

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN POWELL,

Grievant,

v.

Docket No. 2022-0763-BVCTC

BRIDGEVALLEY COMMUNITY AND TECHNICAL COLLEGE,

Respondent.

DECISION

John Powell, Grievant, filed this grievance against his former employer BridgeValley Community and Technical College ("BVCTC"), Respondent, on May 5, 2022, protesting his dismissal. The grievance statement provides, in part:

Respondent terminated Grievant without giving any reason for the termination. This termination was seemingly in retaliation for Grievant's proper questioning of Bridge Valley's leasing/ insurance practices as they pertained to former President Belinger. [Grievant] was terminated days after the conclusion of the forensic audit resulting from his own good faith report to the Higher Education Policy Commission. ...

The relief requested was back pay and reinstatement.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on July 12, 2022, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel Kirk Auvil, Esquire, Employment Law Center, PLLC. Respondent appeared by the President of BridgeValley Community and Technical College, Dr. Casey Sacks and by its counsel, Kristi A. McWhirter, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals and this matter became mature for decision on receipt of the last of these proposals on or about August 15, 2022.

Synopsis

Grievant was employed by Respondent as the Chief Procurement Officer, an at-will position. Grievant contends he was wrongfully terminated. Grievant alleges Respondent retaliated against him for reporting concerns regarding institutional obligations. Grievant has the burden to prove by a preponderance of the evidence that the termination of his employment is in contravention of substantial public policy.

As an at-will employee, Grievant could be terminated at any time for a good reason, bad reason, or no reason at all, but not for rationale which contravene a substantial public policy. At the time of dismissal, Respondent did not provide Grievant with any reason for his termination. Over the course of time, and especially during the level three of this grievance, Respondent has identified and established legitimate, nonretaliatory rationales for terminating Grievant's employment. Grievant failed to prove that his termination was the result of reprisal or was otherwise imposed in violation of a substantial public policy. Accordingly, this Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. BridgeValley Community and Technical College, Respondent, is a public higher education institution governed by the BridgeValley Community and Technical College Board of Governors (hereinafter "Board") and the West Virginia Council for Community and Technical Colleges (hereinafter "Council"). See W. Va. Code §§ 18B-1-2 and 18B-2B-3.

2. Grievant was employed by Respondent as the Chief Procurement Officer in its Finance Department.

3. As the Chief Procurement Officer, Grievant was responsible for preparing all Facility Use Agreements, purchasing anything the College needed, all requisitions needed and any and all major contracts for the College. Grievant L3 testimony; *also see* R Ex 5. As set forth in a June 17, 2014, notification letter and West Virginia Law, Grievant was a non-classified, at-will employee who served at the will and pleasure of the President. L3 Testimony; R Ex 2; *See also* W. Va. Code 18B-9A-2(11).

4. At the times relevant to this matter, Grievant's direct supervisor was Cathy Aquino, Chief Financial Officer. Ms. Aquino testified at the level three hearing.

5. Dr. Eunice Bellinger formerly served as President of BridgeValley Community and Technical College. The newly appointed Acting President, Dr. Casey Sacks, testified at the level three hearing.

6. At some point prior to June 24, 2021, Grievant contacted the Board of Risk and Insurance Management (hereinafter "BRIM"), the entity responsible for providing casualty insurance to West Virginia's State agencies, to determine whether Respondent was permitted to lease property to then President Bellinger to be used as her private residence without requiring Dr. Bellinger to carry insurance for the property.

7. BRIM referred Grievant to Kristin Boggs, General Counsel for the West Virginia Higher Education Policy Commission and Community and Technical College System. At some point prior to June 24, 2021, Grievant talked with Ms. Boggs about his property insurance concerns as well as other concerns he had related to the Facility Use

Agreement form used by Respondent for the property owned by Respondent but used by then President Bellinger as her residence.

8. Pursuant a June 24, 2021 email, Grievant provided Ms. Boggs, among other things, with a Facility Use Agreement he prepared for the land and a dwelling that then President Bellinger had been using as her residence. G Ex 1 and 3 Pursuant to the typewritten date included in the Agreement in two places, then President Bellinger purportedly signed the Facility Use Agreement on November 20, 2019. The Agreement references and includes as an attachment a May 20, 2021 letter from former Board Chair Sally Cline to Dr. Bellinger.¹ Grievant L3 Testimony; G Ex 3

9. Respondent was in fact required to carry insurance for the property in question.

10. On June 25, 2021, the Board terminated former President Eunice Bellinger for cause and installed Casey Sacks as Acting President. Previously, Mr. Sacks had held the position of Interim Vice Chancellor for the West Virginia Community and Technical College System as part of the Higher Education Policy Commission.

11. Further, on June 25, 2021, the Board agreed to obtain an independent audit for the College. R Ex 3

12. In October of 2021, President Sacks removed some of Grievant's job responsibilities related to approving contracts. Dr. Sacks removed the job responsibilities after discovering, during a review of all Oasis staff responsibilities, Grievant did not have

¹ It is not clear why or how a November 20, 2019 document references an attached document that was not in existence until May 20, 2021. The parties do not agree on the explanation.

the proper Oasis authorization to perform those responsibilities even though they had been delegated to him. Sacks L3 testimony

13. President Sacks removed Grievant's ability to sign purchasing agreements, reallocating it to Chief Financial Officer Cathy Aquino, Grievant's direct supervisor. Dr. Sacks testified that she reassigned the duties to Ms. Aquino because she was the employee authorized in Oasis to perform the duties.

14. By an October 22, 2021 engagement letter, Respondent engaged the services of Suttle & Stalnaker (hereinafter "S&S"), Certified Public Accountants, to conduct an independent audit of the College's Finance Department. Pursuant to the terms of the engagement letter, the purpose of the audit was to "determine if fraud or abuse was likely to have occurred" in the following four specific areas:

Phase 1:

- 1) Perform inquiries in the finance department regarding policies and procedures surrounding purchasing and procurement and contracts/facilities agreements, as well as their role in such processes.
- 2) Obtain a sample of contracts or procurement-based agreements and documentation of the selection process to ensure the established process was followed for agreements entered into for period of July 1, 2018-June 30, 2020.
- 3) Inquire and examine relevant records to determine the date of initial occupation or use of Ratliff Hall and the Vice President House commenced. Based on commencement, perform additional inquiries of key employees in the finance department regarding their knowledge of the use and acquisition of Ratliff Hall and the Vice President House from WVU Tech, and any other transactions or expenses incurred related to the properties. Obtain a list of all expenses incurred related to the properties both before and acquisition and analyze for reasonableness. Management anticipates relevant records, inquiries, or transitions may relate to time periods beginning in 2016 through the end of fiscal year 2021.
- 4) Obtain an understanding of the recording of revenue from other sources, specifically those outside of Tuition & Fees, Federal, State, &

Private Grants, and State Appropriations.

R Ex 4

15. Of the four areas examined by the independent auditors, Procedure #2 falls under the specific purview of Grievant's job duties as the Chief Procurement Officer. L3
Testimony

16. Suttle & Stalnaker issued its final audit report on or about April 8, 2022. The audit identified several areas of deficiency within the finance department.

17. Suttle & Stalnaker, Certified Public Accountants, reported the audit's findings to Respondent's Board of Directors. The independent auditors found deficiencies in Procedure #2 and Procedure #3. With regard to Procedure #2, S&S found three "exceptions" (purchasing procedural errors); for example, Respondent failed to follow the competitive bidding procedures and failed to include required documentation related to the competitive bidding process.

18. At the time relevant to this matter Dr. Sacks, in her capacity as Acting President, was making final employment termination decisions. Grievant's at-will employment as the CPO was terminated pursuant to an April 18, 2022, letter signed by Dr. Sacks. R Ex 1 Grievant was an at-will employee. President Sacks was not required to, and upon the advice of legal counsel, did not provide Grievant with any reason for his employment termination.

19. Grievant's termination letter contains no reason for the dismissal. Grievant's termination was approximately ten days after Suttle & Stalnaker reported the audit's findings to Respondent's Board of Directors. Respondent's current president, Dr. Casey Sacks, testified that Grievant was terminated as a result of the audit findings.

Discussion

It is undisputed that Grievant was an at-will employee. “[A]s a general rule, West Virginia law provides that the doctrine of employment at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg’l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). “The 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.” Syl. Pt. 3, *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat’l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)).

A grievant employed at-will alleging he was wrongfully terminated has the burden of proving by a preponderance of the evidence that the termination of his employment was motivated to contravene some substantial public policy. In this case, Grievant may “truly believe” that his employment termination was because he was attempting to address what he understood to be Respondent’s violations of a leasing requirement; however, his beliefs do “not necessarily establish the information as a fact certain.” See *Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (Sept. 22, 2016). Grievant testified at the level three hearing. Grievant contends he was wrongfully terminated. Grievant alleges Respondent retaliated against him for reporting concerns to the West Virginia Higher Education Policy Commission (via General Counsel Boggs)

about Respondent's failure to follow proper leasing practices and procedures as they related to a College-owned property that former-President Bellinger resided in and for making inquiries and reporting about the College's obligations, if any, to require Dr. Bellinger to procure liability insurance for the same property. Grievant was an at-will employee of Respondent. As an at-will employee, Grievant could be terminated at any time for a good reason, a bad reason, or no reason but not for rationale which contravene a substantial public policy. Grievant also tends to allege Respondent's actions against him were inequitable.²

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a prima facie case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance. The burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently

² Grievant's supervisor, Cathy Aquino, in charge of the finance department, was not terminated. Respondent assessed the deficiencies of Procedure #2 identified in the audit report as failings primarily under the specific purview of Grievant's job duties. Grievant disagrees. Grievant suggests that "if" the deficiencies were terminal offenses, his supervisor is just as culpable, or perhaps more. The contention that Respondent must use progressive discipline and/or implement an alternate/lighter punishment instead of terminating Grievant's employment is rejected. See *McGraw v. Dep't of Educ.*, Docket No. 2015-0666-DOE (Apr. 24, 2015)(citing *Wright v. Standard Ultramarine and Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955) and *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479 S.E.2d 602 a(1996)(citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)).

discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. 13 Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

“An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

In the instant case, Grievant learned that Respondent had entered into an arrangement with its then-President, Dr. Eunice Bellinger. Grievant contacted one or more regulatory bodies to determine what the institution's obligations were to comply with West Virginia regulations regarding higher education institutions' insurance requirements. Grievant testified that he made his inquiries and reports regarding the arrangement to ensure that Respondent was in compliance with state regulations. Grievant and

Respondent offered differing testimony as to Respondent's awareness of Grievant's actions. Grievant highlights with great emphasis isolated facts and downplays documented errors of his own.

Grievant tends to reconstruct the facts in a piecemeal fashion which from time to time is non-sequential. Grievant's employment was not terminated contemporaneous with his May 2021 actions, but after an April 2022 audit report. Respondent dismissed the previous president and determined that an independent audit was necessary to "determine if fraud or abuse was likely to have occurred." See FOF's 10-17. Pursuant to the audit of an independent certified public accountants' firm, the auditors found deficiencies of the College's Finance Department. Of the areas examined by the independent auditors, Procedure #2 falls under the specific purview of Grievant's job duties as the Chief Procurement Officer. With regard to Procedure #2, the auditors found purchasing procedural errors; for example, Respondent failed to follow the competitive bidding procedures and failed to include required documentation related to the competitive bidding process. See R Ex 5. The errors were committed by Grievant in his capacity as the CPO. Grievant was terminated a week after the audit was published to Respondent's Board of Directors. Despite providing Grievant the benefit of every doubt, Grievant's contention fails woefully short of establishing a *prima facie* case of unlawful retaliation. Grievant may "truly believe" that his termination was because he was addressing Respondent's violations of a leasing requirement; however, his beliefs does not establish the information as a fact certain. See *Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (Sept. 22, 2016). Grievant's demeanor during his testimony revealed that he had strong feelings and convictions related to why Respondent

terminated his employment, but Grievant's testimony is extremely short on relevant first-hand information. Further, although hearsay is admissible in these proceedings, Grievant's testimony included a large amount of uncorroborated hearsay.³ Grievant presented little documentation to support his opinions.⁴ Grievant's testimony was extremely self-serving, biased and includes much speculation. It was not presented in a manner which generated a sense of reliability. The testimony included speculation mixed with his own opinion regarding events he did not participate in, and he could not recall the specifics of when events relevant to his claims occurred. Grievant's testimony

³ The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990)

⁴ In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. In the circumstances of this case, the undersigned ALJ deemed it prudent to assess the credibility of Grievant's testimony regarding events in discussion.

is not deemed persuasive and lacks the degree of credibility needed to prove the issue(s) in contention.

On June 25, 2021, BVCTC terminated then-President Eunice Bellinger and installed Dr. Casey Sacks as Acting President. Dr. Sacks presented testimony that is direct first-hand recollection regarding relevant events associated with her testimony. Respondent assessed identifiable deficiencies recognized in the audit report as failings primarily within Grievant's purview. Grievant contends this is subtext for retaliatory actions is not supported by reliable evidence of record. Acting President Sacks participated in the meetings for which she provided testimony, and her testimony was supported by the documents she relied on to make her decision to terminate Grievant's employment. Grievant was terminated a week after the audit was published to Respondent's Board of Directors. President Sacks testified that Respondent terminated Grievant as a result of audit findings. Dr. Sacks in her capacity as President made the final determination regarding termination of Grievant's employment. This trier of fact perceives and deems President Sacks' testimony to be reliable.

Grievant thinks Respondent did not appreciate his efforts over the years. Grievant feels betrayed. However, Grievant's opinion alone regarding Respondent's motivation for his termination is not sufficient to maintain his burden of proof. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. See *Young v. W. Va. Dep't of Health and Human Res.*, Docket No. 90-HHR-541 (Mar. 29, 1991). Grievant failed to prove that his employment termination was the result of reprisal or was otherwise imposed in violation of a substantial public policy. If one was

to follow the timeline set forth and fold-in the known relevant factors, it is more probable than not that former President Eunice Bellinger's employment was shortened as a result of Grievant's actions, but Grievant's termination was due to combined deficiencies recognized as Grievant's area of responsibility. Respondent lost faith in Grievant's ability to effectively perform the essential duties of the Chief Procurement Officer. Respondent loss faith in Grievant's abilities to protect its interest. This is NOT the same as a retaliatory dismissal.

Grievant could be terminated at any time for a good reason, a bad reason, or no reason at all, but not for rationale which contravenes a substantial public policy. At the time of dismissal, Respondent did not provide Grievant with any reason for his termination. Over the course of time, and especially during the level three of this grievance, Respondent has identified and established legitimate, nonretaliatory rationales for terminating Grievant's employment. Grievant's failure to follow proper purchasing and competitive bidding procedures is of record. See R Ex 5. Grievant's speculative testimony does not establish retaliatory motive for his termination. Grievant's testimony alone is not sufficient proof. Nevertheless, assuming *arguendo* Grievant had made a *prima facie* case of retaliation, Respondent presented legitimate, non-retaliatory reasons for terminating Grievant's employment that Grievant failed to prove were a pretext for retaliation. Accordingly, Grievant fails to achieve the requisite burden of proof to prevail in this grievance.

Grievant failed to prove that his employment termination was the result of reprisal or was otherwise imposed in violation of a substantial public policy.

Conclusions of Law

1. In cases involving the dismissal of classified-exempt, at-will employees, state agencies do not have the burden of proof to establish reasons for the termination and do not have to establish good cause for discharging an employee. *Logan v. W. Va. Regional Jail & Correctional Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994).

2. Because Grievant was an at-will employee at the time of his termination, this dismissal could occur for "no reason" or a "bad reason," unless a substantial public policy is violated. *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). See *Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Higginbotham v. W. Va. Dep't of Pub. Safety/W. Va. State Police*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Myer v. W. Va. Racing Comm'n*, Docket No. 95-RC-290 (May 3, 1996); *Samples v. Glenville State College*, Docket No. 94-BOD564 (July 28, 1995); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994).

3. "The 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." Syl. Pt. 3, *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241, 588 S.E.2d 406 (2003)(citing Syllabus, *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)). The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the

termination stands. Wilhelm, *supra*. See *Young v. W. Va. Dep't of Health and Human Res.*, Docket No. 90-HHR-541 (Mar. 29. 1991)

4. The Supreme Court has found that the termination of an at-will employee contravenes substantial public policy when it is in retaliation for an employee's actions regarding a matter of substantial public interest. *Kanagy v. Fiesta Salons, Inc.* 208 W. Va. 526, 541 S.E.2d 616 (2000) (Employee terminated in retaliation for cooperating with the investigation of an employer by state regulatory agency); *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997)(employee terminated in retaliation for expressing concern that employer was violating a state regulation); *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996); (Employee terminated in retaliation for truthfully testifying in a legal action against employer).

5. “In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a prima facie case.” *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating, “[t]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of

time that the court can infer retaliatory motivation.” Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank’s Shoe Store v. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm’n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

6. “An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep’t of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

7. Grievant failed to prove that his employment termination was the result of reprisal.

8. Further, assuming *arguendo* Grievant had made a *prima facie* case of retaliation, Respondent presented legitimate, non-retaliatory reasons for terminating Grievant’s employment that Grievant failed to prove were a pretext for retaliation.

9. Grievant failed to prove that his employment termination was unlawful or otherwise imposed in violation of a substantial public policy.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.⁵ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: September 21, 2022

Landon R. Brown
Administrative Law Judge

⁵ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.