure revoke the authority of any campus police officer. The president or other administrative head of the state institution of higher education shall report the termination of employment of a campus police officer by filing a notice to that effect in the office of the clerk of each county in which the campus police officer's oath of office was filed. (See footnote 2) 435.25

Grievant argues that he is a classified employee with a property interest in his employment, and that he can be dismissed only for just cause. Grievant supports hisargument with documentation which lists him as a classified employee, and the personnel handbook given to him outlining the job rights of a classified employee. Grievant also argues that while W. Va. Code § 18B-4-5 allows for the governing boards to revoke the authority of a police officer, it is silent as to his employment. Thus, he asserts that while Shepherd may not permit him to be a police office, it must continue to employ him unless just cause is shown for dismissal.

Evidence supports Grievant's contention that he is a classified employee. A memorandum from Dr. Daniel C. Starliper, Shepherd's Director of Human Resources, dated October 1, 2001, confirms Grievant's employment as a Campus Police Officer, and states, “[y]ou will be NON-EXEMPT from the Fair Labor Standards Act.” Dr. Starliper confirmed this statement at the level four hearing, stating that all police officers are classified, but work at the will and pleasure of the institution.

Notwithstanding Grievant's classified status for purposes of the federal wage and hour law, as a police officer he is also a will and pleasure employee by virtue of W. Va. Code § 18B-4-5. While the language of this provision is not as clear as it might be, the governing boards have certainly been empowered to “revoke the authority of any campus police officer.” Grievant's argument that the statute is silent regarding his employment is not persuasive because the next sentence refers to the “termination of employment” of the individual. (See footnote 3) These sentences cannot be read separate and apart. When a board revokes the authority of a police officer that individual is no longer qualified to perform the dutiesfor which he was hired. There is no requirement that an employer retain an employee who cannot perform his duties.

Grievant's at-will status would indicate he could be fired for good reasons, bad reasons, or no reasons, provided he was not terminated for a reason that violates a substantial public policy. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996) Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). The burden of proof is upon the at-will employee to demonstrate a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Loundmon-Clay v. Higher Ed. Policy Commission/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 29, 2002); Wounaris v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-422 (May 15, 2000). In the present case, Grievant does not assert that the termination was contrary to public policy, and therefore, the action stands.

Even if Grievant were not an at-will employee, Shepherd established just cause for his dismissal. (See footnote 4) It is accepted that Mr. Perdue's observation was to some degree flawed, because he did not maintain visual contact of Grievant throughout the night. However, by his own admission, Grievant was in the apartment from 1:00 or 1:05 a.m. (DST) until about 2:15 a.m. (EST). Grievant testified that he was conducting a surveillance as a result of an anonymous tip he had received regarding a car which might be involved in a drug deal. Grievant also admits that he returned to the

apartment at about 6:00 a.m. (EST) when he took a lunch break, and remained there until he received a call from the officer relievinghim at 7:00 a.m. Grievant further asserts that he maintained a foot patrol throughout his shift, and responded to the emergency call box alarm, but had observed no one in the area from his position on a hillside opposite from Mr. Perdue's location. Grievant additionally offered the testimony of Jennifer L. Petrie, a residence hall coordinator, who stated that she saw Grievant at 10:30 p.m. at her apartment, and 4:30 a.m. in the lobby.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). The Grievance Board considers the following factors when assessing credibility: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

It is to be expected that Grievant's testimony is self-serving, but even to the untrained ALJ, his explanation of the surveillance does not ring true. If a certain car was to be observed on campus, it does not seem reasonable for Grievant to remain in an apartment for three hours. Surely, spotting the vehicle would have been more likely had he been outside, patrolling. Further, no reason was given for ceasing the surveillanceafter only three hours. Grievant's explanation for returning to the apartment for another hour at 6:00 a.m. is also questioned, as a lunch break is not typically taken at the end of a shift since it effectively left the campus without a security officer. Also, a one-hour lunch break was undoubtedly excessive. Given the size of Shepherd's campus, it would be extraordinary for Grievant and Mr. Perdue to have both been on patrol and never cross paths. Finally, if Grievant had been patrolling the campus, he would have found the unsecured doors which Mr. Perdue locked during the night. Therefore, Grievant's testimony is determined not to be credible, and Shepherd has established just cause for Grievant's dismissal.

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

Conclusions of Law

___1. The governing boards for state institutions of higher education are authorized to appoint bona fide residents of this state to act as campus police officers upon any premises owned or leased by the state of West Virginia and under the jurisdiction of the governing boards, subject to certain conditions and restrictions. The governing boards may at their pleasure revoke the authority of any campus police officer. W.Va. Code §18B-4-5.

___2. Pursuant to the provisions of W. Va. Code § 18B-4-5, Grievant is an at-will employee of Respondent and could be fired for good reasons, bad reasons, or no reasons, provided he was not terminated for a reason that violates a substantial public policy. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996) Williams v. Brown, 190W. Va. 202, 437 S.E.2d 775 (1993); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978).

3. The burden of proof is upon the at-will employee to demonstrate a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Loundmon-Clay v. Higher Ed. Policy Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 29, 2002); Wounaris v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-422 (May 15, 2000).

4. In the present case, Grievant does not assert that the termination was contrary to public policy, and therefore, the action stands.

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: December 20, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

In addition to his duties as college counsel, Mr. Perdue supervises the Departments of Human Resources and Public Safety.

Footnote: 2

Similar provisions are found in W. Va. Code §§ 5a-4-3 and 20-14-16.

Footnote: 3

Grievant's argument was previously rejected by the Grievance Board in Harris v. Board of Directors/Shepherd College Docket No. 93-BOD-008 (Aug. 31, 1994).

Footnote: 4

The merits of this case will be briefly addressed pursuant to Grievant's request.