

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**WALID MOHAMED RADWAN,  
Grievant,**

**v.**

**Docket No. 2019-1570-WVU**

**WEST VIRGINIA UNIVERSITY  
Respondent.**

**DECISION**

Grievant, Walid Mohamad Radwan, was employed by Respondent, West Virginia University (WVU). On May 1, 2019, Grievant filed this grievance, stating, "I have been discriminated against and harassed due to my middle eastern descent. I brought forth my concerns on many occasions to Dr. Sedney and all have been met with retaliation, threats and discrimination. She retaliated against me for actions that she tolerated from non middle eastern residents. ..." As relief, he requests, "To reverse the letter of termination and all actions related to retaliation..."

On July 19, 2019, the parties waived the grievance directly to level three.<sup>1</sup> The parties subsequently requested a level two mediation. On September 13, 2019, the grievance was transferred to level two. On September 16, 2019, a level two mediation occurred. The grievance was reopened at level three on September 18, 2019. A level three hearing was held over four days<sup>2</sup> before the undersigned at the Grievance Board's Westover office, the last of which was via an online platform. Grievant appeared and was represented by Sean Cook, Esq. Respondent appeared by Dr. Sedney and was

---

<sup>1</sup>West Virginia 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.

<sup>2</sup>February 21, 2020, February 28, 2020, June 26, 2020, and July 6, 2020.

represented by Samuel Spatafore, Assistant Attorney General. This matter became mature for decision on October 19, 2020. Each party submitted written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed as a resident physician by WVU via annual contract and was not renewed. Grievant contends he was dismissed in retaliation for protesting harassment and discrimination, and that WVU engaged in discrimination/favoritism by not dismissing other residents for similar conduct. He further claims an invalid employment contract transformed his non-renewal into a disciplinary termination. Grievant did not prove a right to continued employment or that his non-renewal was motivated by retaliation, discrimination, or in contravention of substantial public policy. Accordingly, this 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 was employed as a resident physician in the Neurosurgery Department at WVU, pursuant to an annual contract, beginning in the fall of 2015.

(Respondent's Exhibits 18, 25, & 26)

2. Grievant's annual contracts provide the following terms of renewal:

**TERM: It is understood and agreed that the term of this Residency Agreement shall not exceed one (1) year.** The Hospital may choose to offer and the Resident Physician may choose to accept a Residency Agreement for additional terms throughout the course of the Resident Physicians Residency or Fellowship training. **It is understood and agreed that a new Residency Agreement must be entered into for each year** and signed and dated within thirty (30) days of initial date

applicable residency year. **WVUH and or WVU does not represent, warrant or guarantee that it will offer to renew a Residency Agreement with the Resident Physician for any additional terms.** (Emphasis added)

(Respondent's Exhibits 18, 25, & 26)

3. Residents in WVU's Department of Neurosurgery are trainees who practice medicine under faculty supervision. Their responsibilities include direct patient care in the hospital, clinic, and operating room. Faculty physicians are ultimately responsible for all aspects of the patient's care during resident training.

4. The residency track at WVU is a seven-year track. Residents must pass the written board exam and achieve benchmarks defined by the Residency Review Committee (RRC) milestones and Accreditation Council for Graduate Medical Education (ACGME) Core Competencies. The responsibilities of residents increase yearly as they are promoted through the program. At the culmination of residency, residents are expected to lead the resident team as the chief resident with the goal of ultimately becoming independently practicing neurosurgeons upon graduation.

5. Residents care for patients in the clinic, operating room, and hospital. This entails seeing new patients in the emergency room, taking care of patients before and after surgery, diagnosing patients before surgery, assisting with and eventually conducting the surgeries, and communicating with the other members of the healthcare team. Residents handle calls from physicians at other hospitals as well as from patients with questions.

6. Residents are the front line for patient care in the hospital and are tasked with hearing from patients and forming plans to deal with their problems. In neurosurgery, these problems are typically life-threatening emergencies.

7. The policies for graduate medical education at WVU are governed by the institutional Graduate Medical Education office, which answers to the ACGME and relevant subspecialty boards.

8. Residents are evaluated on a semi-annual basis pursuant to the ACGME's six Core Competency areas. These areas include patient care, medical knowledge, practice-based learning and improvement, interpersonal and communication skills, professionalism, and systems-based practice. (Respondent's Exhibit 3)

9. The ACGME considers these six Core Competency areas as critical to the transformation of a resident into a competent physician, and that failure in any of these areas poses a danger to patient safety.

10. The Clinical Competency Committee (CCC) is comprised of seven neurosurgeon faculty who review the progress of residents and recommend remedial action.

11. On February 25, 2019, WVU issued a first letter of non-renewal notifying Grievant of the CCC's decision to not renew his annual contract for 2019-2020, effective June 30, 2019, due to his unsatisfactory performance in the Core Competency areas of professionalism and interpersonal communications. (Grievant's Exhibit 29)

12. This first letter of non-renewal also states:

This letter is in follow-up of your previous semi-annual evaluation which noted professionalism milestones achievement of 2.0 and nearly 100% of peer and 360 evaluators indicating interpersonal difficulties and concerning behavioral trends. The improvement plan and requirements set out in that letter included significant improvement in professionalism domains and 360/peer evaluations, improvement in professional communication regarding and to peers and improved professionalism in response to

constructive criticism and feedback, and participation with Dr. Lee's leadership mentoring.

As you are well aware, the department has undertaken significant effort to help you develop such skills through multiple warning letters and probation/remediation including internal and external mentoring, additional coursework, FSAP counseling, external counseling, and offer of neuropsychological testing in addition to the most recent improvement plan.

The CCC has met to review your progress in the interim, including 460 evaluations and peer evaluations, and review of your interactions with staff and participation on service. ...

13. The first letter of non-renewal notes that the CCC would be willing to rescind the non-renewal if Grievant was able to "achieve level 4.0 professionalism milestones and conduct [himself] professionally in 100% of interactions with peers, healthcare team members, and supervisors" and that "[t]his letter serves as your 120 day notice."

14. The referenced semi-annual evaluation covers the period from July 1, 2018 to December 31, 2018, wherein Grievant received a professionalism milestones achievement of 2.0. (Respondent's Exhibit 15)

15. Grievant did not grieve any of the evaluations issued during his residency.

16. The referenced warning letters include a first warning letter issued on July 24, 2017, and a second warning letter issued on August 23, 2017. The first warning letter found that Grievant made "baseless" allegations of threats from his chief resident and held Grievant responsible for escalating the situation after failing to attend to a patient. The second letter states that Grievant failed to communicate his whereabouts after leaving the operating room. Both warning letters conclude that Grievant violated ACGME Core Competencies in the areas of professionalism, interpersonal and communication skills, and patient care. (Grievant's Exhibits 1 & 3)

17. Grievant did not grieve the warning letters.

18. The first letter of non-renewal mentions that Grievant was placed on probation starting January 9, 2018, as a result of Grievant's semi-annual evaluation for July 1 through December 31, 2017. The CCC did this out of concern that Grievant "continued to score lower in professionalism and interpersonal communication skills than in previous evaluations in spite of intensive remedial efforts." It required Grievant to "achieve milestones of 3.5-4.0 within all Professionalism and Interpersonal and Communication Skills domains at the next evaluation cycle," to meet with Dr. Ramadan three times over 5 months to focus on these issues, and to seek counseling to help with these issues using specially assigned time off. (Respondent's Exhibit 11)

19. On April 16, 2019, WVU issued a final letter of non-renewal for 2019-2020, immediately removing Grievant from clinical service and placing him on work at home with full salary for the remainder of the 2018-2019 academic year. (Grievant's Exhibit 31)

20. This final letter of non-renewal expresses concern about Grievant's "escalating issues in professionalism resulting in unsafe or inappropriate patient care," including the following:

1. Patient abandonment in the operating room.
  - a. On 3/26/19 after a faculty member left the operating room to update a patient family, you were texted by the faculty asking where you were. You responded that you had gone to the restroom and that the overnight resident would return the patient to the ICU. You never returned to the patient bedside for checkout or follow-up. It was noted that neither the overnight resident nor the entire resident team, ICU team, or nursing staff were aware of what procedure had been done, such that the patient received incorrect care and the incorrect procedure was listed on the service handoff sheet until discovery and correction by the faculty.

- b. In discussion with the members of the CCC as well as other residents, multiple additional instances of similar actions were noted routinely in both late cases and cases through the day.
  - c. The actions are not in compliance with GME and Neurosurgery policies regarding professionalism and transitions of care, and represent unsafe and inappropriate patient care.
2. Inability to be reached via pager for on call duties for an extended period.
- a. On 3/28/19 the MARS line supervisor alerted program leadership that they had been unable to reach you for MARS line calls for approximately 5 weeks because your pagers had been rolled to a PA for that time. The supervisors expressed concern because having a PA or junior resident answer MARS line calls was specifically against Department of Neurosurgery policy for MARS line calls and also would limit the ability of nursing staff, consulting services, etc. to be able to reach the chief resident on call, hence affecting patient care.
  - b. Confirmation was done with the telecommunications department that the pager was rolled to the “on call” (junior resident) pager on 2/6/19 and not rolled back to yourself until 3/28/19 when told to do so by Dr. Sedney. Additionally it was noted that when you were paged to come to your meeting with Drs. Sedney and Voelker on 2/25/19, a call back was received from Dr. Lawrence.
  - c. This was confirmed by multiple junior residents and APPs who note frequent pages meant for Dr. Radwan were being re-routed to the on-call pager, leading to uncertainty in how to deal with those patient care questions or requests.
  - d. Appropriate rolling of pager was specifically addressed by Dr. Sedney on 11/27/18 via email when you were instructed to “roll your pager to the other chief on your days off” in order to ensure good continuity of care during your off days.
  - e. Rolling the pager to a subordinate while you are on call leaves the junior resident with no back up way to contact you overnight in addition to leaving you unreachable to other healthcare members.

3. Continued difficulty with service management and assignments leading to excessive work hours, multiple resident complaints, unclear case assignments and last minute changes to case assignments affecting education and wellbeing of other residents as well as patient care.
  - a. On 3/1/19 it was specifically discussed that case assignments were negatively affecting working hours and in particular that the chief resident needs to be doing more late cases to offset the hours spent in the hospital by residents taking in-house call.
  - b. This issue was again reassessed on 3/20/19 and discussion during your requested mentorship meeting with Drs. Sedney and Voelker noted that there needed to be clear service communication and a clear plan for case coverage at the beginning of the day based upon multiple previous resident complaints.
  - c. On 3/22/19 there was a resident complaint regarding last minute case switches and unclear communication of team assignments.
  - d. On 3/25/19 there was a resident complaint regarding last minute case switches and unclear communication of team assignments.
  - e. On 4/1/19 there was a resident complaint regarding inappropriate case assignment.
  - f. On 4/3/19 and 4/4/19 two residents complained that the juniors were again covering the majority of the late cases resulting in work hours concerns. Verification discovered that the chief covered no late cases for the past 8 days and covered a single 3 hour craniotomy and a 3 hour clinic over two days that week, while 2 junior residents worked an excessive number of non-consecutive hours in total during those same two days with additional overnight calls that week being scheduled. This situation led to a junior resident being pulled from the service early on the next day in order to avoid a work hour violation, ultimately affecting patient care.
  - g. On 4/4/19 there again was no clear resident case assignment completed at the beginning of the day, which led to cases being uncovered where coverage might otherwise have been arranged.
  - h. Poor communication and planning of the team leads to frequent interruption of patient care,

multiple unneeded hand-offs, and inadequate cases coverage which represents unsafe patient care.

(Grievant's Exhibit 31)

21. The final letter of non-renewal goes on to state that:

These actions fail to meet level 1.0 as per the RRC Neurosurgery Milestones Professionalism domain: "Behaves ethically and professionally and takes responsibility for personal conduct" and have resulted in inappropriate and unsafe patient care. As per your previous non-renewal letter from 2/25/19, level 4.0 professionalism milestone accomplishment was required for rescinding the non-renewal.

(Grievant's Exhibit 31)

22. There are two versions of the final non-renewal letter. One is the official version approved by the CCC and placed in Grievant's personnel file but not shown to Grievant. The other is an altered version that was shown to Grievant at the time of his non-renewal. The official version is four pages. The altered version is missing the third page and contains alterations to the content on the other pages.

23. The Graduate Medical Education Programs By Laws provide conditions for renewal, stating:

Intent Not to Renew Contract: In the event that WVU School of Medicine elects not to reappoint a resident to the program and the agreement is not renewed, the program director shall provide the resident/fellow with a four (4) month written notice of its determination of non-reappointment unless the termination is "for cause." The GME Office must also be notified in writing. Intent not to renew is subject to academic grievance as outlined in XI.

(Respondent's Exhibit 4)

24. Prior to transferring to WVU, Grievant was a resident physician at Louisiana State University (“LSU”). Grievant transferred to WVU as a PGY3 resident. (Respondent’s Exhibit 1)

25. During his application process with WVU, Grievant stated that LSU did not renew his contract due to his written test results. However, an investigation by the West Virginia State Medical Board uncovered other reasons. Grievant’s personnel file from LSU revealed poor patient care resulting in a patient’s death; issues with professionalism, such as dishonesty, insubordination, aggression towards supervisors; and absenteeism. LSU placed Grievant on probation and notified him that his contract would not be renewed due to issues with professionalism, interpersonal communication, and test performance, but ultimately allowed him to resign.

26. WVU hired Grievant pursuant to the rules and restrictions of a Consent Order between the West Virginia Board of Medicine and Grievant in the fall of 2015. Grievant triggered the Consent Order when he inaccurately answered “no” to a question regarding his prior disciplinary action at LSU on his application for physician licensure in West Virginia. Through the Consent Order, the Board provided Grievant a license to practice medicine in a very restricted capacity, requiring him to do so under the supervision of WVU’s Neurosurgery department and to remain in good standing and demonstrate appropriate progress within WVU’s Department of Neurosurgery. (Respondent’s Exhibit 2)

27. Dr. Cara Sedney, Associate Professor of Neurosurgery, has been a member of faculty at WVU since 2014. She is responsible for all aspects of the residency program specifically relating to compliance with Institutional, ACGME, Residency Review

Committee and American Board of Neurosurgery requirements. Dr. Sedney first met Grievant when he interviewed in July 2015. She supervised him starting with her appointment as Assistant Director of the program in fall of 2015. She continued to supervise Grievant after her appointment to Program Director in October 2018.

28. The WVU Department of Neurosurgery Resident Handbook mandates that all residents must achieve a rating of 4.0 in all six Core Competency areas to be eligible to graduate. (Respondent's Exhibit 23)

29. During his time at WVU, Grievant was evaluated two times per year in the six Core Competency areas. Grievant was consistently found to be deficient and failed to meet the required standards in the areas of Professionalism and Interpersonal Communication.

30. The ACGME Guidelines define Interpersonal and Communication Skills as follows:

Residents must demonstrate interpersonal and communication skills that result in effective exchange of information and collaboration with patients, their families, and health professionals. Residents are expected to:

1. communicate effectively with patients, families, and the public, as appropriate, across a broad range of socioeconomic and cultural backgrounds;
2. communicate effectively with physicians, other health professionals, and health related agencies;
3. work effectively as a member or leader of a health care team or other professional group;
4. act in a consultative role to other physicians and health professionals; and
5. maintain comprehensive, timely, and legible medical records, if applicable.

(Respondent's Exhibit 3)

31. The ACGME Guidelines define Professionalism as:

Residents must demonstrate a commitment to carrying out professional responsibilities and an adherence to ethical principles. Residents are expected to demonstrate:

1. compassion, integrity, and respect for others;
2. responsiveness to patient needs that supersedes self-interest;
3. respect for patient privacy and autonomy;
4. accountability to patients, society and the profession; and,
5. sensitivity and responsiveness to a diverse patient population, including but not limited to diversity in gender, age, culture, race, religion, disabilities and sexual orientation.

(Respondent's Exhibit 3)

32. Grievant reported to Dr. Sedney and former Department Chair Dr. Rosen that resident coworkers made derogatory comments. These included allegations that they called him "sleeper cell" and "ISIS;" said "now that Trump is President, your people need to be sent back to their countries;" and told him that a Middle Eastern patient under the team's care needs to go back to his own country to be watered in one of their gardens.

(Grievant & Dr. Sedney's testimony)

33. Grievant also reported to superiors that senior members of the Department made derogatory comments. These included allegations that they mocked him for fasting during Ramadan, encouraged him to shave his beard so the West Virginia Board of Medicine would not think he was a terrorist, and told him not to use Arabic "or whatever the fuck that language is." (Grievant & Dr. Sedney's testimony)

34. The Department of Neurosurgery Resident Manual for 2017-2018 gives residents the option to go online to click a button to report mistreatment. It also encourages residents to contact the DIO for complaints they feel cannot be addressed directly. (Grievant's Exhibit 75)

35. In 2017, Grievant bypassed clicking the mistreatment button and instead reported to hospital security, and later the Designated Institutional Office (DIO), that the chief resident had threatened, intimidated, and assaulted him, causing him to fear for his safety. (Grievant's testimony)

36. The July 24, 2017 letter of warning informed Grievant that WVU had been unable to corroborate a physical altercation or threatening language between Grievant and the chief resident, "other than elevated voices; yours among them" after interviewing nurses, faculty, and residents. It concluded that "[a]fter an exhaustive review of available information we have determined the complaint to be baseless." (Grievant's Exhibit 1)

37. Grievant reported a number of incidents to program leadership concerning what he felt was inadequate patient care by fellow residents and expressed concern at the lack of action by management.

38. On April 14, 2018, Grievant emailed Dr. Sedney that Dr. Turner was misreporting information on checkout. Dr. Sedney replied that as chief resident it was Grievant's responsibility to correct the information given by junior residents. (Grievant's Exhibit 8)

39. On February 23, 2019, Grievant emailed Dr. Sedney that Dr. Turner was violating ACGME regulations and performing procedures post call. Dr. Sedney responded that the matter was being addressed at a higher level. (Grievant's Exhibit 28)

40. On April 5, 2019, Grievant emailed another superior, Melissa Acocella, that he had received a complaint that Dr. Turner had refused to see a patient. (Grievant's Exhibit 133)

41. On April 15, 2019, Grievant again emailed Dr. Sedney with concerns of unprofessionalism and deficiencies in patient care by junior residents. (Grievant's Exhibit 138)

42. On January 27, 2019, Grievant completed a peer evaluation of Dr. Rehman, rating his patient care as substandard. Dr. Sedney responded that this was indicative of their interpersonal issues. (Grievant's Exhibit 25 & Grievant's testimony)

43. The Department of Neurosurgery Handbook for 2018-2019 empowers the Program Director to take various remedial measures against residents, including non-renewal and dismissal. (Grievant's Exhibit 74)

44. Dr. Sedney signed the letters of Grievant's non-renewal as the acting Program Director, even though her application for permanent assignment as Program Director had not been approved. (Dr. Sedney's testimony)

45. Each resident has a resident advisor who prepares a mid and end cycle rotation resident evaluation in an effort to improve the objective and accurate nature of the resident evaluation process. On March 20, 2019, Grievant's resident advisor issued his mid-rotation evaluation, scoring Grievant anywhere from good to outstanding in each of a number of areas. (Grievant's Exhibit 49)

46. The ACGME Common Program Requirements states that "[t]he Clinical Competency Committee should: review all resident evaluations semi-annually" and "[t]he program must ... use multiple evaluators (e.g., faculty, peers, patients, self, and other professional staff." (Grievant's Exhibit 160)

47. At an emergency meeting on April 10, 2019, the CCC voted to remove Grievant even though members had not seen his resident advisor's mid-rotation evaluation of March 20, 2019.

48. One of the reasons given for non-renewal in Grievant's final letter of non-renewal was that Grievant rolled his pager to other residents for the six or seven weeks between 2/6/19 and until 3/28/19. (Grievant's Exhibit 31)

49. Another chief resident, Dr. Singh, previously rolled his pager to other residents as frequently as once a week. (Grievant's testimony)

50. Grievant emailed Dr. Sedney on November 27, 2018, informing her that he was receiving pages meant for chief resident Dr. Singh. Dr. Sedney responded, "Just roll your pager to the other chief on your days off. ... I'm not aware of any adverse things occurring from missed pages." (Grievant's Exhibit 35)

51. Other residents were involved in incidents that harmed patients but were not dismissed. For example, in 2017, Dr. Singh left a foreign object in a patient, necessitating two trips to the operating room and six weeks of IV anti-microbial treatment. (Grievant and Dr. Sedney's testimony)

52. In the months and years after Grievant reported harassment and various competency concerns about coworkers, Grievant was promoted to chief resident and was given encouragement by Dr. Sedney and members of the CCC. In spite of the shortcomings they perceived in Grievant, they continued to be of the opinion that he possessed excellent surgical abilities. (Dr. Sedney and Dr. Voelker's testimony)

53. Dr. Lee addressed Grievant during the level three hearing, stating, “I personally have a lot of affection for you Walid, and I’m very respectful of your surgical abilities.”

54. On February 15, 2019, Dr. Lee texted Grievant “Terrific surgery you did! I’m proud of you!” (Grievant’s Exhibit 50)

55. On April 10, 2019, a day prior to the CCC’s vote to remove Grievant, Dr. Lee texted Grievant, “Good job!” after Grievant informed him that he had reviewed a CT scan. (Grievant’s Exhibit 54)

56. Grievant’s semi-annual evaluation for July through December 2018 stated: “You have demonstrated improvement in your patient care milestones. ... Because of your improvement in clinical milestones and in order to allow you the opportunity to take on the RRC mandated chief resident role required to graduate on time, the CCC has decided to remove you from probation and allow your promotion to PGY6 at this time.” (Grievant’s Exhibit 21)

57. However, the evaluation tempered this encouragement with grave concerns, stating: “You are reminded that the target for graduation is to achieve 4.0 across all milestones. ... It is noted by the CCC with continued concern that you remain behind level for professionalism domains as evaluated by faculty. Furthermore, significant concerns were raised in your 360 and peer evaluations within the same professionalism domains. ... concerning and consistent themes of interpersonal conflict and with other residents were raised by nearly 100% of evaluation respondents, including descriptions of your interactions as being ‘vindictive,’ ‘unfair,’ and ‘sabotaging’ others. ... However, your continued difficulty and lack of improvement with professional domains

has raised serious concerns amongst the CCC and a number of requirements will therefore be assigned to you in order to continue with the progression of your neurosurgical training..." (Grievant's Exhibit 21)

58. In spite of the vote on April 10, 2019, to remove Grievant, Grievant was permitted to provide patient care for an additional six days until April 16, 2019, after which he was given a home assignment for the remainder of the contract year.

### **Discussion**

Grievant was retained by WVU as a resident physician through annual contracts starting in the 2015-2016 academic year. WVU informed Grievant his contract would not be renewed for 2019-2020 due to deficiencies in professionalism and interpersonal communications. Grievant contends that WVU did so in retaliation for his reporting harassment, discrimination, and incompetency. He also claims that WVU engaged in discrimination/favoritism by not dismissing other residents for similar conduct. WVU counters that Grievant did not prove he had a permanent property right in his employment or that his discharge was motivated in disregard of substantial public policy. WVU contends it provided Grievant numerous opportunities to improve his performance and did investigate his complaints.

The first consideration entails determining burden of proof. When a grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance. W. VA. CODE ST. R. § 156-1-3 (2018). The non-renewal of an annual contract is not disciplinary and a grievant has the burden of proving his dispute thereof. *P.E. v. Marshall Univ.*, Docket No. 06-HE-216 (Mar. 5, 2008). However, Grievant contends that his signature on the 2018-2019 annual contract was forged and that this rendered the

contract invalid and transformed his non-renewal for 2019-2020 into a disciplinary termination.

In support thereof, Grievant submits an affidavit from a handwriting expert which concludes that Grievant's purported signature on the 2018-2019 contract was a forgery. Regardless of the credibility concerns surrounding this affidavit, Grievant did not present any authority for the proposition that the lack of a valid contract for 2018-2019, would enhance Grievant's property right in his employment with WVU or change his employment status to anything other than at-will. Grievant did not meet his burden of proof in this regard.

Grievant does not dispute that he was originally employed through an annual contract for the 2015-2016 academic year and that his contract was renewed for 2017-2018. Each of these annual contracts include the following term of renewal:

**TERM: It is understood and agreed that the term of this Residency Agreement shall not exceed one (1) year.** The Hospital may choose to offer and the Resident Physician may choose to accept a Residency Agreement for additional terms throughout the course of the Resident Physicians Residency or Fellowship training. **It is understood and agreed that a new Residency Agreement must be entered into for each year** and signed and dated within thirty (30) days of initial date applicable residency year. **WVUH and or WVU does not represent, warrant or guarantee that it will offer to renew a Residency Agreement with the Resident Physician for any additional terms.** (Emphasis added)

Thus, Grievant was limited to residency terms of no more than one year, regardless of a failure to renew. Further, once Grievant continued with his employment in 2018-2019, the parties were obligated to enter into a new agreement.

An employee's "property right in employment end[s] when his contract with the College end[s] . . . ." *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 181, 386 S.E.2d 835, 838

(1989). For a property right to exist, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, “the employer may refuse to renew.” *Id.*

[U]nilateral, subjective expectations on the part of an employee developed apart from any action, undertaking, or position of the employer are not sufficient to give rise to a protected property interest. There must be some undertaking by the employer which gives rise to an objective expectation on the part of the employee. *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983); see also *Logan County Education Association v. Logan County Board of Education*, \_\_\_ W. Va. \_\_\_, 376 S.E.2d 340 (1988).

*W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 408 S.E.2d 286 (1991)

To prove a property right in continued employment, Grievant has a heightened burden of proof. “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 practices, such claim must be established by clear and convincing evidence.” *Whitaker v. Bd. of Directors/ West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), citing *Adkins v. Inco Alloys Int’l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). See also *Jerrell v. New River Community and Technical College*, Docket No. 2008-1826-NRCTC (Oct. 7, 2009), *aff’d*, West Virginia Supreme Court of Appeals No. 101403 (Sept. 23, 2011) (memorandum decision). “Clear and convincing proof” is “proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” BLACK’S LAW DICTIONARY, 251 (6th ed. 1990).

The evidence indicates that Grievant did not have a property right to continued employment. The yearly appointment letters clearly set forth that Grievant was being employed for one-year terms with no right or entitlement to employment beyond their end date. Grievant argues that his contract was not renewed for 2018 – 2019 because he never signed it. In raising the possibility that he was not under contract, Grievant did not effectively advance his argument or prove by clear and convincing evidence that he had a property interest in his employment. Further, Grievant failed to prove or even present evidence that he had a property right to continued employment through an express promise by WVU or by implication from WVU's personnel manual.

Although the parties presented arguments regarding whether Respondent's actions were arbitrary and capricious, only employees with a property interest in their employment are entitled to nonarbitrary and non-capricious treatment. See *Sauvageot, supra*. In conjunction with *Whitaker* and *Sauvageot*, Grievant must first prove he had a property right to continued employment. Only then does WVU have an obligation to show that it did not act in an arbitrary and capricious manner in deciding not to retain him. Grievant has not demonstrated by clear and convincing evidence that he had acquired a property interest in his employment or that he acquired any rights in employment beyond the term of his contract. As such, the issue of whether WVU's actions were arbitrary and capricious is not relevant.

Because Grievant did not have a right to continued employment, WVU could choose not to renew him for any reason or no reason, unless motivated in disregard of some substantial public policy principle. Grievant suggests that WVU refused to renew his contract in retaliation for his reporting instances of incompetency, harassment, and

discrimination by coworkers and superiors and that this entitles him to continued employment for public policy reasons. “[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)). The Grievance Board has previously applied the same standard to an employee whose contract is not renewed. *Loundmon-Clay v. Higher Educ. Policy Comm’n/Bluefield State College*, Docket No. 02-HEPC-013 (Aug. 29, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No. 02-AA-117 (Jan. 12, 2005) (citing *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993); *Harless v. First Nat’l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Higginbotham v. W. Va. Dep’t of Public Safety, W. Va. State Police*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Myer v. W. Va. Racing Comm’n*, Docket No. 95-RC-290 (May 3, 1996); *Samples v. Glenville State College*, Docket No. 94-BOD-564 (July 28, 1995); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994)).

As the remaining claims do not involve disciplinary matters, Grievant has the burden of proving them by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant engaged in protected conduct in reporting incidents of harassment, discrimination, and incompetency by coworkers. If this protected conduct did in fact result in his dismissal, it would be a violation of substantial public policy. “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.” Syllabus Point 2, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). The West Virginia Supreme Court has held that “it is the public policy of this State and otherwise unlawful to discriminate or retaliate against an employee for reporting acts of discrimination and/or harassment which are occurring in the workplace.” *Burke v. Wetzel Cty. Comm’n*, 240 W. Va. 709, 728, 815 S.E.2d 520, 539 (2018). “West Virginia Code § 6C-1-3(a) provides that ‘no employer may discharge . . . an employee . . . because the employee, acting on his own volition, . . . makes a good faith report or is about to report . . . to the employer or appropriate authority an instance of wrongdoing or waste.’” *Id.* at 729.

“No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her

participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.” W.VA. CODE § 6C-2-3(h). Reprisal is defined as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W.VA. CODE § 6C-2-2(o).

The West Virginia Supreme Court has set forth a three-phased assessment for determining whether a discharged employee has been retaliated against for engaging in a protected activity. “In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case.” *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

[T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

*Id.*, Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

Under this first phase, the undersigned must determine whether Grievant made a *prima facie* case for retaliation. Under the first element of this phase, Grievant must establish by a preponderance of the evidence that he engaged in a protected activity. Grievant proved that he made good faith reports of harassment to Program Director Dr. Sedney and former Department Chair Dr. Rosen. Grievant reported that coworkers told him that with Trump as President Grievant's people should be sent home, said that a patient from the Middle East should return to his own country to be watered in one of their gardens, and called him "sleeper cell" and "ISIS." Grievant also made good faith reports that senior members of the Department made derogatory comments, including mocking him for fasting during Ramadan, encouraging him to shave his beard so the West Virginia Board of Medicine would not think he was a terrorist, and being told not to use Arabic "or whatever the fuck that language is" around his supervisor. Grievant reported in good faith to program leadership a number of incidents of apparent inadequate patient care by fellow residents. The most recent report prior to his non-renewal was on April 15, 2019, when Grievant emailed Dr. Sedney about issues with junior residents regarding unprofessionalism and patient care issues.

In the context of retaliation, this Board has interpreted "grievance proceeding" to mean a range of "protected activities" beyond a "grievance proceeding." See *Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (September 22, 2016).

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

then has the opportunity to demonstrate legitimate, non-retaliatory reasons for its actions.”

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

Grievant satisfied the second element of a *prima facie* case of retaliation in showing that Dr. Sedney was acting on behalf of WVU when she received his complaints. In complaining to Program Director Dr. Sedney, Grievant put WVU on notice that he had engaged in protected activity. Grievant engaged in this protected activity over the course of his time at WVU, most recently on April 15, 2019. Thus, Grievant's discharge followed his protected activities within such period of time that retaliatory motive can be inferred. Grievant made a *prima facie* case of retaliation by a preponderance of evidence.

Consequently, the second and third phases of assessing retaliatory discharge come into play. Under these phases, the undersigned must determine whether WVU rebutted Grievant's *prima facie* case of retaliatory discharge and, if so, whether Grievant proved that the reasons given by WVU were pretext for unlawful discrimination or retaliatory discharge. “An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions . . . .’” *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Under the second phase of retaliatory discharge, the undersigned will assess WVU's non-discriminatory and non-retaliatory reasons for not renewing Grievant's contract. The letters of non-renewal delineate these reasons, including the milestones achievement of 2.0 in Grievant's semi-annual evaluation, the multiple warning letters, the probation and remediation period wherein Grievant was provided mentoring to enhance his skills, an incident of patient abandonment, Grievant rolling his pager for six weeks, continued difficulty with service management and assignments leading to excessive work hours, the multiple resident complaints against Grievant, unclear case assignments from Grievant, and Grievant's last minute changes to case assignments affecting the education and wellbeing of other residents and patient care.

While Grievant now challenges his evaluations, warning letters, and probation, he never grieved them. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Agliinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Further, WVU showed that Grievant abandoned a patient in the operating room, rolled his pager for six weeks straight without being available for contact, and had ongoing issues with professionalism,

interpersonal communication, and patient care. WVU presented credible evidence of legitimate nondiscriminatory reasons for its actions.

Grievant must now prove that the reasons offered by WVU for his discharge were merely a pretext for unlawful discrimination and retaliatory discharge. Grievant claims that WVU only provided him an altered version of his official final letter of non-renewal and that this shows that the process used to discharge him was a sham. He argues that this alteration was intentional. He further contends that WVU disregarded its progressive discipline policy by dismissing him prior to the expiration of the 120-day notice period set forth in its first letter of non-renewal. He asserts that the letters of non-renewal were invalid because Dr. Sedney did not have authority to sign them since she was not yet approved as the Program Director. He also claims that WVU did not investigate his complaints of harassment and incompetency or discipline the perpetrators. Grievant challenges the pager incident with evidence that Dr. Sedney gave him permission to roll his pager. He testified that other residents regularly rolled their pagers and committed the same types of infractions for which WVU disciplined him without being disciplined in any way. He cites as further evidence the fact that the CCC voted to discharge him without seeing the mid-rotation evaluation from his resident advisor and then allowed him to treat patients for six days after his final letter of non-renewal was issued.

Grievant had reported alleged incidents of harassment and competency concerns over his years as a resident physician at WVU. However, in the days and years following his complaints, Grievant was promoted to chief resident and was given encouragement by Dr. Sedney and members of the CCC. In spite of the shortcomings they saw in him, they continued to be of the opinion that Grievant possessed excellent surgical abilities

and told him so. WVU gave Grievant many opportunities to succeed, beginning with overlooking his failure to report his disciplinary action while at LSU and as seen in the many disciplinary actions it took against him.

Regarding Grievant's arguments over the manner of his discharge, it is undisputed that Dr. Sedney was acting Program Director when she signed the letters of non-renewal. While it appears that the altered version of the non-renewal letter shown to Grievant was simply a mishap, Grievant does not delineate how these alterations, regardless of the intent behind them, worked to his detriment when the only altered letter was the final non-renewal letter rather than the initial letter setting forth the actions Grievant needed to take so his non-renewal could be rescinded. Grievant did not present any evidence that the 120-day notice in the first letter of non-renewal on February 25, 2019, was part of WVU's progressive discipline policy. Rather, it appears that the 120-day notice correlates to the requirement in the Graduate Medical Education Programs By Laws that "the program director shall provide the resident/fellow with a four (4) month written notice of its determination of non-reappointment unless the termination is 'for cause.'" In setting forth an effective termination date of June 30, 2019, this first letter left open the possibility that WVU would be in compliance with the notice requirements for termination without cause should it fail to prove it had cause to discharge Grievant.

As for the permission given Grievant to roll his pager, it appears that Dr. Sedney was accommodating Grievant rather than attempting to set him up for a violation of ACGME Core Competency areas. While Dr. Sedney should have perhaps clarified that rolling a pager for any longer than one day a week was frowned on, any resident should know that they are expected to be readily available for calls and that rolling a pager for

weeks on end is unacceptable. It should have been obvious that six straight weeks was too long. Further, Dr. Sedney informed Grievant that he needed to roll his pager to another chief rather than to subordinates. Grievant did not prove he complied. As for Grievant's complaints of harassment and incompetency, WVU investigated many of these complaints and found they were the result of interpersonal issues. Grievant did not show that WVU failed to act in response to the incidents of incompetency brought to its attention and that coworkers were not disciplined. Grievant did not show that the mid-rotation evaluation prepared by his resident advisor would have had any effect on the CCC's decision. There is no evidence that residents are routinely removed from patient care the same day the CCC votes on their removal. Thus, Grievant failed to prove that the reasons provided by WVU were pretext for retaliatory discharge.

Which brings us to Grievant's claims of discrimination and favoritism. Grievant contends that WVU did not discipline or discharge other residents for engaging in the same conduct he was cited for in his discharge letters. Discrimination for purposes of the grievance process has a very specific definition. "Discrimination' means 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). "Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more

similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In considering the first element, Grievant failed to show that he was similarly situated to any of the other residents to which he compares himself. WVU hired Grievant under the restrictions of a Consent Order between the West Virginia Board of Medicine and Grievant that provided Grievant a license to practice medicine in a restricted capacity due to Grievant's failure to reveal his prior discipline from LSU. WVU had previously issued warning letters notifying Grievant that he was in violation of ACGME Core Competencies areas and had placed him on probation. Grievant did not allege that any of his coworkers were under a Consent Order or that they had a record of prior discipline. Thus, Grievant failed to prove that his discharge was motivated by discrimination.

The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. "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 practices, such claim must be established by clear and convincing evidence." *Whitaker v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), *citing Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). *See also Jerrell v. New River Community and Technical College*, Docket No. 2008-1826-NRCTC (Oct. 7,

2009), *aff'd*, West Virginia Supreme Court of Appeals No. 101403 (Sept. 23, 2011) (memorandum decision). “[W]here an employee has such a property interest, the employee is entitled to nonarbitrary and noncapricious treatment by the public institution.” *W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 538, 408 S.E.2d 286, 290 (1991).

2. The employee’s “property right in employment end[s] when his contract with the College end[s] . . . .” *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 181, 386 S.E.2d 835, 838 (1989). For a property right to exist, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, “the employer may refuse to renew.” *Id.*

[U]nilateral, subjective expectations on the part of an employee developed apart from any action, undertaking, or position of the employer are not sufficient to give rise to a protected property interest. There must be some undertaking by the employer which gives rise to an objective expectation on the part of the employee. *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); see also *Logan County Education Association v. Logan County Board of Education*, \_\_\_ W. Va. \_\_\_, 376 S.E.2d 340 (1988).

*W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 408 S.E.2d 286 (1991).

3. Grievant did not prove by clear and convincing evidence that he had acquired a property right in his continued employment beyond the expiration of his employment contract. Consequently, WVU could terminate Grievant for any reason or no reason, unless motivated in contravention of some substantial public policy principle.

4. As the remaining claims do not involve disciplinary matters, Grievant has the burden of proving them by a preponderance of the evidence. W. VA. CODE ST. R. §

156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

5. “[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)). *Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994). “Once the plaintiff in an action for wrongful discharge based upon the contravention of a substantial public policy has established the existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the

absence of the unlawful motive.” Syl. Pt 8, *Page v. Columbia Nat. Res.*, 198 W. Va. 378, 382, 480 S.E.2d 817, 821 (1996).

6. Grievant did not prove by a preponderance of evidence that his non-renewal was motivated in contravention of a substantial public policy.

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

8. “[I]t is the public policy of this State and otherwise unlawful to discriminate or retaliate against an employee for reporting acts of discrimination and/or harassment which are occurring in the workplace.” *Burke v. Wetzel Cty. Comm’n*, 240 W. Va. 709, 728, 815 S.E.2d 520, 539 (2018).

9. “In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case.” *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie*

case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

[T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

*Id.*, Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). “An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions . . . .’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

10. Grievant did not prove by a preponderance of the evidence that his non-renewal was retaliatory.

11. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

12. Grievant did not prove by a preponderance of evidence that his non-renewal qualified as discrimination or favoritism.

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: December 2, 2020**

---

**Joshua S. Fraenkel**  
**Administrative Law Judge**