

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**HAZRA ALLADIN,**

**Grievant,**

**v.**

**Docket No. 2019-0545-DOE**

**DEPARTMENT OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Hazra Alladin, filed an expedited level three grievance<sup>1</sup> dated November 1, 2018, against her employer, Respondent, West Virginia Department of Education (“DOE”), stating as follows: “[r]eported wrong doing and was terminated. Refusal of reason of termination given.” As relief, Grievant seeks “[r]einstatement and Loss of Wages.”

Respondent filed a Motion to Dismiss this grievance on January 15, 2019, alleging Grievant “has failed to identify with any specificity a substantial public policy that has been violated by her termination of at-will employment,” and that “Grievant has not made a credible claim upon which relief can be granted.” On that same date, the Grievance Board notified Grievant by electronic mail that any response to the motion to dismiss must be made in writing by January 31, 2019. Grievant, *pro se*, responded on January 31, 2019, opposing the motion to dismiss and elaborating on her claim, alleging violation of West Virginia Code § 6C-1-3, The Whistle-Blower Law. Respondent then submitted a Reply in which it asserts that it is still *entitled* to dismissal. The Motion to Dismiss was denied by Order entered March 6, 2019. Therein, this ALJ concluded that Grievant had stated a

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<sup>1</sup> See, W. VA. CODE § 6C-2-4(a)(4).

claim upon which relief could be granted and had also alleged a violation of public policy.

This ALJ further ruled that,

. . . it is readily apparent that the facts are in dispute. Respondent has largely argued the merits of the case in support of its Motion to Dismiss. Respondent appears to be seeking a judgment on the pleadings rather than a dismissal. The Grievance Board does not issue judgments on the pleadings. See W. VA. CODE § 6C-2-1 *et seq.*; W. VA. CODE ST. R. § 156-1-1 *et seq.* While Respondent has attached to its pleadings a number of documents, no evidence has been presented in this matter. The level three hearing is designed for such. These are not the circumstances under which the Grievance Board may dismiss a grievance.

A level three hearing was held on March 18, 2019, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Heather L. Hutchens, Esq., General Counsel, and Sherri Goodman Reveal, Esq., Staff Attorney, West Virginia Department of Education. This matter became mature for decision on April 16, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant, an at-will employee, was dismissed from her position with Respondent on October 23, 2018. Grievant asserts that her dismissal was improper as it violated West Virginia Code § 6C-1-1, *et seq.*, The Whistle-Blower Law. Respondent denies Grievant's claims, and argues that Grievant's dismissal was lawful. Grievant failed to meet her burden of proving her claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

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, Hazra Alladin, was employed by Respondent as a Secretary III-A in Respondent's Office of Technology Integration and Support. This assignment began in or about January 2018. However, Grievant had been employed by Respondent for about sixteen years.

2. It is undisputed that Grievant was an at-will employee. Grievant was not employed in the classified service.

3. At the times relevant herein, Lori Whitt, Assistant Director, was Grievant's immediate supervisor. Ms. Whitt became Grievant's supervisor in January 2018 following a reorganization of the technology department.

4. Dr. Jan Barth is the Assistant Superintendent of the Division of Teaching & Learning. Dr. Barth was Lori Whitt's supervisor.

5. Between January 2018 and June 2018, Ms. Whitt observed Grievant get into verbal altercations with coworkers and engage in behaviors she considered disruptive, such as humming loudly at her desk after being asked not to disturb coworkers. Ms. Whitt also felt that Grievant demonstrated an "unwelcome familiarity" toward her. Also, during this time, there were two occasions when Ms. Whitt gave Grievant assignments and Grievant told her that such were not part of her job when they were.

6. In June 2018, Ms. Whitt met with Dr. Barth, who was about to become the Assistant Superintendent of the Division of Teaching & Learning and Ms. Whitt's supervisor, along with Lou Maynus, the out-going Assistant Superintendent of the Division

of Teaching & Learning. During their meeting, Ms. Whitt brought up the subject of terminating Grievant's employment. However, it was decided that Ms. Whitt would perform Grievant's performance evaluation, then review Grievant's progress sixty days thereafter.<sup>2</sup>

7. Ms. Whitt drafted Grievant's annual Employee Performance Appraisal in or about June 2018, and reviewed the same with Grievant on July 13, 2018. In this evaluation Ms. Whitt rated Grievant as "Does Not Meet Expectation" in these three categories: "Professional Behavior: Maintains a positive, cooperative attitude toward colleagues and observes standards of courtesy and respect;" "Fairness: Contributes to an environment free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination;" and, "Job Requirements: Successfully carries out the essential functions of the assigned position."<sup>3</sup>

8. In the "Work Habits" and "Job Performance" sections, respectively, of the performance evaluation, Ms. Whitt wrote the following comments:

Hazra has a positive attitude and is very willing to help. However, there are times voices are raised and cooperation is lacking. Loud/confrontational conversations have been brought to my attention from others outside OTIS office. Hazra has the skill needed to become an integral part of the office, however, there are times work is not provided because it is unknown how it is going to be received. This will be reevaluated in 60 days. . .

Hazra does a good job with the work she is assigned, however, there have been 2 occasions when she has told her supervisor that it was not her job when indeed it was. This will be re-evaluated in 60 days.<sup>4</sup>

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<sup>2</sup> See, testimony of Dr. Jan Barth; testimony of Lori Whitt.

<sup>3</sup> See, Respondent's Exhibit 5, employee performance appraisal, July 13, 2018.

<sup>4</sup> *Id.*

9. Ms. Whitt listed the following three goals for Grievant in her employee performance appraisal: “Being new with the Office of Integration and Support, I would like to fully master the office workings by August of 2018;” “Develop and perfect an inventory control for our Robo-to-Go equipment’s so all of our office Staff (sic) are on the same page and at any given moment can assist someone needing equipment on their own and everyone will know where the equipment is at any given moment. ASAP[!];” and, “Personal growth within the WVDE organization in One Year!”<sup>5</sup>

10. Ms. Whitt listed the following in the “Areas for Improvement, Commendations, and/or Professional Learning” section: “Associates staff is to strive to improve their working knowledge of the following skills; oral and written communication skills with other WVDE employees. Must improve team-building skills by working effectively and positively with other professional and associate staff within the department. Progress will be reviewed every 60 days.”

11. Ms. Whitt and Marlena Mullens met with Grievant on July 13, 2018, to review Grievant’s evaluation with her. They also explained the 60-day review that was to occur. Grievant was very upset by the ratings she had received in the evaluation, and disagreed with the same. During this meeting, Grievant accused Ms. Whitt of being racist and stated that Ms. Whitt did not understand her culture.<sup>6</sup> It is noted that Grievant has not alleged discrimination or racism in her grievance. Grievant has only alleged in this matter that she was dismissed in violation of The Whistle-Blower Law.

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<sup>5</sup> *Id.*

<sup>6</sup> *See*, testimony of Lori Whitt.

12. In or about early September 2018, Dr. Barth and Ms. Whitt discussed Grievant's performance since her July evaluation. They agreed that Grievant's performance had not improved and she still engaged in disruptive behavior. Ms. Whitt and Dr. Barth determined that Grievant should be dismissed from employment. After this meeting, Dr. Barth talked to Assistant Superintendents in other WVDE divisions to find out whether any would want Grievant to work for them. However, no such placement was found.

13. In mid-September 2018, Dr. Barth directed Ms. Whitt to draft a document listing all of the problems with Grievant's conduct and performance. Ms. Whitt began drafting this document on October 3, 2018.<sup>7</sup> Ms. Whitt provided this document with attachments to Dr. Barth, her secretary, Marlena Mullins, and General Counsel Heather Hutchens on October 5, 2018.<sup>8</sup> Upon receipt of the same, Ms. Mullins drafted a summary of the information Grievant submitted to Dr. Barth, and on October 18, 2018, emailed it to Dr. Barth and Ms. Whitt.<sup>9</sup>

14. Assistant Superintendent Clayton Burch supervises the divisions within WVDE. Also, Mr. Burch makes final employment decisions regarding hiring and firing for all positions below the level of Assistant Superintendent. Mr. Burch reports all such final decisions to State Superintendent of Schools, Dr. Steven Paine.

15. Dr. Barth met with Mr. Burch soon after the October 5, 2018, bulleted summary regarding Grievant's conduct and performance was completed. Dr. Barth had also met with Mr. Burch about Grievant before. On October 5, 2018, Dr. Barth

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<sup>7</sup> See, Respondent's Exhibit 6.

<sup>8</sup> See, Respondent's Exhibit 7, email dated October 5, 2018, and attachments.

<sup>9</sup> See, Respondent's Exhibit 8, email dated October 18, 2018, and summary.

recommended to Mr. Burch that Grievant's employment be terminated, and discussed the issues contained in the bulleted summary. Mr. Burch agreed with Dr. Barth, and the decision to dismiss Grievant was made.

16. Human Resources Director Woods had been aware for several weeks that management was considering dismissing Grievant when he was instructed to draft the dismissal letter following the Dr. Barth and Mr. Burch's meeting on October 5, 2019.<sup>10</sup>

17. On or about October 18, 2018, Grievant went to Respondent's human resources office and spoke to H. Julian Woods, Human Resources Director, and his secretary, Liz Bryant, about problems she was having with Ms. Whitt and other co-workers. Grievant was upset and complained that Ms. Whitt was harassing and bullying her. During this conversation, Grievant also alleged that Ms. Whitt had violated purchasing requirements by giving grant money to Berkeley County Schools for the purchase of 360-degree digital cameras in September 2018 that were needed for a presentation on October 8, 2018. Mr. Woods testified at the level three hearing that he did not recall Grievant alleging purchasing violations. However, Ms. Bryant testified that she did remember Grievant making the comments.<sup>11</sup>

18. Neither Ms. Bryant nor Mr. Woods reported Grievant's allegation to anyone. Ms. Bryant did not pay any attention to Grievant's allegation because she thought Ms. Whitt's supervisor would deal with it.<sup>12</sup>

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<sup>10</sup> See, testimony of H. Julian Woods.

<sup>11</sup> See, testimony of H. Julian Woods; testimony of Liz Bryant.

<sup>12</sup> See, testimony of H. Julian Woods; testimony of Liz Bryant.

19. Grievant has not claimed that she reported the alleged purchasing requirement violations to anyone besides Mr. Woods and Ms. Bryant at WVDE, and there is no evidence to the contrary.

20. Human Resource Director Woods drafted Grievant's dismissal letter for Dr. Paine's signature. This letter is dated October 23, 2018, and states, in part, as follows:

This letter is to inform you that your employment as Secretary IIIA of the Office of Technology Integration and Support at the West Virginia Department of Education will be terminated effective at the close of business Friday, October 26, 2018. You are relieved of all duties effective immediately and are placed on administrative leave through Friday, October 26, 2018.

Prior to your departure, you will need to contact both H. Julian Woods, Office of Human Resources, and Teresa Connor, Office of Internal Operations, for completion of necessary paperwork and an exit interview. You will also need to turn in any Department of Education equipment, parking passes, keys and building passes that you have been issued. . . .<sup>13</sup>

21. The dismissal letter provides no reason for Grievant's termination.

22. Mr. Woods went to deliver the letter to Grievant on October 23, 2019; however, she was not there. As such, Mr. Woods called Grievant and informed her of her dismissal over the phone. Mr. Woods also mailed the dismissal letter to Grievant by certified mail.

23. Ms. Whitt and Dr. Barth did not learn of Grievant's allegations about purchasing violations until January 2019 as part of this grievance.

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<sup>13</sup> See, Respondent's Exhibit 1, dismissal letter.

## 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). However, in cases involving the dismissal of classified-exempt, at will employees, state “agencies do not have to meet this legal standard.” *Logan v. Reg’l Jail & Corr. Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994) *aff’d*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996). “[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg’l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)).

Therefore, a grievant who is an at-will employee has the burden of proof, and must

“‘prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.’ Syl. pt. 4, *Frank’s Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).” Syl. pt. 1, *Brammer v. Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990).

Once the complainant has satisfied that burden, the burden then shifts to the employer to provide a legitimate, intervening reason for the dismissal. As we explained in syllabus point nine of *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E.2d 624 (1992):

“In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her

constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct.” Syllabus point 3, *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987).

*Roach v. Reg'l Jail Auth.*, 198 W. Va. 694, 701, 482 S.E.2d 679, 686 (1996).<sup>14</sup>

The West Virginia Supreme Court of Appeals has stated, as follows:

[t]he 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*, 169 W. Va. 673, 246 S.E.2d 270 (1978). “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.” Syl. Pt. 2, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). West Virginia courts have recognized conduct such as submitting a claim for back wages under the Veterans Reemployment Rights Act [*Mace v. Charleston Area Medical Ctr. Found.*, 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations [*Lilly v. Overnight Transp. Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992)], refusing to conceal alleged environmental violations committed

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<sup>14</sup> *Roach* was a case arising from a grievance action, which the West Virginia Supreme Court of Appeals analyzed under the same standard as cases arising under the West Virginia Human Rights Act.

by the employer [*Bell v. Ashland Petroleum, Inc.*, 812 F. Supp. 639 (S.D. W. Va. 1993)], filing a workers' compensation claim [*Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980)], attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act [*Reed v. Sears, Roebuck & Co.*, 188 W. Va. 747, 426 S.E.2d 539 (1992)], and testifying as a witness in a civil action against the employer [*Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996)], as involving substantial public policy interests. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at-will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [*Graley v. W. Va. Parkways Economic Development & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [*Bellinger v. W. Va. Dept. of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [*Hendricks v. W. Va. Dept. of Tax & Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996)].

In this matter, Grievant asserts that Respondent wrongfully dismissed her from employment in violation of West Virginia Code § 6C-1-1 *et seq.*, The Whistle-Blower Law, and that such is a violation of substantial public policy. Grievant has not raised any claims of discrimination or racism in this grievance. Grievant argues that Respondent dismissed her because she had reported that Ms. Whitt violated purchasing requirements in the awarding of a grant to Berkeley County Schools. Respondent denies Grievant's claims and argues that it properly terminated Grievant's at-will employment. Respondent argues that those making the decision to terminate Grievant's employment, had been considering

the same for several months prior to, and had made the decision to terminate Grievant's employment without any knowledge of her report to Mr. Woods and Ms. Bryant. Respondent also denies any purchasing violations occurred.

West Virginia Code § 6C-1-1, *et seq.*, entitled "The Whistle-Blower Law," provides that "[n]o employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting of his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." W. Va. Code § 6C-1-3(a). Such would certainly constitute a substantial public policy.

The evidence presented establishes that on October 18, 2018, Grievant, very upset, went to the human resources office and spoke to both Mr. Woods and Ms. Bryant alleging that Ms. Whitt was bullying and harassing her. During this same conversation, Grievant also alleged that Ms. Whitt improperly used a grant to Berkeley County Schools to violate purchasing requirements. Grievant's report to Mr. Woods and Ms. Bryant would be considered as "engaging in protected activity" given the language of West Virginia Code § 6C-1-3(a). Grievant was thereafter dismissed on October 23, 2018, just days after her October 18, 2018, meeting with Mr. Woods and Ms. Bryant.

However, the evidence presented establishes that neither Mr. Woods nor Ms. Bryant informed anyone about Grievant's allegation of wrongdoing against Ms. Whitt. Mr. Woods and Ms. Bryant did not pay it any attention, and took no action in response. In other words, the report of alleged wrongdoing went no further than their office. Mr. Woods

and Ms. Bryant did not participate in the decision to dismiss Grievant. Mr. Woods, as Human Resources Director, had some role in the dismissal process, but the evidence demonstrated that he was not the decision-maker. Mr. Woods drafted the dismissal letter at the direction of Mr. Burch, and informed Grievant of her dismissal.

The evidence is clear that Ms. Whitt and Dr. Barth recommended to Mr. Burch that Grievant be dismissed, and Mr. Burch was the ultimate decision-maker on the issue. There is no evidence that Mr. Burch, Ms. Whitt, or Dr. Barth knew of Grievant's allegation of wrongdoing at anytime before the filing of this grievance. In fact, Ms. Whitt and Dr. Barth assert that they did not know about Grievant's complaint to Mr. Woods and Ms. Bryant until January 2019, which was when Grievant first articulated her specific whistleblower claim in her Response to Respondent's Motion to Dismiss. As Ms. Whitt, Dr. Barth, and Mr. Burch did not know about Grievant's protected activities, there is no way such impacted their decision to dismiss Grievant.

Accordingly, Grievant has failed to meet her burden proving that Respondent dismissed her in violation of substantial public policy. As Grievant has failed to meet her burden, there is no need to address any additional arguments made by the parties. Therefore, this grievance is DENIED.

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). However, in cases involving the dismissal of classified-exempt, at will employees, state "agencies do not have to meet this legal standard." *Logan*

*v. Reg'l Jail & Corr. Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994) *aff'd*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996). “[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg'l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)).

2. A grievant who is an at-will employee has the burden of proof, and must

“prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.’ Syl. pt. 4, *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).” Syl. pt. 1, *Brammer v. Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990). . . .

*Roach v. Reg'l Jail Auth.*, 198 W. Va. 694, 701, 482 S.E.2d 679, 686 (1996).

3. The West Virginia Supreme Court of Appeals has stated, as follows:

[t]he 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*, 169 W. Va. 673, 246 S.E.2d 270 (1978).

4. “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.” Syl. Pt. 2, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

5. Grievant failed to meet her burden of proving by a preponderance of the evidence that she was dismissed in violation of substantial public policy.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: July 19, 2019.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**