THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

L. CAROL MORGAN,

Grievant,

v. **Docket No. 06-RESA-240**

WEST VIRGINIA BOARD OF EDUCATION,

Respondent.

D E C I S I O N

_Carol Morgan, employed by the West Virginia Board of Education ("Respondent") as Director of the Regional Education Service Agency - I ("RESA-I"), filed a level four grievance on July 18, 2006, challenging a 90-day suspension. Specifically, Grievant asserts the action was discriminatory and retaliatory, violating her right to free speech, in contravention of a substantial public policy principle. For relief, Grievant seeks recission of the suspension from May 1, 2006, through her retirement on June 30, 2006, back pay, benefits, attorney fees, and "such other relief as may be awarded".

Respondent's "Motion To Bifurcate" the proceedings was granted, and hearings were conducted in the Grievance Board's Charleston office on October 24, 2006, and February 26, 2006, on the issue of whether Grievant was an at-will employee. Grievant was represented by Erwin Conrad, Esq., and Respondent was represented by Kelli D. Talbott, Deputy Attorney General. Proposed findings of fact and conclusions of law were filed by the parties on or before April 26, 2006. For administrative reasons, the grievance was subsequently transferred to the undersigned for disposition on July 17, 2007.

The following findings of fact have been derived from the record developed at level four.

Findings of Fact

1. Enacted by the legislature in 1972, *W. Va. Code* § 18-2-26 authorized the State Board of Education to establish multi-county RESAs to provide educational programs and services to students and school systems within their regions. The State Board was further authorized to make such rules

and regulations necessary for the effective administration of the agencies.

2. In 1982, the State Board of Education implemented a legislative rule, “Resolution of Establishment for Regional Education Service Agencies,” codified at 126 W. Va. C.S.R. 72. Section 8.1 of the rule provided that “[t]he administration of each Agency shall be under the authority of an Executive Director selected and appointed by the board of directors to serve at its will and pleasure.”

3. Grievant was employed as the Executive Director of RESA-I in 1989, and thereafter continuously entered into one-year, written, contracts of employment with the RESA-I Board of Directors.

4. Effective July 1, 2002, *W. Va. Code* § 18-2-26 was amended to provide, in part, that executive directors would be selected by the state board. A revised legislative rule,126 W. Va. C.S.R. 72, § 3.8 (Jan. 12, 2003), provided that “[t]he RESA executive director shall serve at the will and pleasure of the State Board . . . . Termination of a RESA executive director shall be by the State Board with input from the regional council and the State Superintendent of Schools.” (See footnote 1)

5. Grievant continued to enter into annual contracts of employment with the RESA-I Board of Directors through the 2005-2006 year. This contract provided that “the employee may be terminated at any time by the Advisory Council for lack of funds or other cause permitted under the law.”

6. In December 2001, the Office of the Legislative Auditor issued a “Special Report of West Virginia Board of Education's Internal Control Structure for Regional Education Service Agencies For The Period July 1, 1998 - June 30, 2001". The report stated “the Board of Education did not have an effective system of internal controls in place to ensure compliance with applicable State laws.” It also noted that the “[t]he Department of Education has not implemented two recommendations reported in a prior internal control study regarding the awarding of grants to RESAs for the period of 1993-1996.”

7. RESA Directors were not provided the 2001 report, and were unaware of the findings and recommendations it contained, until a meeting held on March 20, 2006.

8. In early 2006, an investigation revealed that Deborah Mitchell, employed at RESA-I as an Executive Secretary and Finance Manager, had embezzled $1.3 million dollars from the agency over a ten-year period.

9. Because Grievant was responsible for the daily operations of RESA-I, and had delegated authority to Ms. Mitchell, Respondent voted to suspend Grievant without pay, for 90 days, effective

May 1, 2006.

10. By letter dated June 9, 2006, Grievant's counsel was advised by Respondent's General Counsel that Grievant's retirement as Executive Director of RESA-I, had been approved to be effective June 30, 2006.

Discussion

Respondent argues that Grievant was initially a will and pleasure employee of the RESA-I Board of Directors. Following an amendment to *W. Va. Code* § 18-2-26, in 2002, and a revised legislative rule, Grievant then became a will and pleasure employee of the State Board of Education, and the suspension was imposed consistent with her employment status. Citing the annual contracts with the RESA-I Board of Directors, Grievant argues that she was not an at-will employee, and in the alternative, asserts that the disciplinary action was contrary to a substantial public policy. The evidence does not support either of Grievant's arguments.

Grievant does not dispute that as Director of RESA-I, she is an employee of the State Board of Education. As such, the legislative rule clearly provides that she is employed at the will and pleasure of the State Board. The annual contract which Grievant entered into with the RESA-I Board of Directors for the 2005-2006 year is without legal authority because the council was no longer her employer.

It is well established that an at-will employee is subject to disciplinary action for any reason which does not contravene some substantial public policy. *See Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996); *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995); *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993)*; Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978). The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the discipline are not at issue, and the suspension stands. "A preponderance of the evidence is evidence of greater weight or more convincing than theevidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). *See Loundman-Clay v. Higher Educ. Policy*

Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 26, 2002).

Courts have recognized that substantial public policy interests are implicated in such actions as submitting a claim for back wages under the Veterans Reemployment Rights Act (*Mace v. Charleston Area Med. 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)). *See Roberts v. Adkins*, 191 W. Va. 215, 444 S.E.2d 725 (1994).

In the present grievance, Grievant asserts that the suspension was discriminatory and taken in retaliation for “voic[ing] her displeasure” during the March 20, 2006, meeting regarding Respondent's failure to timely advise the Directors of the 2001 report. The essence of this allegation is that she was disciplined for exercising her right to free speech. Although the Director's meeting occurred at a time contemporaneous with the discovery of embezzlement, there is no evidence as to what comments Grievant, or the other Directors, expressed.

Grievant has failed to demonstrate discrimination, defined by *W. Va. Code* § 18-29-2(m) as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” (See footnote 2) In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). Grievant offered no evidence that the other Directors were, or were not, disciplined for their comments made at the March 20, 2006, meeting. Again, absent evidence as to the nature of Grievant's comments, it is impossible to determine that Respondent engaged in “reprisal,” defined by *W. Va. Code* §18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In light of the documentation Respondent provided regarding the investigation of the embezzlement, and the subsequent actions taken, the evidence does not support aconclusion that the suspension was discriminatory, imposed in retaliation, or to suppress Grievant's right to free speech.

Finally, Grievant argues that the May 1, 2006, action was taken without a recommendation by the State Superintendent in an open meeting, without input from the RESA-I council, and without providing Grievant notice of the charges and a hearing. The evidence establishes that Grievant was notified of pending disciplinary action, and her counsel was permitted to address the State Board regarding the matter on April 13, 2006. The RESA-I Regional Council had also been notified of the matter, and were invited to attend the meeting and provide input. The invitation was accepted by Lyn Guy, Superintendent of Monroe County Schools. Grievant and counsel additionally participated in the May 1, 2006, meeting prior to the Board voting to impose the suspension. Grievant was not deprived of any due process in this matter.

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. Pursuant to Respondent's legislative rule, RESA Executive Directors are employed at the will and pleasure of the State Board of Education. 126 W. Va. C.S.R. 72, § 3.8 (Jan. 12, 2003).

2. An at-will employee is subject to disciplinary action 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*, DocketNo. 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).

3. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the discipline are not at issue, and the suspension stands. *See Wilhelm, supra*. *of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

4. Grievant has failed to prove that the suspension was discriminatory, a result of reprisal, or was otherwise imposed in violation of a substantial public policy.

Accordingly, the grievance is **DENIED.**

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. *See W. Va. Code* § 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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 circuit court.

DATE: SEPTEMBER 11, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *The terms "Board of Directors," "Advisory Council," and "Regional Council" have been used interchangeably throughout the record.*

Footnote: 2

[2]W. Va. Code §§ 18-29-1, et seq. was repealed by the Legislature in 2007, Acts 2007, c. 207, eff. March 7, 2007, and were replaced by W. Va. Code §§ 6C-2-1, et seq., and 6C-3-1, et seq. (2007). Grievances which were pending when the new statute took effect are to be decided under the former statute, pursuant to Executive Order No. 2-07, May 8, 2007.