ROBERT EGGLETON,

Grievant,

v v.

Docket No. 03-C&H-273

WEST VIRGINIA DIVISION OF

CULTURE and HISTORY,

Respondent,

D E C I S I O N

Grievant, Robert Eggleton, filed this grievance on July 9, 2003, at Level II (See footnote 1) against his employer, the West Virginia Division of Culture and History ("C&H" or "Agency"). (See footnote 2) His Statement of Grievance filed at Level II asserted:

> Dismissal without cause due to mistaken application of "at-will and pleasure" standard and in violation of WV Code §29-6A-1 et seq[.] [sic] and an overly broad interpretation of WV Code §29-1-9. Please see attached: (1) dismissal letter; (2) letter to Secretary Goodwin, chief administrator of the Department of Education and the Arts and which lists specific grounds on which this grievance was file[d]; (3) and, a statement prepared by the grievant which lists significant accomplishments during his period of employment.
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> Relief Sought: That the dismissal letter be declared void and that the grievant be reinstated. Please see attachment 2, the letter to Secretary Goodwin listed above and which specifically lists relief sought.

This grievance was denied at Levels II and III. Grievant appealed to Level IV on September 11, 2003. The parties decided to submit this case on the record, and this case became mature for decision on October 14, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Grievant first asserts he is neither an at-will employee nor a classified exempt employee; instead he calls himself a non-classified employee. Second, Grievant maintains his supervisor,

Commissioner Nancy Herholt, did not have the statutory authority to place him in an at-will position. Third, Grievant avers he could not have been a classified-exempt employee, as he was not in a policymaking position. Fourth, Grievant contends his possible, at-will appointment was modified by "alleged" promises made by Commissioner Herholt during a pre-offer interview. Fifth, Grievant maintains he did not receive due process. Sixth, Grievant believes his property and liberty interests have been violated. Lastly, Grievant asserted the state has a substantial public policy interest in keeping at-will employees in their positions in order to encourage qualified applicants for at-will and classified-exempt positions. (See footnote 4)

Respondent maintains Grievant was an at-will, classified-exempt employee, and he was well aware of his status as he was informed of the nature of the position at hisinterview, and he then signed a statement, without comment, to that effect on the first or second day of his employment. C&H asserts that since Grievant did not raise a substantial public policy issue this grievance should be dismissed.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. In the Fall of 2001, the Director of Administration at C&H resigned. This position was classified-exempt, and is specified as such in the Division of Personnel's list of classified-exempt positions within state government. Resp. No. 3.

2. Commissioner Nancy Herholt advertised the position, and one of her employees suggested Grievant for the position. This employee called Grievant and encouraged him to apply for the position, which he did.

3. Prior to his employment with C&H, Grievant had been employed both as a classified and classified-exempt employee with the state.

4. Commissioner Herholt interviewed Grievant for the position, and the will and pleasure status of the position was discussed in general. Commissioner Herholt indicated that if "things went well there would probably be no need to replace [Grievant]." Grievant was not promised or guaranteed he would have the position until a new Commissioner was appointed. Trans. at 44-45.

5. By letter dated November 15, 2001, Commissioner Herholt offered Grievant the position.

This letter stated, "[t]his position is a will and pleasure appointment and isresponsible for Financial Services, Personnel Services, Information Technology, Security, [and] Custodial and Maintenance staff." Grt. No. 1.

6. Grievant was not hired from a register and was not required to pass any tests. Grievant did not serve a probationary period and did not have evaluations during his tenure.

7. The six other Directors at C&H are will and pleasure employees.

8. On either his first on second day of work, on December 17, 2001, Grievant was given a one page notice that was labeled " **AT-WILL AND PLEASURE CLASSIFIED EXEMPT APPOINTMENT**". The notice further stated, "[t]he purpose of this form is to advise you that the employment you are accepting is exempt from the classified service within the West Virginia Division of Personnel. This appointment is at the will and pleasure of the Commissioner of Culture and History." Grievant signed the document below the following sentence, "I certify that I have read and understand the above information." He asked no questions at the time he signed the document.

9. By letter dated July 2, 2003, Commissioner Herholt informed Grievant that he would be dismissed from his position as Director of Administration, effective July 17, 2003, and this letter would serve as him fifteen-day notice. This letter noted Grievant served at the will and pleasure of the appointing authority of C&H and could be "released from employment without cause." Grievant was offered the opportunity to discuss the matter in writing or in person within fifteen days of the date of the letter. Resp. No. 2. 10. Pursuant to the directions in the letter, Grievant asked to meet with Commissioner Herholt, and he did so on July 3, 2003. Commissioner Herholt's verbally informed Grievant that her decision remained unchanged. (See footnote 5)

11. After Grievant filled his grievance, he met with Commissioner Herholt on July 17, 2003, and Commissioner Herholt's written response dated July 23, 2003, denied the grievance.

Discussion

In disciplinary 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 termination of an employee. W. Va. Code § 29-6A-6; 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). Indeed, an at-will employee may be terminated for any reason which does not contravene some substantial public policy. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994) aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996). Classified-exempt employees are not covered under the civil service system, thereby serving in an at-willemployment status. Bellinger, supra. See Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992); W. Va. Code § 29-6-2(g) (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, 781 (1993).

Grievant's assertions will be discussed one at a time.

A. Employment status

Grievant asserts he was not an at-will or classified-exempt employee, because Commissioner Herholt did not have the statutory authority to create at-will positions. Grievant also asserts he cannot be a classified-exempt employee because he was not in a policymaking position.

The terms at-will and classified-exempt are used interchangeably, and any person holding either employment status is not covered under the classified service and is not entitled to those protections. Bellinger, supra. Thus, Grievant's argument that these terms are different as they relate to him is without merit.

Grievant's key argument is that he was not at-will. W. Va. Code §§ 29-6-1 and 29-1- 1et seq. will be examined to see if Grievant's argument has merit.

W. Va. Code § 29-6-1 gives the general purpose of the civil service system and states:

> The general purpose of this article is to attract to the service of this state personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation and welfare of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness, except as hereinafter specified. All employment positionsnot in the classified service, with the exception of the board of regents, are included in a classification plan known as classified-exempt service.

(Emphasis added).

W. Va. Code § 29-6-2(g) defines an employee in the "Classified-exempt service" as "an employee whose position satisfies the definitions for 'class' and 'classify' but who is not covered under the civil service system or employed by the higher education governing boards."

W. Va. Code § 29-6-2(m) defines a "Policymaking position" to mean:

> a position in which the person occupying it (1) acts as an advisor to, or formulates plans for the implementation of broad goals for an administrator or the governor, (2) is in charge of a major administrative component of the agency and (3) reports directly and is directly accountable to an administrator or the governor.

W. Va. Code § 29-6-4 identifies the employees in the classified-exempt service and states:

> (a) The classified-exempt service includes all positions included in the classified-exempt service on the effective date of this article. (The effective date was July 1, 1989).
>
> . . .
>
> (c) The following offices and positions are exempt from coverage under the classified service:
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> . . .
>
> (5) Members of boards and commissions and heads of departments appointed by the governor or such heads of departments selected by commissions or boards when expressly exempt by law or board order;
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> (6) Excluding the policy-making positions in an agency, one principal assistant or deputy and one private secretary for each board or commission or head of a department elected or appointed by the governor or Legislature;
>
> (7) All policy-making positions; . . . .(Emphasis added).

W. Va. Code § 29-1-1 discusses specifically the "Division of culture and history" and states, in pertinent part:

> (a) The division of culture and history and the office of commissioner of culture and history heretofore created are hereby continued. The governor shall nominate, and by and with the advice and consent of the Senate, appoint the commissioner, who shall be the chief executive officer of the division and shall be paid an annual salary of forty-five thousand dollars per year, notwithstanding the provisions of section two-a, article seven, chapter six of this code. The commissioner so appointed shall have:

(1) A bachelor's degree in one of the fine arts, social sciences, library science or a related field; or

(2) four years' experience in the administration of museum management, public administration, arts, history or a related field.

(b) The division shall consist of five sections as follows:

(1) The arts section;

(2) The archives and history section;

(3) The museums section;

(4) The historic preservation section; and

(5) The administrative section.

. . .

(d) The commissioner shall exercise control and supervision of the division and shall be responsible for the projects, programs and actions of each of its sections. . . .

W. Va. Code § 29-1-2 discusses the "General powers of commissioner" and states in pertinent part:

The commissioner shall coordinate the operations and affairs of the sections and commissions of the division and assign each section or commission responsibilities according to criteria the commissioner deems most efficient, productive and best calculated to carry out the purposes of this article. The commissioner shall provide to the fullest extent possible for centralization and coordination of the bookkeeping, personnel, purchasing, printing, duplicating, binding and other services which can be efficientlycombined. The commissioner may establish such other sections for such purposes as he or she deems necessary, and may appoint directors thereof. The commissioner may appoint a director of the West Virginia science and culture center. The commissioner shall serve as the state historic preservation officer and shall chair the capitol building commission.

. . .

The commissioner shall employ all personnel for the sections, except for persons in the professional positions established within the sections as

> **provided in this article; and shall supply support services to the commissions and to the governor's mansion advisory committee.**

W. Va. Code § 29-1-9 discusses Grievant's duties in particular and states:

> **The purposes and duties of the administrative section are to provide centralized support to the division in all areas of operations.**
>
> **The commissioner shall appoint a director of the administrative section who shall have a bachelor's degree and two years' experience in responsible positions involving office management, public administration, budget and fiscal administration, or related fields; or six years' experience as outlined above. Notwithstanding these qualifications, the person serving as director of the administrative section on the date of enactment of this section shall be eligible for appointment as director of the administrative section.**
>
> **With approval of the commissioner, the director of the administrative section shall establish professional positions within the section.**

(Emphasis added).

Additionally, Respondent submitted into evidence a list complied by the Division of Personnel created May 2, 2001, prior to Grievant accepting the position, which identifies Grievant's position, Director of Administrative Services, as a policymaking one and as a position in the "Exempt Service." Resp. No. 3. The other six Directors within the Division of Culture and History are also identified as being in the "Exempt Service."

It is clear Grievant's position was an at-will, classified-exempt one, and it is also clear Grievant knew this at the time he accepted the position. Grievant was no novice tostate government, and he had served in a classified-exempt position previously. Grievant was informed at the interview that this was a will and pleasure position, he signed a document his first day of work that made his status exceedingly clear, and he did not have to pass any tests or serve a probationary period. **(See footnote 6)**

Grievant asserts his contract was changed by comments made during his pre-hiring interview. This argument is without merit. Under the parol evidence rule, "parol or extrinsic evidence is not admissible to add to, subtract from, vary or contradict judicial or official records or documents, or written instruments which dispose of property or are contractual in nature, and which are valid, complete, unambiguous and unaffected by accident or mistake."

Bailey v. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994)(citing Wheeler, Kelly & Hagny Investigator Co. v. Curts, 158 Kan. 312, 147 P.2d 737, 740 (1944). Grievant signed a "complete" and "unambiguous" document when he first started his employment, accordingly parol evidence is not admissible.

B. Substantial public policy

Even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

> **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, then the employer may be liable to the employee for damages occasioned by this discharge.Syl., Harless, supra. 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.**

Courts have recognized such actions 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 conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)); filing a workers' compensation claim (Powell v. Wyoming Cable Co., 184 W. Va. 700, 403 S.E.2d 717 (1991)); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)); and 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)), as involving substantial public policy interests. See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994). Moreover, this Grievance Board has recognized that reporting alleged violations of the West Virginia Governmental Ethics Act warrants application of a Harless-type analysis to dismissal of an at-will state employee. Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Grievant maintains the state has a substantial public policy interest in keeping at-will employees in their positions in order to encourage qualified applicants for these positions. As

reflected by the above-cited statutes, it is not a violation of a substantial public policyfor the state to hire at-will, classified-exempt employees. In fact, these Code Sections clarify that the state deems these type of positions as necessary for the work of the state to proceed.

C. Due process violations

Since Grievant asserted he was not an at-will employee, he argued his due process rights and his liberty and property interests were violated when he did not receive the protections required by the Division of Personnel's regulations for a classified employee. (See footnote 7) **As an at-will, classified-exempt employee, Grievant could be discharged at any time, with or without cause. Brown, supra. Additionally, Grievant was not owed a duty of good faith and fair dealing. Id. at Syl. Pt. 6. The Division of Personnel's Administrative Rules do not apply to Grievant. "The consequences of one's being [at-will] are that one cannot put on the panoply of protection available to those in the 'competitive' service when threatened by adverse action for cause." Id. (citing Fiorentino v. United States, 221 Ct. Cl. 543, 607 F.2d 963 (1979) cert. denied 444 U.S. 1083 (1980)).**

The West Virginia Supreme Court in the case of Waite v. Civil Rights Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) is also instructive regarding Grievant's due process claims, as Waite defines liberty and property interests and discusses how to decide if a violation has occurred.

"A 'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Id. at Syl. Pt. 3, in part. Non-classified, at-will employees do not have a property interestin continued employment because they do not have a legitimate claim of entitlement to the position. Deputy Sheriff's Ass'n v. County Comm'n, 376 S.E.2d 626, 627-29 (W. Va. 1988). Thus, Grievant has no property interest in his continued employment.

"A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities." Waite, at Syl. Pt. 2, in part. "[A]n 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." Id. at 167- 168.

Respondent has not accused Grievant of any wrongdoing. The dismissal letter merely states a Grievant is a will and pleasure employee and is being dismissed. Using the standard outlined in Waite, this language does not belittle Grievant's worth and dignity so as to foreclose future employment opportunities, nor does it stigmatize Grievant or damage his standing and associations in his community. In essence, this language does not charge Grievant with any offense, and does not deprive Grievant of any liberty interest. See, Parker, supra. (citing Grievant's "failure to inspire confidence" and to "fulfill responsibilities of the position . . . render continued employment impossible.")

In this case, Grievant, an at-will employee, was informed on July 2, 2003, that Commissioner Herholt was planning on terminating his employment. Accordingly, the undersigned Administrative Law Judge finds no procedural due process violation in the manner in which Grievant's termination was performed. Indeed, Grievant, as at-willemployee, received more due process than was required. See also Logan, supra; Wilhelm, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. Bellinger v. W. Va. Dep't of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995). See Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992); W. Va. Code § 29-6-2(g) (1992).

2. Grievant was a classified-exempt, at-will employee at the time of his termination.

3. 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); Bellinger, supra; Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Unless an at-will employee alleges a "substantial contravention of public policy," such as exercising certain constitutional rights, his termination cannot be challenged through the grievance procedure. Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994) aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d

602 (1996).

5. Grievant did not prove a violation of a substantial public policy. 6. At-will, public employees are not owed a duty of good faith and fair dealing. Imposing such a duty would be contrary to the long-standing principle that grants the appointing authority an unfettered right to terminate an at-will employee. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

7. Grievant, a classified-exempt, at-will employee, was granted more due process than required for an at-will employee's termination. Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977).

8. Grievant, a classified-exempt, at-will employee, did not have a property right in his continued state employment, and thus, was not entitled to any procedural due process protection. See Waite, supra.

These terms 9. As no reasons were stated for Grievant's dismissal, there was no action by C&H that belittled or stigmatized Grievant to such an extent that he was deprived of a liberty interest. See Waite, supra; Parker, supra.

10. Grievant did not prove any due process violation.

Accordingly, this grievance is DISMISSED.

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 § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealingparty 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.

_____ JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 24, 2003

Footnote: 1

Grievant elected to file at the lower levels of the grievance procedure in hopes of resolving the grievance there.

Footnote: 2

The Division of Culture and History is within the Department of Education and the Arts.

Footnote: 3

Grievant represented himself, and C&H was represented by Warren Morford, Training and Employee Relations Coordinator of the West Virginia Division of Rehabilitation Services.

Footnote: 4

Grievant also asserted Commissioner Herholt did not provide Grievant with a proper letter of reference. Commissioner Herholt did provide Grievant with a letter of reference, but it was not to his liking. No further discussion of this issue is needed.

Footnote: 5

Grievant's written assertion in his Level IV proposals that this meeting was part of the grievance process, and Commissioner Herholt failed to give him a written decision is without merit. Grievant completed his grievance form on July 9, 2003.

Footnote: 6

Grievant also asserted his was not a policymaking position. This issue need not be addressed in any detail. It is sufficient to say that his position was considered important enough that the duties of his position are identified in W. Va. Code § 29-1-9. This is a policymaking position.

Footnote: 7

Grievant was given a fifteen-day notice prior to his termination.