

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JADA L. THOMPSON,
Grievant,**

v.

Docket No. 2018-0197-BBC

**BOARD OF SOCIAL WORK,
Respondent.**

DECISION

Jada L. Thompson, Grievant filed this grievance against her employer the West Virginia Board of Social Work ("BSW"), Respondent protesting the termination of her employment. The original grievance was filed on August 7, 2017, and the grievance statement provides: "Grievant dismissed in retaliation for having exercised statutory rights" with the relief sought being "[t]o be made whole in every way including back pay with interest and all benefits restored."

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.¹ Respondent filed a *Motion to Dismiss* in this matter on August 15, 2017. No hearing was held, nor ruling issued, on the motion prior to the level three hearing. A level three hearing was held before the undersigned Administrative Law Judge on October 11, 2017, at the Grievance Board's Charleston office. Grievant appeared in person with representative Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by

¹ W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

Executive Director Vickie James and legal counsel Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on or about November 20, 2017, the assigned date for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant filed a grievance regarding the termination of her employment. Grievant held the position of Administrative Assistant with the West Virginia Board of Social Work. This position is an at-will position and is not within the classified system of the West Virginia Division of Personnel. Grievant contends the dismissal was illegal retaliation. Respondent maintains that Grievant was dismissed in the light of on-going performance issues which included identifiable deficits while highlighting that no reason was required.

The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue. Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. This grievance is DENIED.

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

Findings of Fact

1. The West Virginia Board of Social Work ("BSW"), Respondent is created and charged by statute with the authority to license and regulate the profession of Social Work in West Virginia. See W. VA. CODE § 30- 30-1 *et seq.*

2. Grievant was employed by the BSW as an Administrative Assistant, commencing on December 1, 2016.

3. The position of Administrative Assistant is an at-will employee position as are all positions with the BSW.

4. The West Virginia Board of Social Work office staff is comprised of an Executive Director, two Administrative Assistant positions, and a Clerk position. One Administrative Assistant position is a temporary position and paid hourly while the other position is full-time. The Clerk position is not full-time and currently unstaffed.

5. Vickie James is, and was, for the relevant period of the instant grievance, the Executive Director of the Board, a position which she has held full-time since January 2015. Director James was a management consultant for Respondent on a part-time basis from February through December 2014. Executive Director James testified at the level three hearing.

6. Director James interviewed Grievant at the end of October 2016 for the vacant Administrative Assistant position that became vacant after Amy Polen left the Board office in May 2016.

7. Amy Polen held the position of Administrative Assistant for ten years from April 2006 through May 2016. Ms. Polen testified at the level three hearing.

8. Director James indicated that she discussed the unique nature of a small office with Grievant during the October interview.

9. When Grievant commenced working for Respondent, she was trained by Katie Chambers who occupied the other Administrative Assistant position at that time and was working three days a week.

10. There is a Position Description Form for an Administrative Assistant position employed by the West Virginia Board of Social Work. It is debatable to what degree Respondent actually adheres to the parameters (job duties) present by the various version of the position description. See R Ex 1 and G Ex 3.

11. The Position Description Form noted that cash deposits needed to be physically delivered to the State Capitol. The Board's office is located at 1124 Smith Street, Charleston, West Virginia. The delivery is done on a regular basis (2-3 times a week) ideally a short car drive away.

12. It was not specifically stated to Grievant during the October 2016 interview that she would need a vehicle to make these deposits. Nevertheless, Respondent was of the belief that Grievant was aware of the need for reliable transportation.

13. Grievant received training in processing renewals, temporary permits, processing continuing education hours, Access database for licensee, and answering the telephone.

14. Initially, Grievant was not trained in making the deposits in that she had no vehicle. Grievant assured Director James that she would have a vehicle at the beginning of the year, and as such, Ms. Chambers trained Grievant regarding the deposits.

15. Respondent envisioned that Grievant would be delivering the deposits to the State Capitol as a regular job duty. The issue of Grievant having a car and/or reliable transportation became a point of contention.

16. Director James testified regarding performance issues of Grievant. Initially noted work performance issues of Grievant was attendance,² an issue of personal telephone use and handling of incoming telephone calls to the office.

17. Director James perceived an on-going issue of Grievant failing to issue licenses as envisioned. Director James is of the opinion there was an on-going problem of Grievant failing to take responsibility for an error, correcting error(s) and then moving forward.

18. Director James addressed the issue of personal telephone calls with Grievant.

19. In January 2017, the issue of Grievant being able to make periodic deposits became more of an issue of contention, after Administrative Assistant Chambers was down to working one day a week at the Board office.

20. Regular licenses were issued for a two-year period of time at the beginning of the month and temporary permits were issued for six-months at the end of the month; however, Grievant continued to incorrectly issue licenses even after the errors were brought to her attention. In February 2017, Director James noted on-going issue(s) of Grievant failing to issue licenses with the correct expiration dates.

² Director James testified and Grievant confirmed that on Grievant's second day of work she called in and failed to come to work (child-care issues).

21. During February 2017, several upgraded licenses needed to be corrected due to Grievant's failure to issue the license upgrades with the correct expiration dates.

22. During the month of February 2017, Director James tended to perform the task of deposits and mail runs even though these job duties were Grievant's as an Administrative Assistant.

23. In March 2017, Director James developed a form to conduct Grievant's mid-point evaluation. R Ex 2 (Employee Evaluation dated March 8, 2017). Grievant signed this mid-point evaluation without objection.

24. There were three areas where Grievant was marked satisfactory but needing improvement. One area was the issuance of permits. Grievant had difficulty and seemingly unable to reliably issue the permits. Two other areas needing improvement were processing license upgrades and answering the Board's office telephone.

25. On Section 2 of the mid-point evaluation, Grievant was rated needing improvement in job performance, professionalism, technical job skills, attendance, adhering to policies and procedures and communication skills. In the area noted as productivity, Grievant was rated as unsatisfactory. R Ex 2

26. Section 3, in part, stated "Jada is not able to fulfill her position description without reliable transportation. She cannot assume responsibility of the agency in the absence of the Executive Director, with even the most routine tasks as picking up the mail, making deposits, taking the mail to the complex. Not only have the Executive Director had to assume job duties she was hired to do, but I have been unable to add additional tasks to her that we discussed in the interview-administrative tasks such as

Oasis, assisting in P Card use of the Board, and enhancing her skills in Access and Excel. This is not acceptable for a full time administrative assistant position.” R Ex 2

27. Director James is of the opinion that an example of an on-going issue in the area of technical job skills was Grievant’s “overgeneralization” of an issue. Director James eventually began to surmise that Grievant did not possess the critical thinking skills needed for the position.

28. Grievant was told how to access on-line the Board’s statutes, rules and the professional manual that was given to all licensees.

29. Grievant failed to adhere to policies and office procedures by implementing or seemingly attempting to create her own practices.

30. There was an issue regarding applicants obtaining references. Each applicant had to have at least three references that had known the applicant for at least six months. Board Office policy was explained to Grievant numerous times. This explanation was not enough for Grievant, the Administrative Assistant, who insisted that this practice be in writing and quantified to the applicants. Director James disagreed.

31. Similarly, the processing of continuing education and its accompanying certificates began to be a problem during the month of April 2017.

32. In the month of April 2017, there still was no resolution for the vehicle dilemma resulting in Director James continuing to perform a job duty that was envisioned to be performed by Grievant dating back to December 2016. Grievant Thompson was informed that if the issue of the vehicle was not resolved by April 14, 2017, then Grievant

would either be demoted to the vacant Clerk position or dismissed from her position with the Board.

33. Grievant filed a grievance on April 14, 2017, the same day that Director James gave her a date certain to resolve the on-going vehicle dilemma. This grievance was ultimately dismissed by this Grievance Board.

34. Grievant arranged for the use of a vehicle by April 18, 2017, which purportedly resolved the vehicle issue, and Grievant began performing the assigned job duty of deposits and mail runs.

35. Director James issued a memorandum memorializing the vehicle arrangement. R Ex 3 (Memorandum dated April 21, 2017) This memorandum also noted that training for Access would now be set up for Grievant.

36. During the month of May 2017, performance issues continued to plague Grievant. Grievant had problems with processing continuing education hours and continued to have issues with verifying that references were for the appropriate period of time. Director James memorialized the issue(s) with references as noted in a Memorandum dated May 3, 2017. R Ex 4

37. On May 8, 2017, Director James informed Grievant that her mom needed to refrain from coming to the office outside of breaks and lunch because it was causing issues with the staff and work productivity in the office.

38. On May 9, 2017, Grievant filed a complaint with the WV Human Rights Commission (HRC) which is still pending. *See Jada L. Thompson v. WV Board of Social Work*, Docket No. ER-157-17.

39. On May 12, 2017, Respondent by its Chairperson, Rita Brown, and Director James attempted to meet with Grievant. Grievant Thompson refused to meet with them without her representative, Gordon Simmons, present. Chairperson Brown requested that Grievant supply the Board with dates that Representative Simmons would be available for a meeting; no dates were ever supplied to Respondent.

40. Director James prepared a memorandum dated May 12, 2017, prior to the attempted meeting with Grievant Thompson. The memorandum addressed and purported to clarify the vehicle resolution. Chairperson Brown signed the memorandum. Grievant Thompson refused to accept the memorandum. R Ex 5 See *a/so* R Ex 6 (Letter to Gordon Simmons from Respondent's counsel outlining Respondent's attempt to meet with Grievant Thompson).

41. A staff meeting was held on May 19, 2017. A draft Attendance Policy was presented. R Ex 7 (Staff Meeting Notes-May 19, 2017) also see R Ex 8 (Attendance and Leave Procedures).

42. Grievant did not always give adequate notice when she would be using leave. One of Grievant Thompson's work performance issues was attendance.

43. Communication between Director James and Grievant continued to decline throughout the month of June 2017.

44. Grievant acknowledges the lack of communication with Director James during July 2017. This lack of communication became a barrier in meeting the needs of the office and the public.

45. Increasingly, Grievant failed to perform her job duties to the satisfaction of Director James.

46. In July 2017, Director James received complaints from Licensees that their renewals were being held because of the processing of continuing education certificates. Continuing education is required prior to renewal of one's license. Director James elected to institute a change in the procedure of processing continuing education certificates by not requiring any continuing education certificates unless it was for an audit. Director James notified the staff of this change including Grievant and fellow Administrative Assistant Chambers.

47. Director James issued a memorandum on July 5, 2017, regarding scanning continuing education certificates. Director James made a decision to no longer require copies of these documents, but Grievant Thompson continued to scan these documents into the system. Grievant had been told prior to the issuance of the July 5 memorandum not to retain copies of these continuing education certificates.

48. Grievant admits the declining lack of communication with Director James continued and was becoming a barrier in meeting the needs of the Board office and the public.³

49. Director James held a meeting with Grievant prior to an August 7, 2017, Board meeting. On July 20, 2017, they met to discuss the report the Director would be

³ One example of this lack of communication occurred with office supplies. Another example of this lack of communication, Ms. James explained occurred over July 4th Holiday weekend. Ms. James took annual leave on July 3, 2017, and Grievant Thompson was to pick up the mail on July 3, 2017. Grievant Thompson failed to perform that job duty, and instead sent Ms. James an email on July 5, 2017, informing her. Mail was not picked up till done so by Director upon her return to work.

presenting to the Board. Director James explained to Grievant her continued deficits in areas such as renewals, failing to take direction, overgeneralization of issues with no critical thinking skills, failing to learn from prior errors, and overall on-going performance issues with no significant improvement was unacceptable.

50. Director James made a report to the Board of Social Worker in Executive Session at the August 7, 2017, Board meeting.

51. While in Executive Session, Director James left and Grievant entered with her representative, Gordon Simmons.

52. After exiting executive session, the Board motioned and voted to dismiss Grievant from her position as Administrative Assistant on August 7, 2017. See R Ex 12 (Dismissal Letter dated August 7, 2017)

53. After exiting executive session, the Board motioned and voted to dismiss Grievant Thompson from her position as Administrative Assistant. The August 7, 2017, dismissal letter does not state any reason for Grievant's dismissal. R Ex 12

54. No member of the Board of Social Work testified at the level three hearing in the instant grievance.

Discussion

In termination cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for disciplinary action against an employee. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). However, in cases

involving the dismissal of classified-exempt, at-will employees, state agencies do not have to meet this standard. *Logan v. W. Va. Regional Jail & Correctional Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994). Indeed, an at-will employee is subject to disciplinary action for any reason which does not contravene some substantial public policy. See *Harless v. First Nat'l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994). See also *Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n*, Docket No. 94-L-038 (Sept. 30, 1994), *aff'd sub. nom. Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996).

Grievant Thompson was an at-will employee of the West Virginia Board of Social Work, Respondent. Grievant maintains her dismissal was unlawful retaliation. The August 7, 2017, dismissal letter signed by the Board's Chair does not state any reason for Grievant's dismissal. R Ex 12 Respondent maintains that Grievant Thompson was dismissed for on-going performance issues dating back prior to February 2017 which included continued deficits in areas such as processing renewals, issuing license upgrades and temporary permits, answering the Board office telephone and processing references for initial licenses. Moreover, Grievant failed to take direction and overgeneralized issues with unacceptable critical thinking skills and failed to learn from prior errors with no significant improvement. Respondent further avers regardless of whether one is in agreement with the Board's assessment of Grievant's work performance, as an at-will employee, Grievant may be dismissed for good cause, bad cause, or no cause at the discretion of Respondent.

Credibility

An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). In the circumstances of this case, it is deemed prudent to address the reliability and due weight that is most readily applicable to one or more of the witnesses, who testified and provided information within the course of this matter. This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The undersigned had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony and the duration of the level three hearing. Utilizing the noted factors, credibility assessments were made, herein, from direct observations as well as review of the record.

Executive Director of the WV Board of Social Work, Vickie James testified at the level three hearing of the instant grievance. With due acknowledgment to her role in this matter, the witness responded to queries posed and attempted to explain conduct and analysis of events that transpired throughout the course of relevant events. Director

James testified in a manner demonstrating due deference to the issues in contention. She was not always direct with her responses, but the witness had a deliberate message she wanted conveyed. The witness testified for an extended period of time, hours, of a one-day hearing.⁴ Her testimony provided a plethora of information, some information was more persuasive than other information.⁵ It is clear that Director James tends to exchange the terms practice, policy and rule without truly acknowledging the distinct nature of the terms. The credibility of Director James testimony is not truly impeached by unbalanced terminology but the weight this ALJ gives to some isolated examples of alleged miscommunication is prudently measured. Overall, Director James testimony is credible. The plausibility of the information as presented was persuasive, Grievant's employment with Respondent was not a mutually beneficial relationship. There was undue discord in the BSW's office and the situation was getting worse with time. The dissention was not based in racial differences or unreasonable workplace expectations. Director James' testimony touched upon many aspects of the relevant time period and went a long way to depict the overall situation. However, it is readily apparent that Director James and Grievant have different perceptions regarding their perspective roles in BSW's office. What Respondent wanted (envisioned) from an Administrative Assistant working in its office and what Grievant was prepared to provide was not a good fit. Regrettably, this is true. Director James and Grievant have different perceptions,

⁴ Director James testified that in December 2016 when Grievant started working at the Board office she would check in with Grievant to make sure her training was progressing. She also began to make notes regarding Grievant's performance in her planner.

⁵ Director James' testimony regarding Respondent's standard operating procedure(s) regarding notice to Board of Social Work meetings is unclear.

perhaps there was a time when one or the other might have been more amenable to see the other's point, but that time has long passed. This ALJ finds that Grievant was provided ample opportunity to adapt to the agencies' reasonable expectations.

Grievant testified on her own behalf, her demeanor was professional and purposeful. Grievant has an obvious interest in the outcome of the grievance which has a bearing on the reinstatement of her employment, and it is believed that Grievant attempted to provide thoughtful responses. Grievant's opinion of events is in conflict with Director James' recollection of events. The conflict is not generally a dispute of a factual event but a difference in the interpretation, intent and analysis of situations. Grievant's testimony was less persuasive than needed for several reasons. Initially, Grievant tended to agree with overly inclusive statements of legal conclusions, offered as first-hand testimony, this was not effective direct testimony. The expectations and conditions of Grievant's employment for one reason or another is a relevant issue. Nevertheless, Grievant did not establish persuasive facts to indicate that Director James had unrealistic work expectations for Grievant, that being deed(s) or amount of work. Both Grievant and Director James play unnecessary word games regarding events, intent and circumstances. Grievant did not persuasively establish Director James or any responsible member representing Respondent demonstrated hostile activity toward her. Grievant tends to overuse trigger words and state legal conclusions as fact. The facts are the facts, interpretation and analysis of the information produces conclusions. This trier of facts understands Respondent's assessment that Grievant tends to overgeneralize issues and fails to follow instructions. Grievant demonstrates bias and self-serving

predisposition when relating the intent and conduct of others. There were several disagreements which surfaced between Grievant and her employer, but it is not established that Respondent had unrealistic demands or failed to provide Grievant adequate opportunity to succeed. Regrettably, this ALJ finds Grievant's communicated interpretation of facts and several events to be askew. Grievant's rendition of facts is not reliable. Grievant's actions and her reactions to Director James' attempts to resolve miscommunications were extreme. This ALJ is of the opinion that Grievant was as much a catalyst as a principle party with a number of identifiable office events.

Merits

It has been consistently held that an at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. See *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994). See also *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).⁶ However, the "rule giving the employer the absolute right to discharge an employee at will" has an exception: "[W]here the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." *Harless v. First National Bank of Fairmont*, 162 W.Va. 116, 246 S.E.2d 270, 275 (1978). One of the "fundamental rights" of an employee is the "right not to be a

⁶ In fact, an at-will employee may be dismissed for good reasons, bad reasons, or no reasons, unless the employer's motivation for the discharge is to contravene some substantial public policy. *Harless, supra*.

victim of a 'retaliatory discharge', that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy." *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W.Va. 57, 422 S.E.2d 624, 631 (1992) (quoting *McClung v. Marion County Commission*, 178 W.Va. 444, 360 S.E.2d 221 (1987)).

Grievant was a classified-exempt employee and as such served at the will and pleasure of Respondent. See *Wilhelm, supra*; *Dye v. Dep't of Educ.*, Docket No. 99-DOE-217 (Sept. 16, 1999), *Bellinger v. W. Va. Dep't of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995); *Logan, supra*; *Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992). Grievant's at-will status denotes she could be fired for good reasons, bad reasons, or no reasons, provided she was not terminated for a reason that violated a substantial public policy. *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). See *Wilhelm, supra*; *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995); *Harless, supra*. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. *Wilhelm, supra*.

Grievant admitted on cross-examination that initially, as filed, the instant case before the Grievance Board there are no allegations of a hostile work environment, harassment nor racial discrimination.⁷ Nevertheless, Grievant did put forth effort

⁷ Respondent has no way of knowing what Grievant may or may not have discussed with her representative prior to filing the instant grievance. See G Exs 4 and 5. The filed grievance alleges, "Grievant dismissed in retaliation for having exercised statutory rights." It is recognized that Grievant is also litigating allegations in other legal forums, consequently it seems, Grievant's allegations against Respondent in the instant grievance from time to time is less than direct, tending to encompass several alternative theories of unlawful actions.

seeming focused on such allegations. Grievant's allegation of illegal conduct by Respondent tends to metamorphose with time. A comparison could be drawn where Grievant tends to demonstrate the mannerisms of an individual attempting to throw everything at the wall and see what sticks. Grievant Thompson contends her "statutory rights" were violated for filing a grievance and filing a complaint at the WV Human Rights Commission. See *Jada Thompson v. WV Board of Social Work*, Docket No. 2017-2065-BBC and *Jada L. Thompson v. WV Board of Social Work*, Docket No. ER-157-17. However, it is recognized that Grievant has also put forth limited information tending to indicate alternative allegations e.g., hostile work environment, harassment and/or discrimination.⁸

For purposes of the grievance procedure, WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal 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." To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he was subsequently treated in an adverse manner by the employer or an agent;
- (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

⁸ For purposes of the Grievance Procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. Code § 6C-2-2(d).

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).⁹

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id.* See *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was

⁹ An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. See *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013).

merely a pretext for a retaliatory motive.” *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dep’t of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004). Respondent has demonstrated legitimate, non-retaliatory reasons for its actions.

Grievant acknowledges declining and lack of communication with Director James during July 2017. This lack of communication became a barrier in meeting the needs of the office and the public. An example of this lack of communication occurred with regard to ordering office supplies. Instead of communicating when more copy paper or toner was needed, these supplies were left to run out causing additional funds and time to be expended to refill them. Another example of this lack of communication, occurred over July 4th Holiday weekend. Grievant Thompson was to pick up the mail on July 3, 2017, while Director James was on annual leave. Grievant Thompson failed to perform that job duty, and instead sent the Director an email after the fact on July 5, 2017. Increasingly, Grievant failed to perform her job duties to the satisfaction of Director James. Moreover, as noted by Director James, Grievant Thompson became insubordinate in performing job duties. Grievant admits to knowingly doing some activities despite explicit instructions to the contrary. Grievant acknowledges insubordinate activity. See Grievant’s L-3 testimony. Legitimate, non-retaliatory reasons exist for Respondent to want to terminate Grievant’s employment. The employee-employer relationship of Grievant and Respondent was not functioning properly. Grievant was an at-will employee.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

"To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n]*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

Grievant did not establish, by a preponderance of the evidence, that during the time period relevant to this grievance that she was a victim of a hostile work environment. The former Administrative Assistant, Amy Polen, who worked for Respondent from April 2006 through May 2016 did not work at the BSW during the same period as Grievant. Disarray and chaos is not synonymous with hostile. See Polen L-3 testimony. Further, with regard to the instant case, it is noted that Grievant is African-American and Director James is Caucasian. Grievant did not establish race as a significant factor in relevant events of this matter. It is not perceived that Respondent and Grievant were without their differences, but their conflicts were not based in the diversity of their race.

Director James testified that she was not present for the vote by the Board regarding Grievant's employment status. Further Director James testified that the August 7, 2017, meeting notice and agenda for the Board of Social Work was not filed in advance with the Secretary of State's office. R Ex 11 This is disturbing. Disturbing is the information tending to indicate Respondent's Board meetings may be functioning without public notice. "Each governing body of the executive branch of the state shall electronically file a notice of each meeting with the Secretary of State for publication on the Secretary of State's website." West Virginia Code §6-9A-3(e). This testimony raises a distinct possibility that the West Virginia Board of Social Work approved Grievant's dismissal at its August 7, 2017, meeting, however, without proper notice to the Secretary of State, was this a lawful meeting of BSW empowered to discharge Grievant.¹⁰ The

¹⁰ Director James testified that notification to the Secretary of State's office for meetings of BSW were not routinely made. Grievant's dismissal letter is signed by the Board Chair Rita Brown. The undersigned is without sufficient information to reach a prudent determination regarding public notice of the August 7, 2017, meeting.

BSW is empowered and charged with holding lawful meetings, maintaining an office, hiring, discharging, establishing the job requirements and fixing the compensation of its employees. See W. VA. CODE §30-30-5(b). The undersigned is not ready to speculate on what steps Respondent did or did not take to formally authorize Grievant's discharge but the uncertainty is disconcerting.

There were several disagreements which surfaced between Grievant and her employer, but it is not established that Grievant's employer had unrealistic expectations or the work environment was abusive. Respondent established legitimate workplace issues existed with regard to Grievant's employment at BSW. Respondent has offered legitimate, non-retaliatory reasons for its actions. Grievant has failed to establish/prove by a preponderance of the evidence that the reasons offered by the employer were merely a pretext for a retaliatory motive. As an at-will employee, Grievant may be dismissed for good cause, bad cause, or no cause at the discretion of Respondent provided that she is not terminated for a reason that violates a substantial public policy.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. "[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law." *Roach v. Regional Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d

329, 340 (1995)). See *Mahmoud v. Dep't of Health & Human Resources*, Docket No. 2014-0303-DHHR (March 20, 2017).

2. “The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer’s motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.” Syllabus, *Harless v. First Nat’l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978)

3. An at-will State employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. See *Harless v. First Nat’l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994), See also *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (per curiam); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (per curiam). “To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.” *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

4. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. *Wilhelm, supra*. See *Young v. W. Va. Dep’t of Health and Human Res.*, Docket No. 90-H-541 (Mar. 29. 1991).

5. For purposes of the grievance procedure, WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal 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.” To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he was subsequently treated in an adverse manner by the employer or an agent;
- (3) that the employer’s official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

6. “[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

7. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory

reasons for its action. *Id.* See *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive. See *Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

8. Legitimate, non-retaliatory reasons exist for Respondent to want to terminate Grievant's employment.

9. Respondent established non-retaliatory reasons for its actions. Grievant failed to establish by a preponderance of the evidence that the reason(s) offered was merely a pretext for a retaliatory motive.

10. The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required."

Harris, supra at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

11. “To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee’s employment.’ *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).” *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). “As a general rule ‘more than a few isolated incidents are required’ to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm’n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997).” *Marty v. Dep’t of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

12. Grievant did not establish by a preponderance of the evidence that she was a victim of a hostile work environment.

13. Grievant has failed to establish by a preponderance of the evidence that her discharge violates a substantial public policy.

Accordingly, this grievance is **DENIED**.

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* 156 C.S.R. 1 § 6.20 (2008).

Date: February 9, 2018

Landon R. Brown
Administrative Law Judge