

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDRICK ARMSTRONG,

Petitioner,

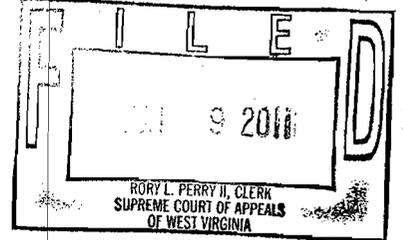
v.

WEST VIRGINIA DIVISION OF
CULTURE AND HISTORY,

Respondent.

11-0698
Appeal No. ~~11-033~~

[Appeal from Civil Action No. 08-AA-82
Honorable Paul Zakaib]



RESPONSE TO PETITIONER'S BRIEF

Thursday, June 9, 2011

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I. RESPONDENT'S REBUTTAL TO PETITIONER'S ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE DECISION OF THE GRIEVANCE BOARD TO DISMISS PETITIONER'S JANUARY 22, 2008 AMENDED GRIEVANCE, "WITHOUT HEARING," BECAUSE NEITHER A HEARING ON THE DISMISSAL MOTION FILED BY RESPONDENT OR A LEVEL III EVIDENTIARY HEARING WAS REQUIRED BY LAW IN THIS MATTER.

A. *Pursuant to 156 C.S.R. 1 (6.6.1) of the West Virginia Public Employees Grievance Board's Procedural Rule, an Administrative Law Judge "may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record upon which a proper decision can be made."*

B. *The Administrative Law Judge acted with legal authority to dismiss Petitioner's January 22, 2008 Amended Grievance, without a hearing, because there was no legal requirement that a hearing be held.*

C. *The Administrative Law Judge's decision to dismiss Petitioner's January 22, 2008 Amended Grievance, based upon Petitioner's failure to articulate a claim upon which relief could be granted, rendered a Level III evidentiary hearing on the merits moot; therefore, Petitioner was not legally entitled to a Level III evidentiary hearing.*

2. THE SECOND ADMINISTRATIVE LAW JUDGE HAD LEGAL AUTHORITY TO RULE ON PETITIONER'S JANUARY 22, 2008 AMENDED GRIEVANCE, AFTER RELEVANT DEPOSITIONS WERE CONDUCTED, AND HER ORDER WAS NOT CLEARLY WRONG.

A. *The second Administrative Law Judge assigned to the grievance matter below did not "overrule" the original decision of the predecessor Administrative Law Judge but issued an Order dismissing the January 22, 2008 Amended Grievance, which was not the subject of Respondent's original Motion to Dismiss and which was based upon deposition testimony elicited from Petitioner, the Cabinet Secretary of the West Virginia Department of Education and the Arts, and the Commissioner of the Division of Culture and History, after the predecessor Administrative Law Judge retired.*

- B. *The second Administrative Law Judge acted with proper legal authority in dismissing Petitioner's January 22, 2008 Amended Grievance, because Petitioner, an at-will employee, failed to articulate any substantial public policy of West Virginia that was violated by his termination.*
- C. *Petitioner's personal lay opinion as to what he believed was or should have been the law of West Virginia does not create a substantial public policy in the State of West Virginia.*

II. STATEMENT OF THE CASE

On or about November 16, 2007, Petitioner was effectively terminated from his position as Director of Archives and History, based upon the recommendation of his direct supervisor, Randall Reid-Smith, Commissioner of Respondent West Virginia Division of Culture and History. (11/16/07 Grievance: *Armstrong Appx. at 00002 – 00006*; *Reid-Smith Deposition: Respondent Appx. at 000046-000047*). Commissioner Reid-Smith's recommendation to terminate the Appellant was supported by his direct supervisor, Kay Goodwin, Cabinet Secretary of the West Virginia Department of Education and the Arts. (*Goodwin Deposition: Pg. 7: 14-15*; *Armstrong Appx. at 00165*).

On November 16, 2007, Petitioner filed a Level Three grievance against the Respondent claiming he was terminated, because he questioned the orders of his superiors, which he claimed caused his "performance and compliance under [the West Virginia Code] to be outside its mandate." (11/16/07 Grievance: *Armstrong Appx. at 00002*). The matter was initially assigned to Janis I. Reynolds, Administrative Law Judge (hereinafter "ALJ") of the West Virginia Public Employees Grievance Board (hereinafter "PEG Board"). On January 7, 2008, Respondent filed "*Respondent's Motion to Dismiss*" and "*Memorandum in Support of Respondent's Motion to Dismiss*" requesting

dismissal of the November 16, 2007 Grievance, because Petitioner failed to plead a substantial public policy was violated by his termination. (*Respondent MTD and Memo: Armstrong Appx. at 00005-00017*). On January 22, 2008, Petitioner filed “*Grievant’s Response to Motion to Dismiss*” the November 16, 2007 Grievance claiming that the November 16, 2007 Grievance did state a claim upon which relief could be granted, because Petitioner alleged he was terminated for his refusal to violate State law and/or for his attempt to enforce State law. (*Petitioner Response MTD: Respondent Appx. at 000001-000003*). On January 22, 2008, Petitioner also filed a “*Motion to File Amended Grievance*,” which included an Amended Grievance as an attachment. (*Petitioner Motion File Amended Grievance: Respondent Appx. at 000004-000011*). Petitioner requested ALJ Reynolds permit him to file an Amended Grievance in place of his November 16, 2007 Grievance.

In his January 22, 2008 Amended Grievance, Petitioner speculated, absent any personal knowledge and/or legal authority to support his position, that three (3) matters, as follows, may have resulted in his termination, which he claimed violated the substantial public policy of West Virginia: (1) His failure to comply with the directives of Secretary Goodwin to transfer materials for the West Virginia History Journal¹ from Archives and History to West Virginia University Press in a timely manner, because he personally believed it was a violation of statute; (2) His decision to voice his personal objections to “proposals” being discussed to merge the reading rooms of the State Library and Archives and History in order to place an eating establishment in the Cultural Center; and (3)

¹ *The West Virginia History Journal was a publication initially published by the Archives and History section within the Division of Culture and History. This was not the only publication produced by the Archives and History section. The West Virginia History Journal was transferred to West Virginia University Press in the year 2006, because the Appellant, as he acknowledged in his deposition, did not timely publish the West Virginia History Journal on occasions. In short, Appellant was not doing his job, and his performance failures resulted in the transfer.*

His decision to voice his personal concerns regarding Commissioner Reid-Smith's decision to place three (3) historical markers in Wayne County, West Virginia. (*Petitioner Motion File Amended Grievance and Amended Grievance: Respondent Appx. at 000004-000011*).

On February 6, 2008, Respondent filed "*Respondent's Reply to Motion to File Amended Grievance Filed in Response to Respondent's Motion to Dismiss*" requesting the Administrative Law Judge enter an Order granting Respondent's original request for dismissal of the November 16, 2007 Grievance, denying Petitioner's request to file an Amended Grievance, and rejecting the proposed Amended Grievance. (*Respondent Reply to Petitioner Motion to File Amended Grievance: Respondent Appx. at 000012-000030*). In said reply, Respondent did not request the Amended Grievance be dismissed, because, at the time of the Reply, the Amended Grievance was not filed. However, in its Reply, Respondent did state that the Amended Grievance should be rejected, because: (1) The events Petitioner pled surrounding the West Virginia History Journal, in the year 2004 and 2006, were time barred by West Virginia Code § 29-6A-4(a); (2) Petitioner failed to articulate any law that prohibited the transfer of the West Virginia History Journal to the West Virginia University Press; therefore, any objection Petitioner had that the transfer was improper was based upon his mere personal, lay opinion, which was not sufficient to establish substantial public policy in West Virginia; (3) Petitioner's personal, lay opinion that discussions and proposals to merge the reading room in Archives and History into the existing State Library and to place an eating establishment in the Culture Center were improper did not establish a substantial public policy of West Virginia; and (4) Commissioner Reid-Smith had the statutory authority to implement, control, and administer the historical markers program, pursuant to West Virginia Code § 29-1-1; therefore,

Petitioner's personal criticism or objection to Commissioner Reid Smith's lawful actions were not sufficient to establish that a substantial public policy of West Virginia was violated by his termination. (*Respondent Reply to Petitioner Motion to File Amended Grievance: Respondent Appx. at 000012-000030*). At the time Respondent filed its Reply, there were no depositions conducted in the matter. However, on January 4, 2008, Petitioner requested that he be permitted to take the depositions of Secretary Goodwin and Commissioner Reid-Smith.

Janis I. Reynolds' Order

On February 15, 2008, ALJ Reynolds issued a three (3) page Order absent providing any hearing to the parties. (*February 15, 2008 Order: Armstrong Appx. at 00023-00025*). In the February 15, 2008 Order, ALJ Reynolds acknowledged that, pending before her, was Respondent's Motion to Dismiss the original November 16, 2007 Grievance, Petitioner's Response to Respondent's Motion to Dismiss, Petitioner's Motion to File Amended Grievance, and Respondent's Reply to Petitioner's Motion to File Amended Grievance. (*February 15, 2008 Order: Armstrong Appx. at 00023*). Judge Reynolds did not have any Motion to Dismiss the January 22, 2008 Amended Grievance, because, as the pleadings show, it was not filed, prior to ALJ Reynolds' February 15, 2008 Order.

The February 15, 2008 Order consisted of approximately two and one half (2 ½) pages of recitations of the law surrounding the termination of at-will employees. (*February 15, 2008 Order: Armstrong Appx. at 00023-00025*). ALJ Reynolds did not state any facts in the Order. ALJ Reynolds did not specifically address Respondent's Motion to Dismiss Petitioner's November 16, 2007 Grievance. ALJ Reynolds did not address any of the arguments forwarded by Respondent in its reply to Petitioner's Motion to File Amended Grievance requesting the January 22, 2008 Amended

Grievance be rejected and not filed. The only thing ALJ Reynolds stated in her February 15, 2008 Order regarding any of the arguments forwarded by the parties was as follows:

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 in Wilhelm, supra. Respondent's Motion to Dismiss is DENIED.

(Emphasis added) (*February 15, 2008 Order: Armstrong Appx. at 00025.*) ALJ Reynolds' Order denied Respondent's Motion to Dismiss; however, Respondent's Motion to Dismiss only addressed the November 16, 2007 Grievance. ALJ Reynolds also, presumably, granted Petitioner's request to file an Amended Grievance, in spite of the fact she did not discuss any of the extensive legal arguments forwarded by the Respondent in its response requesting the January 22, 2008 Amended Grievance be rejected. (*February 15, 2008 Order: Armstrong Appx. at 00023-00025.*) After the February 15, 2008 Order was entered, ALJ Reynolds retired, and the matter was reassigned to ALJ Denise Spatafore.

Depositions and Respondent's Request to Dismiss the January 22, 2008 Amended Grievance

On March 21, 2008, the depositions of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith were conducted. (*Petitioner Dep.: Armstrong Appx. at 00087-00154; Goodwin Dep.: Armstrong Appx. at 00162-00177; Reid-Smith Dep.: Respondent Appx. at 000041-000056.*) The depositions were taken to develop testimony relevant to the allegations contained in the January 22, 2008 Amended Grievance.

Based upon the deposition testimony of Petitioner obtained in relation to the January 22, 2008 Amended Grievance, Respondent filed "*Respondent's Renewed Motion to Dismiss*" and "*Respondent's Memorandum in Support of Renewed Motion to Dismiss*" wherein Respondent

requested dismissal of the January 22, 2008 Amended Grievance, because “there [wa]s no claim upon which relief [could] be granted, or in the alternative, no genuine issue of material fact, because the [Petitioner] ha[d] failed to plead any substantial public policy that was violated as a result of his termination.” (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00027-00178*). Respondent phrased the request for dismissal in this fashion, because, although Respondent cited to matters outside of the January 22, 2008 Amended Grievance, 156 C.S.R. 1 (6.11) of the PEG Board’s Procedural Rule stated the following language in relation to dismissal of grievances:

Failure to State a Claim – 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.

Unlike Rule 56 (c) of the West Virginia Rules of Civil Procedure, 156 C.S.R. 1 does not contain language similar to motions for summary judgment.

As was stated above, in the January 22, 2008 Amended Grievance of Petitioner, Petitioner alleged that he was terminated in violation of the substantial public policy of West Virginia, in his opinion, because he objected to the the transfer of the West Virginia History Journal, which he considered a violation of law, he objected to the proposal to merge the reading room of Archives and History with the State Library, because he believed it was a violation of law, and he objected to Commissioner Reid Smith’s decision to place three (3) historical markers in Wayne County, which he believed was a violation of law. However, based upon Petitioner’s deposition testimony, it was clear that his superiors did not violate the law, and he was never asked to violate any law by his superiors. Petitioner, a non-lawyer, simply was incorrect in his lay interpretation of the law, he did not agree with the lawful objectives of his superiors, and he refused to comply with the lawful

directives of his superiors. (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00027-00178*).

West Virginia History Journal

In relation to the transfer of the West Virginia History Journal, as stated in his January 22, 2008 Amended Grievance, Petitioner alleged that the transfer of the journal violated his statutory duties, pursuant to West Virginia Code §29-1-6. (*Amended Grievance: Armstrong Appx. at 00018-00019*). However, at his deposition, Petitioner's testimony reflected that he was incorrect regarding the plain language of West Virginia Code §29-1-6, and, upon further questioning as to how he could state the transfer of the West Virginia History Journal violated the law, as he claimed in his January 22, 2008 Amended Grievance, Petitioner testified: "Well not being a lawyer, I don't know." (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00035-00037; Armstrong Dep.: Pgs. 92: 3-7 and 94-96: Armstrong Appx. at 00110-00111*).

Placement of Wayne County Historical Markers

In his January 22, 2008 Amended Grievance, Petitioner stated that he voiced his concern about Commissioner Reid-Smith's decision to place historical markers in Wayne County, which Petitioner believed was his "attempt to adhere to published rules and regulations of the placement of historical markers along West Virginia highways . . ." that resulted in his termination. Plaintiff claimed that his objection to actions he personally opined to be a violation of law and his subsequent termination, based upon those objections, violated the substantial public policy of West Virginia. (*Amended Grievance: Armstrong Appx. at 00020*). However, at his deposition, Petitioner acknowledged that he considered Commissioner Reid-Smith's actions contrary to code "as [he] read

it. . .” and, he further acknowledged: (1) He had no legal education; and (2) His opinion as to what he perceived to be a violation of the law in relation to the placement of the historical markers in Wayne County was simply based upon his “personal lay opinion.” (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00040-00049; Armstrong Dep.: Pg. 173; Armstrong Appx. at 00130*).

Discussion to Merge Reading Rooms of Archives and History and State Library and to Place Eating Establishment in Culture Center

In his January 22, 2008 Amended Grievance, Petitioner stated that he voiced his personal objections to his superiors in relation to discussions regarding the possibility of merging the reading room in Archives and History into the existing State Library and to place an eating establishment in the Culture Center. According to Petitioner, his personal objections to his superiors were “to insure the statutory law of West Virginia was fulfilled.” (*Amended Grievance: Armstrong Appx. at 00020-00021*). Based upon his personal objections, Petitioner claimed that he was viewed by his “superiors as insubordinate[,]” which he believed “played a direct role in [his] termination.” (*Amended Grievance: Armstrong Appx. at 00020-00021*). According to Petitioner, “[h]istorical 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 [wa]s merely asking for rodent and pest problems (which [would] attack and destroy paper).” (*Amended Grievance: Armstrong Appx. at 00020-00021*). However, Petitioner’s own deposition testimony demonstrated that his January 22, 2008 Amended Grievance was inaccurate, and there was no law that precluded the merging of the reading room of Archives and History with the State Library. In particular, Petitioner testified that he was familiar with House Bill 4126, which was presented to the West Virginia Legislature in 2008. (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00042-00044; Armstrong Dep.: Pgs. 139-140; Armstrong*

Appx. at 00122). Petitioner acknowledged House Bill 4126 was introduced in an effort to preclude the merging of the reading room of Archives and History with the State Library, and he acknowledged the bill failed to pass. (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00043-00044; Armstrong Dep.: Pgs. 139-140: Armstrong Appx. at 00122*). Petitioner further testified that “current law” would permit the merger of the reading rooms. (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00044; Armstrong Dep.: Pgs. 139: Armstrong Appx. at 00122*).

In short, Petitioner simply did not agree with the lawful actions and lawful directives of his superiors. As Commissioner Reid-Smith testified, he found Petitioner simply was not a team player, he was disrespectful to others, and he was not a good colleague, which is why he was terminated. (*Reid-Smith Dep.: Respondent Appx. at 000047*).

In response to Respondent’s request that the January 22, 2008 Amended Grievance be dismissed, Petitioner filed “*Grievant’s Response to Renewed Motion to Dismiss*” and “*Memorandum in Support of Grievant’s Response to Respondent’s Renewed Motion to Dismiss*.” (*Grievant’s Response Motion and Memo to Renewed Motion to Dismiss: Respondent Appx. at 000031-000056*). In his response, Petitioner improperly argued that Respondent filed its renewed motion to dismiss in relation to the “November 16, 2007” Grievance and further claimed Respondent never mentioned the January 22, 2008 Amended Grievance. This argument was absolutely incorrect as can be seen from Respondent’s renewed dismissal motion. Petitioner then simply stated Respondent should not be able to re-litigate matters, which have been previously litigated. (*Grievant’s Memo: Respondent Appx. at 000033-000037*). Respondent never addressed any of the legal arguments surrounding the

actual law and deposition testimony cited by Respondent in its renewed dismissal motion.

Respondent filed “*Respondent’s Reply to Grievant’s Response to Respondent’s Renewed Motion to Dismiss*” and stated, contrary to Petitioner’s allegations, the renewed dismissal motion was based solely on the January 22, 2008 Amended Grievance, which was cited verbatim in the dismissal motion. (*Respondent’s Reply to Grievant’s Memo: Respondent Appx. at 000057-000059*). Moreover, Respondent argued that the deposition testimony of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith established that there was no genuine issue of material fact, because Petitioner could not articulate any substantial public policy that was violated by his termination. (*Respondent’s Reply to Grievant’s Memo: Respondent Appx. at 000057-000059*).

Denise M. Spatafore’s June 17, 2008 Dismissal Order

On June 17, 2008, ALJ, Denise M. Spatafore, entered a fourteen (14) page Dismissal Order, which granted Respondent’s request for dismissal of Petitioner’s January 22, 2008 Amended Grievance. (*June 17, 2008 Dismissal Order: Armstrong Appx. at 00179-00193*). Similar to ALJ Reynolds, Judge Spatafore entered her Order absent a hearing on the motions filed by the parties.

In the Dismissal Order, contrary to ALJ Reynolds’ Order that stated no findings of fact, Judge Spatafore stated a detailed section regarding her “Findings of Fact.” (*June 17, 2008 Dismissal Order: Armstrong Appx. at 00179-00193*). Moreover, contrary to ALJ Reynolds’ Order, ALJ Spatafore also addressed the substance of the statutes cited by Petitioner in his January 22, 2008 Amended Grievance, which he stated supported his position that his superiors violated the law. (*June 17, 2008 Dismissal Order: Armstrong Appx. at 00186-00193*). In analyzing the law relied upon by Petitioner in relation to the facts in the case, ALJ Spatafore found Appellant “failed to assert any public policy

that ha[d] been violated by his termination, if the claims asserted in his grievance [we]re viewed as true.” (*June 17, 2008 Dismissal Order: Armstrong Appx. at 00179-00193*). In particular, Judge Spatafore held: (1) “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 Appellant’s allegations are true, this does not implicate a substantial public right which is protected by law or policy[,]” because he was not asked to violate any law by Secretary Goodwin; (2) The Appellant’s personal disagreement with his superiors’ proposal to possibly place an eating establishment in the vicinity of archived documents or with regard to his superiors proposal to possibly merge the reading rooms of Archives and History and the State Library did not raise a substantial public policy issue, because he “identified no applicable law to the issue[;]” and (3) The Appellant’s personal disagreement with his superior, Commissioner Reid-Smith, to place historical markers in Wayne County did not implicate a substantial public right protected by law or policy, because Commissioner Reid-Smith acted within his statutory authority. (*June 17, 2008 Dismissal Order: Armstrong Appx. at 00186-00191*). Therefore, ALJ Spatafore dismissed Petitioner’s January 22, 2008 Amended Grievance for failing to state a claim upon which relief could be granted.

Circuit Court of Kanawha County’s December 22, 2010 Order

Petitioner appealed ALJ Spatafore’s Dismissal Order to the Circuit Court of Kanawha County. The Honorable Paul Zakaib was assigned to the matter. In his “*Petition for Appeal*,” Petitioner argued: (1) ALJ Spatafore erred by denying him an evidentiary hearing; (2) ALJ Spatafore erred by granting a motion to dismiss that had been previously denied by the same administrative law body; and (3) ALJ Spatafore erred by concluding Petitioner failed to state a claim upon which relief

could be granted. (*Petition for Appeal: Armstrong Appx. at 00198*). Petitioner argued that he “was fired because he attempted to insure that the Division and the state government that he served for some thirty years continued to follow state law[,]” which he claimed violated the substantial public policy of the State of West Virginia. (*Petition for Appeal: Armstrong Appx. at 00198*). However, as with the briefs he submitted to the PEG Board, Petitioner cited no law that was violated by any of his superiors. (*Petition for Appeal: Armstrong Appx. at 00194-00201*).

Respondent filed “*Respondent’s Response to Petition for Appeal*” with the Circuit Court. (*Petition for Appeal: Armstrong Appx. at 00202-00228*). Respondent requested the Circuit Court uphold ALJ Spatafore’s Dismissal Order, because: (1) ALJ Spatafore was not barred by the doctrine of res judicata in issuing the Dismissal Order, because there was no final adjudication on the merits by ALJ Reynolds; (2) Petitioner’s January 22, 2008 Amended Grievance and his deposition testimony demonstrated that he failed to show the Respondent, by and through its official(s), violated any substantial public policy in the State of West Virginia by his termination; and (3) Petitioner’s January 22, 2008 Amended Grievance and deposition testimony failed to show he made any legitimate complaints that official(s) of Respondent were violating any State law. (*Petition for Appeal: Armstrong Appx. at 00202-00228*). Respondent further argued that Petitioner’s January 22, 2008 Amended Grievance was properly dismissed, because Petitioner’s mere personal, lay opinion as to what he presumed State law was or was not did not create a substantial public policy of the State of West Virginia. (*Petition for Appeal: Armstrong Appx. at 00202-00228*).

On January 19, 2010, the Circuit Court heard oral argument by Petitioner and Respondent. At the conclusion of the hearing, the Circuit Court requested both Petitioner and Respondent submit

proposed Orders detailing findings of fact and conclusions of law. In accordance with the Circuit Court's instructions, Respondent and Petitioner submitted proposed Orders. Petitioner never raised any objection to the proposed Order submitted by Respondent.

On December 22, 2010, the Circuit Court entered a forty-three (43) page "*Final Order Affirming Decision of Grievance Board.*" (*December 22, 2010 Order: Armstrong Appx. at 00302-00344*). In said Order, the Circuit Court listed twenty-two (22) pages of concise findings of fact, based upon the extensive pleadings filed with the PEG Board and the testimony of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith. The Circuit Court further stated eight (8) pages of concise conclusions of law. (*December 22, 2010 Order: Armstrong Appx. at 00328-00336*). Based upon the Circuit Court's analysis of facts in relation to its conclusions of law, the Court stated its extensive ruling in seven (7) pages. (*December 22, 2010 Order: Armstrong Appx. at 00336-00343*).

The Court found:

- (1) ALJ Spatafore was not barred by the doctrine of res judicata in entering her June 17, 2008 Order;
- (2) Pursuant to 156 C.S.R. 1 (6.6.1), ALJ Spatafore was not required to hold a hearing, prior to entering her Dismissal Order, similar to ALJ Reynolds who did not hold a hearing on the motion to dismiss the November 16, 2007 Grievance before issuing her Order;
- (3) ALJ Spatafore did not act improperly in issuing her Dismissal Order nor did she rule upon the same issues addressed by ALJ Spatafore, because ALJ Spatafore's Dismissal Order was based upon the January 22, 2008 Amended Grievance and

deposition testimony elicited after the Order of ALJ Reynolds was entered;

(4) Petitioner failed to file a grievance regarding his April 10, 2006 written reprimand for insubordination in relation to the transfer of the West Virginia History Journal, as required by West Virginia Code § 29-6A-4(a);

(5) In the alternative, ALJ Spatafore's Dismissal Order regarding the transfer of the West Virginia History Journal was not "clearly wrong," because, contrary to the allegations of Petitioner in the January 22, 2008 Amended Grievance, a plain reading of West Virginia Code § 29-1-6 demonstrated that Petitioner was not required to publish an annual history journal entitled the West Virginia History Journal;

(6) Petitioner failed to cite to any precepts in the constitution, legislative enactments, legislative approved regulations, or judicial opinions that would demonstrate the transfer of the West Virginia History Journal was contrary to law;

(7) The plain language of West Virginia Code § 29-1-1(b) provided Commissioner Reid-Smith with the power to exercise the control and supervision of the placement of the highway historical markers program, and Petitioner failed to cite to any precepts in the constitution, legislative enactments, legislative approved regulations, or judicial opinions that demonstrated Commissioner Reid-Smith acted improperly in placing the historical markers in Wayne County;

(8) Petitioner's allegation that he was terminated for stating 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 was not sufficient to establish a substantial public policy was violated.

(December 22, 2010 Order: Armstrong Appx. at 00336-00343). Based upon the foregoing, the Circuit Court found that Petitioner failed to plead any substantial public policy was violated, as a result of his termination, and ALJ Spatafore's Dismissal Order was not "clearly wrong." (December 22, 2010 Order: Armstrong Appx. at 00343). The Circuit Court Ordered ALJ Spatafore's Dismissal Order be affirmed.

III. SUMMARY OF ARGUMENT

In relation to Petitioner's Assignment of Error No. 1, he alleged the Circuit Court erred in affirming ALJ Spatafore's Dismissal Order, because the January 20, 2008 Amended Grievance was dismissed "without hearing." Based upon a review of "*The Petitioner's Brief*," it appears that he is alleging that ALJ Spatafore improperly issued her Dismissal Order regarding Respondent's dismissal motion, without conducting a hearing. Petitioner also seems to be claiming that, although ALJ Spatafore dismissed his January 20, 2008 Amended Grievance for lacking merit, he was still entitled to a Level III evidentiary hearing. Respondent disagrees.

Respondent contends that the plain language of the Procedural Rule of the PEG Board explicitly provides that an ALJ is not required to hold a hearing, prior to dismissing a grievance. The procedure implemented by the PEG Board is similar to practices followed in West Virginia State and Federal Courts. In particular, West Virginia judges often times dismiss cases for lack of merit absent conducting hearings, which is exactly what ALJ Spatafore did in this matter. ALJ Spatafore acted within her judicial power to dismiss Petitioner's Amended Grievance, without hearing. Moreover,

ALJ Reynolds never provided the parties with a hearing, prior to entering her Order, which was favorable to Petitioner. Petitioner does not argue that ALJ Reynolds acted improper in entering her Order, absent a hearing. However, Petitioner argues ALJ Spatafore acted improperly by not holding a hearing before issuing an adverse ruling against him. Respondent contends that both ALJ Spatafore and ALJ Reynolds had the authority to issue their Orders, absent providing a hearing, which both had done in this matter. ALJ Spatafore acted in accordance with the law.

Respondent further contends that Petitioner had no right to a Level III evidentiary hearing, after ALJ Spatafore dismissed his January 20, 2008 Amended Grievance, because she found his grievance lacked merit. Again, similar to West Virginia State and Federal Courts, if a judge determines that a case should be dismissed for lack of merit, the parties are not then required to attend a trial. Similarly, if an ALJ determines a grievance lacks merit and dismisses the grievance, the parties should not then be required to proceed with a Level III evidentiary hearing. To require the parties to engage in a Level III evidentiary hearing, after an ALJ determines the grievance lacks merit, would strip the ALJs of their judicial power to dismiss grievances that are meritless and would further result in waste of State monies by holding evidentiary hearings on grievances that lack merit. Once ALJ Spatafore found the January 20, 2008 Amended Grievance lacked merit, Petitioner was not entitled to a Level III evidentiary hearing on the merits, and the issue was moot.

In relation to Petitioner's Assignment of Error No. 2, he alleged that ALJ Spatafore was without legal authority to "overrule" the original decision of ALJ Reynolds denying a motion to dismiss. Respondent contends this position is inaccurate. Respondent filed its original motion to dismiss regarding the November 16, 2007 Grievance. In response to Respondent's Motion to

Dismiss, Petitioner requested permission to file an Amended Grievance. In its response to Petitioner's request to file the January 22, 2008 Amended Grievance, Respondent requested that ALJ Reynolds reject the Amended Grievance. Respondent never moved for dismissal of the January 22, 2008 Amended Grievance with ALJ Reynolds, because it was not filed at the time of Respondent's response. Therefore, ALJ Spatafore did not "overrule" a prior motion to dismiss by ALJ Reynolds. Additionally, after ALJ Reynolds retired, the depositions of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith were conducted, which further demonstrated that Plaintiff failed to articulate any substantial public policy of West Virginia that was violated by his termination. Based upon the deposition testimony elicited in the matter in relation to the averments contained in the January 22, 2008 Amended Grievance, Respondent requested ALJ Spatafore dismiss the matter, because Plaintiff failed to articulate any legally cognizable claim in his January 22, 2008 Amended Grievance.

ALJ Spatafore acted within her judicial authority to analyze the January 22, 2008 Amended Grievance to determine whether the grievance was sufficient to withstand dismissal, and she found it was not. The actions undertaken in the proceedings below are similar to a Court proceeding. In particular, if a Judge dismisses a Complaint for failure to state a claim upon which relief can be granted, often times, a Plaintiff will file an Amended Complaint. After depositions are conducted, a Defendant may submit evidence from the depositions to the Court and request dismissal of the Amended Complaint, if Defendant finds the Amended Complaint lacks merit. At that time, the Court would rule on the issue of whether the Amended Complaint should be dismissed. This is proper. The Court would not be ruling on the original Complaint, but the Court would be ruling on the substance

of the Amended Complaint. Essentially, this is what happened in the present matter. ALJ Reynolds issued a ruling on Respondent's motion to dismiss Petitioner's November 16, 2007 Grievance and permitted the filing of Petitioner's January 22, 2008 Amended Grievance. ALJ Spatafore issued a ruling on Respondent's separate request for dismissal of the January 22, 2008 Amended Grievance. Thus, ALJ Spatafore acted properly in dismissing the January 22, 2008 Amended Grievance, based upon the evidence presented to her. She did not improperly "overrule" ALJ Reynolds' Order, as the underlying pleadings demonstrate.

Although Petitioner did not state any additional assignments of error, it appears that he has argued that the Circuit Court erred by making "evidentiary conclusions" in support of its Order. As the Circuit Court's Order reflects, its findings were based upon the allegations in the January 22, 2008 Amended and sworn deposition testimony of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith. The Circuit Court did not err by citing to the sworn testimony of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith in issuing its findings of fact. Court's often times dismiss cases, based upon factual information established by deposition testimony. It is not error for a State or Federal Court to dismiss a case for lack of merit, based upon deposition testimony, absent having an evidentiary trial. Similarly, in this matter, it was not error for the Circuit Court to cite to deposition testimony derived from the underlying grievance proceeding in issuing its findings of fact and finding the January 20, 2008 Amended Grievance lacked merit. The Circuit Court committed no error in relying upon sworn deposition testimony in affirming the decision of ALJ Spatafore.

Additionally, although Petitioner did not specifically articulate more than two (2)

assignments of error, it appears that he is also arguing that the January 22, 2008 Amended Grievance sufficiently pled that he was terminated in violation of the substantial public policy of West Virginia. Respondent contends a review of the Amended Grievance, a review of the law cited by Petitioner in the Amended Grievance that he claims was violated by his superiors, and a review of Petitioner's sworn deposition testimony demonstrates that Petitioner was incorrect in his lay interpretation of the law, Petitioner refused to follow the lawful directives of his superiors, and Petitioner's personal objections to his superiors' lawful actions did not create a substantial public policy of West Virginia. Accordingly, Respondent contends ALJ Spatafore's Dismissal Order was not clearly wrong in this matter but was clearly right.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure, Respondent respectfully requests that it be permitted to present oral argument in this matter, because the issues raised in this appeal involve issues of first impression and issues of public importance.

V. ARGUMENT

STANDARD OF REVIEW

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.¹ Jamison v. Bd. of Educ., 702 S.E.2d 840, 841, 2010 W. Va. LEXIS 100, 4 (2010) (Per Curiam); Frymier v. Higher Education Policy Commission, Syl. Pt. 1, 221 W.Va. 306, 655 S.E.2d 52 (2007) (Quotation omitted). “[T]his Court

² On the first day of July, two thousand seven, West Virginia 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 Court.

accords deference to the findings of fact made below.” Jamison, 702 S.E.2d at 841, 2010 W.Va. Lexis 100 at 4 (Quotation omitted). “This Court reviews decisions of the circuit under the same standard as that by which the circuit reviews the decision of the ALJ.” Id. at 841, 2010 W.Va. Lexis 100 at 4 (Quotation omitted). On appeal, this Court “must uphold any of the ALJ’s factual findings that are supported by substantial evidence, and [the Court] owe[s] substantial deference to inferences drawn from these facts.” Id. at 841, 2010 W.Va. Lexis 100 at 4 (Quotation omitted). “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). “Plenary review is conducted as to conclusions of law and application of law to the facts, which are reviewed *de novo*.” Id. at 217, 632 S.E.2d at 904 (Quotation omitted).

PETITIONER’S ASSIGNMENT OF ERROR NO. 1 AND RESPONDENT’S REBUTTAL

In Petitioner’s Assignment of Error No. 1, he claimed the Circuit Court erred by affirming the decision of the PEG Board to dismiss the grievance without hearing. Petitioner cited to no law in support of his position. Respondent contends that the Circuit Court did not err, because ALJ Spatafore was not required, under law, to hold a hearing regarding Respondent’s request that she dismiss Petitioner’s Amended Grievance. Furthermore, a Level III evidentiary hearing became a moot issue, once ALJ Spatafore dismissed Petitioner’s Amended Grievance for lack of merit. Respondent supports its position, based upon the following:

- A. *Judge Spatafore was not required to hold a hearing on Respondent’s request for dismissal of the Amended Complaint, pursuant to Pursuant to 156 C.S.R. 1 (6.6.1) of*

the West Virginia Public Employees Grievance Board's Procedural Rule; therefore, her Dismissal Order was not clearly wrong and was properly upheld by the Circuit Court.

Pursuant to West Virginia Code § 6C-3-4(b), the PEG Board is permitted to “adopt, modify, amend and repeal procedural rules. . .” A procedural rule means every rule that “fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency.” W.Va. Code § 29-1A-2(g). On December 27, 2007, the PEG Board’s Procedural Rule entitled “Rules of Practice and Procedure of the West Virginia Public Employee Grievance Board[,]” 156 C.S.R. 1, became effective. (*PEG Board, December 27, 2007 Rule: Attachment 1*). Pursuant to Rule 6.2 of 156 C.S.R. 1, “[e]ach administrative law judge has the authority and discretion to control the processing of each grievance assigned to such judge and to take any action considered appropriate. . .” “An application to an administrative law judge for an order must be made by motion, in writing, unless made during a hearing. . .” 156 C.S.R. 1 (6.6). “If any party desires a hearing on a motion, the party shall make a request for a hearing at the time of the filing of the motion or response.” 156 C.S.R. 1 (6.6.1.). “An administrative law judge may, in the judge’s discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made.” 156 C.S.R. 1 (6.6.1.) (Emphasis added). “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.” 156 C.S.R. 1 (6.11.).

In the underlying grievance proceeding, after the depositions of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith were complete, Respondent submitted a written

memorandum to ALJ Spatafore requesting she enter an Order dismissing Petitioner's January 22, 2008 Amended Grievance, because he did not and could not articulate any public policy of West Virginia that was violated as a result of his termination. Petitioner filed a written response to Respondent's request for dismissal. As Rule 6.6.1. of the 156 C.S.R. 1 provides, ALJ Spatafore had the discretion to rule on Respondent's written request for dismissal, absent conducting a hearing. In exercising her discretion, ALJ Spatafore elected to issue her Dismissal Order absent oral argument by the parties. ALJ Spatafore's acted in accordance with the Procedural Rule of the West Virginia PEG Board, as did ALJ Reynolds when she entered her Order, absent a hearing. Therefore, the Circuit Court did not err in upholding ALJ Spatafore's Dismissal Order with respect to this issue. Judge Spatafore's Dismissal Order was not clearly wrong and must be affirmed.

B. Judge Spatafore was not required to hold a Level III evidentiary hearing, after she dismissed Petitioner's Amended Grievance for his failure to articulate a substantial public policy of West Virginia that was violated, as a result of his termination; therefore, her Dismissal Order was not clearly wrong and was properly upheld by the Circuit Court.

In establishing the West Virginia Public Employees Grievance Procedure, the West Virginia Legislature stated that its purpose was to resolve grievances "in a fair, efficient, cost-effective and consistent manner. . ." W.Va. Code § 6C-2-1(b). There are three (3) levels in the grievance process. W.Va. Code § 6C-2-4(3). With regard to the third and final level, pursuant to West Virginia Code § 6C-2-4(3), an "administrative law judge [of the PEG Board] shall schedule the level three hearing and any other proceedings or deadlines within a reasonable time in consultation with the parties." "The administrative law judge may issue subpoenas for witnesses, limit witnesses, administer oaths and exercise other power granted by rule or law." W.Va. Code § 6C-2-4(4).

During the Level III process, an ALJ may dismiss a grievance, if there is no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” 156 C.S.R. 1 (6.11.). The PEG Board does not have a rule stating language similar to that contained in Rules 56(c) of the West Virginia Rules of Civil Procedure in relation to motions for summary judgment. However, an ALJ has the “authority to order such additional discovery, by way of depositions. . . or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure.” 156 C.S.R. 1 (6.12.1). A Level III evidentiary hearing is not required by law and can be decided on the record. 156 C.S.R. 1 (6.1.1.).

Petitioner cited to no law that requires he be provided with a Level III evidentiary hearing, once ALJ Spatafore determined his Amended Grievance should be dismissed. The Procedural Rule of the PEG Board, which was adopted by and through the authority granted to the PEG Board by the West Virginia Legislature, specifically provides that an ALJ has the discretion to dismiss a grievance, if the grievance fails to state a claim upon which relief can be granted. Pursuant to Rules 12(b)(6) and 56(c) of the West Virginia Rules of Civil Procedure and Federal Rules of Civil Procedure, justices of West Virginia State and Federal Courts have the same discretion to dismiss lawsuits that lack merit. If a justice of a State or Federal Court dismisses a case, pursuant to Rule 12(b)(6) and/or Rule 56(c), the case does not go to trial. The issue of conducting a trial is moot. Similar to a Court action, if an ALJ dismisses a grievance matter that he or she finds lacks merit, the necessity of holding a Level III evidentiary is moot, because the grievance is dismissed.

If it were a requirement that a grievance matter proceed to a Level III evidentiary hearing in spite of an Order from an ALJ dismissing the grievance for lack of merit, the ALJ would be stripped

of his or her powers to exercise his or her sound discretion to dismiss cases that lacked merit. Furthermore, if a Level III evidentiary hearing was required in spite of a dismissal order of an ALJ, it is inherent that the State would be required to expend monies on evidentiary hearings that lacked merit, which would result in a waste of State monies. This would run contrary to and would frustrate the expressed intent of the West Virginia Legislature that grievances be resolved “in a fair, efficient, cost-effective and consistent manner. . .” W.Va. Code § 6C-2-1(b). Therefore, ALJ Spatafore was not required to conduct a Level III evidentiary hearing regarding Petitioner’s Amended Grievance, which she found failed to articulate a legally plausible claim. Judge Spatafore’s Dismissal Order was not clearly wrong and must be affirmed.

PETITIONER’S ASSIGNMENT OF ERROR NO. 2 AND RESPONDENT’S REBUTTAL

In Petitioner’s Assignment of Error No. 2, he claimed that ALJ Spatafore was without legal authority to “overrule” ALJ Reynolds’ original decision denying a motion to dismiss. Petitioner cited to no law in support of his position. Respondent contends ALJ Spatafore acted with her legal authority, when she issued her Dismissal Order regarding Petitioner’s January 22, 2008 Amended Grievance. As the pleadings in the underlying record below show, at the time of ALJ Reynolds’ Order, Respondent’s Motion to Dismiss requested dismissal of Petitioner’s November 16, 2007 Grievance for failing to state a claim upon which relief could be granted. Prior to the entry of ALJ Reynolds’ Order, Respondent could not file a Motion to Dismiss Petitioner’s January 22, 2008 Order, because it was not filed. Therefore, ALJ Spatafore never “overruled” ALJ Reynolds’ ruling denying any motion to dismiss the January 22, 2008 Amended Grievance.

Notwithstanding the foregoing, after ALJ Reynolds’ retired, the depositions of Petitioner,

Secretary Goodwin, and Commissioner Reid-Smith were conducted. As was stated above, the PEG Board's Procedural Rule permits an ALJ to dismiss a grievance, if a grievant fails to state a claim upon which relief can be granted. The Procedural Rule does not contain language, which permits dismissal if there is no genuine issue of material fact. However, ALJs do have the discretion to permit depositions "as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure." In the underlying proceeding, after the depositions of Petitioner, Secretary Goodwin, and Commissioner Reid-Smith were conducted, Respondent filed a dismissal motion requesting ALJ Spatafore dismiss the January 22, 2008 Amended Grievance, because the deposition testimony demonstrated that Petitioner could not articulate any substantial public policy of West Virginia that was violated by his termination. Contrary to his Amended Grievance, at his deposition, Petitioner could not articulate any law that his superiors violated and/or that they required him to violate. Petitioner's deposition demonstrated that he simply did not agree with the lawful actions of his superiors and simply refused to follow the lawful directives of his superiors. Petitioner's deposition testimony demonstrated that his Amended Grievance was flawed and did not articulate a justiciable claim. Therefore, ALJ Spatafore acted with legal authority in issuing her Dismissal Order regarding the January 22, 2008 Amended Grievance, and she was not clearly wrong; therefore, her Dismissal Order must be affirmed.

OTHER ERROR ARGUED BY PETITIONER SHOULD NOT BE CONSIDERED ON APPEAL

Although Petitioner only explicitly stated two (2) errors in this matter, in the body of his Brief, he appears to be arguing Judge Spatafore's decision must be overturned on other grounds. Respondent contends any other arguments contained in Petitioner's brief, which were not articulated

as error by Petitioner, should not be considered by this Court on appeal. However, out of an abundance of caution, Respondent will respond to other arguments forwarded by Petitioner in the text of his Brief with this Court.

FINDINGS OF FACT BY THE CIRCUIT COURT

On page five (5) of “The Petitioner’s Brief,” it appears that he is arguing that 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. . .” Respondent disagrees. The language of the Procedural Rule enacted by the PEG Board does not distinguish between a motion to dismiss and/or a summary judgment motion. ALJ Spatafore utilized the language in the Procedural Rule of the PEG Board, after deposition testimony was submitted to her in relation to the Amended Grievance. On appeal to the Circuit Court, the Circuit Court did not make any “evidentiary” findings. The Circuit Court did properly issue extensive findings of fact, based upon sworn testimony of Petitioner, Secretary Goodwin, and Commissioner Smith. In Court actions, Court’s often cite to deposition testimony in referencing findings of fact in an Order dismissing the case. By preparing Orders in this fashion, Court’s are not making “evidentiary” findings but are compiling findings of fact, based upon sworn deposition testimony, which is proper. Similarly, in this matter, the Circuit Court committed no error in issuing its findings of fact, based upon the sworn testimony of Petitioner, Secretary Goodwin, or Commissioner Reid-Smith. Therefore, Petitioner’s argument must be rejected.

PETITIONER DID NOT ARTICULATE ANY SUBSTANTIAL PUBLIC POLICY OF WEST VIRGINIA THAT WAS VIOLATED BY HIS TERMINATION; THEREFORE, HIS AMENDED GRIEVANCE WAS PROPERLY DISMISSED BY ALJ SPATAFORE, AND HER DISMISSAL ORDER WAS NOT CLEARLY WRONG

“[T]he rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer’s motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.” Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 704, 696 S.E.2d 1, 12 (2010) (Quoting Harless v. First Nat’l Bank in Fairmont, 162 W. Va. 116, 246 S.E.2d 270 (1978)). “Thus, ‘a cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination.’” Id. at 704, 246 S.E.2d at 15 (Quotation omitted). “This Court previously has provided guidance regarding a determination of public policy exceptions to the at-will employment doctrine: ‘[P]ublic policy’ is that principle of law which holds that ‘no person can lawfully do that which has a tendency to be injurious to the public or against public good . . .’ even though ‘no actual injury’ may have resulted therefrom in a particular case ‘to the public.’” Id. at 704, 246 S.E.2d at 15 (Quotation omitted). Moreover, “[i]nherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person.” Id. at 704, 246 S.E.2d at 15 (Quoting Syl. pt. 3, Birthisel v. Tri-Cities Health Servs. Corp., 188 W. Va. 371, 424 S.E.2d 606 (1992)). “Significantly, this Court has acknowledged that ‘to be substantial, a public policy must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike.’” Id. at 704, 246 S.E.2d at 15 (Quotation omitted).

“The applicable legal precedents have set forth that ‘[t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, [this Court] look[s] to established precepts in our constitution, legislative enactments, legislatively approved regulations,

and judicial opinions.” Id. at 704, 246 S.E.2d at 15 (Quoting Syl. Pt. 2, Birthisel, 188 W. Va. 371, 424 S.E.2d 606)). Expanding on this principle, this Court articulated the “necessary proof for a claim for relief for wrongful discharge in contravention of substantial public policy as follows:

- (1) Whether a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law.
- (2) Whether dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy.
- (3) Whether the plaintiff’s dismissal was motivated by conduct related to the public policy.
- (4) Whether the employer lacked overriding legitimate business justification for the dismissal.”

Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 704, 246 S.E.2d 1, 16 (2010) (Quotation omitted).

“It has been noted that ‘[this Court’s] retaliatory discharge cases are generally based on a public policy articulated by the legislature[.]’” Id. at 704, 246 S.E.2d at 15 (Quotation omitted). “Therefore, courts are to ‘proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.’” Id. at 704, 246 S.E.2d at 15 (Quoting Tiernan v. Charleston Area Med. Ctr., Inc., 203 W. Va. 135, 141, 506 S.E.2d 578, 584 (1998)). “In addition, ‘despite the broad power vested in the courts to determine public policy,’ courts are to ‘exercise restraint’ when using such power.” Id. at 704, 246 S.E.2d at 15 (Quotation omitted). “Therefore, it has been stated ‘[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community so declaring.’” Id. at 704, 246 S.E.2d at 15 (Quotation omitted).

Transfer of West Virginia History Journal

In his Amended Grievance, Petitioner claimed that he objected to Secretary Goodwin's directive to transfer the West Virginia History Journal to the West Virginia University Press, because he believed the transfer violated West Virginia Code § 29-1-6, which Petitioner claimed required him to publish a yearly history of West Virginia. Petitioner claimed that he believed this played a part in his termination.

As was discussed more fully in "*Respondent's Memorandum in Support of Renewed Motion to Dismiss*," the plain language of West Virginia Code § 29-1-6 did not require Petitioner to publish a "yearly" history journal entitled the West Virginia History Journal. (*Renewed Memo in Support of MTD: Armstrong Appx. at 00033-00044*). In particular, West Virginia Code § 29-1-6 provided:

(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.**

(Emphasis added). Furthermore, at his deposition, Petitioner acknowledged that he was not a lawyer and did not know what the law actually stated. Secretary Goodwin simply requested Petitioner follow her lawful directives in transferring the West Virginia History Journal, which he refused to do. Clearly, Petitioner did not articulate any substantial public policy that was violated, as a result of his termination, in relation to this issue. Therefore, Judge Spatafore's Order was not clearly wrong.

Placement of Wayne County Historical Markers

Petitioner asserted in his Amended Grievance that he was terminated in violation of the substantial public policy of West Virginia, because he objected to Commissioner Reid-Smith's placement of three (3) historical markers in Wayne County, which he claimed violated West Virginia

law. (*Amended Grievance: Armstrong Appx. at 00020*). However, at his deposition, Petitioner acknowledged that he had no legal education, and it was simply his personal opinion that Commissioner Reid-Smith violated the West Virginia Code. (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00040-00049; Armstrong Dep.: Pg. 173: Armstrong Appx. at 00130*). However, as ALJ Spatafore and the Circuit Court correctly ruled, Commissioner Reid-Smith had statutory authority to place the three (3) historical markers in Wayne County. In particular, pursuant to West Virginia Code § 29-1-1:

- (d) 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 and promote the creative and performing arts and crafts, including both indoor and outdoor exhibits and performances; to advance, foster, promote, identify, register, acquire, mark and care for historical, prehistorical, archaeological and significant architectural sites, structures and objects in the state. . . and, in general, to do all things necessary or convenient to preserve and advance the culture of the state.

(Emphasis added). Based upon the plain language of West Virginia Code § 29-1-1, Commissioner Reid-Smith acted properly in the placement of the historical markers, and Petitioner's lay opinion that Commissioner Reid-Smith did not have this statutory power is not sufficient to establish the public policy of West Virginia. Therefore, Judge Spatafore's Dismissal Order was not clearly wrong regarding this issue.

Proposal Regarding Reading Rooms and Eating Establishment

Petitioner stated that he was terminated in violation of the substantial public policy of West Virginia, because he objected to proposals to possibly merge the reading room of Archives and History into the existing State Library and to place an eating establishment in the Cultural Center.

Petitioner claimed that he personally objected to his superiors regarding the proposals, because he was “insur[ing] the statutory law of West Virginia was fulfilled.” (*Amended Grievance: Armstrong Appx. at 00020-00021*). However, at his deposition, Petitioner testified that current law would have permitted the merger of the reading rooms. (*Respondent Renewed Dismissal Motion: Armstrong Appx. at 00042-00044; Armstrong Dep.: Pgs. 139-140: Armstrong Appx. at 00122*). Thus, Petitioner could not articulate any substantial public policy that was violated as a result of his termination in respect to this issue. Therefore, ALJ Spatafore’s Dismissal Order was not clearly wrong.

VI. CONCLUSION

ALJ Spatafore properly dismissed Petitioner’s January 22, 2008 Amended Grievance, because Petitioner could not articulate any substantial public policy of West Virginia that was violated by his termination. The Circuit Court of Kanawha County properly affirmed the Dismissal Order of ALJ Spatafore, because her Dismissal Order was not clearly wrong. Therefore, Respondent requests that this Court deny the relief requested by Petitioner in “The Petitioner’s Brief” and that his Petition for Appeal be denied.

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

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDRICK ARMSTRONG,

Petitioner,

v.

Appeal No. 11-033

[Appeal from Civil Action No. 08-AA-82
Honorable Paul Zakaib]

WEST VIRGINIA DIVISION OF
CULTURE AND HISTORY,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Response to Petitioner's
Brief" was served upon the following by hand delivery on this day, Thursday, June 9, 2011:

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EXHIBITS

ON

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CLERK'S OFFICE