

11-0698

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY WATSON, CLERK
KANAWHA CO. CIRCUIT COURT

FREDRICK ARMSTRONG,

Appellant,

v.

Civil Action No. 08-AA-82
Honorable Paul Zakaib, Jr.

WEST VIRGINIA DIVISION OF
CULTURE AND HISTORY,

Appellee.

FINAL ORDER AFFIRMING DECISION OF GRIEVANCE BOARD

On January 19, 2010, came the parties, Appellant Fredrick Armstrong (hereinafter Appellant Armstrong), by counsel, James B. Lees, Esquire and Appellee West Virginia Division of Culture & History (hereinafter "Appellee"), by counsel, Billie Jo Streyle, Esquire for oral argument in the above-styled matter. After reviewing the record from the underlying Level III Grievance Proceeding held before the West Virginia Public Employees Grievance Board (hereinafter "PEG Board"), the appellate memoranda filed, and after hearing oral argument, the Court does hereby **FIND** and **ORDER** as follows:

FINDINGS OF FACT

1. Appellant Armstrong was employed by Appellee as the Director of Archives & History. (Amended Grievance: Pg. 1).
2. The Director of Archives & History position held by Appellant Armstrong was an at-will position, which is not disputed by the parties.

3. Randall Reid-Smith was appointed the Commissioner of the Division of Culture & History on July 1, 2006. (**Grievant's Response to Respondent's Renewed Motion to Dismiss: Ex. A: Randall Reid-Smith Depo: Pg. 4: 17-19**)¹.
4. Commissioner Reid-Smith was the direct supervisor of Appellant Armstrong.
5. After he began working with Appellant Armstrong, Commissioner Reid-Smith found Appellant Armstrong to be disrespectful to him and his fellow Directors at the upper level management meetings. Commissioner Reid-Smith further felt that Appellant Armstrong was not a team player in the organization. (**Grievant's Response to Respondent's Renewed Motion to Dismiss: Ex. A: Randall Reid-Smith Depo: Pgs. 23-30**).
6. At his deposition, Appellant Armstrong testified that, although he tried to avoid being condescending to his fellow co-workers and/or to talk down to them when he recited the *West Virginia Code*, he acknowledged that "at times it probably came across that way." (**Respondent's Renewed Motion to Dismiss: Ex. D: Fredrick Armstrong Deposition: Pg. 75: 18-23**).
7. Due to Appellant Armstrong's failure to be a team player and due to his disrespectful actions toward Commissioner Reid-Smith and his fellow Directors, Commissioner Reid-Smith made the decision to terminate Appellant Armstrong from his position.
8. Kay Goodwin is the Cabinet Secretary of the West Virginia Department of Education & the Arts.

¹ Grievant's Response to Respondent's Renewed Motion to Dismiss was filed on May 30, 2008.

9. Secretary Goodwin has served as the Cabinet Secretary, since the year 2001. **(Respondent's Renewed Motion to Dismiss: Ex. F: Secretary Goodwin Deposition: Pg. 4: 10-16).**
10. As Cabinet Secretary, Secretary Goodwin oversees the West Virginia Division of Culture & History and was the direct supervisor of Commissioner Reid-Smith. **(Respondent's Renewed Motion to Dismiss: Ex. F: Secretary Goodwin Deposition: Pg. 4: 17-21).**
11. Secretary Goodwin was not the direct supervisor of Appellant Armstrong.
12. Commissioner Reid-Smith made the decision to terminate Appellant Armstrong. **(Respondent's Renewed Motion to Dismiss: Ex. F: Secretary Goodwin Deposition: Pg. 5: 11-15).**
13. Commissioner Reid-Smith informed Secretary Goodwin that he believed Appellant Armstrong was insubordinate in his position and did not believe he was a good part of the leadership team; therefore, Commissioner Reid-Smith wanted to terminate Appellant Armstrong from his position. **(Respondent's Renewed Motion to Dismiss: Ex. F: Secretary Goodwin Deposition: Pg. 6: 19-23; 9: 1-2).**
14. Secretary Goodwin supported Commissioner Reid-Smith's decision, since Commissioner Reid-Smith was Appellant Armstrong's direct supervisor. **(Respondent's Renewed Motion to Dismiss: Ex. F: Secretary Goodwin Deposition: Pg. 7: 14-15).**
15. On November 1, 2007, Commissioner Reid-Smith notified Appellant Armstrong that he was being terminated from his position. **(Respondent's Renewed Motion to Dismiss: Ex. D: Fred Armstrong Deposition: Pgs. 83: 7-23; 84: 1-3).**

November 27, 2007 Level III Grievance and

Administrative Law Judge Janis Reynolds' February 15, 2008 Order

1. On **November 16, 2007**, Appellant Armstrong, without the assistance of counsel, filed a Level III grievance with the PEG Board regarding his termination.

2. In his November 16, 2007 grievance, Appellant Armstrong stated the following:

My job performance in carrying out the requirements of my professional position as archivist and historian as stated in the WV State Code, 29-1-6 and answerable to the WV Archives & History Commission 29-1-5 have been contradicted by the Secretary of Education & the Arts and her staff and the Commissioner of Culture & History. Her, and their actions and orders have placed my performance and compliance under the code to be outside its mandate. These actions and orders, when questioned or legal advice sought on my part to insure that I remained true under the code have then been held against me, leading to unfair and untruthful accusations and finally in termination.

(Memorandum in Support of Respondent's Motion to Dismiss: Ex. 1: November 16, 2007 Grievance: Pg. 1).

3. On January 7, 2008, Appellee filed "Respondent's Motion to Dismiss," pursuant to 156 C.S.R. 1 (6.11) (2007), requesting the Administrative Law Judge (hereinafter "ALJ") dismiss Appellant Armstrong's **November 16, 2007** grievance for various reasons, including his failure to plead that his termination violated the substantial public policy of the State of West Virginia.

4. On **January 22, 2008**, Appellant Armstrong, by and through counsel, James B. Lees, filed a "**Motion to File Amended Grievance**" requesting permission to file an **Amended Grievance** in substitution of the grievance filed on November 16, 2007.

5. In his **Amended Grievance**, Appellant Armstrong alleged that he was terminated “in whole or in part for [his] actions relating to . . . three matters.” (**Amended Grievance: Pg. 1**).
6. The three (3) matters Appellant Armstrong raised in his **Amended Grievance** related to the following: (1) The transfer of the West Virginia History Journal to the West Virginia University Press in the year 2006; (2) The placement of three (3) highway historical markers in Wayne County, West Virginia; and (3) The discussions and proposals of merging the readings rooms of Archives & History and the State Library, as well as discussions concerning the possibility of placing an eating establishment in the West Virginia Division of Culture & History building.
7. With regard to the transfer of the West Virginia History Journal in the year 2006, Appellant Armstrong claimed that he was terminated for his “attempt to comply with West Virginia Code § 29-1-6[.]” which he claimed “required [him] to publish a **yearly history of West Virginia.**” (**Amended Grievance: Pg. 1 ¶ 1**) (Emphasis added). In and about July 2004, Appellant claimed he was apprised of a Memorandum of Understanding between the West Virginia University Press and the West Virginia Division of Culture & History to assign the publication of “the yearly West Virginia History” to the West Virginia University Press, which Appellant Armstrong claimed was “in violation of statute.” (**Amended Grievance: Pg. 1 ¶ 1**). In January or February of 2006, Appellant Armstrong claimed that he was advised that Secretary Goodwin entered into a contract with West Virginia University Press to assume all control over the publication of the West Virginia History Journal. Appellant Armstrong was directed to transfer the materials to West Virginia

University Press on February 17, 2006 and again on March 21, 2006. (Amended Grievance: Pg. 2 ¶ 1). He failed to do so. On April 10, 2006, Appellant Armstrong was issued a written reprimand by Secretary Goodwin for insubordination. (Amended Grievance: Pg. 2 ¶ 1). He claimed:

It is *my contention* this matter, including the aforesaid written reprimand, played a direct role in my termination on November 1, 2007.

(Amended Grievance: Pg. 2 ¶ 1) (Emphasis added). Commissioner Reid-Smith, who made the decision to terminate Appellant Armstrong, was not appointed as Commissioner at the time of these events.

8. With regard to the placement of three (3) highway historical markers in Wayne County, Appellant Armstrong alleged that the West Virginia Archives & History Commission, which is a Commission under the supervision of Commissioner Reid-Smith, rejected the request of the Wayne County Geological and Historical Society to place highway historical markers in Wayne County, West Virginia, on two occasions. (Amended Grievance: Page 2 ¶ 2). According to Appellant Armstrong, Commissioner Reid-Smith assured one or more representatives of the House of Delegates that the historical markers would be approved. (Amended Grievance: Page 3 ¶ 2). He further alleged that, on September 7, 2007, the Attorney General issued an opinion stating the West Virginia Archives & History Commission "had no authority to control, administrate, or regulate highway markers." (Amended Grievance: Page 3 ¶ 2). The Grievant stated that the Attorney General opinion was "indeed curious since it directly contravened the history of West Virginia since 1977[.]" and he voiced his "*concern*" that the request had been considered and

rejected by the West Virginia Archives & History Commission on two occasions. (Amended Grievance: Page 3 ¶ 2) (Emphasis added). Appellant Armstrong claimed that his “attempt to adhere to published rules and regulations of historical markers along West Virginia highways and, in particular, to insure that the process did not devolve into a political system was met with strong disapproval by [his] superiors and played a direct role in [his] termination.” (Amended Grievance: Page 3 ¶ 2).

9. Appellant Armstrong further alleged that, prior to his termination, there were “discussions” and “proposals” within the Division of Culture & History “to merge Archives and History into the existing state library and to place an eating establishment in the Culture Center,” which he personally opposed. (Amended Grievance: Pg. 3 ¶ 3). Appellant Armstrong alleged, absent citing to any legal authority, that historical records are “not as a rule” merged with a lending library for “obvious reasons” “and the introduction of a restaurant in the vicinity of a historical archive is merely asking for rodent and pest problems (which will attack and destroy paper).” (Amended Grievance: Pg. 3 ¶ 3). He further alleged his attempts to “*voice his legitimate and professional concerns*” played a direct role in his termination. (Amended Grievance: Page 3 ¶ 3) (Emphasis added).
10. On February 6, 2008, Appellee filed “Respondent’s Reply to Motion to File Amended Grievance in Response to Respondent’s Motion to Dismiss.”
11. In Appellee’s Reply, Appellee requested the PEG Board enter an Order: (1) Granting “Respondent’s Motion to Dismiss” regarding the November 16, 2007 grievance filed by Appellant Armstrong; and (2) “Denying “Grievant’s Motion to File

Amended Grievance;” and (3) Rejecting the proposed Amended Grievance submitted by Appellant Armstrong. (**Respondent’s Reply to Motion to File Amended Grievance in Response to Respondent’s Motion to Dismiss: Pgs. 17-18**) (Emphasis added).

12. In Appellee’s Reply, Appellee argued that the PEG Board must deny Appellant Armstrong’s Motion to File Amended Grievance. At the time Appellee filed its Reply, the only grievance filed was the November 17, 2006 grievance of Appellant.
13. In Appellee’s Reply, Appellee argued that the **Amended Grievance** must be rejected and the **Motion to File Amended Grievance** denied, because: (1) Any and all actions alleged by Appellant Armstrong that took place in the years 2004 and 2006 regarding the West Virginia History Journal were barred by the statute of limitations; (2) Commissioner Reid-Smith, who had the power to terminate Appellant Armstrong, was not appointed as Commissioner at the Division of Culture & History at the time of the 2004 and 2006 events regarding the West Virginia History Journal; (3) Appellant Armstrong failed to plead any substantial public policy of the State of West Virginia that was violated as a result of the transfer of the West Virginia History Journal; (4) Commissioner Reid-Smith had the statutory authority to implement, control, and administer the historical markers program; therefore, insofar as Appellant Armstrong was alleging that his objections to the lawful directives of his supervisor resulted in his termination, he failed to articulate any substantial public policy that was violated; and (5) Appellant Armstrong failed to articulate any substantial public policy of the State of West Virginia that was violated with regard to his assertion that he was terminated for his personal objections to the discussions

concerning the merging of the Archives & History and the State Library reading rooms and the placement of an eating establishment in the West Virginia Division of Culture & History building. (**Respondent's Reply to Motion to File Amended Grievance in Response to Respondent's Motion to Dismiss: Arguments A through E**) (Emphasis added). Appellee further requested the Court enter an Order prohibiting Appellant Armstrong from conducting depositions, prior to an Order being entered by the PEG Board on the filed memoranda.

14. Absent a hearing, on February 15, 2008, Janis I. Reynolds, Administrative Law Judge, entered an Order wherein she noted the following:

On January 9, 2007, Respondent filed a Motion to Dismiss (which pertained to the grievance filed on November 16, 2007); on January 22, 2007, Grievant filed a Response to the Motion to Dismiss and a Motion to File Amended Grievance; and on February 6, 2008, Respondent filed a **Reply to the Motion to File Amended Grievance**.

(Reynolds Order: Pg. 1) (Emphasis Added).

15. Absent identifying any findings of fact, ALJ Reynolds merely stated:

The issues asserted in Grievant's amended grievance are sufficient to raise the *possibility* of a substantial public policy issue or issues, thus, meeting the requirements identified in Wilhelm, supra. Respondent's Motion to Dismiss is DENIED.

(Reynolds Order: Pg. 3) (Emphasis Added).

16. ALJ Reynold's Order effectively denied Appellee's Motion to Dismiss the grievance initially filed by Appellant Armstrong dated November 16, 2007 and granted Appellant Armstrong's "**Motion to File Amended Grievance.**"

17. Therefore, as of February 15, 2008, the date of ALJ Reynold's Order, the **Amended Grievance** was filed.

18. Although Appellee found ALJ Reynold's Order legally flawed, it had no right of appeal, since the Order was not a final adjudication on the merits. The parties proceeded with discovery in the grievance proceeding.

Amended Grievance and Administrative Law Judge Denise Spatafore's June 17, 2008 Order

1. Due to the Order entered by ALJ Reynolds, a "**Joint Motion to Continue Grievance Hearing**" was filed on February 20, 2008 by the parties requesting a continuance of the scheduled Level III hearing date of February 25, 2008 for the sole purpose of allowing counsel for Appellant Armstrong to conduct the depositions of Secretary Goodwin and Commissioner Reid-Smith and to further allow counsel for the Appellee to conduct the deposition of Appellant Armstrong. (**Joint Motion to Continue Grievance Hearing: Pg. 2**).
2. On February 21, 2008, ALJ Reynolds granted the motion to continue the hearing scheduled to take place on February 25, 2008 and rescheduled the hearing for April 16, 2008. (**February 21, 2008 Order**).
3. After ALJ Reynold's Order was entered, the depositions of Secretary Goodwin, Commissioner Reid-Smith, and Appellant Armstrong were conducted on **March 21, 2008**.
4. On March 25, 2008, the parties received an Order from ALJ, Denise M. Spatafore, which unilaterally continued the hearing scheduled for April 16, 2008 to June 12, 2008 and June 13, 2008 "for administrative reasons." (**March 25, 2008 Order**).
5. Apparently, ALJ Reynolds elected to retire.
6. After receiving copies of the deposition transcripts taken of Secretary Goodwin, Commissioner Reid-Smith, and Appellant Armstrong conducted on March 21, 2008,

Appellee filed "Respondent's Renewed Motion to Dismiss" wherein it requested dismissal, pursuant to Rule 156 C.S.R. (6.11) (2007) "or, in the alternative, a summary judgment motion[,] "based upon the testimony elicited from the Grievant, Fredrick Armstrong, at his deposition, which demonstrates there is no claim upon which relief can be granted, or, in the alternative, no genuine issue of material fact, because the Grievant, an at-will employee, has failed to plead any substantial public policy was violated as a result of his termination." (Respondent's Renewed Motion to Dismiss: Pg. 1) (Emphasis added).

7. In Respondent's Renewed Motion to Dismiss, on pages six (6), fifteen (15), and seventeen (17), Appellee specifically cited to the Amended Grievance that was effectively filed by ALJ Reynolds' Order dated February 15, 2008.
8. In its motion, Appellee cited to extensive portions of Appellant Armstrong's deposition transcript on pages three (3), seven (7), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), fifteen (15), sixteen (16), eighteen (18), twenty (20), and twenty-one (21), which Appellee believed showed that dismissal of the Amended Grievance was required. (Respondent's Renewed Motion to Dismiss: Pg. 1). This evidence was not available at the time ALJ Reynolds entered her Order.
9. In good faith, counsel for Appellee requested dismissal of the Amended Grievance, because: (1) The Amended Grievance was filed by Order dated February 15, 2008, by ALJ Reynolds; and (2) The depositions of Appellant Armstrong, Secretary Goodwin, and Commissioner Reid-Smith were concluded, after the February 15, 2008 Order was entered by ALJ Reynolds, which Appellee's counsel believed

demonstrated that there was no genuine issue of material fact regarding any of Appellant Armstrong's claims.

10. The PEG Board is governed by Rule 156 C.S.R. 1 (6.11), which permits dismissal of actions "if no claim upon relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." The legislative rule of the PEG Board in relation to dismissal of grievance matters does not mirror the language in Rule 56(c) of the West Virginia Rules of Civil Procedure with respect to motions for summary judgment.
11. In **Respondent's Renewed Motion to Dismiss**, in relation to the Appellant Armstrong's **Amended Grievance** regarding the transfer of the West Virginia History Journal in the years 2004 and 2006, Appellee requested dismissal of the **Amended Grievance** in relation to this matter, based upon the deposition testimony of Appellant Armstrong. Appellant Armstrong testified that he knew and understood that he could have filed a grievance regarding Secretary Goodwin's written April 10, 2006 reprimand within the statutorily required [ten (10) day] limitations period, and he voluntarily chose not to file a grievance. (**Respondent's Renewed Motion to Dismiss: Pgs. 13-14, Citing Grievant's Depo: Pg. 126: Lines 7-23: Ex. D**). Therefore, based upon Appellant Armstrong's deposition testimony, Appellee requested the **Amended Grievance** be dismissed for Appellant Armstrong's failure to comply with the applicable statute of limitations.
12. In **Respondent's Renewed Motion to Dismiss** relating to Appellant Armstrong's **Amended Grievance** regarding the transfer of the West Virginia History Journal in the years 2004 and 2006, Appellee further requested dismissal, because, based upon

Appellant Armstrong's testimony, it was shown that he failed to plead any violation of substantial public policy occurred with regard to his termination. In his **Amended Grievance**, Appellant Armstrong claimed that the transfer of the West Virginia History Journal to the West Virginia University Press was "in violation of statute" and in violation of his alleged "statutory obligation to publish the yearly West Virginia History. . . ." Appellee cited to West Virginia Code § 29-1-6, which Appellant Armstrong claimed required him to publish an "annual" journal entitled West Virginia History, and argued dismissal of the **Amended Grievance** on this issue was required, based upon both the plain language of the statute and upon Appellant Armstrong's deposition testimony. (**Respondent's Renewed Motion to Dismiss: Pg. 7-14, Citing Grievant's Depo: Pgs. 92, 94, 104, 106, 109, 110, and 126: Ex. D; Citing Secretary Goodwin's Depo.: Pg. 17: Ex. F**). There was no statutory requirement, pursuant to West Virginia Code § 29-1-6, for Appellant Armstrong to publish an "annual" journal entitled the West Virginia History Journal. Therefore, dismissal of Appellant Armstrong's **Amended Grievance** was requested.

13. Moreover, Commissioner Reid-Smith testified at his deposition that he found Appellant Armstrong to be disrespectful to both him and his fellow Directors at upper level management meetings. Commissioner Reid-Smith further felt that Appellant Armstrong was not a team player in the organization. (**Grievant's Response to Respondent's Renewed Motion to Dismiss: Ex. A: Randall Reid-Smith Depo: Pgs. 23-30**).

14. At his deposition, Appellant Armstrong testified that although he tried to avoid being condescending to his fellow co-workers and/or to talk down to them when he recited

the *West Virginia Code*, he acknowledged "at times it probably came across that way." (**Respondent's Renewed Motion to Dismiss: Ex. D: Fred Armstrong Deposition: Pg. 75: 18-23**).

15. In **Respondent's Renewed Motion to Dismiss** relating to Appellant Armstrong's **Amended Grievance** regarding the placement of the three (3) Wayne County highway historical markers, Appellee requested dismissal of the **Amended Grievance**, based upon plain statutory language that provided Commissioner Reid-Smith with the power and duty to operate the highway historical markers program and based upon the deposition testimony of Appellant Armstrong. Appellee believed the evidence showed that Appellant Armstrong failed to articulate any public policy that was violated by his termination in relation to this matter; therefore, dismissal of his **Amended Grievance** was required. (**Renewed Motion to Dismiss Pgs. 16-21**). Appellant Armstrong conceded at his deposition that the West Virginia Archives & History Commission did not have statutory authority to control the historical markers program; the West Virginia Archives & History Commission did not promulgate legislative rules; and an attorney general provided an opinion to Commission Reid-Smith affirming that he had the statutory authority to control the historical markers program. (**Renewed Motion to Dismiss Pgs. 16-21, Citing Grievant's Depo. Pgs. 150, 151, 172, and 144: Ex. D**). Therefore, Appellee requested dismissal of Appellant Armstrong's **Amended Grievance** for his failure to articulate any public policy that was violated in relation to this issue.
16. Moreover, Commissioner Reid-Smith testified that Appellant Armstrong's termination from his position had nothing to do with the Wayne County historical

markers. (**Grievant's Response to Respondent's Renewed Motion to Dismiss: Ex. A: Randall Reid-Smith Depo: Pg. 13: 18-20**).

17. In **Respondent's Renewed Motion to Dismiss** relating to Appellant Armstrong's **Amended Grievance** regarding the discussions concerning the possible merging of the Archives & History and the State Library reading rooms and placement of an eating establishment in the West Virginia Division of Culture & History building, Appellee requested dismissal of this issue, based upon the deposition testimony of Appellant Armstrong, which showed there was no law that prohibited either the merger of the reading rooms or the placement of an eating establishment in the building. (**Renewed Motion to Dismiss: Pgs. 14-16**). By way of his own deposition testimony, Appellant Armstrong acknowledged that House Bill 4126 (2008) was introduced in the Legislature. House Bill 4126 was introduced to preclude the merging of the reading rooms of Archives & History and the State Library. The bill failed, and as Appellant Armstrong himself testified, "current law would permit" the merging of the reading rooms. (**Renewed Motion to Dismiss: Pgs. 14-16, citing Grievant's Depo. Pg. 139**). Appellant Armstrong further failed to identify any law that prohibited the introduction of an eating establishment in the Division of Culture & History building. Therefore, Appellee requested dismissal of the **Amended Grievance** in relation to this issue.
18. Moreover, Commissioner Reid-Smith testified at his deposition that Appellant Armstrong's termination had nothing to do with proposals regarding the possible merger of the Archives & History and State Library reading rooms. (**Grievant's**

Response to Respondent's Renewed Motion to Dismiss: Ex. A: Randall Reid-Smith Depo: Pg. 21: 1-6).

19. On May 30, 2008, Appellant Armstrong filed "**Grievant's Response to Respondent's Renewed Motion to Dismiss**" arguing the dismissal motion must be denied, because: (1) The "Respondent's 'Renewed' Motion to Dismiss discussed only the November 16, 2007 initial grievance filed by Grievant but does not reference at any time the **Amended Grievance** filed January 22, 2008 by Grievant[;]" therefore, he claimed the issue was barred by the doctrine of res judicata; (2) Grievant "was terminated because he was attempting to abide by the statutory laws, rules, and regulations relevant to his position (absent citing to any legal precedent that was allegedly violated) and for voicing legitimate and professional concerns on proposed State actions consistent with his position[;]" and (3) The statute of limitations argument forwarded by Appellee was improper. (**Grievant's Response to Respondent's Renewed Motion to Dismiss Pgs. 2 -5**). Appellant Armstrong further affixed Commissioner Reid-Smith's deposition as Exhibit A to his response.
20. On June 3, 2008, Appellee filed "**Respondent's Response to Grievant's Response to Respondent's Renewed Motion to Dismiss**" and stated Appellant Armstrong's arguments in his responsive memorandum were false insofar as he claimed that Appellee merely referred to the November 16, 2007 initial grievance, because the renewed motion to dismiss cited specifically to the **Amended Grievance**. Moreover, Appellee argued that it filed the renewed dismissal motion based upon evidence discovered at the depositions which showed Appellant Armstrong could not articulate any substantial public policy that was violated by his termination.

21. On June 17, 2008, ALJ Spatafore entered a **Dismissal Order**. A hearing was not conducted on the dismissal motion; however, a hearing was also not held by ALJ Reynolds prior to entry of the Order dated February 15, 2008.²
22. In her **Dismissal Order**, ALJ Spatafore stated that, on April 29, 2009, Appellee filed “its Renewed Motion to Dismiss, based upon the renewed statement of grievance and further analysis of factual information obtained during discovery.” (**Dismissal Order: Pg. 2**) (Emphasis added). “Grievant’s response was received on May 31, 2008, and Respondent filed a reply to that response on June 3, 2008.” (**Dismissal Order: Pg. 2**).
23. In her **Findings of Fact**, ALJ Spatafore cited specifically to the **Amended Grievance** and to factual information only learned through the depositions of Appellant Armstrong, Secretary Goodwin, and Commissioner Reid-Smith. (**Dismissal Order: Pgs. 2 ¶ 3, 3 ¶ 5, 4 ¶ 6, and 4 ¶ 7**).
24. ALJ Spatafore stated the PEG Board’s standard of review for dismissal of a matter. In particular, “[p]ursuant to the Grievance Board’s Rules of Practice and Procedure, 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.’” (**Dismissal Order: Pg. 5**) (Quoting 156 C.S.R. 1 § 6.11 (2007)).
25. ALJ Spatafore rejected Appellant Armstrong’s argument that she was precluded from ruling on the Appellee’s renewed dismissal motion, based upon the doctrine of res

² Pursuant to 156 C.S.R. 1 (6.6.1), a hearing on a motion is not mandated and is a discretionary decision afforded to the administrative law judge.

judicata. ALJ Spatafore found that ALJ Reynolds' February 15, 2008 Order "contain[ed] no discussion of the specific issues alleged in the Amended Grievance; therefore, there was no 'adjudication' on the merits of Grievant's claim." (**Dismissal Order: Pg. 6**) (Citing Vance v. Jefferson County Board of Education, Docket No. 03-19-018 (May 27, 2003) and Liller v. W.Va. Human Rights Commission, 376 S.E.2d 639, 646 (W.Va. 1988)). ALJ Spatafore further found that ALJ Reynolds' Order "merely state[d] that Grievant raised the 'possibility' of a substantial public policy issue, and it contains no ruling that Grievant had, in fact, alleged a substantial public policy violation which would, if proven, prevent the termination of his at-will employment." (**Dismissal Order: Pg. 6**). Therefore, ALJ Spatafore found she was not precluded from ruling upon the issues raised by Appellee.

26. With regard to Appellant Armstrong's employment as an at-will employee, he was subject to disciplinary action for any reason which does not contravene some substantial public policy. As an at-will employee, Appellant Armstrong bore the burden of proof. (**Dismissal Order: Pg. 6**) (Quoting Logan v. W.Va. Regional Jail & Correctional Auth., 94-RJA-225 (Nov. 29, 1994)).
27. "[A] determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact[.] (**Dismissal Order: Pg. 6**) (Quoting Cordle v. General Hugh Mercer Corp., Syl. Pt. 1, 174 W.Va. 321, 325 S.E.2d 111 (1984)).
28. "The basic rule that an employer has an absolute right to discharge an at-will employee has been subjected to several exceptions by this Court, one of which is that where an employer's motivation for the discharge is to contravene the substantial public policy, then the employer may be liable to the employee for damages. A review

of these exceptions indicates that generally they were created to protect the public from threats to its health, financial well-being, or constitutional rights, or to guarantee the effective operation of the legal system. The rationale underlying each exception is that protecting the employee from discharge is necessary to uphold a substantial public interest.” (Dismissal Order: Pgs. 6-7) (Quoting Wounaris v. W.Va. State College, 214 W.Va. 241, 588 S.E.2d 406 (2003)).

29. With regard to the issue surrounding the transfer of the West Virginia History Journal, ALJ Spatafore examined West Virginia Code § 29-1-6. ALJ Spatafore noted that Appellant Armstrong claimed he believed his employer to be in violation of this statutory provision due to his alleged obligation to “publish a yearly history journal.” (Dismissal Order: Pg. 8). However, ALJ Spatafore found that *W. Va. Code § 29-1-6* did not name a specific publication that would meet the statutory requirements nor did the statute require the publication to be issued annually. (Dismissal Order: Pg. 8). “Grievant’s disagreement with a management decision made by his employer does not constitute a substantial public policy interest.” (Dismissal Order: Pg. 8). Grievant was not personally asked to violate any law. (Dismissal Order: Pg. 9). Secretary Goodwin sought legal advice on the subject, and it was not Appellant Armstrong’s “right” to protest his supervisor’s decision. (Dismissal Order: Pg. 9). In the alternative, ALJ Spatafore also found that “Grievant’s challenge to his employer’s decision regarding a contract for publication of a historical journal, whether or not it violated the statute addressing his agency’s duties, does not implicate any law designed to protect important public interests.” (Dismissal Order: Pg. 9). “If Grievant was terminated as a result of his refusal to cooperate with Secretary Goodwin’s

decision regarding the publication of the *West Virginia History Journal*, even if Grievant's allegations are true, this does not implicate a substantial public right which is protected by law." (Dismissal Order: Pg. 10).

30. With regard to Appellant Armstrong's allegations in his **Amended Grievance** wherein he stated his termination was related to his "attempt to voice legitimate and professional concerns regarding the proposal [to merge the Archives & History and the State Library reading rooms] so as to insure the statutory law of West Virginia was fulfilled. . ." and for voicing his opinion concerning the proposal for placement of an eating establishment, ALJ Spatafore found that "Grievant has identified no applicable law on the issue." (Dismissal Order: Pg. 10) (Quoting Amended Grievance). "The provisions of W.VA. CODE § 29-1-6 state that one of the purposes and duties of A&H [Archives & History] is 'to operate and maintain a state library for preservation of public records, state papers. . .'" (Dismissal Order: Pg. 10) (Quoting West Virginia Code § 29-1-6). "However, the Commissioner of DCH [Division of Culture & History] is charged with the responsibility to 'assign and allocate space of the facilities assigned to the division and all space in the building presently known as the West Virginia science and culture center, and any other buildings or sites under the control of the commissioner.'" (Dismissal Order: Pg. 10) (Quoting *W. Va. Code § 29-1-2*). ALJ Spatafore found that "Grievant's voicing of what amounts to a concern regarding the advisability of a decision which he was not responsible for making does not amount to a substantial right or interest of the public." (Dismissal Order: Pg. 10). "The expression of 'legitimate and professional concerns,' as Grievant describes them, are not public rights entitled to legal protection." (Dismissal Order: Pgs. 10-

11). "Grievant's disagreement with the location of A&H documents, or the placement of an eating establishment in their vicinity, does not raise an issue involving a substantial public policy." (Dismissal Order: Pg. 11).

31. With regard to the placement of the three (3) Wayne County historical highway markers, ALJ Spatafore found that "[o]ne of the statutory duties of the Commissioner of DCH is to 'advance, foster, promote, identify, register, acquire, mark, and care for historical, prehistorical, archeological and significant architectural sites, structures and objects in the state.'" (Dismissal Order: Pg. 12) (Quoting *W. Va. Code* § 29-1-1). "Apparently, at some point in time the approval of the historical markers had been delegated to the A&H Commission, with the initial applications being reviewed by Grievant."³ (Dismissal Order: Pg. 11). "Grievant contends that he was terminated for 'attempting to adhere to established rules and regulations of the placement of historical markers[.]'" (Dismissal Order: Pg. 12). ALJ Spatafore gleaned from the statement of the parties that the "A&H Commission had promulgated some sort of rules regarding standards for placement of historical markers, but they were not legislative rules adopted by the West Virginia Legislature." (Dismissal Order: Pg. 11: FN. 3). ALJ Spatafore found that "[r]egardless of whether the Wayne County markers complied with any existing rules governing the placement of such markers, by statute this decision ultimately resided with the Commissioner." (Dismissal Order: Pg. 12). Grievant was not personally asked to violate any law. (Dismissal Order: Pg. 12). "Grievant's personal disagreement with the decisions of his superiors regarding

³ This factual information was discovered in the deposition transcript of Fredrick Armstrong, which occurred after ALJ Reynold's Order.

issues that do not implicate substantial public interests is not a legally protected right which would usurp the principles allowing termination of at-will employees.”
(Dismissal Order: Pg. 12).

32. ALJ Spatafore found that Appellant Armstrong failed to assert any substantial public policy that was violated by his termination, and she dismissed his **Amended Grievance**. (Dismissal Order: Pg. 12). She entered her **Dismissal Order** on June 17, 2008.

Appellant Armstrong's Appeal to the Circuit Court

1. Appellant Armstrong appealed the **Dismissal Order** entered by ALJ Spatafore to this Court.⁴ (Brief of Appellant, Fredrick Armstrong).
2. Appellant Armstrong argues that ALJ Spatafore's Order must be overturned and the matter remanded to the PEG Board for rehearing, based upon the following:
 - A. The dismissal by Judge Spatafore was “based upon the **identical record** reviewed by Judge Reynolds” and ALJ Spatafore “proceeded to set aside or overrule Judge Reynolds' Order and legal conclusions in the February 15, 2008 Order and granted a re-filed Motion To Dismiss filed by the Appellee[;]”
 - B. “Appellant was not afforded a hearing on the Motion To Dismiss[;]” and
 - C. Appellant “was never provided an evidentiary hearing on the merits of the Amended Grievance as required by state law.”

(Brief of Appellant, Fredrick Armstrong: Pg 2) (Emphasis added).

⁴ Brief of Appellant, Fredrick Armstrong referred to in this Order is the brief filed on April 13, 2009.

3. Appellant Armstrong noted that ALJ Spatafore found the doctrine of res judicata did not apply to her decision, because, she found ALJ Reynolds' Order was not "an 'adjudication' on the merits as defined in law." (**Brief of Appellant, Fredrick Armstrong: Pg 3**).
4. In his appellate brief, Appellant Armstrong states: "In order to identify the sources of public policy in West Virginia, a Court looks to established precepts in . . . the constitution, legislative enactments, legislatively approved regulations and judicial opinions." (**Brief of Appellant, Fredrick Armstrong: Pg 1**) (Quoting Eggleton v. West Virginia Division of Culture & History, Docket No. 03-C&H-273 (November 24, 2003)). However, Appellant Armstrong failed to identify any established precepts in the constitution, legislative enactments, legislatively approved regulations, or judicial opinions to support his allegations that a substantial public policy of the State of West Virginia was violated by his termination.
5. Appellee filed "**Appellee's Response to Brief of Appellant, Fredrick Armstrong.**" Appellee requested this Court deny Appellant Armstrong's request to overturn the **Dismissal Order** of ALJ Spatafore; because her **Dismissal Order** was not "clearly wrong."⁵
6. In Appellee's brief, Appellee stated that "[a] final order of the hearing examiner for the West Virginia Education and State Employee's Grievance Court should not be reversed unless clearly wrong."⁶ (**Appellee's Response to Brief of Appellant,**

⁵ **Appellee's Response to Brief of Appellant, Fredrick Armstrong** was filed on May 14, 2009.

⁶ On July 1, 2007, *W. Va. Code* § 6C-2-1 *et seq.* became effective. On said date, the West Virginia Public Employees Grievance Board replaced the former West Virginia Education and State Employees Grievance Board.

Fredrick Armstrong: Pg. 6) (Quoting Frymier v. Higher Education Policy Commission, Syl. Pt. 1, 221 W.Va. 306, 655 S.E.2d 52 (2007)).

7. Appellee argued that ALJ Spatafore's decision must be upheld, because:
 - A. Judge Spatafore was not barred by the doctrine of res judicata in issuing the **Dismissal Order**, because ALJ Reynolds' Order was not a final adjudication on the merits;
 - B. Judge Spatafore's **Dismissal Order** was not "clearly wrong" insofar as she dismissed the Appellant's **Amended Grievance** regarding the transfer of the West Virginia History Journal, because: (1) Appellant Armstrong's allegations ran contrary to the plain language of *W.Va.Code* § 29-1-6; (2) Appellant Armstrong failed to plead any substantial public policy that was violated by the transfer of the West Virginia History Journal and his subsequent termination; and (3) Appellant Armstrong failed to file a grievance regarding his April 10, 2006 written reprimand within the applicable statute of limitations period;
 - C. Judge Spatafore's **Dismissal Order** was not "clearly wrong" insofar as she dismissed the Appellant's **Amended Grievance** regarding his allegations concerning the mere proposals to merge the Archives & History reading room with the State Library reading room and the proposal to place an eating establishment in the Cultural Center, because there is no law in the State of West Virginia that precluded either of the proposals in an archive environment; and

D. Judge Spatafore's **Dismissal Order** was not "clearly wrong" insofar as she dismissed the **Amended Grievance** regarding Appellant Armstrong's allegations concerning the placement of the Wayne County highway historical markers, because the statutory authority for administration of the highway marker program resided with Commissioner Reid-Smith; therefore, Appellant Armstrong's personal opinions as to whether he believed the placement of the markers was inappropriate did not create substantial public policy of the State of West Virginia.

(Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pgs. 7-20)

8. With regard to Appellant Armstrong's argument that the doctrine of res judicata barred ALJ Spatafore from issuing her **Dismissal Order** predicated upon the earlier Order entered by ALJ Reynolds, Appellee argued that ALJ Spatafore was not precluded from rendering her decision, because ALJ Reynolds' Order, which denied Appellee's original motion to dismiss, was not a final adjudication on the merits. In support of Appellee's position, Appellee relied on West Virginia law which states that in order for a claim to be barred by the doctrine of res judicata, "there must have been a final adjudication on the merits." **(Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 7)** (Quoting Antolini v. West Virginia Division of Natural Resources, 220 W.Va. 255, 258, 647 S.E.2d 535, 538 (2007)). Moreover, the West Virginia Supreme Court of Appeals has held that, "when a motion to dismiss is denied and the case is not dismissed, there has been no final adjudication on the merits." **(Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pgs. 7-8)** (Citing Taylor County Board of Education v. Cox, 172 W.Va. 559, 559, 309 S.E.2d 57, 57

(1983)). Appellee argued that ALJ Spatafore's decision must not be overturned, because her Dismissal Order was not "clearly wrong."

9. In his **Amended Grievance**, Appellant Armstrong claimed that *W. Va. Code* § 29-1-6 required him to publish a "yearly history of West Virginia." (**Amended Grievance: Pg. 1**). Appellee argued the plain language of *W. Va. Code* § 29-1-6 did not require Appellant Armstrong to publish a "yearly" journal entitled "West Virginia History." (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 11**). In fact, at his deposition, Appellant Armstrong acknowledged that he had previously prepared other publications regarding West Virginia's history apart from the West Virginia History Journal. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 12**). Moreover, Secretary Goodwin testified, at her deposition, she sought the advice of an attorney regarding the transfer of the West Virginia History Journal and was informed the transfer was in compliance with the law. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 13**). Therefore, Judge Spatafore's **Dismissal Order** was not "clearly wrong." Appellee further argued that any claims regarding the transfer of the West Virginia History Journal were barred by the applicable statute of limitations. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 14-15**).
10. With regard to the proposals to merge the Archives & History reading room with the State Library reading room and to place an eating establishment in the Cultural Center, Appellee stated there was no law in West Virginia that precluded either the merger of the reading rooms or the placement of an eating establishment in the Cultural Center. At his deposition, Appellant Armstrong testified that "current law," in fact, permitted

the merging of the reading rooms. Due to the failure of Appellant Armstrong to articulate any substantial public policy which was violated, Appellee argued ALJ Spatafore's **Dismissal Order** was not "clearly wrong" and must be upheld.

11. With regard to the placement of the historical highway markers in Wayne County, Appellee argued the plain language of *W.Va. Code* § 29-1-1 provided Commissioner Reid-Smith with the authority to regulate the highway marker programs. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 19**). *W.Va. Code* § 29-1-5, which gave powers to the West Virginia Archives & History Commission, did not give the Commission the power to regulate the highway historical marker program. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 19**). Additionally, as Appellant Armstrong acknowledged in his **Amended Grievance**, an Attorney General for the State of West Virginia issued an opinion to Commissioner Reid-Smith informing him that he had the statutory authority to regulate the highway historical marker program. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 19**). At his deposition, Appellant Armstrong further acknowledged the only authority the West Virginia Archives & History Commission had with regard to the highway historical markers program was the authority delegated to it in the Division of Culture & History and was not a statutory power granted by the Legislature. (**Appellee's Response to Brief of Appellant, Fredrick Armstrong: Pg. 20**). Therefore, Appellee argued ALJ Spatafore's decision was not "clearly wrong" and must be upheld.

STATEMENT OF THE LAW

1. Pursuant to *W.Va. Code* § 6C-2-5(a), “[t]he decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County.”
2. Pursuant to *W.Va. Code* § 6C-2-5(b), “[a] party may appeal the decision of the administrative law judge on the grounds that the decision: (1) Is contrary to law or a lawfully adopted rule or written policy of the employer; (2) Exceeds the administrative law judge’s statutory authority; (3) Is the result of fraud or deceit; (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”
3. A final order of the hearing examiner for the West Virginia Education and State Employee’s Grievance Court should not be reversed unless clearly wrong. Frymier v. Higher Education Policy Commission, Syl. Pt. 1, 221 W.Va. 306, 655 S.E.2d 52 (2007) (Quotation omitted).
4. “Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations.” Kanawha County Court of Education v. Sloan, 219 W.Va. 213, 217, 632 S.E.2d 899, 904 (2006) (Quotation omitted).
5. “Plenary review is conducted as to conclusions of law and application of law to the facts, which are reviewed de novo.” Kanawha County Court of Education v. Sloan, 219 W.Va. 213, 217, 632 S.E.2d 899, 904 (2006) (Quotation omitted).
6. The West Virginia Public Employees Grievance Board has the statutory authority to promulgate procedural rules. *W.Va. Code* § 6C-3-4(b).

7. Pursuant to 156 C.S.R. 1 (6.11), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” There is no rule promulgated by the West Virginia Public Employees Grievance Board that tracts the language of Rule 56(c) of the *West Virginia Rules of Civil Procedure*.
8. “The procedural rules for the Board are set forth in 156 C.S.R. 1 (1996). The Board’s rules allow for the dismissal of a grievance when ‘no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.’” Wilhelm v. West Virginia Lottery, 198 W.Va. 92, 94, 479 S.E.2d 602, 604, fn. 3 (1996).
9. The basis of the doctrine of res judicata is to “preclude the expense and vexation attending relitigation of causes of action which have been fully and fairly decided.” Antolini v. West Virginia Division of Natural Resources, 220 W.Va. 255, 258, 647 S.E.2d 535, 538 (2007) (Quotation omitted).
10. Prosecution of a lawsuit will be barred based upon the doctrine of res judicata if the following three (3) elements are satisfied: (1) There was a final adjudication on the merits in the prior action; (2) The two (2) actions involve the same parties or persons in privity with the parties; and (3) The cause of action in the prior proceeding was either identical or must be such that it could have been resolved in the prior proceeding had it been presented. State of West Virginia ex rel. Richey v. Hill, Syl. Pt. 4, 216 W.Va. 155, 157, 603 S.E.2d 177, 179 (2004). (Citations omitted).
11. Before the prosecution of a lawsuit may be barred on the basis of res judicata, “there must have been a final adjudication on the merits in the prior action by a court having

jurisdiction of the proceedings.” Antolini v. West Virginia Division of Natural Resources, 220 W.Va. 255, 258, 647 S.E.2d 535, 538 (2007) (Quotation omitted).

12. The West Virginia Supreme Court of Appeals has held that, when a motion to dismiss is denied and the case is not dismissed, there has been no final adjudication on the merits. Taylor County Board of Education v. Cox, 172 W.Va. 559, 559, 309 S.E.2d 57, 57 (1983).
13. Prior to the effective date of *W.Va.Code* § 6C-2-1 et seq. in the year 2007, the definition of grievance and the statute of limitations applicable to the filing of a grievance was governed by *W. Va.Code* § 29-6A-2(I) and *W.Va. Code* § 29-6A-4(a).
14. Pursuant to former *W.Va.Code* § 29-6A-2(I), a “[g]rievance was defined to mean “any claim by one or more affected state employees alleging a violation, a **misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work. . .**” (Emphasis added).
15. Pursuant to *W.Va.Code* § 29-6A-4(a), an employee was required to file a Level One grievance within ten (10) days following the occurrence of the event upon which the grievance was based or within ten (10) days of the date on which the event became known to the grievant, or within ten (10) days of the most recent occurrence of a continuing practice giving rise to the grievance.
16. “In 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.” Creasy v. Regional Jail and Correctional Facility Authority / South Central Regional Jail, Docket No. 07-RJA-035 (April 30, 2007) (Citations omitted). “However, in cases involving the dismissal of classified-exempt, at-will employees, state agencies do not

have to meet this legal standard.” Creasy v. Regional Jail and Correctional Facility Authority / South Central Regional Jail, Docket No. 07-RJA-035 (April 30, 2007) (Quotation omitted); Baughman v. Regional Jail Authority, Docket No. 05-RJA-420 (February 6, 2006) (Denise M. Spatafore, Administrative Law Judge) (Quotation omitted); Washington v. Adjutant Mountaineer Academy, 05-ADJ-074 (April 12, 2005) (Quotation omitted).

17. “Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status.” Eggleton v. West Virginia Division of Culture and History, Docket No. 03-C&H-273 (November 24, 2003).
18. Therefore, an at-will employee “can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy.” Creasy v. Regional Jail and Correctional Facility Authority / South Central Regional Jail, Docket No. 07-RJA-035 (April 30, 2007); Collins v. Elkay Min. Co., 179 W.Va. 549, 551, 371 S.E.2d 46, 48 (1988); Harless v. First National Bank in Fairmont, 162 W.Va. 116, 124, 246 S.E.2d 270, 275 (1978).
19. “The basic rule that an employer has an absolute right to discharge an at-will employee has been subjected to several exceptions by this Court, one of which is that where an employer’s motivation for the discharge is to contravene a substantial public policy, then the employer may be liable to the employee for damages. A review of these exceptions indicates that generally they were created to protect the public from threats to its health, financial well-being, or constitutional rights, or to guarantee the effective operation of the legal system. The rationale underlying each exception is that protecting the employee from discharge is necessary to uphold a substantial public

interest.” Wounaris w. West Virginia State College, 214 W.Va. 241, 247, 588 S.E.2d 406, 412 (2003) (Quoting Feliciano v. 7-Eleven, Inc., 210 W.Va. 740, 751, 559 S.E.2d 713, 724 (2001)).

20. “The burden of proof is on an at-will employee to establish a violation of substantial public policy[,]” and, “[i]f the burden is not met, the reasons for the termination are not at issue, and the termination stands.” Creasy v. Regional Jail and Correctional Facility Authority / South Central Regional Jail, Docket No. 07-RJA-035 (April 30, 2007) (Citing Wilhelm v. West Virginia Lottery, 198 W.Va. 92, 96, 479 S.E.2d 602, 606 (1996)).
21. “To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, [the Court will] look to established precepts in . . . the constitution, legislative enactments, legislatively approved regulations, and judicial opinions.” Eggleton v. West Virginia Division of Culture & History, Docket No. 03-C&H-273 (Quoting Birsthisel v. Tri-Cities Health Service Corp., 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992)).
22. The phrase “substantial public policy” “. . . was designed to exclude claims that are based on insubstantial considerations.” Birsthisel v. Tri-Cities Health Service Corp., 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992)).
23. “The term ‘substantial public policy’ implies that the policy principle will be clearly recognized simply because it is substantial.” Birsthisel v. Tri-Cities Health Service Corp., 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992)).
24. Moreover, “[i]nherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person[;]” therefore, “[a]n

employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.” Birsthisel v. Tri-Cities Health Service Corp., 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992)).

25. Pursuant to *W.Va. Code* § 29-1-1(b):

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. The purpose and duty of the division is. . . to advance, foster, promote, identify, register, acquire, mark and care for historical, prehistorical, archaeological and significant architectural sites, structures and objects in the state. . .to acquire, preserve and classify books, documents, records and memorabilia of historical interest or importance; and, in general, to do all things necessary or convenient to preserve and advance the culture of the state.

26. Pursuant to *W.Va. Code* § 29-1-2:

The commissioner shall assign and allocate space in all facilities assigned to the division and all space in the building presently known as the West Virginia science and culture center, and any other buildings or sites under the control of the commissioner, and may, in accordance with the provisions of chapter twenty-nine-a of this code, prescribe rules, regulations and fees for the use and occupancy of said facilities, including tours.

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.

27. *W.Va. Code § 29-1-5* provides the West Virginia Archives & History Commission with the following powers:

(a) To advise the commissioner and the directors of the archives and history section, the historic preservation section and the museums section concerning the accomplishment of the purposes of those sections and to establish a state plan with respect thereto;

(b) To approve and distribute grants-in-aid and awards from federal and state funds relating to the purposes of the archives and history section, the historic preservation section and the museums section;

(c) To request, accept or expend federal funds to accomplish the purposes of the archives and history section, the historic preservation section and the museums section when federal law or regulations would prohibit the same by the commissioner or section director, but would permit the same to be done by the archives and history commission;

(d) To otherwise encourage and promote the purposes of the archives and history section, the historic preservation section and the museums section;

(e) To approve rules and regulations concerning the professional policies and functions of the archives and history section, the historic preservation section and the museums section as promulgated by the directors of those sections;

(f) To advise and consent to the appointment of the section directors by the commissioner; and

(g) To review and approve nominations to the state and national registers of historic places.

28. *W.Va. Code* § 29-1-6(a) provides:

(a) The purposes and duties of the archives and history section are . . . to edit and publish a historical journal devoted to the history, biography, bibliography and genealogy of West Virginia.

COURT'S ORDERS

In accordance with the foregoing, the Court does hereby **ORDER** as follows:

Denise M. Spatafore's Authority and the June 17, 2008 Order

1. On February 15, 2008, ALJ Reynolds issued an Order denying Appellee's motion to dismiss the November 16, 2007 grievance and granting Appellant' Armstrong's motion to file **Amended Grievance**.
2. ALJ Reynolds' Order was not a final adjudication on the merits.
3. After ALJ Reynolds issued her Order, the depositions of Appellant Armstrong, Secretary Goodwin, and Commissioner Reid-Smith were conducted.
4. Due to the testimony elicited in the depositions conducted after ALJ Reynolds' Order was entered, Appellee filed a dismissal motion, pursuant to the PEG Board's procedural rule 156 C.S.R. 1 (6.11), requesting the **Amended Grievance** be dismissed for Appellant Armstrong's failure to allege any substantial public policy that was violated by his termination.
5. Before the prosecution of a lawsuit may be barred on the basis of res judicata, "there must have been a final adjudication on the merits in the prior action by a court having

jurisdiction of the proceedings.” Antolini v. West Virginia Division of Natural Resources, 220 W.Va. 255, 258, 647 S.E.2d 535, 538 (2007) (Quotation omitted).

6. The West Virginia Supreme Court of Appeals has held that, when a motion to dismiss is denied and the case is not dismissed, there has been no final adjudication on the merits. Taylor County Board of Education v. Cox, 172 W.Va. 559, 559, 309 S.E.2d 57, 57 (1983).
7. The Court does hereby **FIND** that ALJ Spatafore was not barred by the doctrine of res judicata in entering the **Dismissal Order** dated June 17, 2008, because there was no final adjudication on the merits by ALJ Reynolds.
8. Furthermore, pursuant to 156 C.S.R. 1 (6.6.1), a hearing on a motion by an ALJ at the PEG Board is not mandated and is a discretionary decision afforded to the ALJ. ALJ Reynolds, in her discretion, did not hold a hearing on the motion filed by Appellee prior to entering her Order on February 15, 2008, which decision was within her discretion. Similarly, ALJ Spatafore did not hold a hearing on the motion filed by Appellee prior to entering her Order on June 17, 2008, which decision was within her discretion. ALJ Spatafore’s decision not to hold a hearing in advance of entering her Order was permissible under the procedural rules governing the PEG Board. Appellant Armstrong’s argument that ALJ Spatafore acted improperly in failing to hold a hearing in advance of entering her Order is without merit.
9. The Court does hereby **FIND** that ALJ Spatafore did not act improperly in issuing her **Dismissal Order** nor did she rule on the same issues addressed by ALJ Reynolds. ALJ Spatafore’s **Dismissal Order** was based upon the **Amended Grievance** and deposition testimony elicited in the matter after ALJ Reynold’s Order was entered.

ALJ Spatafore did not engage in any procedural violations in “clear violation” of law; therefore, the Court does hereby **FIND** that ALJ Spatafore’s decision was not “clearly wrong” in addressing the matters contained in Appellee’s dismissal motion nor was her ability to render a decision barred by the doctrine of res judicata.

Allegations Regarding the Transfer of the West Virginia History Journal

1. In his **Amended Grievance**, Appellant Armstrong alleged that he was terminated, in part, for issues surrounding the West Virginia History Journal in the years 2004 and 2006. In the year 2006, Appellant Armstrong failed to transfer the West Virginia History Journal materials to the West Virginia University Press, after he was directed to do so by Secretary Goodwin. Appellant Armstrong was issued a written reprimand on April 10, 2006 for insubordination, due to his failure to forward the materials. These events occurred prior to Commissioner Reid-Smith being appointed to his position.
2. At his deposition, Appellant Armstrong acknowledged he knew he had a right to file a grievance regarding his written reprimand and chose not to do so at the time of the event.
3. Pursuant to *W.Va. Code § 29-6A-4(a)*, an employee was required to file a Level One grievance within ten (10) days following the occurrence of the event upon which the grievance was based, or within ten (10) days of the date on which the event became known to the grievant, or within ten (10) days of the most recent occurrence of a continuing practice giving rise to the grievance.
4. The Court does hereby **FIND** that Appellant Armstrong failed to file any grievance on this issue within the applicable statute of limitations time period. Therefore, the

Court does hereby **ORDER** that Appellant Armstrong's **Amended Grievance** on this issue be dismissed, with prejudice.

5. In the alternative, the Court does hereby **FIND** that Judge Spatafore's decision to dismiss the **Amended Grievance** regarding the transfer of the West Virginia History Journal was not "clearly wrong."
6. A plain reading of *W.Va. Code* § 29-1-6 shows that, contrary to the allegations contained in his **Amended Grievance**, Appellant Armstrong was not statutorily required to publish an annual historical journal entitled the West Virginia History Journal.
7. At his deposition, Appellant Armstrong incorrectly stated the statute required him to publish an "annual" historical journal. The plain language of the statute clearly does not require an "annual" journal be published.
8. Moreover, the plain language of the statute does not require him to publish a historical journal entitled the West Virginia History Journal, and, in fact, Appellant Armstrong testified that he had published other historical items apart from the West Virginia History Journal.
9. "To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, [the Court will] look to established precepts in . . . the constitution, legislative enactments, legislatively approved regulations, and judicial opinions." Eggleton v. West Virginia Division of Culture & History, Docket No. 03-C&H-273 (Quoting Birsthisel v. Tri-Cities Health Service Corp., 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992)).

10. Appellant Armstrong failed to cite to any established precepts in the constitution, legislative enactments, legislatively approved regulations, or judicial opinions that would demonstrate that the transfer of the West Virginia History Journal to the West Virginia University Press was contrary to any law or that his termination was the result of any violation of the any substantial public policy in West Virginia. The Court does hereby **FIND** Appellant Armstrong failed to plead any substantial public policy that was violated in regard to this issue. Appellant Armstrong failed to plead any substantial public policy violation that occurred as a result of the transfer of the West Virginia History Journal to the West Virginia University Press and his subsequent termination.
11. The Court does hereby **FIND** that ALJ Spatafore's **Dismissal Order** was not "clearly wrong" on this issue.

Wayne County Historical Markers

1. In his **Amended Grievance**, Appellant Armstrong alleged that he was terminated, in part, for stating his personal objections to Commissioner Reid-Smith's decision to place three (3) highway historical markers in Wayne County. Appellant Armstrong claimed this resulted in a violation of the substantial public policy of West Virginia.
2. The Court does hereby find, based upon the plain language of *W.Va. Code* § 29-1-1(b), Commissioner Reid-Smith had the power to exercise the control and supervision of the placement of the highway historical marker program.
3. Pursuant to *W.Va. Code* § 29-1-5, the West Virginia Archives & History Commission did not have the statutory power to regulate the highway historical marker program.

4. At his deposition, Appellant Armstrong acknowledged that the power regarding the highway historical marker program was delegated to the West Virginia Archives & History Commission and was not a power statutorily granted by the Legislature.
5. Appellant Armstrong further acknowledged that Commissioner Reid-Smith was provided with an opinion from an independent Attorney General who informed Commissioner Reid-Smith that he had the power to regulate the program.
6. Moreover, Appellant Armstrong acknowledged that the rules implemented by the West Virginia Archives & History Commission were not legislative rules but were merely rules established by the members of the Commission. They did not have the force of law.
7. Commissioner Reid-Smith testified that he decided to terminate Appellant Armstrong, because he considered him disrespectful and not a team player. He further testified that Appellant Armstrong's termination had nothing to do with the matter involving the Wayne County highway historical markers.
8. Again, "[t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, [the Court will] look to established precepts in . . . the constitution, legislative enactments, legislatively approved regulations, and judicial opinions." Eggleton v. West Virginia Division of Culture & History, Docket No. 03-C&H-273 (Quoting Birthisel v. Tri-Cities Health Service Corp., 188 W. Va. 371, 377, 424 S.E.2d 606, 612 (1992)).
9. Appellant Armstrong failed to cite to any established precepts in the constitution, legislative enactments, legislatively approved regulations, or judicial opinions that would demonstrate that Commissioner Reid-Smith acted inappropriately in exercising

his statutory authority or that his termination was the result of any violation of the any substantial public policy in West Virginia. The Court does hereby **FIND** Appellant Armstrong failed to plead any substantial public policy that was violated in regard to this issue.

10. The Court does hereby **FIND** that ALJ Spatafore's **Dismissal Order** was not "clearly wrong" on this issue.

Proposals Regarding the Merger of the Archives & History and State Library Reading Rooms and Placement of an Eating Establishment in the Division of Culture & History Building

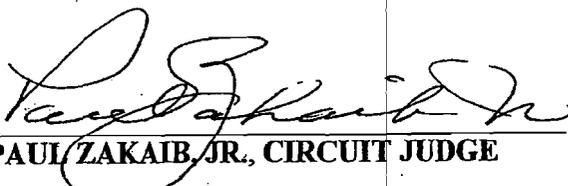
1. In his **Amended Grievance**, Appellant Armstrong alleged that he was terminated, in part, for stating his personal objections to discussions and proposals to potentially merge the Archives & History reading room with the State Library reading room and to potentially place an eating establishment in the Division of Culture & History building. Appellant Armstrong claimed this was a violation of the substantial public policy of West Virginia.
2. Appellant Armstrong failed to cite to any established precepts in the constitution, legislative enactments, legislatively approved regulations, or judicial opinions that precluded either the merging of the Archives & History reading room and the State Library reading room or the proposal regarding the placement of an eating establishment in the Division of Culture & History building. See Eggleton v. West Virginia Division of Culture & History, Docket No. 03-C&H-273 (Quoting Birsthisel v. Tri-Cities Health Service Corp., 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992)).

3. The plain language of *W.Va. Code* §§ 29-1-1(b) and 29-1-2 provides Commissioner Reid-Smith with the power to control the projects of the division and to allocate space, as he sees fit, in the Division of Culture & History building. The statutory power did not reside with Appellant Armstrong.
4. Appellant Armstrong's personal opinion and objection to the proposals and discussions regarding these matters does not create the substantial public policy of the State of West Virginia.
5. Moreover, at his deposition, Appellant Armstrong acknowledged that current law would permit the merger of the reading rooms.
6. Commissioner Reid-Smith also testified that he decided to terminate Appellant Armstrong, because he considered him disrespectful and not a team player. He further testified that Appellant Armstrong's termination had nothing to do with his objections to either the proposal regarding the merger of the reading rooms or the proposal regarding the placement of an eating establishment in the Division of Culture & History.
7. The Court does hereby **FIND** Appellant Armstrong failed to plead any substantial public policy that was violated in regard to this issue.
8. The Court does hereby **FIND** that ALJ Spatafore's **Dismissal Order** was not "clearly wrong" on this issue.

Based upon the foregoing, the Court does hereby **ORDER** that ALJ Spatafore's **Dismissal Order** is **AFFIRMED**, and this case is **DISMISSED AND STRICKEN** from the docket of the Court. The exceptions and objections of Appellant Armstrong are duly noted herein.

The Clerk is directed to send certified copies of this Final Order to all counsel of record and to the West Virginia Public Employees Grievance Board.

ENTERED December 22, 2010


PAUL ZAKAIB, JR., CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, GATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 23rd
DAY OF December 2010
Gathy S. Gatson TK, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 12-23-10
Certified copies sent to:
counsel of record
parties
 other: WVPEGB, JL, CB, Lynne
(please indicate)
By: certified/telex mail
 fax
 hand delivery
 interdepartmental
Other directives accomplished:
TK
Deputy Circuit Clerk

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDRICK ARMSTRONG,

Petitioner,

Vs.

Appeal No. 11-033
(Circuit Court of Kanawha County)
(Civil Action No. 08-AA-82)

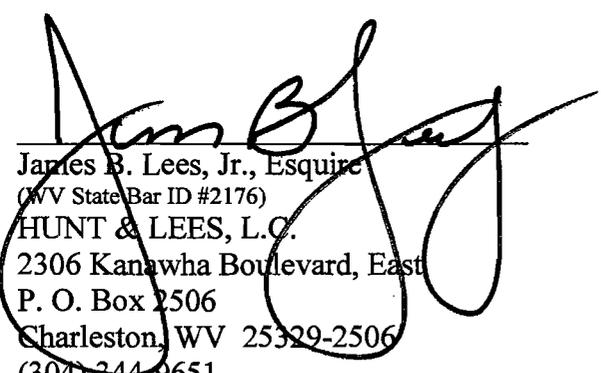
WEST VIRGINIA DIVISION OF
CULTURE AND HISTORY,

Respondent.

CERTIFICATE OF SERVICE

I, James B. Lees, Jr., hereby certify this 21st day of April, 2011, that the foregoing *Appendix* was served upon the following by placing a true and exact copy thereof in the United States Mail, postage prepaid:

Billie Jo Streyle, Esquire
BAILEY & WYANT
P. O. Box 3710
Charleston, WV 25337-3710



James B. Lees, Jr., Esquire
(WV State Bar ID #2176)
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