THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MIKE DUMINIAK,
Grievant,

v. **Docket No. 2017-2342-CONS**

WATER DEVELOPMENT AUTHORITY,
Respondent.

DECISION

Grievant, Mike Duminiak, was employed by Respondent, Water Development Authority ("WDA"). On March 30, 2017, Grievant filed a grievance against Respondent alleging suspension without good cause. By email dated July 2, 2017, Grievant, by representative, moved to amend the grievance to include Grievant's subsequent dismissal from employment. By order entered July 3, 2017, the Grievance Board accepted the request to amend the grievance filing as a new grievance filing and consolidated the two grievances into the above-styled grievance.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was scheduled for June 23, 2017, which was converted to a conference due to Respondent's failure to provide relevant discovery to Grievant prior to the hearing. A second telephone conference regarding discovery was held on June 30, 2017. The level three hearing was held on August 14, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Jacob A. Manning, Dinsmore & Shohl LLP. This matter became mature for decision on September 15, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Geographic Information System Manager 2. Grievant was dismissed from employment for alleged misuse of State property for personal and inappropriate purposes after Grievant filed a complaint with the West Virginia Ethics Commission against Respondent's Executive Director for using his public office for private gain. Grievant established a *prima facie* case of retaliation. Respondent failed to prove it had legitimate, non-retaliatory reasons to terminate Grievant's employment, as it failed to prove the majority of the charges against Grievant and did not have good cause to terminate Grievant's employment based on the limited misconduct it did prove. Given the timing of the charges, the exaggeration of the charges, the absolute failure of proof of most of the charges, the Executive Director's attempt to get Grievant to withdraw the ethics complaint, and his intimidation of Grievant during the suspension meeting, it is more likely than not that Grievant was terminated in retaliation for filing an ethics complaint against the Executive Director. Accordingly, the grievance is granted.

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 as a Geographic Information System Manager 2 and had been so employed since May 1, 2012. Grievant had previously worked for Respondent as a consultant for approximately one year prior to his hire.

2. The Water Development Authority is a state agency that provides West Virginia communities with financial assistance for the devolopment and maintenance of wastewater, water and economic infrastructure to protect the streams of the state and to improve drinking water.

3. During all times relevant to the events of the grievance, Christopher Jarrett was the Executive Director of the WDA. Mr. Jarrett resigned as the Executive Director on July 27, 2017.

4. During all times relevant to the events of the grievance, Carol Cummings was Mr. Jarrett's Executive Assistant.

5. Respondent paid for Ms. Cummings' internet service for her home address and a cell phone, which was her only cell phone.[1]

6. Sometime in 2012 or 2013, Respondent's computer system was infected by a virus caused by employees accessing their personal email through a web browser, which caused Respondent's employees to be unable to send email for a time due to the severity of the infection. As a result, a temporary information technology employee set up employee personal email through Microsoft Outlook so that such email would be more secure. This personal email went to a separate folder or inbox from the employee's work email. Respondent's system is independent of the State's Office of Technology and Respondent did not use the services of the State's Office of Technology. The temporary information technology employee was employed directly by Respondent.

[1] Ms. Cummings was called to testify on this point during the June 23, 2017 discovery conference.

7. On two occasions in 2013, Executive Director Jarrett asked Grievant by email to print maps from Respondent's software for Mr. Jarrett's personal use regarding a transaction in which he was selling his own real estate. The emails include forwarded emails relating to this transaction that had been sent to Mr. Jarrett at his work address.

8. On January 8, 2016, Grievant filed a grievance alleging harassment and false allegations made by Ms. Cummings. In addition to the specific instance grieved, at the level one hearing in the matter, Grievant also objected to Ms. Cummings having access to Executive Director Jarrett's email, because Grievant could not send sensitive information or complaints about Ms. Cummings to Mr. Jarrett without Ms. Cummings reading the email. The level one decision was issued March 2, 2016. Also in the spring of 2016, Grievant served as a lay representative for a co-worker in a grievance filed against Respondent.

9. On an unspecified date in 2016, Grievant filed a complaint with the West Virginia Ethics Commission against Executive Director Jarrett regarding Mr. Jarrett's use of Respondent's office space to store personal furniture.

10. In September 2016, Executive Director Jarrett complained to Grievant that Grievant had not brought the ethics complaint to him prior to filing the complaint with the Ethics Commission. Executive Director Jarrett encouraged Grievant to withdraw the ethics complaint. Grievant reported this conversation to the Ethics Commission because he thought it was inappropriate.

11. In early 2017, Respondent was under investigation by the legislative Commission on Special Investigations. As a result, Respondent was required to provide certain information to the Commission. One of the items Respondent was required to

provide were purchasing card receipts. Some purchasing card receipts were missing, and Respondent[2] reviewed employee email for copies of the missing purchasing card receipts. Although Grievant had not received a purchasing card until 2015, Respondent reviewed Grievant's email back to 2012.

12. In its review, Respondent searched the separate inbox containing Grievant's personal email and discovered over six thousand messages Grievant had received from a listserv[3] in 2012 and 2013. Included were twelve conversations which contained offensive content. Grievant did not author any of these messages, nor was he included specifically as a recipient of any of the messages. The offensive content was created by three other people and were messages sent directly between these three people and four additional people in which the listserv was simply copied. There was nothing in the subject lines of the messages to indicate they contained offensive content. There is no evidence the offensive messages had been opened by Grievant.

13. Grievant had joined the listserv to receive notifications of Civil War reenactment events as he was a Civil War reenactor. Grievant only read selected messages from the listserv, which he determined from the subject line of the message.

14. Grievant's only documented interaction with the listserv was his response to a message with the subject: "New member request." Grievant stated that the person "has been posting here and there for at least 6 years. If he's trolling or spying, he's spent

[2] The record does not reflect exactly who conducted the initial search of Grievant's email.

[3] "An electronic mailing list." OXFORD LIVING DICTIONARIES (Oxford University Press 2017), *available at* https://en.oxforddictionaries.com/definition/listserv.

a long time embedding. More likely, he's another keyboard warrior who just wants to join the discussion. I don't know him personally. I just did a little background digging on him."

15. On March 24, 2017, Grievant was called into a meeting with Mr. Jarrett and Ms. Cummings with two armed Capitol Police officers present. Grievant requested he be allowed a representative and was told that the meeting was for investigation, not discipline. Grievant was not allowed a representative.

16. By letter dated March 27, 2017, Mr. Jarrett memorialized the verbal suspension given on March 24, 2017, and suspended Grievant for thirty-one calendar days, without pay, for investigation of "allegations of your questionable emails and misuse of government property."

17. Mr. Jarrett asserts he hired a company to conduct a forensic examination of Grievant's equipment. No report of this examination was submitted as evidence, nor was anyone from the company called to testify.

18. Grievant had a total of three mobile devices provided by Respondent that used data from Respondent's account with AT&T: an iPad, cell phone, and mobile hotspot.

19. For the billing cycle from February 4, 2017 through March 3, 2017, Grievant used 57.01 gigabytes of data on his work iPad. The total usage for all WDA employee devices for that month was 82.27 gigabytes.

20. A printout of Grievant's data usage for his mobile devices for the three billing cycles from January 4, 2017 through April 3, 2017 shows his data transfers by day of the week, date, and time, but does not show a total amount of data used. All three billing cycles show zero data usage for Grievant's mobile hotspot and only one day each cycle

of minimal usage on his cell phone.[4] The printout shows data transfers on Grievant's iPad mostly during the weekday, presumably during the workday.[5] There was also significant data usage almost every weekend and some data usage during weekday evenings.

21. Some of the data usage on evenings and weekends was for continuing education Grievant was required to receive to renew his professional certification. During his previous employment, Grievant received continuing education by attending conferences, but was not permitted to do so by Respondent. Other usage was related to a research project Grievant undertook to develop a predictive model by which changes in water-related needs could be projected on a state-wide basis over time. Grievant also spent time researching other mapping software as he was concerned that the current software in use by Respondent was going to be changed. Grievant did not request overtime for these activities as he believed it was not technically work for the agency, although it would be of benefit to the agency.

22. As Grievant's family was in Pennsylvania most of the time, he had a lot of free time and enjoyed working on these projects because he, as he described himself, is "a nerd."

23. Grievant admitted that some of his data usage was for minimal personal use. It is more likely than not that Grievant's strictly personal use of wireless data on evenings and weekends was more than minimal.

---

[4] The pages of the printout are not numbered, but they are arranged by billing cycle. Each billing cycle is then arranged by device; iPad, cellphone, and then hotspot.

[5] No evidence was presented regarding Grievant's work hours. Most of the data transfers occurred between the customary business hours of eight to five.

24. Between May 2015 and December 2016, Grievant exchanged a total of one hundred twenty text messages with Grievant's former manager from CDM Smith, the company with which Grievant was employed when he was hired as a contractor for Respondent. The only protracted conversation Grievant had in these exchanges were seventy messages that appear to be at least tangentially related to work as they are discussing building a tank in a floodplain and the mapping, legislation, and regulations relating to that endeavor. The messages were otherwise fairly brief and amounted to an average of nine texts per month during this twenty-month period.

25. The text messages contained two messages in which Grievant's former manager mentioned "FuckOSU." Grievant did not use any profanity in his text messages. The text messages also contained the following exchange:

> Former manager: Jimmy carter[6] wrote another book for you
> Grievant: I wonder if it's as homo as the first[7]

26. Neither the data usage nor texts resulted in any overage charges.

27. Although Grievant's suspension was only effective through April 27, 2017, Respondent did not conduct a predetermination conference until May 5, 2017. As Grievant was staying in Pennsylvania at the time, and believed that the investigation had been initiated in retaliation by Executive Director Jarrett, Grievant chose not to attend the predetermination in person, instead sending his representative. Grievant's representative responded to the allegations raised in the predetermination by email on May 6, 2017.

[6] Former President of the United States, Jimmy Carter.
[7] The text messages are reproduced as written.

28. By letter dated May 10, 2017, Mr. Jarrett dismissed Grievant from employment stating Grievant "did misuse government property for personal and inappropriate purposes."

- In early March of 2017, during the course of retrieval of requested information for a third-party entity, thousands of emails under your name, mostly pursuant to a listserv chain titled "Southern Herald," were discovered on agency backup servers. All of these emails had been sent to you at your personal email address, but had been retained on agency servers, indicating that your participation in the email discussions had occurred at work and/or on agency devices. The email discussions contained many offensive and inappropriate discussions, including numerous racist and religious discriminatory statements.
- By letter dated March 27, 2017, you were suspended without pay pending the outcome of an investigation of the alleged conduct.
- In addition to the information described above, a forensic review of all of your agency devices, including your computers, IPad, and agency cell phone, revealed hundreds of instances of inappropriate usage of state property in violation of agency policy. Specifically, your data usage, per the agency AT&T account, shows an extreme and excessive use of a WIFI "hotspot", both during extensive weekend periods of time when you were not working, along with excessive usage during workday hours (when office Internet access should have been used), showing that you were using the device for personal purposes in an extremely excessive amount. In addition, text messages on your agency phone showed approximately 180 messages between you and a personal friend, over the course of a 15-month period of time. All of these activities violate the West Virginia Water Development Authority Information Technology Policy, Section 5.0 Internet Usage and 11.0 Portable and Wireless Devices, in addition to various items listed in the policy's "Acceptable/Unacceptable Use of Agency-Provided Technology."

29. Executive Director Jarrett signed a Conciliation Agreement with the West Virginia Ethics Commission on May 25, 2017. Mr. Jarrett admitted he had violated the

Ethics Act by using his public office for private gain. Mr. Jarrett agreed to receive a public reprimand, to pay restitution of $2,500 to the West Virginia Infrastructure and Jobs Development Council, and to pay of fine of $2,000 to the West Virginia Ethics Commission.

30. At its meeting on April 23, 2015, the West Virginia Water Development Board reviewed a draft *Information Technology Policy*, authored by Grievant, and adopted it to be effective July 1, 2015, "subject to any changes that might be required by the insurance company." The relevant policy sections are as follows:

> 5.1.2 Excessive use of the Internet by personnel that is inconsistent with business needs is considered a misuse of resources.
> 5.1.3 Incidental personal use is permissible so long as it:
> 5.1.3.1 is completed on personal time (i.e. lunch time, break)
> 5.1.3.2 does not consume more than trivial amount of systems resources,
> 5.1.3.3 does not interfere with worker productivity,
> 5.1.3.4 does not preempt business activity, and
> 5.1.3.5 is not used for illegal activities.
>
> . . . .
>
> 11.1.4 Personal use of wireless devices and service is prohibited except in certain limited and occasional circumstances that meet with the supervisor's approval. Personal use should only occur when it does not (1) interfere with the employee's work performance; (2) interfere with the work performance of other; 93) have undue impact on business operations; (4) incur incremental cost; or (5) violate any other provision of this policy or any other State policy, procedure, or standard. . . .
> 11.1.4.2 The agency reserves the right to address excessive personal usage and recover the cost of excessive personal usage from the user.

31. Respondent asserts that the applicable policy was a document also entitled "*Information Technology Policy*," which states on the title page, "Revised April 23, 2015"

and “Adopted by WDA Board July 1, 2015.” This document is a reproduction of the policy adopted by the Board on April 23, 2015, with large portions of the document deleted. Large portions of pages in the document are blank where sections of the adopted policy were removed. The numbering of the document is incorrect, as when a section was removed, the sections were not renumbered. The missing sections do not reflect that they were removed; they are simply missing. For example, under the section for “Account Management,” the sections are 3.1., then 3.3., then 3.9. The subsections of section five quoted above in the adopted policy are unchanged. Section eleven, as quoted above in the adopted policy, was substantially changed, removing the allowance of personal use entirely, and changing subsection 11.2.4.2 to “TheExecutive (sic) Director of WDA reserves the right to address excessive personal usage.”

32. Neither document was disseminated to staff, nor was the included Acceptable/Unacceptable Use of Agency-Provided Technology form provided to staff to sign to acknowledge receipt of the policy.

33. Prior to his termination, Grievant had not been previously disciplined. Grievant had never received a performance evaluation. There was no indication that his work had been other than good.

34. Executive Director Jarrett retired from his position on July 27, 2017.

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 (2008). "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).

Although former Executive Director Jarrett attempted to make other allegations against Grievant in his level three testimony, the letter of dismissal states that Grievant was terminated for the number and content of emails he received from the listserv, for his "extreme and excessive" use of his work-issued WIFI hotspot, and for receiving and sending personal text messages on his work-issued cell phone. Respondent argues that the above violated Respondent's *Information Technology Policy*, that Respondent was not discriminatory in terminating Grievant, and that termination was not too severe of a penalty. Grievant asserts he was denied due process[8], that his termination was retaliatory, and that Respondent did not have legitimate reasons to terminate Grievant's employment.

[8] As the grievance is being granted on other grounds, this argument will not be addressed.

As the parties dispute facts, the undersigned must make credibility determinations. 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).

Respondent called only former Executive Director Jarrett as a witness. Mr. Jarrett was not credible. Although Mr. Jarrett's demeanor was professional and otherwise appropriate, Mr. Jarrett was evasive in cross examination and his memory of events appeared poor. Mr. Jarrett failed to answer simple questions. For example, Mr. Jarrett testified that he "did not recall" denying Grievant representation during the suspension meeting, but did not deny that Grievant asked for representation, and repeatedly refused to answer what he said in response to Grievant's request. When asked whether Grievant had ever been disciplined, Mr. Jarrett repeated failed to answer the question, instead bringing up instances and conversations in which Grievant had clearly not been disciplined, only admitting that Grievant had never actually been disciplined after several minutes of questioning. While Mr. Jarrett's outrage regarding the content of the listserv messages appeared genuine, Mr. Jarrett also stated that the text messages were "embarrassing" to read, which is an obvious exaggeration, as the text messages were

innocuous, with the exception of the use of profanity in two messages and the use of the word “homo” in one message. In fact, the only protracted conversation Grievant had with the sender were seventy messages that appear to be, at least tangentially, related to work.

Moreover, Respondent did not present evidence that should have been readily available to corroborate Mr. Jarrett if the allegations against Grievant were true, or to rebut Grievant’s testimony. Although in the termination letter Mr. Jarrett stated that there had been a forensic review of Grievant’s equipment, no evidence of a forensic review was presented. Mr. Jarrett stated that an outside security firm, Intelligent Network Security, had been hired and provided a one to two-page letter of its findings. However, other testimony regarding how information on Grievant’s devices was found appears to indicate that WDA employees, including Ms. Cummings, with whom Grievant had an acrimonious relationship, researched and compiled the information. Therefore, either Intelligent Network Security did perform a forensic examination, the report of which was not provided as evidence, or no actual forensic examination was performed and Mr. Jarrett’s statement in the termination letter was untrue. Also quite troubling was Mr. Jarrett’s presentation of a document as the basis for Grievant’s discipline that was clearly not Respondent’s policy. Mr. Jarrett’s assertion that the unprofessional, nonsensical document he presented as Respondent’s policy had been adopted by the West Virginia Water Development Board defies belief. Even if members of the Board had not actually read the document, it would be impossible not to notice the gaping holes where sections of the document had been removed. Again, if this document had inexplicably been adopted by the Board, Respondent could have presented the Board minutes as proof and did not do so.

Mr. Jarrett's denial of animosity against Grievant for the ethics complaint is not plausible in light of his attempt to get Grievant to withdraw the ethics complaint and his continual exaggeration of Grievant's alleged misconduct. Mr. Jarrett's allegations in the termination letter were unsupported by the evidence on several key points: Mr. Jarrett stated Grievant had participated in the offensive listserv discussions, when there was no evidence presented of his actual participation; Mr. Jarrett stated Grievant had excessively used his hotspot, when Grievant had used zero data on his hotspot; and Mr. Jarrett stated Grievant had sent one hundred eighty texts during a fifteen-month period when it had been a twenty-month period. Even in his level three testimony, Mr. Jarrett made new allegations against Grievant that were completely unsupported by the record. Mr. Jarrett's decision to terminate Grievant also appears extreme given Mr. Jarrett's otherwise lackadaisical attitude towards the use of state resources in general, as demonstrated by his provision of home internet access for his Executive Assistant, his misconduct which generated the ethics complaint, and his use of Grievant and the state mapping system for his own personal real estate transactions. Former Executive Director Jarrett is not credible.

Grievant was mostly credible. Grievant's demeanor was calm, professional, and direct. Grievant testified in detail and appeared to have a good memory of events. Grievant's assertion that the information technology employee is the one who created the separate inbox for Grievant's personal email was unrebutted. Grievant's assertions are plausible and supported by the evidence, except that it does appear Grievant somewhat downplayed his involvement with the listserv and his personal use of agency data. Grievant testified he had joined the listserv because of his involvement with Civil War

reenactment and that he did not read messages that did not relate to that purpose. However, in his response to the new member request he states that the new member "just wants to join the discussion." Dissemination of Civil War reenactment events and scheduling is not a "discussion," thus, Grievant's response indicates he was reading the listserv for more than just event information. However, it does not prove that he was involved in any of the offensive content of the listserv, and Grievant's denouncement of the offensive content in the messages appeared to be genuine and credible. While Grievant's explanation regarding his recertification and research plausibly explains some of the evening and weekend data usage, his assertion that his data use for strictly personal reasons was minimal is not plausible given the amount and timing of the data transfers.

Grievant asserts he was terminated in retaliation for filing the ethics complaint against former Executive Director Jarrett and for his previous participation in the grievance process. The West Virginia Public Employees Grievance Procedure specifically prohibits retaliation for participation in the grievance procedure stating, "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). In order to establish a *prima facie* case of retaliation, a grievant must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);

> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
> (3) that, thereafter, an adverse employment action was taken by the employer; and
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.
>
> *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Graley v. *W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013).

In addition,

> "The Grievance Board has previously concluded that public employers may not retaliate against an employee for exercising his or her right to report misconduct to the Ethics Commission, and that such reporting is protected under the Whistle Blower Law, W. Va. Code § 6C-1-3(a). [citations omitted] A grievant may establish a *prima facie* case of retaliation for filing an ethics complaint in the same manner as for participation in the grievance process, and the employer then has the opportunity to demonstrate legitimate, non-retaliatory reasons for its actions."

Metz v. Dep't of Health and Human Res., Docket No. 2013-2256-CONS (Aug. 7, 2014).

Grievant was suspended on March 27, 2017. Grievant's previous grievance ended on March 2, 2016, and the grievance in which he acted as a lay representative was also in the spring of 2016. Mr. Jarrett admitted in his testimony he was aware of the grievance activity. It is not clear from the record exactly when Grievant made the ethics complaint,

although the complaint number contains the year "2016," but it is clear from Mr. Jarrett's testimony that the complaint was made prior to Grievant's suspension and that Mr. Jarrett knew Grievant had made the complaint. Mr. Jarrett signed the Conciliation Agreement admitting his ethics violation on May 25, 2017, fifteen days after he terminated Grievant. A retaliatory motive can be inferred due to the short period of time between Grievant's protected activities and his suspension and subsequent termination. Grievant has made a *prima facie* case of retaliation.

Therefore, Respondent must show legitimate, non-retaliatory reasons for its actions. Respondent has not done so. There is significant evidence that Grievant's termination was retaliatory, and Respondent failed to prove that it had good cause to terminate Grievant.

Former Executive Director Jarrett's assertion that he held no ill-will toward Grievant following the ethics complaint is not credible. Mr. Jarrett's conversation with Grievant in which he admonished Grievant for not bringing the ethics complaint to him before filing with the Ethics Commission demonstrates he was resentful that Grievant had brought the complaint. While Respondent had the right to inspect Grievant's email usage, as there is no expectation of privacy on work devices, the reason given for the review of Grievant's email in 2012 and 2013 appears to be a pretext. As Grievant was not issued a purchasing card until 2015, there was no reason for Respondent to review Grievant's email from 2012 and 2013. Former Executive Director Jarrett's use of two armed Capitol Police officers during their meeting, when there had been absolutely no indication of any danger from Grievant, appears to be an attempt to intimidate Grievant, as was Mr. Jarrett's refusal to permit Grievant representation in the meeting. Further, as will be discussed more fully

below, the charges Mr. Jarrett levied against Grievant were exaggerated and not supported by the evidence.

The primary reason given for Grievant's termination was the offensive content contained in the listserv messages. Respondent provided printouts of twelve individual messages or message chains. Grievant did not author or reply to any of these messages, nor was he included specifically as a recipient of any of the messages. The offensive content was sent by the same three people and were messages directly between these three people and four other people in which the listserv was simply copied. Grievant testified credibly that he joined the listserv to receive notifications regarding Civil War reenactment and that he only read messages he felt were relevant based on the subject line of the message. While the printouts cut off the sending information of some of the messages, none of the message subject lines that are visible contain any indication that the content of the message was offensive, nor did the subject lines relate to reenactment. Respondent provided absolutely no evidence that Grievant opened these messages or was aware of the offensive content in the messages, and whether Grievant had opened the messages should have been a fact easily verified in the forensic examination of Grievant's computer. By Respondent's own estimate, there were over six thousand messages in the listserv, and that volume lends credibility to Grievant's assertion that he would ignore messages that were not relevant. Further, although Mr. Jarrett testified that he believed the listserv to be a racist organization, he also testified that most of the other listserv messages were just regular email without offensive content. No evidence apart from these selected few messages was presented regarding the nature of the listserv. What the evidence shows is that out of over six thousand messages, there were only

twelve containing offensive content from only three people who were not Grievant. While it does appear from the one message Grievant did send to the listserv that he read more of the listserv than just the Civil War reenactment event notifications, it is Respondent's burden to prove misconduct, and the evidence failed to prove Grievant was responsible for the offensive content or even aware of the offensive content.

As to Respondent's assertion that the volume of the listserv messages was a misuse of state property and in violation of Respondent's policy, the listserv messages all predate Respondent's policy by several years, so the policy clearly does not apply. While the receipt of personal email on a work computer is a concern, Grievant testified without rebuttal, that it was Respondent's own information technology employee who set up a separate inbox for Grievant to receive personal email.

The other reasons given for Grievant's termination were his "extreme and excessive use of a WIFI 'hotspot'" and one hundred eighty personal text messages over a fifteen-month period. Respondent's evidence shows Grievant had *zero* data usage on his hotspot for the three-month period Respondent presented evidence. It was the supposed use of the hotspot that Respondent asserted proved Grievant was using the device for personal purposes. Grievant did not use his hotspot, so there was no reason to be suspicious of Grievant's use of his work-issued iPad during work hours, which constituted the majority of Grievant's data usage. Respondent also points to the amount of usage of data compared to other employees as proof of wrongdoing, but Grievant's position was unique within the agency, and it would not be unusual for different positions to have a different need for data usage. However, it does appear, despite Grievant's credible explanation of some of the weekend and weekday evening use of his iPad, that

Grievant did use his iPad for personal use in more than an incidental amount. However, the incidental use did not otherwise violate the policy as it was during personal time, did not consume systems resources, interfere with worker productivity, preempt business activity, or include illegal activity.

Respondent proved that Grievant did send and receive a total of one hundred eighty text messages from his former manager. However, this was over the course of twenty months, not the fifteen months Respondent alleged. Also, seventy of these messages appear to be at least tangentially related to work as they discuss building a tank in a floodplain and the mapping, legislation, and regulations relating to that endeavor, leaving an average of nine clearly personal text messages per month. This amount appears to fall within the policy's exception for "limited and occasional use" as there was no evidence it interfered with the work performance of Grievant or others, impacted business operations, or incurred any cost. However, Grievant's reference to former President Jimmy Carter's novel as "homo" was inappropriate, although it was not specifically in violation of Respondent's *Information Technology Policy*.

Therefore, Respondent only proved that Grievant acted inappropriately in his more than incidental personal use of his work-issued iPad during non-business hours and his use of the word "homo" in discussing the work of former President Jimmy Carter on his work-issued cell phone. While these infractions certainly would have warranted some corrective action, Respondent in no way had good cause to terminate an employee who had no previous record of discipline. Given the timing of the charges, the exaggeration of the charges, the absolute failure of proof of most of the charges, former Executive Director Jarrett's attempt to get Grievant to withdraw the ethics complaint, and his

intimidation of Grievant during the suspension meeting, it is more likely than not that Grievant was terminated in retaliation for filing an ethics complaint against former Executive Director Jarrett.

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 (2008). "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. § 143-1-12.02 and 12.03 (2012).

3. The West Virginia Public Employees Grievance Procedure specifically prohibits retaliation for participation in the grievance procedure stating, “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).

4. This prohibition against retaliation extends to an employee who files an ethics complaint:

> "The Grievance Board has previously concluded that public employers may not retaliate against an employee for exercising his or her right to report misconduct to the Ethics Commission, and that such reporting is protected under the Whistle Blower Law, W. Va. Code § 6C-1-3(a). [citations omitted] A grievant may establish a *prima facie* case of retaliation for filing an ethics complaint in the same manner as for participation in the grievance process, and the employer then has the opportunity to demonstrate legitimate, non-retaliatory reasons for its actions."

Metz v. Dep't of Health and Human Res., Docket No. 2013-2256-CONS (Aug. 7, 2014).

5. In order to establish a *prima facie* case of retaliation, a grievant must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
> (3) that, thereafter, an adverse employment action was taken by the employer; and
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.
>
> *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Graley v. *W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its

> actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013).

6. Grievant established a *prima facie* case of retaliation.

7. Respondent failed to prove it had legitimate, non-retaliatory reasons to terminate Grievant's employment as it failed to prove the majority of the charges against Grievant and did not have good cause to terminate Grievant's employment based on the limited misconduct it did prove.

8. Given the timing of the charges, the exaggeration of the charges, the absolute failure of proof of most of the charges, former Executive Director Jarrett's attempt to get Grievant to withdraw the ethics complaint, and his intimidation of Grievant during the suspension meeting, it is more likely than not that Grievant was terminated in retaliation for filing an ethics complaint against Mr. Jarrett.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a Geographic Information System Manager 2 effective March 24, 2017, to pay him back pay to that date, with statutory pre-judgment interest on the back pay, and to reinstate all other benefits to which he would have otherwise been entitled, including any annual leave used during the investigatory suspension, effective that date.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* 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 so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 25, 2017

_____

Billie Thacker Catlett
Chief Administrative Law Judge