DARIAN R. PERMELIA,

Grievant,

v v.

DOCKET NO. 05-RJA-116

WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITYAUTHORITY/
SOUTHERN REGIONAL JAIL,

Respondent.

DECISION GRANTING MOTION TO DISMISS

On the 2nd day of November, 2005, came the grievant, Darian R. Permelia ("Grievant"), by his counsel, Kyle Lusk, Esquire, and came also the respondent, West Virginia Regional Jail and Correctional Facility Authority ("RJA"), by counsel, Chad M. Cardinal, Esquire, for a telephonic hearing on RJA's "Motion to Dismiss." Prior to the telephonic hearing, Grievant filed his "Answer to Motion to Dismiss." Based upon a review of the pertinent documents including, without limitation, the dismissal letter and the statement of grievance, and upon due consideration of the arguments presented by the parties, it is hereby found as follows:

FINDINGS OF FACT

.1 1. Grievant was employed by RJA as a Correctional Officer II at the Southern Regional Jail. This is a classified-exempt, or at-will, position.

.2 2. By correspondence, dated March 30, 2005, Grievant was notified that he was being dismissed from his employment with RJA.

.3 3. In the March 30 dismissal letter, John L. King, II, Chief of Operations, ("Chief King") identified a number of provisions of RJA's Policy and Procedure Manual that were violated by Grievant upon his arrest by a Mabscott law enforcement officer. Based on an internal investigation,

Chief King concluded that, on January 9, 2005, Grievant had been committed to the Southern Regional Jail on charges of “soliciting prostitution, false reporting to an officer, running a stop sign[,] and no insurance.” .4 4. Grievant challenged his dismissal by filing directly to Level IV. The document initiating the Level IV action was dated April 6, 2005, but was received by the West Virginia Education and State Employees Grievance Board on April 8, 2005.

.5 5. RJA filed a motion to dismiss, claiming that Grievant was an at-will employee and, as such, could only challenge his dismissal on the ground that, in dismissing him, the employer violated a substantial public policy.

.6 6. Grievant has failed to identify any substantial public policy RJA violated in connection with his dismissal.

.7 7. Grievant, who claims that he is not an at-will employee, looks to RJA's Policy and Procedures Manual to support this claim.

.8 8. The foreword to RJA's Policy and Procedures Manual expressly states that “[t]he policies and procedures contained herein are not conditions of employment nor do they represent an employment contract.” It further cautions that “[t]his manual does not grant any rights or privileges not previously afforded to employees under applicable law.”

Discussion

Classified-exempt state employees may be dismissed from employment for any reason, or no reason, as long as it is not violative of a substantial public policy. A classified-exempt, or at-will, employee bears the burden of proving, by a preponderance of the evidence, that his dismissal was unlawful. *Logan v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 94-RJA-225 (Nov. 29,1994)(citing *Parker v. W. Va. Health Care Cost Review Auth*., Docket No. 91-HHR-400 (June 30, 1992)).

“Employees holding positions *statutorily exempt* from coverage under the classifiedservice . . . are deemed 'at-will' employees for purposes of resolving the employer/employee relationship.” *Roach v. Reg'l Jail Auth.*, 198 W. Va. 694; 482 S.E.2d 679 (1996). It is well-established that an employer has unfettered discretion to dismiss an at-will employee unless “the employer's motivation for the discharge is to contravene some substantial public policy principle.” *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 94; 479 S.E.2d 602, 604 (1996)(citing Syl., *Harless v. First National Bank*, 162 W. Va. 116; 246 S.E.2d 270, 271 (1978)).

RJA has filed a motion to dismiss this grievance on the grounds that Grievant has failed to identify any substantial public policy violated by his discharge from employment as a Correctional Officer II. The Supreme Court of Appeals of West Virginia has approved dismissing a grievance brought by a public, at-will employee where the employee "failed to assert that his dismissal contravened some substantial public policy." *Wilhelm*, 198 W. Va. at 94; 479 S.E.2d at 604. This case differs from *Wilhelm* in that Grievant argues that his at-will status was altered by the terms of RJA's Policy and Procedures Manual.

Grievant relies upon *Cook v. Heck's, Inc.*, 176 W.Va. 368, 342 S.E.2d 453 (1986) for the proposition that "[a]n 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." Syl. pt. 6, *Cook*, 176 W.Va. at 369, 342 S.E.2d at 454 (emphasis added). It is clear from the foreword to RJA's Policy and Procedures Manual that nothing contained therein is intended to give rise to an employment contract. In light of the express disclaimer contained in the foreword, Grievant is not entitled to rely upon any provisions in the Policy and Procedures Manual to alter his statutory status asan at-will employee.

Because Grievant's at-will status remains unchanged, he is still subject to dismissal for any reason that does not contravene substantial public policy. Grievant conceded during the telephonic hearing on November 2, 2005, that he could not identify any substantial public policy that was implicated in his dismissal. RJA is thus correct that this grievance is subject to dismissal, pursuant to Rule 4.12, which provides that "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

Grievant's failure to allege violation of a substantial public policy forecloses any possibility that he could obtain relief from the West Virginia Education and State Employees Grievance Board. Accordingly, this grievance must be dismissed.

This conclusion is not altered by Grievant's argument that other employees received less drastic punitive measures for similar conduct. Such arguments have already been rejected by the West Virginia Education and State Employees Grievance Board. *Joplin v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 00-RJA-073 (July 11, 2000)(citing *Logan v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 94-RJA-225 (Nov. 29,1994)). In *Logan*, the Grievance Board cited *Wilhelm v. Dep't of*

Tax & Revenue, Docket No. 94-L- 038 (Sept. 30, 1994), for the proposition that an at-will employee "cannot challenge his dismissal on the grounds of 'discrimination' under *W. Va. Code* §29-6A-2(d), by attempting to show other employees who engaged in substantially similar misconduct were not disciplined or were not disciplined so severely as he."

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

.1 1. A classified-exempt employee is not covered under the civil service system

and is an at-will employee. *Roach v. Reg'l Jail Auth.*, 198 W. Va. 694; 482 S.E.2d 679 (1996).

.2 2. An at-will employee may be dismissed for good reasons, bad reasons, or no reasons, unless "the employer's motivation for the discharge is to contravene some substantial public policy principle." *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 94; 479 S.E.2d 602, 604 (1996)(citing Syl., *Harless v. First National Bank*, 162 W. Va. 116; 246 S.E.2d 270, 271 (1978)).

.3 3. The burden of proof is upon the at-will employee to demonstrate a violation of a substantial public policy. *Washington v. Adjutant Gen. Office/Mountaineer Challenge Acad.*, Docket No. 05-ADJ-074 (Apr.21, 2005).

.4 4. "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." Syl. pt. 6, *Cook*, 176 W.Va. at 369, 342 S.E.2d at 454 (emphasis added). The foreword to RJA's Policy and Procedures Manual contains an express disclaimer that prevents the formation of a unilateral contract on the basis of the contents of the Policy and Procedures Manual. In light of the foreword, Grievant could not establish the existence of a unilateral contract arising from the Policy and Procedures Manual that would alter his status as an at-will employee.

.5 5. Grievant's failure to allege that his dismissal violated a substantial public policy forecloses any possibility of Grievant obtaining relief in this action. *Wilhelm*, 198 W.Va. at 97, 479 S.E.2d at 607. Therefore, this grievance is properly subject to dismissal, pursuant to Rule 4.12, for failure to state a claim.

Based upon the foregoing, the "Motion to Dismiss" is **GRANTED** and the above- styled action is

DISMISSED for failure to state a claim.

Any party 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 West Virginia Code section 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: November 8, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Equal Opportunity Employer