

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOHN KEITH SIMMERMAN,  
Grievant,**

**v.**

**Docket No. 2019-0084-CU**

**CONCORD UNIVERSITY,  
Respondent.**

## **DECISION**

John Keith Simmerman, Grievant, was employed by Respondent, Concord University ("CU"), as an Information Systems Technician. Pursuant to WEST VIRGINIA CODE § 6C-2-4(a)(4), Mr. Simmerman filed an expedited grievance form dated July 16, 2018, directly to level three. Grievant alleged:

Grievant's, an at-will employee, employment was terminated for his alleged failure to meet the performance expectations for his position on or about July 9, 2018. The Grievant is deaf and the Respondent has failed to provide appropriate procedures and resources such as an interpreter to accommodate his deafness and to allow him to perform his job satisfactorily. The Respondent's failure to provide these resources and procedures to Grievant caused the Grievant's inability to perform his job in a satisfactory manner rather than Grievant's alleged poor performance. Grievant alleges a violation of the WV Human Rights Act, the Americans with Disabilities Act, & substantial public policy.<sup>1</sup>

As relief Grievant seeks, reinstatement with backpay and interest plus restoration of benefits. Additionally, Grievant seeks to have all documents related to his dismissal removed from all files, paper or electronic media, maintained by Respondent.

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<sup>1</sup> The grievance statement is written herein as it appears on the grievance form.

A level three hearing was conducted at the Beckley office of the West Virginia Public Employees Grievance Board on November 14, 2018. Grievant personally appeared and was represented by John E. Roush, Esquire, AFT-WV. Respondent was represented by Dawn George, Esquire. An additional day of hearing was scheduled and continued numerous times upon motions and agreement of the parties which were granted upon a showing of good cause. On July 27, 2020, Grievant moved that a second day of hearing be canceled, and the grievance submitted on the record created at the first day of evidentiary hearing, supplemented by written arguments. Respondent did not object to this motion. The motion was granted. This matter became mature for decision on August 26, 2020, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was originally employed by Respondent as a classified employee, but his employment was converted to nonclassified or "at-will" by the passage of legislation which became effective on July 1, 2017. Respondent dismissed Grievant from employment for "continuing failure to meet employment expectations." Grievant argues that Respondent was required to grant Grievant employment protections set out in CU policy. He asserts that his work performance was satisfactory, and any performance shortfalls were related to Respondent's failure to provide him with reasonable accommodations necessary to assist with his disability.

As an at-will employee, Respondent may terminate Grievant's employment for any reason that does not violate public policy. Respondent proved that Grievant's job performance failed to meet expected standards and that Grievant was not denied

reasonable accommodations. Grievant did not prove that he was dismissed for prohibited reasons.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, John Keith Simmerman, was originally employed by Respondent, Concord University, as a Computer Center Assistance Specialist in January 2000. His duties mainly related to technical support for the resident halls.

2. In 2014, Grievant's position was changed to an Information Systems Technician, in the IT department, and his immediate supervisor was Steve Meadows, Director of Networking and Support Systems. His supervisor changed to Tyler Webb in 2015. Mr. Webb reported to Director Meadows.

3. The transfer occurred because CU was making structural changes which included moving toward a wireless computer network on campus which rendered Grievant's prior position unnecessary.<sup>2</sup>

4. Grievant's new position required a different skill set since he was required to perform the same tasks as other technicians including support for classrooms and faculty. His position was located at the helpdesk where he had other technicians as backup.

5. Shortly after Grievant was reassigned to IT, Director Meadows conducted a skills assessment of Grievant to determine what additional assistance might be necessary for Grievant to be a functioning member of the team. Based upon this assessment,

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<sup>2</sup> A technician who had been assigned to the library was also reassigned to IT.

Director Meadows did not believe Grievant had the skills necessary to pass the initial skills tests routinely required for new IT hires at CU.

6. As a result, Grievant and Director Meadows had several discussions regarding performance expectations. Grievant and Director Meadows had weekly one-on-one meetings. During these meetings they communicated with the use of a wall-mounted television monitor. Director Meadows typed the discussion points and Grievant's responses which all appeared on the screen to ensure mutual understanding. Following each meeting, the notes were cleaned up and provided to Grievant by email. Grievant had requested to have an interpreter present for these meetings but that request was not granted.

7. In addition to the mounted television monitor, Grievant was provided a video phone, a Mimix application on cell phones, a strobe fire alarm, and an interpreter for performance evaluations and disciplinary meetings.<sup>3</sup>

8. Grievant was provided with access to JAVAware on Lynda.com which includes transcripts of application training modules. This material was intended to help Grievant develop necessary skills in his new assignment.

9. On May 13, 2015, Director Meadows met with Grievant, an interpreter, and CU Vice President Daniel Fitzpatrick. At that meeting, Director Meadows gave Grievant a written notice of verbal counseling and a written warning. (Respondent Exhibit 2). The written warning noted that Grievant's skills and abilities were not up to acceptable levels

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<sup>3</sup> Grievant requested a different application for the cell phones but it did not alert the users when their microphones were active. This was not acceptable to Respondent due to potential breaches of confidentiality. There is no indication that the Mimix application was inadequate.

from the start of his new assignment and that Grievant had been provided with discussions and training opportunities to improve his skills. The warning also stated among other things:

Your continuing inability to perform basic IT is unacceptable. As an IT professional, you are expected to resolve technical problems both timely and accurately. Your inability to resolve routine and basic technical problems in a timely manner, if at all, is unacceptable.

*Id.*

10. Grievant was also cited with insubordination for failing to follow through on assigned training and flagrant disregard of instructions concerning student contact procedures. *Id.* In addition, Grievant was warned about following leave procedures by failing to provide any notice that he would not be coming to work until after he was due to be present for the day.

11. Grievant was provided a Performance Improvement Plan (“PIP”) on May 13, 2015, setting out specific trainings to be completed on specified dates from May 27, 2015 through June 12, 2015. Grievant was also expected to immediately review written communications for clarity, accuracy, and correct terminology. Finally, Grievant was given a list of eight tasks to be performed by June 30, 2015, to demonstrate that he had obtained the necessary skills to perform his duties.<sup>4</sup> *Id.*

12. On October 25, 2016, Director Meadows, and Grievant completed a CU State Performance Appraisal. In the section titled Rating Expectations, Director Meadows wrote:

We’ve witnessed no appreciable improvement in abilities to complete tasks in spite of multiple attempts in training and

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<sup>4</sup> Grievant alleged that he only received the PIP during the meeting but did not recall receiving the Written Warning or the Notice of Verbal Counseling.

access to closed caption material. Employee has not shown the ability to retain and repeat repair procedures. Employee, even though written up before, does not check the workorder system to self-deploy on work orders. The helpdesk manager has resorted to deploying student workers to cover for the employee's inabilities. Employee has not complied with the written instructions to have the Helpdesk schedule appointments with students.

(Respondent Exhibit 4)

13. An interpreter was provided at this meeting. Grievant was given guidance regarding Office 360 software and to complete workorders for all campus units, not just housing. Grievant was issued a second PIP in conjunction with this evaluation. *Id.*

14. During the period following the evaluation, Grievant's immediate supervisor became Tyler Webb, Helpdesk Manager. Mr. Webb reported directly to Director Meadows. Mr. Webb reported to Director Meadows that Grievant's productivity was decreasing rather than improving.

15. During the 2017 legislative session, the legislature passed WEST VIRGINIA CODE § 18B-9A-2, which converted all higher education technology-related positions "nonclassified" positions, removing those positions from the protections of classified service. Notwithstanding this development, Respondent continued to follow the progressive discipline procedure regarding Grievant's employment, even though his employment status had been legislatively converted to "at-will".

16. During the summer of 2017, Grievant met with Vice President Fitzpatrick, Director Meadows, and Chuck Elliott, to discuss his performance and ultimate employment with CU. Grievant's AFT representative, Christine Barr accompanied him to this meeting. At that meeting, Grievant was informed that his employment was not being

terminated at that time notwithstanding his at-will employment status. Rather, Respondent was going to give Grievant one more chance to improve his performance.

17. During the meeting, Grievant was told he needed to specifically improve in the areas of software, evaluating classroom IT problems, and operating system upgrades.

18. Respondent provided a printout of the CU Helpdesk records for the four-month period of September 2017 and December 31, 2017. During that time, Grievant completed nine workorders. Grievant's coworker at the helpdesk completed forty-two workorders over the same period.<sup>5</sup>

19. On November 7, 2017, Grievant met with Helpdesk Manager Webb to review his Performance Appraisal for 2016-2017 work. (Respondent Exhibit 8). There are five statements reflecting the employee's overall performance in specified areas. The employee is given a rating from 1 to 5 by the supervisor. "1" indicates that the supervisor "Strongly Disagrees" with the statement and "5" indicates that the supervisor "Strongly Agrees." A rating of "3" is expected if the employee is meeting basic expectations.

20. The statements and supervisor's ratings for Grievant on November 7, 2017 are set out as follows with emphasis that appears on the form:

- This person's overall performance tied to the job met **outcome expectations** for an effective and experienced employee. Rating: (2.5).
- This person's on-the-job performance outcomes have improved during the past period. Rating: (3).

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<sup>5</sup> It is troubling that the data presented covers only this four-month period. However, it is the period after the summer meeting at which Grievant was advised that he had to improve in this area.

- This person's overall behavior met acceptable standards for an effective, experienced employee. Rating: (3).
- This person's behavior performance has improved during the past period. Rating: (3).
- This person's knowledge, skills and abilities are a good fit for the employer's current job. Rating: (2).

21. After the "ratings" section of the CU Staff Performance Appraisal, there are areas for the supervisor to make comments. Those areas and the comments made by supervisor Tyler Webb were as follows:

**1. Rating Exceptions:** 2.5 Increase from 2 in the previous year. Keith has been more involved in the past year. The reason for the rating below 3 is to improve on expectations to complete a higher percentage of the workload. Case knowledge and ability needs to increase in order to meet expectations of the job.

**2. Accomplishments:** 1) Large improvement and help during the image project of 2017. 2) completion of the printer inventory of all network printers.

**3. Development:** 1) more preemptive practice to prevent problem with computers and classrooms. 2) Develop understanding of Banner in Java. Also, Kronos and Java. 3) maintain a more organized and cleaner office.

**4. Measurable Goals:** 1) Increase amount of work orders completed by 25%. 2) Renew "A+" and "Network + Certifications. 3) complete workorders through phone calls (10%).

(Respondent Exhibit 8).

22. Notwithstanding the substandard performance ratings, Helpdesk Manager Webb requested that Director Meadows keep Grievant employed for the remainder of the 2017-2018 school year to give him additional time to improve.

23. After this evaluation, Grievant continued to struggle with the Kronos and WV OASIS systems which are utilized extensively at CU and throughout State government.



Grievant admitted that he had problems operating within these systems but claimed it was due to idiosyncrasies in the system and no fault of his own.

24. By letter dated July 9, 2018, CU Vice President Dan Fitzpatrick informed Grievant that his “employment as an at-will employee with Concord University has been terminated, effective this date July 9, 2018, for your continuing failure to meet the performance expectations of your position.”<sup>6</sup> Vice President Fitzpatrick outlined the various warnings, evaluations, and improvement opportunities Grievant had received since early, 2015. He then noted that Grievant’s supervisor had requested that Grievant be given the balance of the 2017-2018 fiscal year to demonstrate his ability to be successful. Thereafter, Mr. Fitzpatrick stated the following:

Even after another training/performance cycle, you continue to fail to meet the performance expectations of your position. It has become increasingly evidence that, for whatever reason, you have not and will not improve your performance regardless of training and encouragement provided. Administration is lost confidence that you will be able to meet the expectations for your position.

(Respondent Exhibit 7).

### **Discussion**

In cases involving discipline of classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for termination of an employee. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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<sup>6</sup> Respondent Exhibit 7, "Termination of Employment" letter.

However, in cases involving the suspension or dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." *Logan v. W. Va. Regional Jail & Correctional Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994). An at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause. *Wright v. Standard Ultramarine and Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955).

"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., *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)." Syl. Pt. 4, *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*). The West Virginia Supreme Court of Appeals has specifically found that an at-will employee's grievance challenging his/her termination of employment may be dismissed without hearing when the employee fails to allege a contravention of substantial public policy. *Wilhelm v. W. Va. Lottery*, 198 W.Va. 92, 479 S.E.2d 602 (1996); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*).

WEST VIRGINIA CODE Chapter 18B, Article 9A deals with the classification and compensation system for higher education employees. W. VA. CODE § 18B-9A-2 (11) states in pertinent part:

(11) "Nonclassified employee" means, an employee of an organization who meets one or more of the following criteria:

(D) Is in an information technology-related position;

Unless otherwise established by action of the institution where employed, a nonclassified employee serves at the will and pleasure of the organization, which authority may be delegated by act of the board.

*Id.* This provision became effective July 1, 2017 and had been in effect for a year prior to the termination of Grievant's employment. Grievant was employed as an Information Systems Technician. This position is "an information technology-related position" as set out in W. VA. CODE § 18B-9A-2 as a nonclassified, at-will position.

Grievant argues that CU Policy No. 49 creates an expectation of continued employment unless terminated for good cause. Grievant cites the *Powell v. Brown*, 238 S.E.2d 220, 160 W.Va. 723 (1977) for the proposition that Grievant is entitled to the "good cause" dismissal standard set out in Respondent's policy in spite of his at-will employment status. *Powell v. Brown* holds that an agency must abide its properly adopted policies and procedures even if the policies are "generous beyond statutory or constitutional requirements" *Id.* "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).

The employee in *Powell* was a probationary teacher who had been dismissed without a predetermination hearing. The Court held that the school board's policy required her to receive a hearing prior to her termination, even though such a hearing was not required by statute. A probationary teacher in the education system has specific statutory

rights which fall short of a continuing contract, but certainly provide more protection than “at-will” employment.<sup>7</sup>

When addressing “at-will” employees in state agencies, the W. Va. Supreme Court has consistently held that the only impediment to dismissing an at-will employee is if “the employer's motivation for the discharge is to contravene some substantial public policy principle.” *Armstrong v. W. Va. Div. of Culture & History*, *supra*. Grievant was an at-will employee and Respondent was not required to demonstrate good cause for his dismissal.

Grievant next argues that Respondent’s refusal to provide him with sufficient reasonable accommodations for his disability constitutes retaliation against him based upon his handicap. “To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.” Syl. pt. 2, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). Where no specific public policy source is cited, the Supreme Court has “refused to impose a duty on the State of good faith and fair dealing with its at-will employees” because to grant that right would be contrary to the principle that the appointing authority has an unfettered right to terminate an at-will employee barring a violation of substantial public policy. *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479

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<sup>7</sup> For example, W. VA. CODE § 18A-2-8 provides that “Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.”

S.E.2d 602 (1996) (citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)). The West Virginia Human Rights Act “prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap.” W. Va. Code, 5-11-9 (1992). *Vest v. Board of Educ.*, 193 W.Va. 222, 225, 455 S.E.2d 781, 784 (1995). If Respondent fired Grievant due to his hearing impairment it would be in contravention of the public policy established by this legislation.

To support his claim, Grievant points out that he requested to have an interpreter at all meetings with management. Respondent provided Grievant with an interpreter at all meetings involving discipline and improvement plans. At other meetings, Director Meadows typed their discussions on a large wall-mounted television monitor including his points and Grievant’s replies. Those notes were then typed and provided to Grievant so that he could refer to them as needed. Grievant generally avers that the lack of an interpreter at these meetings inhibited understanding and performance but did not provide any specific evidence to show how the lack of an interpreter adversely affected his employment.

On the other hand, Respondent provided a plethora of evidence that Grievant was provided with resources to help him become proficient at his job. In addition to the interpreter and monitor at the meetings, he was provided with computer training programs to learn the necessary skills to perform his job, as well as a video phone, and a Mimix application on cell phones so that he could communicate with clients and colleagues. Notwithstanding the fact that Grievant was an at-will employee, he was given performance evaluations and opportunities to improve work. Grievant did not prove

Respondent's motivation for the discharge was related to Grievant's hearing impairment in contravention of a substantial public policy principle. Accordingly, the grievance is **DENIED.**

### **Conclusions of Law**

1. In cases involving disciplinary of classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for termination of an employee. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). However, in cases involving the suspension or dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." *Logan v. W. Va. Regional Jail & Correctional Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994).

2. An at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause. *Wright v. Standard Ultramarine and Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955).

3. W. VA. CODE § 18B-9A-2 (11) states in pertinent part:

(11) "Nonclassified employee" means, an employee of an organization who meets one or more of the following criteria:

(D) Is in an information technology-related position;

Unless otherwise established by action of the institution where employed, a nonclassified employee serves at the will and pleasure of the organization, which authority may be delegated by act of the board.

4. "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).

5. Grievant did not prove that he had substantive rights related to continued employment. Grievant was an at-will employee and Respondent was not required to demonstrate good cause for his dismissal.

6. "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., *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)." Syl. Pt. 4, *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*).

7. The West Virginia Human Rights Act "prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap." W. Va. Code, 5-11-9 (1992). *Vest v. Board of Educ.*, 193 W.Va. 222, 225, 455 S.E.2d 781, 784 (1995). If Respondent were motivated to dismiss Grievant due to his hearing impairment, it would be in contravention of the public policy established by this legislation.

8. Grievant did not prove that Respondent's motivation to dismiss him was to contravene some substantial public policy principle.

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* 156 C.S.R. 1 § 6.20 (2018).

**DATE: September 28, 2020**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**