JAMES HACKER,

Grievant,

v. **Docket No. 01-DJS-543**

DIVISION OF JUVENILE SERVICES/
INDUSTRIAL HOME FOR YOUTH,

Respondent.

DECISION

James Hacker ("Grievant") filed this grievance directly at level four on October 19, 2001, challenging his dismissal from employment at the Industrial Home for Youth ("IHY"). He seeks reinstatement, plus back pay and benefits. After this matter was held in abeyance for several months at the request of the parties, a level four hearing was held on May 8, 2002, and August 12, 2002, at the Grievance Board's office in Westover, West Virginia. Grievant was represented by Elaine Harris and Jack Ferrell, union representatives for the Communication Workers of America, and Respondent was represented by Assistant Attorney General Barbara Elkins. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 11, 2002.

The following findings of fact are made based upon a preponderance of the evidence presented at the level four hearing.

Findings of Fact

1. Grievant began employment at IHY as a Correctional Officer in September of 2000.
2. IHY is a maximum security juvenile facility, housing both male and femaleresidents.
3. In mid-August, 2001, Case Manager Deborah Frick filed an incident report, stating that two female residents had reported that Grievant had observed them in states of undress and had made inappropriate comments of a sexual nature to them.
4. Sometime in early August of 2001, at a time when the residents had been instructed to

change clothes, Grievant knocked on the window of resident H.C. (See footnote 1) The resident had no shirt on at the time, and when she turned around in response to the knocking, she saw Grievant standing there looking at her. He did not immediately look away when she saw him.

5. Also in early August of 2001, resident S.T. saw Grievant looking in the window at her as she came out of the shower. She was undressed at the time. Later the same day, when she returned to her room, Grievant asked if he could “have a peek”, and said he “had already seen it,” presumably referring to her body. S.T. Statement and Level IV Testimony.

6. On another occasion, Grievant was walking S.T. back from a visit to the medical facility at IHY and made a statement that he would like to “bend her over a desk and fuck her.” S.T. Statement and Level IV Testimony.

7. In response to the reported incidents, an investigation was begun by IHY in conjunction with the Department of Health and Human Resources (“DHHR”), because the allegations involved misconduct of a sexual nature against minors.

8. During the investigation, Grievant was moved to the control tower to reducecontact with residents.

9. While working in the control tower, Grievant made joking remarks to other IHY employees about seeing H.C. masturbating on a previous occasion. No residents were present at the time Grievant's remarks were made.

10. Prior to August of 2001, Grievant and another officer were verbally reprimanded for making fun of a resident who had been treated for lice. They were scratching themselves “like monkeys” and were told by the superintendent of IHY that this was inappropriate conduct for correctional officers, who are to be role models for the juvenile residents.

11. On September 11, 2001, IHY investigators took a recorded statement from Grievant, asking him questions and informing him of the specific allegations made by H.C. and S.T as described above. Grievant denied all of the allegations.

12. Grievant was suspended on September 14, 2001, while the investigation was conducted.

13. By letter dated October 12, 2001, Grievant's employment was terminated.

Discussion

In suspension or termination cases involving classified employees, the burden of proof is upon the

employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for disciplining an employee. W. Va. Code §29-6A-6(e); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the suspension or dismissal of classified-exempt, at-will employees, state agencies do not have to meet this legal standard. Logan v. W. Va.Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

___Although the issue was not raised by either party to the instant grievance, employees of DJS are classified-exempt employees, pursuant to the provisions of W. Va. Code § 49-5E-5a. See Bennett v. Div. of Juvenile Services , Docket No. 01-DJS-127 (Aug. 17, 2001). As a classified-exempt employee, Grievant is not covered by the civil service system and is an at-will employee. See Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996); Ramos v. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-363 (Jan. 29, 1999); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1995). However, the West Virginia Supreme Court of Appeals has held that an employer may be liable for damages if an employee was discharged in contravention of some substantial public policy. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). Subsequently, in Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 377, 424 S.E.2d 606 (1992), the Court identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

West Virginia courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations [Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992)], refusing to conceal allegedenvironmental violations committed by the employer [Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)], filing a workers' compensation claim [Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)], attempting to

enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act [Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)], and testifying as a witness in a civil action against the employer [Page v. Columbia Natural Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996)], as involving substantial public policy interests. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at-will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996)].

Grievant has asserted no public policy concerns implicated by his termination. His only argument has been that he did not engage in the conduct alleged, and that whatever misconduct he does admit to committing, i.e., the “masturbation comment”, does not justify the punishment he received. These arguments do not raise any public policy issues, and, unfortunately, Grievant's termination from at-will employment with DJS must be upheld.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Employees of the Division of Juvenile Services are classified-exempt employees. W. Va. Code § 49-5E-5a; Bennett v. Div. of Juvenile Services , Docket No. 01- DJS-127 (Aug. 17, 2001).

2. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public Safety, Docket No. 95-DPS- 119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91- HHR-400 (June 30, 1992).

3. At-will employees may be terminated for good cause, bad cause, or no cause. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1995).

4. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

5. Grievant has failed to prove that his dismissal contravened any substantial public policy.

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

Date: October 28, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

To protect the privacy of juvenile offenders, whose criminal records are confidential, they will be identified only by their initials.