

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**PHILLIP RAY LEWIS,  
Grievant,**

**v.**

**Docket No. 2024-0551-CU**

**CONCORD UNIVERSITY,  
Respondent.**

**DISMISSAL ORDER**

Grievant, Phillip Ray Lewis, was employed in a non-classified, at-will, position of Director of the Career Center, with an effective date of March 30, 2020. On February 8, 2023, Concord University notified Grievant that his employment was terminated effective that day. Grievant filed this action at level one on February 14, 2024, challenging the termination of his employment with Concord University. Grievant later expedited his filing directly to level three on March 1, 2024. Respondent filed a motion to dismiss this case on March 7, 2024. After receiving a response from Grievant to the motion to dismiss, the undersigned conducted a hearing on the motion on April 11, 2024. Grievant appeared in person and *pro se*. Concord University appeared by its counsel Kristi A. McWhirter, Assistant Attorney General. Thereafter, the parties were invited to further address the motion with a submission date of April 26, 2024. Grievant filed his final response to the motion on April 25, 2024, and Respondent filed their final brief on the motion on April 26, 2024. The matter is now mature for a ruling on the motion.<sup>1</sup>

**Synopsis**

Grievant served at the will and pleasure of Concord University. As such an employee, Grievant must allege a substantial public policy violation to challenge the

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<sup>1</sup> At the time of the issuance of this order Grievant had passed away on June 2, 2024.

termination of his employment. Grievant alleges that he was the victim of age and sex discrimination, both qualifying as substantial public policy violations. The undersigned does not have jurisdiction to hear discrimination claims based on sex or any other protected class status because recent statutory amendments to the Grievance Board statute set out exclusions from the definition of “grievance” that remove such claims from the Grievance Board’s jurisdiction. Accordingly, this case must be dismissed.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. Concord University is a public institution of higher education governed by the Concord University Board of Governors. W. VA. CODE § 8B-2A-1(b).

2. By a February 24, 2020, letter, Concord University offered Grievant the non-classified, at-will, exempt position of Director of the Career Center, effective March 30, 2020.

3. Grievant accepted the offer of employment on March 2, 2020.

4. On February 8, 2024, Concord University notified Grievant that his employment was terminated effective that day. This communication was memorialized in a letter dated February 12, 2024, from Daniel O. Fitzpatrick, Chief Human Resources Officer.

5. Concord University’s Board of Governors Policy 49 on disciplinary action, states, “This policy establishes a policy and procedures related to a progressive disciplinary process and for all Concord University faculty and classified staff.” As such, this policy applies to faculty and classified employees only and does not apply to Grievant as a non-classified employee.

6. Grievant filed this action challenging his termination. He indicated that, “No previous violation of any wrongdoing or violation of University policy was given and no corrective progression was put in place. When a reason was requested, Dan Fitzpatrick, Vice President of Operations, COO/CHRO, stated a reason was not required. I feel the termination is in violation of the Concord University Board of Governor’s Policy No. 49 . . . In addition, Phillip R. Lewis’ right to the due process of the Pre-Termination Conference listed in Section 7 of Policy No. 49 was violated.”

7. At the hearing on the motion to dismiss, the undersigned instructed the Grievant that, to proceed, he needed to allege that the motivation for his employment termination violated a substantial public policy. Grievant responded by email dated April 25, 2024, identifying both age and sex discrimination as the motivation for Concord University to end his employment, which violated substantial public policy.

8. Grievant argues that Concord University, following his employment, hired a younger female employee and alleges that Concord University paid him less than a female employee in the same department, though she held a different job title.

### **Discussion**

“Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W. VA. CODE ST. R. § 156-1-6.2 (2018). When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep’t of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No.

95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). However, in cases involving the dismissal of classified-exempt, at-will employees, state “agencies do not have to meet this legal standard.” *Logan v. Reg’l Jail & Corr. Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994) *aff’d*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996).

“The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “[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)).

Thus, an at-will employee must allege a substantial public policy violation to avail himself to the statutory grievance procedure. However, the alleged public policy violation must also fall under the jurisdiction of the Grievance Board. “[A]dministrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003).

To be sure, the West Virginia Human Rights Act prohibits discrimination based on sex and age. As noted above, Grievant argues that Concord University, following his termination, hired a younger female employee and alleges that, during his employment, Concord University paid him less than a female employee in the same department, though she held a different job title. Ostensibly, these claims could be said to implicate the West Virginia Human Rights Act. Prior to 2023, alleged violations of the West Virginia Human Rights Act constituted an allegation of a substantial public policy violation sufficient for an at-will employee to access the statutory grievance procedure established by the Public Employees Grievance Board. See Syl. Pt. 1 of *Vest v. Nicholas County Bd. of Educ.*, 193 W. Va. 222 (1995); *Harless, supra.*, *Bellinger v. W. Va. Dept. of Pub. Safet.*, Docket No. 95-DPS-119 (Aug. 15, 1995), and Syl. Pt. 4., *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012). However, the Legislature has

since removed from the Grievance Board its authority and jurisdiction over claims that would violate the West Virginia Human Rights Act:

(2) “Grievance” does not mean:

(B) Any matter relating to the protected classes set forth in § 5-11-1 *et seq.* of this code. W. VA. CODE § 6C-2-2(i) (2023).

If a classified employee is barred from bringing a disability and/or sex discrimination claim covered by the West Virginia Human Rights Act under the new statutory grievance procedure, it flows logically that at-will employees, likewise, are barred from using West Virginia Human Rights Act claims to access the grievance procedure. In any event, it is undisputed that Grievant has alleged his employment termination was discriminatory based on age and sex, clearly covered by the West Virginia Human Rights Act. Even assuming *arguendo* that Grievant has demonstrated an acceptable substantial public policy violation, the undersigned is without authority to hear, on the merits of the case, protected class discrimination claims or any other claims covered by the West Virginia Human Rights Act. Accordingly, Concord University’s Motion to Dismiss is granted.

The following Conclusions of Law support the ruling in this case.

### **Conclusions of Law**

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W. VA. CODE ST. R. § 156-1-6.2 (2018). When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep’t of Educ.*,

Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). However, in cases involving the dismissal of classified-exempt, at will employees, state “agencies do not have to meet this legal standard.” *Logan v. Reg’l Jail & Corr. Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994) *aff’d*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996).

3. “[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)).

4. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). Concerning exclusions set out in recent amendments to the grievance statute, WEST VIRGINIA CODE § 6C-2-2(i)(2) (2023) states that “[g]rievance does not mean any pension matter or other issues relating to public employee insurance in accordance § 5-16-1, *et seq.* of this code, retirement, or any other matter in which the authority to act is not vested with the employer; (B) Any matter relating to the protected classes set forth in § 5-11-1 *et seq.* of this code.”

5. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003).

6. The Grievance Board is without jurisdiction to hear protected class discrimination claims, or any other claims covered by the West Virginia Human Rights Act.

Accordingly, this grievance is **DISMISSED**.



“An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with § 51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: June 11, 2024**

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**Ronald L. Reece**  
**Administrative Law Judge**