THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES E. WILLIAMS,
Grievant,

v. **Docket No. 2023-0571-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant, James E. Williams, was employed by Respondent, Department of Health and Human Resources at Jackie Withrow Hospital. On January 12, 2023, Grievant filed this grievance against Respondent protesting the termination of his employment. For relief, Grievant seeks reinstatement, back pay, and restoration of tenure.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on May 11, 2023 and May 12, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office via videoconferencing. Grievant appeared personally and was represented by Gordon Simmons. Respondent appeared by Angela Booker, CEO, and was represented by counsel, Heather Olcott, Assistant Attorney General. This matter became mature for decision on June 12, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent at Jackie Withrow Hospital as a maintenance worker. Grievant's employment was terminated for sexual harassment following a prior suspension for sexual harassment. Grievant denied the allegations, asserted the termination was retaliatory, and alternately argued mitigation of the

punishment was warranted. Respondent proved Grievant sexually harassed two female coworkers and that termination of his employment was justified. Grievant failed to prove the termination was retaliatory or that mitigation of the punishment was warranted. Grievant proved his due process rights were violated. Grievant is entitled to nominal damages of one dollar for the due process violation. Accordingly, the grievance is granted, in part, and denied, in part.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent, Department of Health and Human Resources at Jackie Withrow Hospital as a maintenance worker and had been so employed since August 2014.

2. Grievant was a shop steward at the hospital for the West Virginia Public Workers Union from 2014 through 2022.

3. Jamie Pugh is a registered nurse employed by the hospital as an In-Service Coordinator. Ms. Pugh also works some weekends as a Nurse Supervisor.

4. Beginning in the summer of 2021, shortly after she was hired, Grievant began to make comments to Ms. Pugh that she initially ignored, but, over time, made her uncomfortable.

5. There were five specific incidents of particular concern, as follows:

5.1. Ms. Pugh was in a hallway wearing personal protective equipment ("PPE") that included a gown covering her dress. As Ms. Pugh walked past Grievant, he told Ms. Pugh to lift up her gown so that he could

see what was underneath the gown. When Ms. Pugh indicated he should not have said that, he chuckled with his hand by his mouth stating that she was taking it the wrong way and he was "just kidding" because he thought she dressed nicely and he just wanted to see.

5.2. Ms. Pugh and several other employees were standing around the time clock when Ms. Pugh saw Grievant hug another employee. When Ms. Pugh questioned why Grievant was hugging the other employee, Grievant then said, "come here and give me a hug" and "got a hold of" Ms. Pugh to hug her. Ms. Pugh pushed him away and told him to stop. Grievant said he was kidding and thought Ms. Pugh wanted a hug too and laughed like Ms. Pugh was joking.

5.3. As Ms. Pugh was entering the building to clock in, Grievant approached Ms. Pugh with both arms raised up and out, loudly saying something like, "Are you ready to do this" or "Let's do this" while closely approaching Ms. Pugh, appearing to try to hug her. There was nothing Grievant and Ms. Pugh were doing together at that time for him to approach her about being ready. Ms. Pugh was confused and uncomfortable and did not know what Grievant meant or if he was going to try to hug or touch her. She turned her body away and questioned what he was doing. Grievant then lowered his hands and walked by. Aimee Brag, Assistant Chief Executive Officer ("CEO"), witnessed this incident and found it to be "very weird."

5.4. When working as Nurse Supervisor on weekends, Ms. Pugh wore scrubs. One day when Ms. Pugh was wearing scrubs, Grievant approached her and questioned why she was wearing scrubs but wore nice clothes during the week, saying that Ms. Pugh wore scrubs on the weekend because she wasn't trying to show off like she does during the week. When Ms. Pugh responded that she did not dress inappropriately during the week and did not wear tight clothing or show cleavage, Grievant made a comment that it didn't matter because, "You don't have any boobs."

5.5. Grievant also brought up another maintenance worker to Ms. Pugh, saying he knew Ms. Pugh and the other maintenance worker were "fucking." When Ms. Pugh said it was not his business, Grievant stated he could not believe Ms. Pugh would not "step outside" of her marriage at least once. When Ms. Pugh denied it, Grievant sarcastically said, "Oh, I forget you are Betty Crocker and the best homemaker."

6. Ms. Pugh did not make any formal complaint about Grievant's behavior but, following the weekend of August 27, 2022, mentioned to the hospital's Equal Employment Opportunity ("EEO") counselor, Aleta Freeman, R.N., that Grievant was making her feel uncomfortable and that he had followed her around all weekend.

7. Shortly thereafter, Ms. Freeman observed Grievant sitting in Ms. Pugh's office. Because Ms. Pugh had stated that Grievant had been following her around and she was uncomfortable, Ms. Freeman instructed Grievant to leave, which he did.

8. Just before Ms. Freeman saw Grievant in Ms. Pugh's office and told him to leave, another employee, Jeff Stone, also saw Grievant in the office. Mr. Stone went

directly to Human Resources Associate, Ashley Presgraves, to ask her to call Ms. Pugh to "get her out of the situation." Ms. Pugh then told Ms. Presgraves that Grievant had been making comments to her and she was uncomfortable. Ms. Presgraves told Ms. Pugh should file a report.

9. Later that day, Grievant messaged Ms. Pugh on Facebook Messenger and said, "Wow, did I get you in trouble or did she just save you?" When Ms. Pugh did not respond, Grievant stated, "Oh, I'm shunned now."

10. Ms. Freeman informed Grievant's supervisor, Joseph Wickline, of what Ms. Pugh had reported to her and that she had found Grievant in Ms. Pugh's office and asked him to leave. Mr. Wickline asked if he could speak with Ms. Pugh about the incidents and Ms. Freeman agreed.

11. Mr. Wickline met with Ms. Pugh, who disclosed the prior incidents as stated above that Ms. Pugh had not discussed with Ms. Freeman.

12. Mr. Wickline considered the allegations to be serious and reported them to hospital CEO Angela Booker.

13. After Mr. Wickline reported the allegations to CEO Booker, Ms. Freeman met with Ms. Pugh on August 31, 2022, to get more details of the allegations. Ms. Pugh still did not want to file a complaint, so Ms. Freeman only took notes of what Ms. Pugh disclosed. Ms. Freeman informed Ms. Pugh that she was required to report the allegations to administration even though Ms. Pugh did not want to file a formal complaint.

14. On September 7, 2022, Ms. Freeman submitted the allegations to the Office of Human Resource Management ("OHRM") by email.

15. OHRM EEO officer, Wesley Henderson, received the report of allegations from Ms. Freeman.

16. Mr. Henderson and Jason Barnette, EEO/Civil Rights Specialist, investigated the allegations. The investigators interviewed witnesses, which interviews were recorded and informally transcribed, except for Grievant's interview and Ms. Skeens' interview. Mr. Henderson accidentally deleted Grievant's interview and, due to a recording malfunction, Ms. Skeens' recording cuts off after two minutes. The investigators did not solicit written signed statements from the witnesses or have them certify the informal transcripts made of the recordings.

17. During the investigation, two other female employees who were interviewed, Summar Thomas and Angela Skeens, also made allegations that Grievant had harassed them.

18. Grievant had commented to Ms. Skeens that her body looked nice and he had grabbed and hugged her twice. Although Ms. Skeens did not specifically tell him to stop hugging her, she froze up, kept her arms straight, and did not reciprocate the hug. Grievant also put his hand on Ms. Skeens buttocks and held it there while she was walking.

19. The investigators completed an investigative report in December 2022, in which they substantiated the allegations of inappropriate comments of a sexual nature and unwanted physical touching and harassment by Grievant.

20. Prior to this investigation, on August 6, 2019, Grievant had been suspended for three days for violation of Respondent's hostile work environment policy for making comments regarding a female co-worker's shirt and cleavage.

21. CEO Booker reviewed the investigative report and, in consultation with OHRM, decided termination of Grievant's employment would be required due to the nature of the allegations in combination with his previous suspension for sexual harassment. Ms. Booker specifically found Grievant had violated DHHR 's Hostile Work Environment policy and the Division of Personnel's Prohibited Workplace Harassment Policy.

22. By letter dated January 6, 2023, CEO Booker notified Grievant of a predetermination conference scheduled for the same day. The letter alleged violation of Respondent's employee conduct policy regarding substantiation of a claim of sexual harassment and a second complaint of sexual harassment received on January 4, 2023. The letter provided no explanation of the charges against Grievant.

23. CEO Booker gave Grievant the letter approximately thirty minutes before the conference. CEO Booker, Mr. Wickline, Travis Puffenbarger, and Grievant were present in the meeting. CEO Booker informed Grievant only that there had been an allegation of sexual harassment that had been substantiated. She refused to tell him who the alleged victims of harassment were or what, specifically, Grievant had been accused of doing.

24. CEO Booker dismissed Grievant from his employment by letter dated January 10, 2023. Grievant was dismissed for violation of Respondent's *Employee Conduct* and *Hostile Work Environment* policies and the Division of Personnel's *Prohibited Workplace Harassment Policy*. The letter fails to explain the specific misconduct for which Grievant was terminated, stating only that sexual harassment was substantiated by the investigation.

25. Respondent's *Employee Conduct* policy, Policy Memorandum 2108, requires employees to comply with agency and Division of Personnel policies, conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public; refrain from harassing, intimidating, or physically abusing residents/patients/clients, or fellow employees; refrain from profane, threatening, or abusive language; and to refrain from making unwanted or inappropriate verbal or physical contacts.

26. Respondent's *Hostile Work Environment* policy, Policy Memorandum 2123, prohibits, in pertinent part, intrusion - pestering, spying, or stalking; unwelcome touching or unconsented-to touching; unsolicited and unwelcomed sexual advances; and verbal, written, or physical conduct of a sexual nature.

27. DOP's *Prohibited Workplace Harassment Policy* prohibits harassment including, in pertinent part, as follows: improper questions about an employee's private life; sexually discriminatory ridicule**,** insults, jokes, or drawings;; undesired, intentional touching such as embracing, patting, or pinching; threatened; and repeated sexually explicit or implicit comments or obscene and suggestive remarks that are unwelcome or discomfiting to the employee.

28. Respondent's *Progressive Correction and Disciplinary Action* policy, Policy Memorandum 2104, allows for dismissal from employment "when infractions/deficiencies in…behavior continue after the employee has had adequate opportunity for correction or an employee commits a singular offense of such severity that dismissal is warranted."

29. Grievant had filed two other grievances against Respondent prior to the instant grievance.

30. On June 15, 2015, Grievant grieved his non-selection for a Supervisor 2 position, which had been awarded to Anthony Mansfield. By decision dated June 28, 2017, the grievance was granted in part and denied in part. Respondent was ordered to repost the position and undertake a new selection process. Several months prior to the grievance decision, Mr. Mansfield had resigned and Mr. Wickline was named acting supervisor. The position was never reposted as ordered by the Grievance Board.

31. Grievant also filed a grievance protesting a charge of unauthorized leave against his supervisor, Mr. Wickline. By decision dated April 3, 2019, the grievance was granted and Respondent was ordered to pay two days of annual leave and two days of holiday pay plus interest.

Discussion

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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980);

Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent asserts termination of Grievant's employment was justified for the proven sexual harassment in violation of policy and in consideration of his prior suspension for sexual harassment.[1] Grievant denies the allegations and asserts Respondent has failed to prove the same. Grievant asserts the termination was retaliatory and that his due process rights were violated. Alternatively, Grievant asserts mitigation of the punishment is warranted.

As the relevant facts are in dispute, credibility determinations are necessary. 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 Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of

[1] Respondent submitted evidence of allegations that were not substantiated by the investigation. As the stated basis for terminating Grievant's employment was only the "substantiated record of sexual harassment" by the investigation, only those allegations that were substantiated by the investigation were considered as evidence to justify the termination.

prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Jaimie Pugh's demeanor was appropriate. Although Ms. Pugh made clear from the beginning that she did not want to pursue a complaint against Grievant, her testimony was forthcoming. She answered questions seriously and without hesitation but admitted when she did not remember certain facts. She was somewhat hostile during cross examination and took offense at the perceived tone of Grievant's representative, however, this appears to be based on her feeling that Grievant's representative had attempted to intimidate her in their pre-hearing conversation[2]. Ms. Pugh does not appear to have a motive to lie about the allegations or have bias against Grievant. In fact, when she first disclosed the behavior to Ms. Freeman and Mr. Wickline she did not want to pursue a complaint against Grievant; she only wanted the behavior to stop.

Ms. Pugh's testimony was consistent with her interview with the investigators, although her wording differed slightly. Ms. Pugh was careful in both the interview and testimony to say she was not giving exact quotations of what was said. Given the passage of time, some variation in the narrative is to be expected and is not an indication of lack of credibility here.

Ms. Pugh's testimony regarding the gown incident was consistent with her statement to the investigators and was more plausible than Grievant's version of events. Ms. Pugh's testimony is not credibly contradicted by Ms. Johnson's interview statement,

[2] Grievant's representative strongly denies Ms. Pugh's allegation. The allegation is discussed only for its relevance in explaining Ms. Pugh's demeanor.

as will be discussed more fully below. Grievant did not deny that he asked Ms. Pugh to lift the gown and testified instead that he only complimented Grievant's dress. As Ms. Pugh was wearing a gown covering her dress, it is not plausible that Grievant was complimenting her dress. Ms. Pugh's testimony that Grievant brought up wanting to compliment her dress as an excuse for his comment is more plausible.

Ms. Pugh's testimony regarding the "Are you ready to do this?" incident was consistent with her interview and was supported by Assistant CEO Bragg's testimony. Grievant's denial that he had his hands raised as he came at Ms. Pugh is contradicted by Ms. Pugh and Ms. Bragg's testimony. Ms. Pugh's testimony regarding Grievant laughing off his behavior during the incidents was consistent with Grievant's behavior during his testimony. As to the remaining three incidents that Grievant simply denied occurred, Ms. Pugh's account of each appeared genuine and provided sufficient detail to be credible.

Angela Skeens' demeanor was calm and serious. Her answers were straight-forward and she admitted when she did not know the answer to a question. There is no credible evidence Ms. Skeens had any bias against Grievant. Ms. Skeens' investigative interview is unavailable due to technical error, so there are no prior statements to compare to her testimony. Ms. Skeens' description of the events is plausible. Ms. Skeens is credible.

Summar Thomas' demeanor was appropriate, considering that she was called to testify unexpectedly. Ms. Thomas testified simply, did not hesitate in her answers, and admitted when she did not remember something. However, her testimony was not consistent with her interview and her assertion in the interview that she had told Ms. Pugh

that Grievant grabbed her breasts was not corroborated by Ms. Pugh. Therefore, it cannot be found more likely than not that Grievant grabbed Ms. Thomas' breasts.

Grievant's demeanor was poor. Grievant repeatedly failed to answer direct questions, instead giving evasive answers, fidgeting nervously, and pausing overly long before answering. Grievant's attitude during the proceeding was flippant at times. When asked about each of the serious allegations, he laughed each time he said "no." Grievant manifested disrespect towards women during the hearing by calling Respondent's female counsel "honey" and referring to women as "girls." As discussed above, Grievant's version of the gown and attempted hug incidents were not plausible and the attempted hug testimony was directly contradicted by Assistant CEO Brag's testimony. Grievant's testimony was also internally inconsistant. For example, Grievant denied hugging Ms. Pugh because he "already knew where we stood," yet testified that he thought he was welcome in her office because they were friends. Grievant was not credible.

Paula Johnson's interview transcript was offered to rebut Ms. Pugh's testimony regarding the gown incident. The interview transcript is hearsay. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand 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. *Id.*; *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-H-115 (June 8, 1990).

Ms. Johnson's statements are contained in an informal, uncertified transcript of the recorded interview. Ms. Johnson was not asked to affirm the transcript or provide her own written sworn statement. Ms. Johnson was not called to testify. The interview statement is entitled to little weight. Further, Ms. Johnson's transcribed comments do not contradict Ms. Pugh's testimony. Ms. Johnson stated she was in a hurry, did not hear the entire exchange, and did not remember what was said. Her statement was that, when she questioned what Grievant said, his response was that he said "I like your gown." This is even contradicted by Grievant's admission that he complimented Ms. Pugh's dress and not the gown.

Based on the credibility assessments and the evidence presented, Respondent proved it was more likely than not Grievant sexually harassed Ms. Pugh and Ms. Skeens.

Specifically, Grievant told Ms. Pugh to lift up her gown so he could see what she was wearing, hugged her without her permission, accused her of cheating on her husband by "fucking" a co-worker, and told her she didn't have any "boobs." Grievant hugged Ms. Skeens without her permission, told her that her body looked nice, and held his hand on her buttock.[3]

These actions violate both the DOP's *Prohibited Workplace Harassment Policy* and Respondent's *Hostile Work Environment* policy. Grievant's behavior included unconsented-to, undesired, intentional touching; improper questions about an employee's private life; sexually discriminatory insult; undesired, intentional touching such as embracing, patting, or pinching; and suggestive remarks that are unwelcome or discomfiting to the employee. Grievant had already been suspended[4] for sexual harassment for making comments about an employee's clothing and cleavage and was aware that the above behavior was prohibited. Given the prior suspension and the escalation of behavior to unwanted touching and multiple instances against multiple women, Respondent was justified in terminating Grievant's employment.

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[4] Grievant attempted to argue the prior suspension was not justified. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Grievant argues the termination of his employment was retaliatory. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

"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.

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)).

Grievant engaged in the protected activities of union representation and participation in the grievance process. CEO Booker was aware of these activities. However, no incident of protected activity occurred within a short enough time to infer a retaliatory motive. CEO Booker directed the matter be referred to investigation on August 31, 2022, which was more than three years after the latest decision granting Grievant's prior grievance. Grievant provided no evidence of a specific union activity within such a time that retaliation could be inferred.

Grievant appears to argue that there was direct retaliatory motivation on the part of Mr. Wickline. Grievant cites the prior grievance that protested the award of the supervisor position to Mr. Wickline and his successful grievance challenging Mr. Wickline's charge of unauthorized leave to Grievant. Even if Mr. Wickline had been motivated to report Ms. Pugh's allegations to CEO Booker because of his history with Grievant, Mr. Wickline did not conduct the investigation or make the decision to terminate Grievant's employment. There is no credible evidence that the decisionmaker, CEO Booker, had a retaliatory motivation. Therefore, Grievant failed to prove that the termination of his employment was retaliatory.

"[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995),

aff'd, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

"Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant had been employed for eight years. He had been previously suspended for sexual harassment and was aware of the prohibition of sexual harassment and specifically not to discuss co-worker's appearance. Grievant did not enter his performance evaluations into evidence. Other employees who were found to have committed sexual harassment were terminated immediately. Termination of employment

for an escalation of sexual harassment after a prior suspension for the same is not a disproportionate penalty. Grievant failed to prove mitigation of the penalty was warranted.

Grievant further argues that Respondent violated his right to due process when it failed to properly notify him of the charges against him. Civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

"[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative

burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987). "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

In this case, although Respondent met with Grievant in a predetermination conference, Respondent provided no meaningful notification of the charges against him. Neither the written notice, nor CEO Booker during the conference, stated what specific behavior Grievant was accused of committing, to who the behavior was directed, nor

when it was alleged to occur. Grievant had no opportunity to present his side of the story when he had no idea what he was accused of doing. Respondent's own policy dictates that the employee receive notice of the "WHO, WHAT, WHEN, WHERE, HOW" of the charges and that the act of misconduct "be identified to the extent that the accused employee will have no reasonable doubt as to the identity of the persons or property involved." Not only did Respondent fail to give this information in writing, but when Grievant asked for details during the predetermination conference, CEO Booker refused to give him any information, stating she "was not at liberty to say" even when Grievant stated he did not know who the allegation was about. When questioned about the failure to provide any information about the allegations, CEO Booker stated that Grievant would have known from the investigatory interview and that if she was involved in sexual harassment she would have known who she harassed. This, of course, pre-supposes that the accused did what they were accused of doing. Even the termination letter failed to give any specific information regarding Grievant's alleged misconduct. Since Grievant's interview recording was lost, and Mr. Henderson testified that he did not remember what he asked Grievant, there is no evidence Grievant was ever told of the allegations. As found in *Wirt*, the provision of only a general allegation renders the opportunity to be heard meaningless. Therefore, Grievant's due process rights were violated.

The remedy for a due process violation is not reinstatement unless "dismissal would have been prevented by a pretermination hearing." *See Nickerson v. City of Anacortes,* 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487. As previously discussed, Respondent had good cause to

terminate Grievant and a pretermination hearing that would have allowed Grievant to present his defense would not have prevented the termination given the evidence. Otherwise, the WVSCA has remedied due process violations with either an award of nominal damages or a limited award of back pay.

The WVSCA first addressed this issue in *Clarke I* and then *Clarke II*, two years later. Mr. Clarke was a professor who was notified of the charges against him in his termination letter, which made his termination effective several months later at the end of the semester. Grievant requested an appeal of his termination through the Board of Regents. A hearing was scheduled with a hearing examiner but the hearing was not held until after the termination and the hearing examiner's recommendation to uphold the termination did not state which specific causes for termination were upheld or the factual basis for the decision. The president of the college adopted the recommendation and the Board of Regents affirmed. Thus, *Clarke I* presented violations of due process for both a failure to provide a predeprivation opportunity to be heard and for an inadequate post-deprivation hearing. *Clarke I* remanded the case for a determination regarding back pay. *Clarke II* clarified that the award of back pay was due to the policy of the employer requiring it to retain the employee on payroll until the dismissal process was complete and that the remedy for the due process violation itself was nominal damages of one dollar.

The WVSCA next addressed the issue of damages in *Fraley*. Although *Fraley* awarded back pay for the violation of due process, it did not address the previous holding in *Clarke II* that the proper remedy was nominal damages or explain its reasoning for the award of back pay. When confronted with the issue in the next two cases, the WVSCA

would only award nominal damages. In *Barazi*, the Court explained the award of back pay in *Clarke I and II* and awarded only nominal damages according to that holding. In *White*, several years later, the Court awarded nominal damages stating, "[a]s this Court explained in *Barazi:* 'When official policy results in a person being deprived of property or liberty without procedural due process, and such deprivation would have taken place even if a proper hearing had been held, then the person is not entitled to compensatory damages for the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978). The person is entitled only to nominal damages for the denial of due process, unless the person demonstrates actual injury attributable to the *denial of due process* rather than to the *deprivation*.' 201 W.Va. at 533, 498 S.E.2d at 726, *(*quoting *DeSimone v. Board of Educ.*, 612 F. Supp. 1568, 1571 (E.D.N.Y.1985))." *White v. Barill*, 210 W. Va. 320, 324, 557 S.E.2d 374, 378 (2001) (*per curiam*).

The WVSCA last addressed the issue of damages in *Wines v. Jefferson Cty. Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003) (*per curiam*). In *Wines*, the WVSCA reversed the award of nominal damages by the lower court and awarded back pay. The employer's argument that a nominal damages award was justified under *Barazi* was addressed only in a footnote, which simply said, "We believe the facts of the instant case mandate a different result." *Wines*, 213 W. Va. at 386 n.5, 582 S.E.2d at 833. The Court does not state what specific facts it found determinative to distinguish the remedy in *Barazi*. However, the Court stated the following in finding an award of nominal damages insufficient:

> [W]e cannot condone the School Board's impertinent disregard of Appellant's right to be heard before it discharged her from its employ. As suggested above, it is not insignificant that Appellant requested a hearing before the School Board

> acted on the recommendation of termination, and that her request was effectively rebuffed when the School Board declined to accommodate her lawyer's schedule and held the vote in their absence. It is also meaningful that, only months earlier, the School Board conducted a pre-termination hearing in another disciplinary matter involving Appellant.

Wines, 213 W. Va. at 386, 582 S.E.2d at 833.

Wines is distinguished from *Barazi* and *White* by the *Wine*s court's analysis of due process under the specific statutory due process required for school employees and the mandate to strictly construe the same in favor of the employee and the exclusion of counsel. *Barazi* and *White* were analyzed only under general principles of due process, similar to this case. As the general remedy appears to be the award of nominal damages and the instant case appears most similar to *Barazi* and *White*, Grievant is entitled to the award of nominal damages of one dollar.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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). "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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or

mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. 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 Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

4. "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with

formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997).

5. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand 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. *Id.*; *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-H-115 (June 8, 1990).

6. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

7. "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.

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)).

8. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

9. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure

is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

10. Civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

11. “[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977).” *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583.

12. “The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Waite* at Syl. Pt. 5.

13. The West Virginia Supreme Court of Appeals “‘has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,’ including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982).” *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583.

14. In determining the due process that is required for public employees the West Virginia Supreme Court of Appeals has determined “[t]he constitutional guarantee of procedural due process requires '“some kind of hearing” prior to the discharge of an employee who has a constitutionally protected property interest in his employment.’

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

15. "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5.

16. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

17. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes,* 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487.

18. 'When official policy results in a person being deprived of property or liberty without procedural due process, and such deprivation would have taken place even if a proper hearing had been held, then the person is not entitled to compensatory damages for the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978). The person is entitled only to nominal damages for the denial of due process, unless the person demonstrates actual injury attributable to the *denial of due process* rather than to the *deprivation*.' 201 W.Va. at 533, 498 S.E.2d at 726, *(*quoting

DeSimone v. Board of Educ., 612 F. Supp. 1568, 1571 (E.D.N.Y.1985))." *White v. Barill*, 210 W. Va. 320, 324, 557 S.E.2d 374, 378 (2001) (*per curiam*).

19. Respondent proved that Grievant sexually harassed two female coworkers and that it was justified in terminating Grievant's employment for the same when he had previously been suspended for sexual harassment.

20. Grievant failed to prove the termination of his employment was retaliatory.

21. Grievant failed to prove that mitigation of the punishment was warranted.

22. Grievant proved his due process rights were violated.

23. Grievant is not entitled to reinstatement as his dismissal from employment would not have been prevented by appropriate notice and opportunity to be heard.

24. Grievant is entitled to the award of nominal damages of one dollar.

Accordingly, the grievance is **GRANTED**, in part, and **DENIED**, in part. Grievant's request to be reinstated to his position is DENIED. Grievant is awarded nominal damages of one dollar for the due process violation.

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

[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.

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: July 26, 2023

Billie Thacker Catlett
Chief Administrative Law Judge