THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

WILLIAM PRINCE,

Grievant,

v. DOCKET NO. 07-MHST-001

OFFICE OF MINERS' HEALTH,

SAFETY AND TRAINING,

Respondent.

DISMISSAL ORDER

Grievant William Prince filed this grievance on January 2, 2007, challenging the termination of his employment by Respondent. On January 25, 2007, Respondent filed a Motion to Dismiss, asserting that Grievant was an at-will employee and had not alleged a violation of substantial public policy in his grievance.

A level four hearing on the Motion to Dismiss was held in the Grievance Board's Charleston office on February 2, 2007. Grievant appeared *pro se*, and Respondent was represented by Barry L. Koerber, Assistant Attorney General. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Synopsis

Grievant was an at-will, probationary employee at the time of his dismissal by Respondent, who did not allege a reason for the termination. As an at-will employee who did not allege his dismissal violated a substantial public policy, Grievant is precluded from using the grievance procedure to challenge his termination. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent as an Electrical Mine Inspector, from September 18, 2006 to December 29, 2006.

2. On December 29, 2006, Grievant was informed by the Director of Miners' Health, Safety and Training, Ronald L. Wooten, that he was being terminated. In a letter memorializing their meeting on that date, Director Wooten did not state a reason for the termination, but referred to Grievant's at-will status.

3. Grievant was a probationary employee at the time of his termination. 4. In the Statement of Grievance filed by Grievant, he does not allege that his termination was in contravention of any public policy. Instead, he claims he was told that he was “un-trainable,” but he was not given enough time to complete his training.

Discussion

An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. (See footnote 1) 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. (See footnote 2)

By Executive Order No. 2-83, Governor John D. Rockefeller, IV extended civil service coverage to certain employees of the Department of Mines, but specifically excepted Electrical Inspectors (and others). West Virginia Code § 22A-1-8 discusses the employment status of mine inspectors, including electrical inspectors by virtue of W. Va. Code § 22A-1-11(e), and imposes a one-year probationary period, only after which does the inspector gain “tenure” and become subject to dismissal “only for cause.” Even then, the Mine Inspector's Examining Board is given jurisdiction to “hear and determine proceedings for removal.”

In *Birthisel v. Tri-Cities Health Services*, 188 W. Va. 371, 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 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 [*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. Dep't of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [*Hendricks v. W. Va. Dep't of Tax & Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996)]. Grievant stated he does not know why he was terminated, other than the comment that he was “un-trainable.” He claims that assertion is false, therefore there must be some unidentified reason he has not been told. However, the undersigned cannot engage in speculation as to what that hiddencause might be, and Grievant's claim that he was not given a fair period to train is merely a disagreement with the management decision of his employer, and not an allegation of public policy violation.

Grievant was an at-will, probationary employee who was not dismissed for cause, and he does not allege a contravention of any substantial public policy in his grievance.

The following conclusions of law support this discussion:

Conclusions of Law

1. Electrical Mine Inspectors are at-will employees for at least their first year of employment. W. Va. Code §§ 22A-1-11(3) and 22A-1-8.

2. 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); *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).

3. 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).

4. Grievant did not allege a contravention of public policy, and as an at-will employee he may not utilize the grievance process to challenge his employment.

For the foregoing reasons, the Motion to Dismiss is hereby **GRANTED**. This matter is hereby **Dismissed** and stricken from the docket of the Grievance Board. 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 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.

February 16, 2007

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

Footnote: 2

Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994).