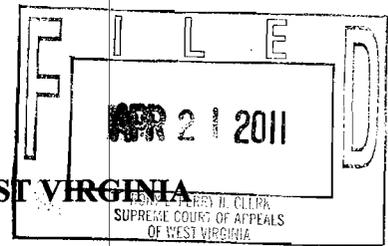


11-0698



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDRICK ARMSTRONG,

Petitioner,

Vs.

**WEST VIRGINIA DIVISION OF
CULTURE AND HISTORY,**

Respondent.

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

THE PETITIONER'S BRIEF

James B. Lees, Jr., Esquire
(WV State Bar ID #2176)
HUNT & LEES, L.C.
2306 Kanawha Boulevard, East
P. O. Box 2506
Charleston, WV 25329-2506
Telephone: (304) 344-9651
E-Mail: leesgov@citynet.net

Table of Contents

	<u>Page</u>
I. Assignments of Error.....	1
II. Statement of the Case.....	1
III. Summary of Argument.....	5
IV. Statement Regarding Oral Argument and Decision.....	6
V. Argument.....	6
VI. Conclusion.....	12

Table of Authorities

<u>Cases, Authorities</u>	<u>Page</u>
<u>Frymier v. Higher Education Policy Commission</u> Syl. Pt. 1, 221 W.Va. 306, 655 S.E.2d 52 (2007).....	6
<u>Creasy v. Regional Jail and Correctional Facility Authority/South Central Regional Jail</u> Docket No. 07-RJA-035 (April 30, 2007).....	6
<u>Wilhelm v. West Virginia Lottery</u> 198 W.Va. 92, 96, 479 S.E.2d 602 (606) (1996).....	6
<u>Eggleton v. West Virginia Division of Culture & History</u> Docket No. 03-C&H-273 (November 24, 2003).....	8
<u>Reynolds v. Kanawha-Charleston Health Dep't</u> Docket No. 90-H-128 (Aug. 8, 1990).....	10
<u>Harless v. First Nat'l Bank</u> 162 W.Va. 116 (1978).....	11
<u>Dufficy v. Div. of Military Affairs</u> Docket No. 93-DPS-370 (June 16, 1994); supra.	11
<u>Flowers v. City of Morgantown</u> 166 W.Va. 92 (1980).....	11
<u>Cordle v. General Hugh Mercer Corp.</u> Syl. Pt. 1, 174 W.Va. 321 (1984).....	12
W.Va. Code §29-1-6.....	10

I. Assignments of Error

1. THE CIRCUIT COURT ERRED IN AFFIRMING THE DECISION OF THE GRIEVANCE BOARD TO DISMISS THE GRIEVANCE WITHOUT HEARING.
2. THE ADMINISTRATIVE LAW JUDGE WAS WITHOUT LEGAL AUTHORITY TO OVERRULE THE ORIGINAL DECISION OF THE PREDECESSOR ADMINISTRATIVE LAW JUDGE DENYING A MOTION TO DISMISS.

II. Statement of the Case

Petitioner had been employed by the State of West Virginia as Director of Archives and History, or similar such position, for many decades and by all accounts has served this State with honor and integrity. On or about November 16, 2007 the Commissioner for the West Virginia Division of Culture and History, one Randall Reid-Smith, terminated the Petitioner without prior notice and ordered that the Petitioner be escorted from the public premises of the State Culture and History Building by a security officer. No reason for his termination was given to the Petitioner.

Petitioner immediately filed, without the assistance of counsel, a grievance with the West Virginia Public Employees Grievance Board alleging that his termination was improper under State law. On January 7, 2008 the Respondent filed a Motion to Dismiss alleging that Mr. Armstrong had failed to state a claim upon which relief could be granted. On January 22, 2008 Petitioner, with the assistance of counsel, filed an Amended Grievance which specifically alleged that the termination was in violation of State public policy. By Order dated February 15, 2008 then acting Chief Administrative Law Judge Janis I. Reynolds denied the Respondent's Motion to Dismiss, stating that the issues stated in the Amended Grievance were sufficient to raise the possibility of a substantial policy issue or issues.

Administrative Law Judge Reynolds retired shortly thereafter and the case was then assigned to Administrative Law Judge Denise M. Spatafore on March 16, 2008. On April 29, 2008 the Respondent essentially re-filed the prior Motion to Dismiss that had previously been ruled upon by Administrative Law Judge Reynolds. Administrative Law Judge Spatafore, holding that Administrative Law Judge Reynolds February 15, 2008 Order denying the Motion to Dismiss was not an "adjudication" on the merits as defined by law and that therefore the doctrine of res judicata did not apply, proceeded to grant the re-filed Motion to Dismiss without providing Mr. Armstrong with a hearing either on the Motion To Dismiss or an evidentiary hearing on the merits of the Grievance.

Petitioner notes that the Dismissal Order entered by Administrative Law Judge Spatafore in this matter dismisses this case based solely on the alleged insufficiency of the Grievance Petition. The Conclusions of Law section of the Dismissal Order only references the "failure to state a claim" language in justifying the dismissal without hearing.

However, Administrative Law Judge Spatafore confuses the issue substantially by referring to deposition evidence submitted in support of and in opposition to the Motion to Dismiss. Thus it would appear from the four corners of the Order that Administrative Law Judge Spatafore seemed to consider evidence submitted while confining her dismissal strictly on the sufficiency of the Grievance Petition itself. Petitioner thus is unsure whether to reference specific evidence in this response or not.

The opinion of Administrative Law Judge Spatafore is specific in this regard in that it states:

Grievant has failed to allege a claim upon which relief can be granted, because his statement of grievance does not allege violations of substantial public policy.

In his Amended Grievance the Petitioner specifically stated as follows:

1. I was terminated from my position on November 1, 2007 in violation of the public policy of the State of West Virginia.
2. On April 10, 2006 I was issued a written reprimand by Secretary Goodwin for insubordination. The "insubordination" was, in my opinion, my actions to comply with West Virginia statutory law. It is my contention this matter, including the aforesaid written reprimand, played a direct role in my termination on November 1, 2007.
3. I believe my attempt to adhere to the published rules and regulations of the placement of historical markers along West Virginia highways...played a direct role in my termination.
4. It is clear to me that in my attempt to voice legitimate and professional concerns regarding this proposal so as to insure the statutory law of West Virginia was fulfilled, I was viewed by my superiors as insubordinate. I believe my actions played a direct role in my termination.

The Amended Grievance is thus clear and unambiguous.

Frederick Armstrong specifically alleges he was terminated because as Director of Archives and History he tried to make sure the Division of Culture and History followed existing West Virginia state law, state rules, and state procedures, and that his actions in attempting to insure that the law was followed were viewed by his superiors as "insubordinate." He was thus fired for simply doing his job and attempting to follow the law.

Petitioner is not sure therefore exactly what Administrative Law Judge Spatafore means when she states that his statement of grievance did not allege violations of substantial public policy given the specifics of his statement noted above. Presumably one must conclude that Administrative Law Judge Spatafore read the Grievance statement and simply concluded that there is no substantial public policy in West Virginia that requires Divisions of State Government to follow existing State law and procedure. Petitioner specifically submits that it is the public policy of West Virginia for all Divisions of State Government and those individuals who manage

and supervise those Divisions to follow the law of West Virginia. Petitioner further submits that the termination of the employment of a state employee for attempting to insure that a Division of State government complies with this public policy is a wrongful discharge under applicable West Virginia case law.

While reluctant to cite to the record containing deposition evidence given that the Dismissal Order is confined to the pleading, Petitioner does note that the evidence in the record below clearly supports Petitioner's position that his termination was due to his perceived attitude in attempting to insure that his superiors followed the law.

Commissioner Randall Reid-Smith was specifically asked at deposition why Mr. Armstrong was fired:

Q: Can you please state on this record, sir, the reason then why you terminated him?

A: The reason I--it was a lack of team work. He was not a team player. And mainly was because every Tuesday when I was in, we would have a meeting. And I found him to be disrespectful. I did not find him to be a good colleague with his other colleagues in that room. And I did not find him to be a team player.

Q: Okay. Are there any other reasons why you terminated him, other that he wasn't a team player?

A: He was disrespectful to me as well.

Q: Any other reasons?

A: No, sir.

Petitioner appealed the decision of the Administrative Law Judge Denise Spatafore to the Circuit Court of Kanawha County and on December 22, 2010, Judge Paul Zakaib, Jr. affirmed the decision of the Administrative Law Judge noting the objections and exceptions of the Petitioner Fredrick Armstrong.

III. Summary of Argument

Petitioner argues the Amended Grievance filed on January 22, 2008 was sufficient on its face to require a Level III hearing and an adjudication on the record of such hearing. Petitioner's position was adopted by the Order of Administrative Law Judge Reynolds denying a Motion to Dismiss filed on the basis of an alleged insufficient grievance petition. However, on June 17, 2008, successor Administrative Law Judge Denise Spatafore "reversed" Administrative Law Judge Reynolds and granted a renewed Motion to Dismiss. Petitioner argues Administrative Law Judge Spatafore did not have legal or statutory authority to "overrule" another Administrative Law Judge. Petitioner further argues that the Circuit Court of Kanawha County, in findings of fact, in essence made evidentiary findings in support of the decision to affirm the decision of the Grievance Board even though the dismissal of Petitioner's Grievance without hearing was predicated strictly upon the sufficiency of Petitioner's Amended Grievance Petition. Petitioner has been denied an evidentiary hearing and all the rights and benefits that are part of that process on the basis of the opinion of an Administrative Law Judge that reverses another Administrative Law Judge and concludes that the Grievance Petition on its face is insufficient. A Circuit Court thereupon affirms the dismissal by making evidentiary conclusions in a case where there was no evidentiary hearing and where the dismissal was based upon the lack of sufficiency of a pleading. Petitioner argues the Amended Grievance Petition was sufficient so as to require a Level III hearing; that Administrative Law Judge Spatafore had no legal authority to overrule the decision of a prior Administrative Law Judge to deny Respondent's Motion to Dismiss; and the Circuit Court erred in making evidentiary conclusions in support of its Order in a case in which the dismissal was based upon the sufficiency of a pleading (and when the main complaint is the failure to be afforded an evidentiary Level III hearing).

IV. Statement Regarding Oral Argument and Decision

Petitioner states that oral argument is not necessary

V. Argument

A final Order of the hearing examiner for the West Virginia Education and State Employees' Grievance Court should not be reversed unless it is clearly wrong. Frymier v. Higher Education Policy Commission, Syl. Pt. 1, 221 W.Va. 306, 655 S.E.2d 52 (2007).

It is agreed as among the parties that Mr. Armstrong was an at-will employee. Therefore, Mr. Armstrong could be terminated for various reasons or for no reasons and have no recourse. However, he could not be terminated for a reason that violated a substantial public policy. Creasy v. Regional Jail and Correctional Facility Authority/South Central Regional Jail, Docket No. 07-RJA-035 (April 30, 2007). The burden rests with the Grievant to prove a violation of substantial public policy. Wilhelm v. West Virginia Lottery, 198 W.Va. 92, 96, 479 S.E.2d 602 (606) (1996).

Petitioner first notes that on January 7, 2008 Respondent filed a Motion to Dismiss seeking to dismiss Mr. Armstrong's original Grievance Petition. (App. at 5) His original Grievance Petition was filed without the assistance of counsel. (App. at 2) Mr. Armstrong thereupon retained counsel and on January 22, 2008 filed an Amended Grievance Petition. (App. at 18) It is the Amended Grievance Petition which is the subject matter of this appeal.

Respondent's Motion to Dismiss sought to dismiss the Grievance Petition based upon the sufficiency of the Petition. (App. at 5) Respondent argued the Grievance Petition was insufficient as a matter of law. (App. at 7-15) On February 15, 2008 Administrative Law Judge Reynolds specifically rejected that argument and denied Respondent's Motion to Dismiss. (App.

at 23) At that point Petitioner herein argues the issue of the legal sufficiency of the Amended Grievance Petition (App. at 18) was the subject of a Final Order (App. at 23) at the Administrative level and could not be modified or reversed except by Administrative Law Judge Reynolds.

Yet on April 29, 2008, shortly after Administrative Law Judge Reynolds had retired, Respondent filed a renewed Motion to Dismiss. (App. at 27) The case was now assigned to Administrative Law Judge Denise M. Spatafore, and on June 17, 2008 Administrative Law Judge Spatafore dismissed Mr. Armstrong's Grievance Petition without providing him a Level III hearing as required by West Virginia law. (App. at 179) Petitioner argues that Administrative Law Judge Spatafore had no legal authority to "overrule" or "reverse" the final order and decision of a fellow Administrative Law Judge on this matter. Petitioner argues that the decision of Administrative Law Judge Reynolds to deny Respondent's Motion to Dismiss (App. at 5) was a final order subject to review and modification only at the Circuit Court level or higher. The affirmation of this act by the Circuit Court in the Order (App. at 302) which is the subject of this appeal constitutes error.

In reading Administrative Law Judge Spatafore's decision granting Respondent's Renewed Motion to Dismiss (App. at 179), it is somewhat difficult to ascertain exactly what Administrative Law Judge Spatafore is concluding in her Order. However, in reading her Conclusions of Law Section (App. at 191), it appears abundantly clear that she grants the Motion to Dismiss (App. at 27) based upon an alleged failure by Mr. Armstrong to plead a claim upon which relief can be granted. Here is the precise language from Administrative Law Judge Spatafore's Order:

Grievant has failed to allege a claim upon which relief can be granted, because his statement of grievance does not allege violations of substantial public policy. (App. at 191)

Petitioner takes issue with this Conclusion of Law in that Petitioner's Amended Grievance Petition (App. at 18) clearly alleges that Mr. Armstrong was terminated in violation of a substantial public policy in West Virginia. (App. at 18) That allegation in and of itself is sufficient to require that a Level III hearing be provided to Mr. Armstrong so as to provide him with an opportunity to prove the allegations made in his Amended Grievance Petition. (App. at 18) The failure to provide him with such a hearing constitutes error.

The Petitioner herein claims it is a substantial public policy of West Virginia law to follow and adhere to the statutory laws and rules of this State. Specifically, Mr. Armstrong alleged in his Grievance that he was found by his superiors to be guilty of insubordination for attempting to follow West Virginia law as it related to the care and maintenance of historical records of West Virginia, and the publication of a yearly journal as required by West Virginia law, and the appropriate determination of the placement of historical roadside markers in West Virginia. (App. at 18 – 21)

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. Eggleton v. West Virginia Division of Culture & History, Docket No. 03-C&H-273 (November 24, 2003). It is alleged by the Petitioner that his efforts to insure that Archives and History adhere to these legislative enactments and legislatively approved regulations caused his superiors to view him as “disrespectful” and “not a team player.” How inconvenient it must have been for the Commissioner and his superiors to actually have a state employee insist that politics must take a back seat to the law. Faced with this

situation, the solution was easy: fire the employee and refuse to provide him with a reason for his discharge. And when challenged, later simply refer to him as “disrespectful” and/or “not a team player” as reasons to justify ending the long and honorable career of the Petitioner with State government.

Petitioner has set forth a specific and clear Amended Grievance Petition. (App. at 18) He was fired because he attempted to insure that the Division of state government that he had served for some thirty years continued to follow state law. He specifically alleges his efforts were viewed by his new superiors as “insubordination” and “disrespect” and thus he was fired. Petitioner alleges that firing a state employee for attempting to insure that state law is followed violates a substantial public policy of the state of West Virginia.

In reading the Dismissal Order of Administrative Law Judge Spatafore in this case, (App. at 179) one would think that the Judge believes state employees must follow all orders of their superiors, whether lawful or not, and that a state employee has no right or obligation to insist upon compliance with state law. In her opinion at page 10 she states:

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 or policy.
(App. at 188)

This statement shakes the very foundation of democracy. It echoes the statements of many lost souls throughout history who relied upon the defense of “I was only following orders.”

Administrative Law Judge Spatafore either totally missed the point of this case or simply believes that state employees must follow all orders of their superiors without regard to the legality of those orders. If Mr. Armstrong’s allegations are true, i.e., that his refusal to cooperate with Secretary Goodwin because Secretary Goodwin was VIOLATING STATE LAW played a

role in his termination, then these allegations directly implicate a substantial public right which is protected by law and policy. It is simply the foundation of our democracy; it is the hallmark of a free society; and it is the standard to which we hold our soldiers, our employees, and hopefully ourselves to follow.

At times Administrative Law Judge Spatafore's Order displays a startling lack of understanding of the issues involved in this case. Again at page 10 of her Order she notes that West Virginia Code §29-1-6 requires the Director of Archives and History to operate and maintain a state library for the preservation of all public records....(App. at 188) (Mr. Armstrong became concerned that his new superiors were contemplating introducing food service in an archive environment as well as merging historical documents with lending library documents. (App. at 120-121) Either or both of these actions would violate state law if they endangered the "preservation" of all public records as required by state code.) Yet Administrative Law Judge Spatafore again retreats to the same mantra that the superiors have the power to assign and allocate space in all facilities as they so choose.

They do not, at least not if such assignments violate the statutory duty to preserve all public records.

The theme of Administrative Law Judge Spatafore's Order is best summed up when she quotes a line from Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990):

Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. (App. at 189)

Counsel for Petitioner wishes to be crystal clear in this Appeal. It is the public policy of West Virginia for state employees to ignore unlawful orders and unlawful instructions and to do their best to insure that state government follows the law. If an employee is fired for attempting

to insure that his superiors do indeed follow the law then the firing is a wrongful discharge under state law. An allegation by a state employee that he was fired for attempting to enforce existing state law requires under West Virginia statutes the holding of a Level III evidentiary hearing so that an evidentiary record may be created. It is only through that mechanism that a state employee can be afforded a full hearing, an adjudication on the record, and appellate review if necessary based upon an evidentiary record.

Instead, based upon the dismissal (App. at 179) of the Amended Grievance Petition (App. at 18) without hearing clear back in June of 2008, we are now in April of 2011 attempting to discuss the merits of this case without the benefit of an evidentiary record. Petitioner respectfully submits this is not how the statutory scheme with respect to grievances is designed to work.

Petitioner submits there is a clear and substantial public policy in West Virginia to encourage and support those state employees who seek to enforce existing state law and that any employee that is fired for attempting to abide by or enforce this policy shall have recourse for a wrongful discharge. The Petitioner further requests that this Court find that an employee who alleges a termination of this nature is entitled to a full and complete evidentiary hearing before the appropriate administrative body in which to prove his allegations.

Petitioner adopts by reference herein as is fully set forth herein those points and authorities cited in the Dismissal Order. (App. at 179-192)

Petitioner specifically relies upon Harless v. First Nat'l Bank, 162 W.Va. 116 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); supra., and Flowers v. City of Morgantown, 166 W.Va. 92 (1980). With respect to the issue of the determination of the existence of a public policy in West Virginia being a question of law for this

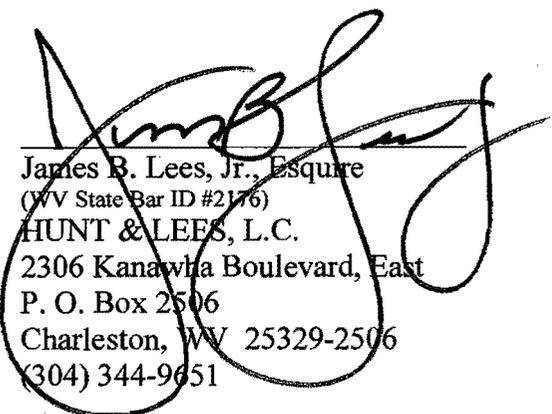
Court Petitioner relies upon Syl Pt. 1, Cordle v. General Hugh Mercer Corp., 174 W. Va. 321 (1984). To the extent this Court does not find that the substantial public policy articulated by Petitioner above is already the public policy of West Virginia Petitioner requests this Court adopt and find as a matter of law that the above-described policy is indeed the public policy of West Virginia.

VI. Conclusion

Petitioner requests this matter be remanded back to the Grievance Board with instructions to provide Petitioner with a Level III hearing in accordance with West Virginia law and to make an adjudication of the merits of said grievance based upon the evidentiary record created at the Level III hearing.

RESPECTFULLY SUBMITTED,

FREDRICK ARMSTRONG,
By Counsel



James B. Lees, Jr., Esquire
(WV State Bar ID #2176)
HUNT & LEES, L.C.
2306 Kanawha Boulevard, East
P. O. Box 2506
Charleston, WV 25329-2506
(304) 344-9651

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDRICK ARMSTRONG,

Petitioner,

Vs.

**WEST VIRGINIA DIVISION OF
CULTURE AND HISTORY,**

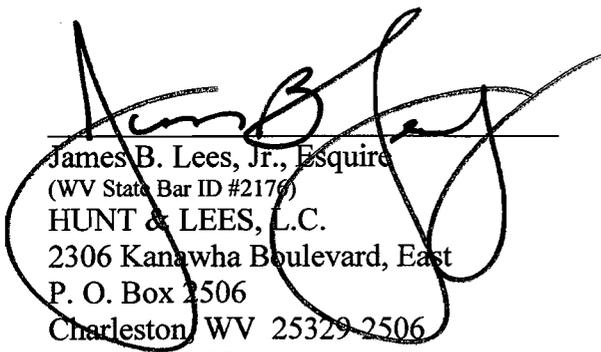
Respondent.

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

CERTIFICATE OF SERVICE

I, James B. Lees, Jr., hereby certify this 21st day of April, 2011, that the foregoing *The Petitioner's Brief* 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)
HUNT & LEES, L.C.
2306 Kanawha Boulevard, East
P. O. Box 2506
Charleston, WV 25329-2506
(304) 344-9651