THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK ALAN HOOKER,
Grievant,

v. **Docket No. 2019-0505-DOR**

OFFICES OF THE INSURANCE COMMISSIONER,
Respondent.

DECISION

Grievant, Mark Alan Hooker, was employed by Respondent, West Virginia Offices of the Insurance Commissioner. On October 22, 2018, Grievant filed this grievance against Respondent stating, "I was wrongfully terminated and discriminated against based upon a false allegation of a misdemeanor not related to work performance and treated differently (based on gender and/or age) than younger female co-worker(s) involved in the same and/or similar circumstances (one in the workplace). Denial of Severance pay." For relief, Grievant sought reinstatement, return of used leave, back pay, opportunity to secure personal documents, and severance pay.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held over the course of three days on July 15, 2019, October 28, 2019, and October 29, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, Jenny A. Bonham. Respondent was represented by counsel, Cassandra L. Means, Assistant Attorney General. By request and agreement of the parties, the parties were given until December 16, 2019, more than the twenty days provided under statute, to submit Proposed Findings of Fact and Conclusions of Law ("PFFCL"). On December 2, 2019, counsel for Grievant moved to withdraw. By *Order* entered

December 3, 2019, counsel's request to withdraw was granted and the time to submit PFFCL was extended to January 15, 2020. This matter became mature for decision on January 17, 2020, upon receipt of Respondent's written PFFCL. Grievant did not file PFFCL.[1]

Synopsis

Grievant was employed by Respondent as an Insurance Company Examiner Supervisor. Grievant was suspended and then terminated from his position after he was arrested for domestic battery against his girlfriend, who was also employed by Respondent, and his bond agreement required he have no contact with her. Grievant asserted he was entitled to civil service protection; however, Grievant was a classified-exempt employee who is presumed to be at will. Grievant failed to establish a permanent employment contract or other substantial employment right by clear and convincing evidence that would change his status as an at-will employee. As an at-will employee Grievant could be terminated for any reason that did not contravene a substantial public policy. Grievant was a member of a protected class and adverse employment action was taken against him but Grievant failed to prove that but for his protected status, the adverse decision would not have been made. Therefore, Grievant failed to prove his termination was motivated to contravene a substantial public policy. As a classified-exempt employee, Grievant was not entitled to severance pay. Accordingly, the grievance is denied.

[1] As Grievant chose not to file PFFCL, the undersigned has identified his arguments from his statement of grievance, his former counsel's opening statement during the level three hearing, and those that would naturally flow from the evidence presented at the level three hearing.

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 an Insurance Company Examiner Supervisor, with the working title of Director of the Market Conduct Unit.

2. Grievant was previously employed by Respondent as a Market Conduct Examiner, a classified position.

3. On May 9, 2008, Grievant resigned his classified position as a Market Conduct Examiner to accept a position as a classified-exempt Insurance Company Examiner Supervisor. In his letter of resignation, Grievant acknowledged that the Insurance Company Examiner Supervisor position was classified exempt and stated further, "I fully understand that the new position is not a Covered Civil Service position."

4. Grievant accepted the position because it was a very significant pay increase of nearly $25,000 per year.

5. Grievant again acknowledged the non-covered nature of his position in a September 21, 2018 letter, following the suspension that is at issue in this grievance.

6. Classified-exempt employees are exempt from the pay ranges assigned by the Division of Personnel and are not required to meet the minimum qualifications for a position.

7. Grievant does not meet the minimum qualifications for an Insurance Company Examiner Supervisor position as a classified employee.

8. Grievant was recorded as an at-will classified-exempt employee in the Division of Personnel's records.

9. Respondent has an employee handbook to provide "guidance" to employees regarding "policies, procedures, benefits, and other aspects" of employment.

10. The handbook describes three types of employment with Respondent: Classified, Classified-Exempt, and Temporary Appointment. The handbook states that classified employees are covered by the "merit system (civil service)" as reflected by the administrative rule of the Division of Personnel. The handbook states the following regarding classified-exempt employees:

> Classified-Exempt employees serve in positions that are not subject to merit system standards. However, OIC extend the policies and procedures outlined in the DOP's Administrative Rule to many classified-exempt employees in the same way that they are applied to classified employees.
>
> These rules are not generally extended to classified-exempt employees who are considered to be at will employees. These positions include those that are policy-making or appointed by the Governor. Examples of these positions include the Commissioner and Board Members.

11. On July 25, 2017, Grievant signed an acknowledgement of a disclaimer to the handbook which stated, in pertinent part, "I further understand that this handbook is not a contract of employment and nothing in the handbook implies any contractual obligations between employee and employer."

12. On September 11, 2018, Grievant was arrested and charged with domestic battery. The alleged victim of the battery was Grievant's girlfriend, F.S.[2], who was also employed by Respondent.

[2] In the interests of protecting her privacy, the alleged victim will be referred to by her initials. The undersigned further acknowledges F.S.'s assertion that she is not a victim, however, "alleged victim" is the proper legal terminology for the person who is the subject of an alleged battery.

13. The criminal complaint against Grievant alleged that a neighbor had reported they heard a woman screaming “get off me” and “help” and that when law enforcement arrived they observed F.S. with a large mark and knot on her forehead and bruising and redness on her arms. The complaint states that F.S. stated she didn’t know how the knot got on her forehead but that the bruises were from Grievant holding her down and not letting her up. The complaint further states that, once Grievant was arrested, F.S. refused to give a written statement to law enforcement.

14. As a condition of his bail agreement, Grievant was required “to have no direct or indirect physical or verbal contact” with the alleged victim, F.S.

15. Grievant and F.S. work in close proximity to one-another. Grievant and F.S. work in the same building, on the same floor, and in offices approximately five doors away from each other, which shared the same hallway and elevator.

16. On September 12, 2018, Grievant informed members of administration of his arrest and Commissioner Allan McVey met with Grievant, Deputy Commissioner/General Counsel Erin Hunter, and Grievant’s supervisor, Attorney Supervisor Jeff Black. Following the meeting, Respondent obtained copies of the criminal complaint and Grievant’s bail agreement.

17. The same day, Commissioner McVey met with F.S., Ms. Hunter, Mr. Black, and Assistant Commissioner of Operations Debbie Hughes. F.S. relayed that she had not pressed criminal charges against Grievant and had not wanted him to be arrested. She also stated that she had previously hit Grievant when she had found him in bed with another woman and that she had not been arrested or charged for that incident because Grievant had not wanted to press charges against her.

18. Commissioner McVey, Ms. Hunter, Mr. Black, and Ms. Hughes all believed that F.S. was downplaying the incident with Grievant and were concerned regarding contact between the two at the office.

19. Commissioner McVey determined Grievant should be immediately suspended because of the bond restriction. Ms. Hughes and Mr. Black informed Grievant of the verbal suspension the same day.

20. Commissioner McVey memorialized the suspension as non-disciplinary and without pay by letter dated September 17, 2018. Specifically, he stated that the suspension was issued "due to the criminal complaint filed against you for domestic battery" against F.S. and the conditions of the bond agreement. Commissioner McVey further stated, "Upon reviewing the criminal charge, it is my decision that you should be suspended from employment for the next 30 days, until October 12, 2018, or until the criminal charge is resolved, whichever comes first. If the criminal charge has not been resolved by October 12, 2018, your employment status with the OIC will be reevaluated, and you will be informed of such further action that I shall take regarding your employment with the OIC at that time, up to and including further suspension or termination."

21. On October 2, 2018, Grievant moved to modify the bond in his criminal action, citing his suspension from employment and the agreement of the alleged victim. The bond was not modified.

22. During Grievant's suspension, Commissioner McVey learned that Grievant and F.S. were still in contact in violation of the bond agreement and that F.S. had emailed Grievant a copy of his resume from her work computer. He also received

confirmation from the Division of Personnel that Grievant was an at-will classified-exempt employee who could be terminated without cause.

23. By letter dated October 9, 2018, Commissioner McVey dismissed Grievant from employment stating that Grievant could be released from employment without cause as Grievant served in an at-will classified-exempt position. Commissioner McVey further stated, "Though it would suffice to say that your dismissal is based on my loss of confidence in your ability to perform your duties (which is the case), I am compelled, for your benefit, to articulate the reason for my loss of confidence, that being your inability to be at work to carry out your duties as the Director of the Market Conduct Unit. However, my providing you with the reasoning for my decision to dismiss you should not be construed as vesting you with any property interest in continued employment with the OIC."

24. Grievant did not receive severance pay upon his termination from employment.

25. On January 8, 2019, the criminal complaint against Grievant was dismissed with the statement, "Victim does not wish to proceed."

26. During his tenure, Commissioner McVey suspended six employees, of which two were female and four were male, and terminated four employees, of which two were female and two were male.

27. The two females who were suspended were Chief Administrative Law Judge Rebecca Roush and N.W.

28. Although Chief Judge Roush testified that she had been terminated from her position, she also admitted that the disciplinary letter she received stated she was

suspended pending her removal from her position by the Industrial Council. As she was not removed by the Industrial Council, she was not terminated from her position.

29. Grievant particularly points to disparate treatment than N.W., the other female employee who was suspended.

30. N.W. was employed within the Office of Judges. The Office of Judges operates somewhat independently from the Offices of the Insurance Commissioner, although it appears the level of independence of the office was in contention between Commissioner McVey and Chief Judge Roush. However, there appears to be no dispute that the chief and deputy chief administrative law judges served as administrators of the Office of Judges and issued discipline to employees, if the same was approved by the commissioner.

31. N.W. had a contentious working relationship with Chief Judge Roush that culminated in N.W. alleging that Chief Judge Roush had harassed her in a Facebook message. That allegation would later be the subject of a criminal charge that N.W. had actually sent the Facebook message to herself, to which N.W. pled guilty. As a result of this accusation, Commissioner McVey removed Chief Judge Roush from her position, although Chief Judge Roush denied sending the message.

32. Following her removal, Chief Judge Roush made a complaint to law enforcement regarding the Facebook message. While the law enforcement investigation was still pending, the Industrial Council reviewed Chief Judge Roush's removal from her position and reinstated her to her position.

33. On March 9, 2018, Chief Judge Roush returned to work. Another Office of Judge's employee, T.F., put up signs in the office welcoming Chief Judge Roush back

to the office. N.W. and two other employees went through the office angrily ripping down the signs and confronted T.F. regarding the signs. During this incident, someone also disturbed the contents of T.F.'s office, although the perpetrator of that act was never identified.

34. The Office of Judges conducted an internal investigation and Deputy Chief Judge Kristin Halkias determined that N.W. should receive a written reprimand for the incident, which recommendation was approved by Commissioner McVey. During the meeting to inform N.W. of her written reprimand, Chief Judge Roush alleged N.W. exhibited further improper behavior and requested N.W. be suspended.

35. On April 4, 2018, Commissioner McVey denied the request to suspend N.W.

36. On the same date, T.F. was granted a *Temporary Personal Safety Order* against N.W. stating that N.W. was "allowed to go to work but no unlawful or verbal contact with Petitioner. No direct or indirect contact." The order also set a final hearing on the petition for personal safety order for April 12, 2018.

37. By order entered April 12, 2018, the *Temporary Personal Safety Order* was terminated and the petition for a final personal safety order was denied.

38. While the temporary order was in place, Respondent moved N.W. to another work location to ensure no contact between N.W. and T.F.

39. N.W. was arrested on August 23, 2018 on charges relating to the fraudulent Facebook post. On the same day Commissioner McVey suspended N.W. pending resolution of the criminal charges.

40. Following her arrest, N.W. was indicted on felony charges. N.W. eventually pled guilty to a misdemeanor and resigned her position.

41. N.W. was a classified employee entitled to civil service protections.

Discussion

Grievant first asserts that, despite his status as a classified-exempt employee, his employment was not at will as he was entitled to civil service protection and could only be terminated from employment for cause. Ordinarily in grievance cases, 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).

Therefore, it must first be determined whether Grievant's employment was at will. "Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence." Syl. Pt 3, *Adkins v. Inco Alloys Int'l*, 187 W. Va. 219, 220, 417 S.E.2d 910 (1992).

"'Classified-exempt service' means an employee whose position satisfies the definitions for 'class' and 'classify' but who is not covered under the civil service system. . . ." W. Va. CODE § 29-6-2(g). "Civil service system" and "merit system" are synonymous as used in the statute and the Division of Personnel's administrative rule.

"Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status." *Bellinger v. W. Va. Dep't of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995); *Eggleton v. Div. of Culture and History*, Docket No. 03-C&H-273 (Nov. 24, 2003); *Hensley v. W. Va. Parkways Auth*., Docket No. 2016-0897-DOT (June 15, 2016).

The evidence clearly demonstrates that Grievant previously held a civil service position and resigned that position to accept the at-will classified-exempt position he held at the time of his employment was terminated. Grievant acknowledged by signed letter upon accepting the position that the position was classified-exempt and was not a covered civil service position. Grievant accepted the position because it paid significantly more money. Grievant did not meet the minimum qualifications for the position and, therefore, could only hold the position as a classified-exempt employee. Grievant again acknowledged his status as a non-covered employee in writing in September 2018, in response to the suspension at issue in this grievance. Nevertheless, Grievant asserts civil service protection was extended to his position by action of Respondent's employee handbook, by Respondent requiring Grievant to comply with Division of Personnel rules, and by the provisions of the suspension letter.

The employee handbook explanation of classified-exempt employment does include some language that is somewhat confusing in that it appears to indicate that some classified-exempt employees are at will and some are not. However, the very first sentence specifically states that "classified-exempt employees serve in positions that are not subject to merit system standards." Regardless, somewhat confusing handbook language is not clear and convincing evidence of a permanent employment contract or

other substantial employment right, especially in the face of Grievant's acknowledgement of his non-covered status.

Requiring Grievant to comply with the Division of Personnel's rules regarding time, attendance, and performance appraisals and extending to Grievant insurance and leave benefits was not a contract and did not create an employment right. "Within state government, there are both classified employees and classified-exempt employees. All are employees of the State, but classified employees are afforded certain protections that classified-exempt employees are not. West Virginia Code § 29-6-10 authorizes the DOP to establish and maintain a position classification plan for all positions in the classified ***and*** classified-exempt services. *See* W. VA. CODE § 29-6-10(1) (emphasis added). Having a job classification does not make one a classified employee. Just because Grievant earns leave in the same way as classified employees, has the same set of insurance benefits, and is evaluated in the same fashion as classified employees, such does not make him a classified employee." *Carter v. Public Broadcasting*, Docket No. 2013-1556-DEA (Feb. 4, 2014).

The suspension letter did not create a contract or other substantial employment right. While Respondent initially chose to suspend Grievant in compliance with the Division of Personnel's administrative rule for classified employees, Respondent was not required to extend those protections to Grievant's at will employment. The suspension letter stated that Grievant would be suspended until October 12, 2018, and if the criminal charge was not resolved by that date Grievant's employment status would be re-evaluated. Grievant was terminated from employment three days before the initial suspension period ended. Even if it could be said that the letter conferred upon

Grievant the right to remain employed for three more days, that is of no practical consequence as Grievant was suspended without pay and the criminal charges had not been resolved. The letter clearly does not create a permanent contract or other substantial employment right.

Grievant received the benefit of his bargain when he accepted the at-will position to make more money and he must now accept the consequences of that bargain. Grievant has failed to establish by clear and convincing evidence that the employee handbook, the application of certain Division of Personnel rules and benefits, or the suspension letter established a permanent employment contract or other substantial employment right. Grievant's employment was clearly at will.

Although this matter involved three days of hearing and substantial documentary evidence, much of that evidence was provided based on the argument that Grievant was entitled to civil service protection and could not be terminated without good cause. It being clear from the evidence that Grievant was an at-will employee, evidence regarding lack of good cause is ultimately irrelevant. Only evidence relating to Grievant's argument that he was terminated to contravene substantial public policy was considered and will be discussed. Further, Respondent introduced evidence regarding alleged performance deficiencies discovered while Grievant was suspended. As Commissioner McVey's letter dismissing Grievant states specifically that Grievant was terminated due to lack of confidence for Grievant's "inability to be at work to carry out your duties as the Director of the Market Conduct Unit" and not for any other performance deficiency, such evidence is irrelevant, was not considered, and will not be discussed.

Grievant argued alternatively that, even if his employment was at will, his termination was wrongful because it was motivated to contravene substantial public policy. "[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law." *Roach v. Reg'l Jail Auth*., 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). "The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." Syl. Pt. 3, *Wounaris v. W. Va. State Coll*., 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)). "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 Services Corp.,* 188 W. Va. 371, 424 S.E.2d 606 (1992).

Therefore, a grievant employed at will alleging he was wrongfully terminated has the burden to prove by a preponderance of the evidence that the termination of his employment was motivated to contravene some substantial public policy. "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).

In this case, Grievant alleged sex discrimination, age discrimination, familial relationship discrimination, and retaliation for exercising his fourth amendment rights. Grievant provided no evidence to prove his allegation of age discrimination, so that allegation will not be further addressed. Grievant did not make clear the nature of his argument regarding the fourth amendment. The fourth amendment confers the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Although fourth amendment issues may or may not have been involved in Grievant's criminal case, Grievant did not connect how Respondent's termination of him was motived to contravene his right to be free from unreasonable search and seizure. Therefore, that allegation will not be further addressed. This leaves two allegations of protected class discrimination: sex discrimination and familial relationship discrimination.

No previous grievance case appears to have addressed the elements of proof required to prove the termination of a grievant's employment was motivated by the grievant's protected class. However, the West Virginia Supreme Court of Appeals has addressed the elements of proof required when a grievant alleges they were terminated due to their protected activity. In such cases, the West Virginia Supreme Court of Appeals analyzed the cases using the elements of proof required to prove a claim under the West Virginia Human Rights Act. *See Roach v. Regional Jail Auth*., 198 W. Va. 694, 701, 482 S.E.2d 679, 686 (1996); *Freeman v. Fayette Cty. Bd. of Educ.,* 215 W. Va. 272, 275, 599 S.E.2d 695, 698 (2004).

Therefore, it appears that an analysis of a grievance claim of protected class should also be made using the elements required to maintain an action under the West

Virginia Human Rights Act. "In order to make a *prima facie* case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made." Syl. Pt. 3, *Conaway v. E. Associated Coal Corp.*, 178 W. Va. 164, 167, 358 S.E.2d 423, 426 (1986).

"It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status." W. VA. CODE § 5-11-2.

Grievant has alleged sex discrimination in that he was treated differently than female employees, which meets the first prong under *Conaway* that Grievant was a member of a protected class. Grievant's claim of sex discrimination also meets the second prong under *Conaway* as Respondent made the adverse decision to terminate Grievant's employment. Grievant's allegation of familial status discrimination does not

meet the first prong of *Conaway* as that protected class applies to housing discrimination and not employment discrimination and will not be further discussed.

Regarding the last *Conaway* prong, Grievant asserts he would not have been terminated from employment but for his sex. As proof of this allegation, Grievant asserts that another employee, N.W., who was female, was not terminated from employment for similar conduct, and that he was treated differently than the alleged victim when she physically abused him.

There was no evidence that Grievant and N.W. were treated differently because of sex. The evidence shows that the circumstances involving Grievant and N.W. were both legally and factually different. Legally, Grievant and N.W.'s employment status was different in that Grievant was an at-will employee and N.W. was a classified employee. As a classified employee, N.W. was entitled to civil service protections, including due process protections, so N.W. could only be terminated from her employment for good cause, which could only be had after the completion of the criminal proceeding or other investigation. *See* Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977); W. VA. CODE ST. R. § 143-1-12.3.b (2016). As an at-will employee, Grievant was not entitled to the protections N.W. was afforded as a classified employee.

Factually, Grievant was charged with a physical crime involving injury against a fellow employee and had bond restrictions preventing contact with that employee. N.W. was charged with a crime against Chief Judge Roush but the crime was not physical and there were no bond restrictions relating to N.W.'s employment. Upon being

arrested, like Grievant, N.W. was also suspended. A decision whether to terminate N.W.'s employment was never reached as she resigned her position when she pled guilty to the criminal charge. As to the other incident, N.W. was not charged with any crime for ripping down signs and there was no allegation of physical violence against any employee regarding that instance. The employee in that matter received a temporary civil restraining order and N.W. was moved to another building while that was pending for approximately one week when the permanent restraining order was denied. Further, the civil restraining order specifically stated that N.W. was allowed to go to work.

As the circumstances relating to the discipline of Grievant and N.W. were so legally and factually different, their difference in treatment is not evidence of sex discrimination. There was nothing in the evidence to indicate N.W. was favored or Grievant disfavored because of their sex. In fact, Grievant's own evidence, in the form of testimony by Chief Judge Roush, was that she believed N.W. was favored because N.W. was close friends with Commissioner McVey's son-in-law.

Grievant asserts he was also treated differently than F.S. due to his sex. Grievant provided evidence that F.S. repeatedly hit him during an incident when she found him in bed with another woman and that law enforcement did not arrest F.S. when Grievant refused to press charges against her. In contrast, although F.S. refused to press charges against Grievant, law enforcement still arrested Grievant. While this may or may not be evidence that Grievant and F.S. were treated differently due to their sex, that difference in treatment was by law enforcement, not Respondent. As for difference in treatment between the two by Respondent, F.S. was not arrested for the

incident with Grievant so there were no bond restrictions regarding their contact. Whether any member of Respondent's administration was aware that F.S. had hit Grievant at the time, which they deny, Grievant made no allegation that he had sought help from any member of Respondent's administration or expressed any concern about contact with F.S.

Grievant has failed to prove that, but for his sex, he would not have been terminated from his position. Grievant was terminated because he had bond restrictions due to his alleged physical assault resulting in injury to a fellow employee. As Grievant was an at-will employee, Respondent was not required to continue his suspension to allow the resolution of his criminal charges. This result was not because of his sex but was because of the at-will nature of his employment.

Grievant was not entitled to severance pay. "An appointing authority may require that a classified employee dismissed for cause immediately vacate the workplace, or a classified employee dismissed for cause may elect to do so. If the appointing authority requires a dismissed employee to immediately vacate the workplace in lieu of working during the notice period, or if an employee who receives notice of dismissal elects to immediately vacate the workplace, the employee is entitled to receive severance pay attributable to the time he or she otherwise would have worked, up to a maximum of fifteen (15) days after vacating the workplace." W. VA. CODE ST. R. § 143-1-12.2.b. This section applies only to classified employees dismissed for cause. Grievant was not a classified employee.

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).

2. "Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence." Syl. Pt 3, *Adkins v. Inco Alloys Int'l*, 187 W. Va. 219, 220, 417 S.E.2d 910 (1992).

3. "'Classified-exempt service' means an employee whose position satisfies the definitions for 'class' and 'classify' but who is not covered under the civil service system. . . ." W. VA. CODE § 29-6-2(g).

4. "Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status." *Bellinger v. W. Va. Dep't of Pub. Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995); *Eggleton v. Div. of Culture and History*, Docket No. 03-C&H-273 (Nov. 24, 2003); *Hensley v. W. Va. Parkways Auth*., Docket No. 2016-0897-DOT (June 15, 2016).

5. Grievant was an at-will classified-exempt employee and failed to establish a permanent employment contract or other substantial employment right by clear and convincing evidence.

6. “[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg’l Jail Auth*., 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). “The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.” Syl. Pt. 3, *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)).

7. “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 Services Corp.,* 188 W. Va. 371, 424 S.E.2d 606 (1992).

8. “In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made.” Syl. Pt. 3,

Conaway v. E. Associated Coal Corp., 178 W. Va. 164, 167, 358 S.E.2d 423, 426 (1986).

9. "It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status." W. VA. CODE § 5-11-2.

10. Grievant was a member of a protected class and adverse employment action was taken against him but Grievant failed to prove that but for his protected status, the adverse decision would not have been made. Therefore, Grievant failed to prove his termination was motivated to contravene a substantial public policy.

11. "An appointing authority may require that a classified employee dismissed for cause immediately vacate the workplace, or a classified employee dismissed for cause may elect to do so. If the appointing authority requires a dismissed employee to immediately vacate the workplace in lieu of working during the notice period, or if an employee who receives notice of dismissal elects to immediately vacate the workplace, the employee is entitled to receive severance pay attributable to the time he or she

otherwise would have worked, up to a maximum of fifteen (15) days after vacating the workplace." W. VA. CODE ST. R. § 143-1-12.2.b.

12. As a classified-exempt employee, Grievant was not entitled to severance pay.

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: February 28, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge