THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WENDY M. SMITH,
Grievant,

v. **Docket No. 2019-1889-CONS**

HOUSING DEVELOPMENT FUND,
Respondent.

DECISION

Grievant, Wendy M. Smith, is employed by Respondent, the West Virginia Housing Development Fund ("the Fund"). On May 28, 2019, Grievant filed a grievance against Respondent alleging harassment and protesting a written warning. For relief, Grievant sought for the written warning to be removed from her file and "to be able to work free from harassment." The grievance was assigned docket number 2019-1666-HDF.

A level one conference was conducted on June 10, 2019, and the grievance was denied by an undated level one decision. Grievant appealed to level two on July 18, 2019. On August 13, 2019, Grievant filed a second grievance, which was assigned docket number 2020-0112-HDF. The grievance form states only "See Attached" and then attaches an unsigned *Employment Separation Agreement and Release* which states that Grievant's employment was terminated August 12, 2019. Following the unsuccessful mediation session on October 1, 2019, an order consolidating the two grievances into the above-styled grievance was entered on the same day. On October 8, 2019, Grievant, by counsel, appealed the consolidated grievance to level three of the grievance process. A level three hearing was held over two days on January 31, 2020, and March 9, 2020, before the undersigned at the Grievance Board's Charleston, West

Virginia office. Grievant was represented by by counsel, Katherine L. Dooley, Dooley Law Firm. Respondent was represented by counsel, Jill E. Hall and Grace E. Hurney, Jackson Kelly, PLLC. This matter became mature for decision on May 13, 2020, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant was employed by Respondent as a Mortgage Loan Closer. Grievant's employment was at will. Grievant grieves a written reprimand and subsequent termination from employment. Grievant alleged that she was terminated due to her race and protected activities of participating in the grievance procedure and Respondent's EEO procedure, all of which would be substantial public policies. Grievant failed to make a *prima facie* case of protected class discrimination. Grievant made a *prima facie* case of protected activity discrimination but Respondent showed legitimate, nondiscriminatory reasons for the termination that Grievant could not prove were pretextual. Grievant failed to prove mitigation of the punishment is warranted. As the termination of Grievant's employment is upheld, the grievance protesting the written reprimand is moot. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Mortgage Loan Closer in the Single Family Lending Department. Grievant had been so employed since February 2003, approximately seventeen years.

2. Grievant is an African American woman and was one of only three African American employees of approximately one hundred employees working for Respondent.

3. Respondent is a public corporation created by West Virginia Code section 31-18-4. The management and control of Respondent is vested solely in its board of directors pursuant to West Virginia Code section 31-18-5(a), and the board of directors has the authority "[t]o appoint such officers, employees, and consultants as it deems advisable and to fix their compensation and prescribe their duties" pursuant to West Virginia Code section 31-18-6(12).

4. Respondent's Executive Director, Erica Boggess, is responsible for managing and administering Respondent's daily operations pursuant to West Virginia Code section 31-18-5(c).

5. Respondent's mission is to increase the supply of affordable housing to low and moderate income borrowers. As part of its mission Respondent makes direct loans and works with lending partners. Some loans are made from Respondent's funds and some loans are made with federal funds made available through federal programs.

6. Grievant acknowledged the at-will status of her employment by her signature of the *Acknowledgement and Receipt* of Respondent's handbook on January 23, 2019. The acknowledgement specifically states, "I acknowledge that the Handbook is neither a contract of employment nor a legal document. I also acknowledge that I am employed on an at-will basis, and that I am free to end my employment relationship with the Fund, at any time, just as the Fund retains the right to terminate my employment at any time for any reason or no reason whatsoever."

7. Grievant was employed at will.

8. From the beginning of her employment until 2015, except for a "performance memorandum" issued in 2009 regarding consistent errors in the calculation of pre-paid finance charges, Grievant's performance had been evaluated as meeting or exceeding standards with no concerns.

9. However, beginning in 2015, although Grievant's evaluations remained satisfactory or better overall, the evaluations began to mention issues relating to Grievant's conflicts with other staff and emerging performance issues.

10. Patti Shamblin, Division Manager, Single Family Lending, was Grievant's direct supervisor for all years except 2008 and 2009 and completed all the evaluations except for those years.

11. In the annual appraisal dated June 4, 2015, although Grievant's overall evaluation was rated "Above Expectations," Ms. Shamblin noted that "Wendy sometimes has issue in dealing positively with other staff members when presented with challenges that arise at the final stages of the loan closing preparation," noted that Grievant needed to document files in the computer system in more detail "to ensure compliance with new rules and regulations," and stated that Grievant "misses work frequently and often without advance notice" and "is often late in arriving for work in the morning."

12. Grievant's annual appraisal signed June 17, 2016 rated her as "successful" overall and noted that Grievant had "worked diligently to improve" but that Grievant needed to "continue to develop input of comments" in the computer systems.

13. Sometime during this time Jon Rogers, who had previously been employed by the Fund, returned to the Fund as the Senior Division Manager of Single Family Lending, which placed him as Grievant's second-level supervisor.

14. Mr. Rogers scrutinized employee attendance more closely than had previously been the practice in the division.

15. On February 22, 2017, Ms. Shamblin, at the direction of Mr. Rogers issued Grievant a written warning for continuous late arrival. Grievant was placed on a written development plan to approve her attendance.

16. Grievant's annual appraisal signed June 6, 2017, notes that Grievant's "late arrival to work resulted in a written development plan that has proven to be successful."

17. On December 13, 2017, Grievant met with Joshua Brown, Senior Manager, Asset Management, who serves as Respondent's EEO officer, to make an EEO complaint against Mr. Rogers. In her complaint, Grievant stated that she did not wish to remain anonymous. She alleged that Mr. Rogers was harassing her in that she is "treated more harshly than other members of her department." She alleged Mr. Rogers watched her, reprimanded her for tardiness, and scrutinized her breaks but did not do the same with other employees. She alleged the only difference between her and the other employees that could explain the difference in treatment was race. Grievant agreed to informal counseling to attempt to resolve the dispute.

18. Mr. Brown investigated the complaint by interviewing Grievant, Mr. Rogers, Ms. Shamblin, and Kay Bowe, Senior Manager of Underwriting, another member of the management of the Single Family Lending Department. Grievant

admitted that she had been having attendance issues due to personal problems but believed those issues should have been excused because of her long tenure of good service. Mr. Brown concluded through the interviews that Mr. Rogers had required more strict compliance with attendance, which was a change from the previous senior manager. Mr. Rogers checked on the arrival of all employees in the department each morning. Mr. Rogers had referred four other employees to Ms. Shamblin and Ms. Bowe to address his concerns with their attendance, including an employee for whom he directed Ms. Bowe issue a written warning. Mr. Brown confirmed through personnel records the documentation of attendance concerns for those employees, the written warning to the other employee, and that those employees were Caucasian.

19. On January 29, 2018, Mr. Brown drafted a four-page single-spaced memorandum detailing his investigation and findings. By memorandum of the same date he notified Grievant that the evidence did not support her allegation of racial discrimination.

20. Grievant's annual appraisal signed May 4, 2018 rates Grievant as "successful" but again notes issues with Grievant's interaction with coworkers, encouraging Grievant to "be more mind full (sic) and considerate" of coworkers and to be more "flexible and considerate of coworkers and the schedules and timelines that we all face." Ms. Shamblin's overall summary encourages Grievant to "fully document" her files in the computer systems. Further, Ms. Shamblin discusses the upcoming implementation of new systems and software stating, "Wendy will be encouraged to participate in the roll out of the paperless system and the new software for loan origination and closings that will be replacing the current system. I would encourage

Wendy to take the initiative with the opportunities that will be opening up with the implementation of the new software for the LOS system and the paperless system."

21. On July 13, 2018, Jon Rogers wrote a *Memo to File* stating that Ms. Bowe had reported to him that April Marion had reported to Ms. Bowe a conversation she and Grievant had in which Grievant was disparaging a co-worker, Debbie Harris. Mr. Rogers notes, "Clearly Wendy continues to engage in behavior that is detrimental to our department. I made Kay [Bowe] aware of the meeting that Taran [Wolford, Senior Manager of Human Resources], Julie [Davis, Deputy Director of Production and Mr. Brown's supervisor], Patti [Shamblin] and I had on this topic in which we agreed that we would be on the lookout for future instances of Wendy continuing to be disruptive. Kay will join Patti and I in watching and listening for the same."

22. In 2018, Grievant's division became responsible for preparing closing documents for loans issued through the HOME Program. Grievant had previously prepared closing documents for the HOME Program but had not done so "in some time."

23. HOME Program loans are funded by the United States Department of Housing and Urban Development ("HUD"). The loans have special requirements and require a specific promissory note and the deed of trust. These are different documents than those Grievant was used to using with the types of loans Grievant customarily closed.

24. The differences in the HOME Program documents and the non-HOME Program loan documents that Grievant typically drafted are obvious at a glance. The documents are titled differently, have a completely different layout, contain a different

number of pages and have a different font. Even a person with no familiarity with the HOME Program documents would immediately see that the non-HOME program documents were not the same.

25. Grievant was assigned the closing for two HOME Program loans, the A.G. loan and the S.H. loan.

26. On October 2, 2018, Teresa Sarver, Loan Originator, emailed Grievant stating that the closing documents for the A.G. and S.H. loans needed to be sent to the attorney's office by the 4th.

27. Previously, Tammy Jones, HOME Regulatory Specialist, had sent Grievant an email explaining what documents were to be sent to the accounting department for HOME Program loans. The email does not specify or attach the closing documents to be used but does specify that after closing Grievant is to send "Note (copy to Accounting & Approval signed by Cathy)." Grievant wrote on a printed copy of the email, "PER: Patti Shamblin USE HOME Program Note 2:06 PM. 10/3/18."

28. "Cathy" is Cathy Colby, Senior Manager, HOME & HTF Programs. Ms. Colby oversees the HOME Program and has managed that program for six years.

29. On October 29, 2018, Grievant noted in the computer system that she had emailed the attorney the closing package for the S.H. loan on October 3, 2018 at 1:40 p.m.

30. On the same day, Grievant noted in the computer system that she emailed the attorney the closing package for the A.G. loan on October 3, 2018 at 2:23 p.m.

31. No signed approval from Ms. Colby appears in the file of either loan.

32. Grievant did not review the documents with either her supervisor, Patti Shamblin, or the HOME Program's manager, Ms. Colby.

33. The documents Grievant sent to the attorney were the wrong documents and did not contain the provisions required by the HOME Program.

34. Grievant was assigned a third HOME Program loan, F.M. Grievant again prepared the wrong closing documents and on November 19, 2018, without reviewing the documents with Ms. Shamblin or Ms. Colby, Grievant sent the closing documents to the closing attorney.

35. On November 21, 2018, Grievant forwarded the closing documents to Ms. Jones.

36. As Ms. Colby was going to be out of the office on that date, she had previously instructed Ms. Jones to make sure to review the documents for the required language.

37. Upon receiving the documents from Grievant, Ms. Jones reviewed the documents and determined they were prepared using the wrong forms and did not contain the required language. On the same date, Ms. Jones replied to Grievant, copying Ms. Colby, stating that the note and deed of trust to be used were the HOME note and deed of trust.

38. Ms. Jones was concerned that Grievant had used the wrong closing documents so decided to review prior cases to make sure that the proper documents had been used. Ms. Jones discovered that the three cases done by Grievant's co-worker, Trisha Poe, used the correct documents but the two cases Grievant had done,

the A.G and S.H. loans, had used the same incorrect documents that Grievant had sent to Ms. Jones for the 3rd loan on November 21st.

39. The incorrect documents had not yet been used for the third loan, so the Fund was able to recall the documents from the attorney and provide the correct documents for the loan to close.

40. By email dated January 4, 2019, Ms. Shamblin notified Grievant that an audit had revealed Grievant was putting document "in the wrong containers in Virpak." Virpak is Respondent's document imaging system in which all documents are stored. Ms. Shamblin offered Grievant additional training on this issue.

41. On January 22, 2019, Mr. Brown drafted a memorandum to "file," copying his direct supervisor, Deputy Director of Production Julie Davis, and Senior Manager of Human Resources Teran Wolford regarding an "EEO Inquiry" from Grievant. In response to Ms. Shamblin's January 4, 2019 email, Grievant met with Mr. Brown on January 7, 2019, and asserted that Ms. Shamblin was harassing her, although Grievant did not request to file a complaint or that Mr. Brown take any action. Grievant claimed that the program's history would show that she was placing the documents in the correct containers and Grievant provided a printout of the history. However, upon interviewing Ms. Shamblin, Ms. Shamblin asserted Grievant had provided only a partial history. Ms. Shamblin provided the full program history which, upon review, Mr. Brown determined that Grievant did not place the documents in the correct containers. However, as Mr. Brown could not determine that Grievant had been properly trained on which containers to use, Mr. Brown determined that the email was not inappropriate or

harassing, but that management should provide more clear direction by creating a policy and procedures manual for the use of Virpak.

42. Meanwhile, Ms. Davis had continuing discussions with the management of the Single Family Lending division, the accounting department, and HUD officials regarding how to handle the two loans that had been closed using the incorrect documents. At some point Director Boggess was informed of the situation but she was not included in the discussions between staff or with HUD officials.

43. Closing documents generally contain an errors and omissions clause that obligates the borrower "to fully cooperate and adjust for clerical errors, any or all loan closing documentation if deemed necessary or desirable in the reasonable discretion of Lender to enable Lender to sell, convey, seek guaranty, or market said loan to any entity…"

44. The errors and omissions clause of the loans could not be used to correct this issue because it is meant to correct clerical errors. Both the promissory note and deed of trust were completely wrong and had already been recorded. The only way to correct the error to allow the use of HUD funds would have been to completely re-do both forms, which is well beyond the scope of an errors and omissions clause.

45. Because the closing documents did not have the required provisions, the loan did not meet HUD's requirements for funding and the money used to fund the loans had to be returned to HUD.

46. Ms. Davis received final word from HUD that the funds would have to be returned on April 2, 2019. As a result, Respondent was required to fund the loans from its own budget using money that was intended to fund other programs. As the loans are

zero percent loans, Respondent will not make income from the loans as it would have with other programs. Respondent will lose the use of that money for the thirty years of the mortgage terms. In addition, the HOME program loans are risky with an almost forty percent failure rate, meaning that Respondent is at quite a significant risk for losing the money entirely.

47. On April 16, 2019, at Director Boggess' direction, Ms. Shamblin issued Grievant a written warning for performance for "a pattern in your performance of not actively communicating with management and your co-workers along with failing to follow instructions." The memorandum cites the incorrect HOME loan documents, failure to follow instructions for implementing new software, and improperly storing files in violation of policy. The memorandum further states that, "In every staff or group meeting I have held and every one-on-one interaction I have had with you, you have not taken any notes or asked any questions. I have later learned that you then proceed to ask questions of your co-workers on how to do something claiming you did not know or were never told. On numerous occasions, I have instructed you to ask me, not your co-workers, when you have questions on how to do your job." The memorandum concludes that Grievant's errors were a result of lack of proper communication with Grievant's supervisor.

48. By memorandum on May 16, 2019, to Ms. Davis and Ms. Wolford, Mr. Brown memorialized another meeting with Grievant in which they discussed the possibility of Grievant filing an EEO compliant. After discussion and review of the EEO complaint form, Grievant stated that she did not believe the incidents were motivated by

protected class and elected not to file an EEO complaint. Mr. Brown advised Grievant of her right to file a grievance.

49. On May 28, 2019, Grievant filed the grievance protesting the written warning alleging harassment and requesting a level one conference.

50. On May 28, 2019, Grievant sent a memorandum to Director Boggess, Ms. Wolford, Mr. Brown, Ms. Shamblin, and Mr. Rogers detailing her grievance regarding the written warning. Grievant did not include this document in her grievance filing with the Grievance Board. In the memorandum, she asserts she had done nothing wrong and that she was being harassed and discriminated against. Regarding the HOME loan documents Grievant stated that since she had not closed a HOME loan in some time, she provided the documents to Ms. Shamblin to ensure they were the right documents and also checked with Ms. Colby that they were the right documents. Grievant stated that she then "proceeded with the preparation and ultimately the closing of the two home loans."

51. The level one conference was held on June 10, 2019. During the level one conference, Grievant asked whether she needed to obtain letters of support from outside business partners to prove she was doing a good job and was told not to do that because it was an internal issue and there had not been any complaints about Grievant from business partners.

52. Following the conference, Director Boggess arranged for Grievant to have additional training to ensure she understood the new computer system and that Grievant had been assigned the appropriate rights in the system. Director Boggess

also engaged a private company to do a forensic analysis of Grievant's computer to determine if others had placed documents on Grievant's computer as she alleged.

53. At some unspecified time after the level one conference, Grievant did solicit a letter of support from Rebekah Arthur, a Mortgage Loan Officer for Fayette County National Bank, who stated she would be unable to provide such a letter. During this conversation Grievant also "vented" to Ms. Arthur about her treatment at work and also told Ms. Arthur that when other employees at the Fund "talked trash" about Ms. Arthur Grievant defended her.

54. It was not unusual for Grievant and Ms. Arthur to discuss personal matters and to "vent" work frustrations. They had daily contact for work and had developed a friendship over the years through their association at work.

55. Ms. Arthur was generally unconcerned about this conversation with Grievant. She viewed it as the venting of a friend. Ms. Arthur had asked Grievant about her well-being during the conversation because she could tell Grievant was having issues and was concerned about her. However, Ms. Arthur was surprised to hear that other employees "talked trash" about her because she had thought she had a good relationship with everybody.

56. Also, after the level one conference, Ms. Shamblin went to Ms. Bowe and expressed concern over Grievant's statements in the conference that she wanted to get letters of support. Believing that Grievant was likely to ask Ms. Arthur for such a letter and knowing that Ms. Bowe also had a relationship with Ms. Arthur, Ms. Shamblin asked Ms. Bowe to contact Ms. Arthur to "warn" her.

57. Ms. Bowe called Ms. Arthur and told her that if she should receive a request from a Fund employee for a letter of support, she should be cautious of providing one.

58. Ms. Bowe and Ms. Arthur later had a second conversation in which Ms. Arthur stated that Grievant had asked for a letter of support and discussed that Grievant had been venting about her work situation and disclosed the comment regarding "trash-talking." Ms. Arthur had not been concerned by Grievant's contact but was concerned by Ms. Bowe's contact because she did not understand why her name had been mentioned in a grievance, why she was being involved, and was concerned that it might impact her job. Ms. Arthur asked Ms. Bowe to keep their conversation in confidence.

59. On June 19, 2019, Director Boggess emailed Grievant regarding the training she had arranged for her to ensure Grievant was saving to the appropriate network drives, backing up appropriately, and complying with document retention policies.

60. On June 24, 2019, Damien Attoe, Director of Professional Service at Spyder Forensics, the computer forensics company Director Boggess hired, provided its final report of the examination of Grievant's hard drive. Mr. Attoe concluded there was no evidence that files were "automatically synced to the local drive" and that "[t]he lack of file access on network resources suggest the user stored the majority of her files locally."

61. On July 19, 2019, Ms. Shamblin sent an email to Grievant directing her to assist in the correction of a closing disclosure after Grievant had refused to do so. The

closing disclosure had inappropriately charged the borrower a $151 fee, which needed to be refunded and the closing document revised to reflect the removal of the fee.

62. In the *Employee Quarterly Check-in* dated August 1, 2019, Grievant states that all issues or goals from the last quarterly meeting had been completed, she listed no new skill or specific training that would help her job performance, she provided no ideas or suggestions for improving operations, and had no suggestion or request for what Ms. Shamblin might do better to help Grievant or the department.

63. In August, Grievant also asked for a letter of support from a co-worker, Sonya Arthur, no relation to Rebekah Arthur, stating that she was having problems at work and needed the letter for court. Ms. Arthur reported the conversation to Ms. Wolford, who reported it to Ms. Shamblin.

64. Having confirmation that Grievant had been asking for letters, Ms. Shamblin asked Ms. Bowe if Grievant had requested a letter from Rebekah Arthur.

65. Although Ms. Bowe had agreed to hold her conversation with Ms. Arthur in confidence, she broke that confidence because she did not feel she could lie when asked directly about the conversation. Without further discussing with Ms. Arthur that she was going to break her confidence and use the information that had been relayed, on August 8, 2019, Ms. Bowe informed Director Boggess of her conversation with Ms. Arthur regarding Grievant.

66. Director Boggess directed Ms. Bowe to provide a written report, which she did so by email of the same date in which Ms. Bowe stated that Ms. Arthur said Grievant had vented about her job and being treated poorly, that Grievant had contacted her

requesting a letter, and that Grievant had told Ms. Arthur that "we all talked trash about her here and that she (Wendy) was the only one who took up for her."

67. Director Boggess made the decision to terminate Grievant's employment based on the information she received from Ms. Bowe without talking to either Ms. Arthur or Grievant. Director Boggess believed Grievant's communications with Ms. Arthur were unprofessional and put Respondent's reputation and business relationship at risk.

68. On August 12, 2019, Director Boggess and Ms. Wolford met with Grievant and informed Grievant that her employment was being terminated, although Director Boggess did offer to allow Grievant to resign in lieu of termination. Director Boggess also presented Grievant with a written separation agreement that would provide a lump sum severance payment if Grievant would agree to withdraw her grievance and pursue no further action. Director Boggess advised Grievant she should review the agreement with an attorney and that she would have twenty-one days to decide whether to accept the agreement, although Director Boggess required Grievant to immediately decide if she would resign in lieu of termination.

69. Directly after her meeting with Director Boggess, Grievant called Ms. Arthur very upset stating that she had been fired for inappropriate communication with a lender, wanting Ms. Arthur to "swear [she] hadn't lied on [Grievant]," and stating that she would force the identity of the lender to be released.

70. Ms. Arthur provided a written statement on August 13, 2019, relating the previous conversations she had with Grievant and Ms. Bowe and relaying the August 12, 2019 conversation with Grievant. Ms. Arthur expressed concern that she would be

"drug in" if Grievant filed a discrimination lawsuit against Respondent and expressing her dismay that Grievant had been fired.

71. Director Boggess officially terminated Grievant's employment by letter dated August 15, 2019. The letter did not state a reason for the termination of Grievant's employment. The letter also again provided the proposed separation agreement that would grant Grievant severance pay for her agreement to withdraw her pending grievance and not grieve her termination.

72. Respondent has suffered no direct negative financial consequence in its relationship with Ms. Arthur's employer.

Discussion

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).

Grievant has asserted that she is not an at-will employee. "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). In her PFFCL, Grievant does not explicitly explain her argument on this issue. Grievant did list the following in her proposed findings of fact that appear to be offered for the argument that Grievant's employment was not at will: that Respondent is "a governmental instrumentality of the State of West Virginia," that Respondent's employees have access to the grievance process, and that Grievant had worked for Respondent for seventeen years. Contrary to Grievant's assertion, despite being a "governmental instrumentality" the statute creating Respondent makes clear that its employees are at will by vesting the management and control of the Fund solely in its board of directors and by stating the board of directors have the authority "[t]o appoint such officers, employees, and consultants as it deems advisable and to fix their compensation and prescribe their duties." W. VA. CODE § 31-18-5(a), W. VA. CODE § 31-18-6(12). Further, Grievant acknowledged through her signature on the acknowledgement of Respondent's handbook that her employment was at will. Grievant's length of employment does not act to prove an alteration of her employment's at will nature without evidence of promises made by Respondent that would reasonably lead Grievant to believe that the continuation of her employment over those years had created an employment contract. That Respondent's employees have access to the grievance process is not evidence that Grievant was not an at-will employee as the grievance procedure does not exclude at-will employees. Grievant's employment was clearly at will.

"[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 she was wrongfully terminated has the burden to prove by a preponderance of the evidence that the termination of her 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).

Grievant argues that the letter of warning was issued in retaliation for Grievant's EEO activities and that it was not otherwise warranted. Grievant argues she was terminated in violation of substantial public policy for her EEO and grievance activities, and for disparate treatment and impact. Grievant alternatively argues that the punishment should be mitigated. Respondent asserts Grievant was terminated solely

because Grievant's communications with Ms. Arthur were unprofessional and put Respondent's reputation and business relationship at risk.

Some essential facts are in dispute. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Ms. Arthur's demeanor was appropriate. Although she was somewhat hesitant on some answers, she was mostly forthcoming. Ms. Arthur's hesitation appeared to be due to her general befuddlement regarding the entire situation. Ms. Arthur very clearly did not think that Grievant had done anything wrong and did not believe that she should have been fired. Her confusion and upset regarding Grievant's termination appeared genuine, although Ms. Arthur also seemed concerned about the impact of this situation

on her own job. It appeared that Ms. Arthur, who identified as a friend of Grievant's, was reluctant to say anything bad about Grievant and attempted to minimize the negative things Grievant had said about Respondent. However, when asked a direct question about the "trash-talking" statement, she was forthcoming and did appear to have a good memory of the statement.

Ms. Bowe's demeanor was appropriate. She did not hesitate in her answers and appeared to have a good memory of the events. There was no allegation that she had any existing bias against Grievant. As will be discussed below, her story is consistent with Ms. Arthur's story. Her testimony was also consistent with her written statement. Her explanation for why she disclosed her conversations with Ms. Arthur when she did is plausible and does not indicate ill will toward Grievant. Ms. Arthur had asked for their conversation to remain confidential. Ms. Bowe honored that request until Ms. Bowe was directly asked if Grievant had contacted Ms. Arthur for a letter. At that point, Ms. Bowe determined that she would have to break the confidence in order to avoid lying. If Ms. Bowe's contact with Ms. Arthur had been intended to harass or retaliate against Grievant, Ms. Bowe would have shared what she had been told immediately. That Ms. Bowe did not is evidence that her intent in contacting Ms. Arthur was as stated; to protect Ms. Arthur and the interests of Respondent.

Although Ms. Bowe and Ms. Arthur's stories are not completely consistent, they are consistent enough to be credible. All Ms. Arthur knew when she wrote her letter was that Grievant had just called her very upset stating that she had been fired and essentially accusing Ms. Arthur of being responsible. That Ms. Arthur did not include all the information in the letter is indicative of her lack of knowledge regarding the situation,

her shock and upset, and her opinion that Grievant's "griping" was not important; not that Ms. Arthur is lying. Further, Ms. Arthur and Ms. Bowe had agreed to keep the conversation confidential. Both were describing conversations that had occurred months before that were not intended to be disclosed. The important facts of the conversation are consistent: Grievant had asked Ms. Arthur for a letter of support, Grievant had been complaining to Ms. Arthur regarding the way she was being treated at work, and Grievant told Ms. Arthur that "even when they talk trash about [Arthur] [Grievant] takes [Arthur's] part." Ms. Arthur had no way of knowing that the trash-talking statement would be viewed by Respondent as important. Although Ms. Bowe worded the trash-talking statement slightly differently, it still conveys the same information that Grievant told Ms. Arthur that other employees talked negatively about Ms. Arthur and that Grievant was the only one who defended her.

Cathy Colby's demeanor was appropriate. She was professional and made good eye contact. Her memory of events appeared good. There was no allegation of specific bias against Grievant. She specifically denied that Grievant reviewed the documents with her. Her explanation why she did not approve and would not have approved the documents is plausible. As the manager of that program for six years, Ms. Colby was intimately familiar with the documents. Given that experience and the obvious difference on the face of the documents to even an unfamiliar observer, it defies belief that Ms. Colby would have approved the documents as Grievant asserts.

Director Boggess is credible. Her demeanor was direct, and her memory appeared good. She was clearly annoyed with some of the questioning on cross examination, but she was not evasive in her answers. Her concern regarding the

potentional damage to Respondent's reputation by Grievant's actions appeared genuine. Her explanation that she did not contact Ms. Arthur to confirm because Ms. Arthur had requested confidentiality and did not want to be involved is plausible and supported by Ms. Arthur's letter and testimony. Regardless of whether Director Boggess' determination that Ms. Bowe and Ms. Shamblin should not be disciplined for their involvement of Ms. Arthur was a sound decision, her reasoning for why she viewed their actions differently is not unreasonable or implausible. Director Boggess believed that it was a matter of intent. Grievant had complained to Ms. Arthur with either the intent to damage Ms. Arthur's relationship with the Fund or with disregard to that possibility in favor of her own interests. Ms. Bowe and Ms. Shamblin, whether it was a good idea or not, had involved Ms. Arthur with the intention of protecting Ms. Arthur and the Fund.

Grievant was not entirely credible. Grievant's demeanor was mostly appropriate except that she occasionally interrupted, appeared to be somewhat evasive at times during cross examination, and stated she was confused by questions on cross examination that were not confusing. Grievant's credibility is in question due to the implausibility of her testimony, the inconstancies between her testimony, written statement, and the computer records, and contradiction of her testimony by the testimony of others. In Grievant's written statement in support of her level one grievance, Grievant stated that since she had not closed a HOME loan in some time she provided the documents to Ms. Shamblin to ensure they were the right documents and also checked with Ms. Colby that they were the right documents. Grievant stated that she then "proceeded with the preparation and ultimately the closing of the two

home loans." In her level three testimony, Grievant testified that she prepared the documents, took them to Ms. Shamblin for review, Ms. Shamblin approved them but told Grievant to take them to Ms. Colby, that Grievant took the documents to Ms. Colby, and that Ms. Colby approved them. The statement and testimony are directly contradicted by Grievant's computer records, handwritten note, her admission on cross examination at level three that she sent the documents to the attorney before she reviewed with Ms. Shamblin and Ms. Colby, Ms. Colby's credible testimony, and the lack of written approval by Ms. Colby in the files.

The computer records show that on October 3, 2018, Grievant sent the completed closing documents on the S.H. loan to the attorney's office at 1:33 p.m. and that she sent the completed closing documents on the A.G. loan to the attorney's office at 2:23 p.m. Grievant's handwritten note on the email says that at 2:06 p.m. on the same date Ms. Shamblin told her to use the HOME Program note. Grievant's assertions simply do not add up. If Grievant was confused about the documents why would she go ahead and prepare them and send them to the attorney? Why ask Ms. Shamblin which documents to use after she had already sent the documents to the attorney on the first loan? Grievant's testimony on this point is also contradicted by Ms. Colby's credible testimony and the documents on their face. The documents are very obviously different even to one who is completely unfamiliar with either process. For Grievant to be believed, Ms. Colby, who oversees that loan program would have had to have failed to recognize that the documents were wrong.

Grievant's assertion that she did not request a letter of support from Ms. Arthur and did not tell Ms. Arthur that other employees were "talking trash" about her is also

not credible in the face of Ms. Arthur and Ms. Bowe's credible testimony. Grievant has shown through her attempt to cover up her mistake regarding the loans that she is willing to be dishonest to avoid negative consequences and it appears her denial of the conversation with Ms. Arthur is also self-serving.

Grievant argues that Respondent's termination of Grievant's employment was motivated to violate substantial public policies prohibiting racial discrimination, retaliation for EEO activity, and retaliation for grievance activity. The West Virginia Human Rights Act creates a substantial public policy against employment discrimination. "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. The West Virginia Human Rights Act also prohibits retaliation against employees for asserting rights conveyed by the Act. W. VA. CODE § 5-11-9(7)(C). The West Virginia Supreme Court of Appeals has further found that the grievance procedure "advances a substantial public purpose, and that public policy considerations demand that an employer not be permitted to violate the rights an employee enjoys under this process." *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241,

249, 588 S.E.2d 406, 414 (2003) (per curiam). Therefore, Grievant has successfully alleged violations of substantial public policy for both her protected class and protected activities.

The Grievance Board analyzes cases of at-will employees alleging the violation of substantial public policy due to protected class or protected activity discrimination 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); *Hooker v. Offices of the Ins. Comm'r*, Docket No. 2019-0505-DOR (Feb. 28, 2020). In order to make a *prima facie* case of protected activity discrimination Grievant must "'prove by a preponderance of the evidence (1) that [Grievant] engaged in protected activity, (2) that [Grievant's] employer was aware of the protected activities, (3) that [Grievant] was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that [Grievant's] discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.' Syl. pt. 4, *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986)." Syl. pt. 1, *Brammer v. Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990). In order to make a *prima facie* case of protected class discrimination Grievant must prove "(1) That [Grievant] is a member of a protected class. (2) That the employer made an adverse decision concerning [Grievant]. (3) But for [Grievant'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).

Once Grievant has made a *prima facie* case of either protected activity or protected class discrimination the burden then shifts to Respondent to provide some legitimate, nondiscriminatory reason for the dismissal. *Conway*, 178 W. Va. at 171, 358 S.E.2d at 430; *Roach*, 198 W. Va. at 701, 482 S.E.2d at 686. "The reason need not be a particularly good one. It need not be one which the judge or jury would have acted upon. The reason can be any other reason except that the plaintiff was a member of a protected class. If the fact finder believes that the proffered reason was the true reason for the decision, then the employer, while he may be guilty of poor business practices, is not guilty of discrimination." *Conaway*, 178 W. Va. at 171, 358 S.E.2d at 430. "Of course, after the employer has set out his reason for the decision, the employee will have the chance to rebut the employer's evidence with a showing that the stated reason was merely a pretext for discriminatory motive." *Id*.

Grievant has made a *prima facie* case of protected activity discrimination. Grievant has engaged in the protected activities of using the grievance procedure and participating in Respondent's EEO procedure. Grievant was still participating in the grievance process protesting her written warning when her employment was terminated. Director Boggess was aware of the grievance because she participated as the chief administrator. Therefore, a retaliatory motivation can be inferred. Likewise, Grievant had availed herself of Respondent's EEO process. Grievant had filed a formal EEO complaint with Respondent's EEO officer in January 2017, which is too remote in time for an inference of retaliation. However, as Grievant had alleged racial discrimination in her grievance, Respondent's EEO officer attended the level one grievance conference and Grievant's more recent inquiries of the EEO officer and allegations were discussed.

As Director Boggess conducted the level one grievance conference on June 10, 2019, she was aware of Grievant's EEO activities and Grievant's employment was terminated approximately two months after the level one conference. Due to the closeness in time, a retaliatory motive can be inferred.

Grievant failed to make a *prima facie* case of protected class discrimination. The West Virginia Supreme Court of Appeals has acknowledged the difficulty of proving that the adverse decision would not have been made but for the employee's protected class and addresses the same as follows:

> Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

Conaway, 178 W. Va. at 170-71, 358 S.E.2d at 429-30. In this case, as both protected class discrimination and protected activity discrimination are alleged and intertwined it can be difficult to distinguish what claim which evidence is meant to prove. In addition, the elements of proof for protected class discrimination also blurs the line between making a *prima facie* case by "elimination of the apparent legitimate reasons for the decision" and defense of *prima facie* case by a Respondent showing legitimate, nondiscriminatory reasons for the decision. As will be more fully discussed below, Respondent has offered that their legitimate, nondiscriminatory reason for terminating

Grievant's employment was that Grievant's communications with Ms. Arthur were unprofessional and put Respondent's reputation and business relationship at risk.

Grievant's evidence on the issue of protected class discrimination appears to consist mostly of evidence to eliminate the stated legitimate reason for the termination. Grievant has argued that Respondent failed to follow its progressive discipline policy, that Director Boggess performed no investigation, that Respondent's former HR director believed the termination to be excessive, that Grievant had been employed by Respondent for seventeen years with a good performance history, and that there was no evidence Grievant's communication with Ms. Arthur actually harmed the agency.

Grievant did not prove Respondent failed to follow its progressive discipline policy. The policy is outlined in Respondent's handbook, which specifically states that immediate termination may be taken at Respondent's discretion and that Respondent reserve the right to deviate from the policy as appropriate. Although the policy does list four specific infractions for which immediate termination may result, that list is obviously not meant to be the only infractions for which an employee may be terminated. Director Boggess' immediate termination of Grievant did not violate Respondent's progressive policy.

Director Boggess admits she performed no investigation, relying solely on Ms. Bowe's report of what Ms. Arthur told her about Ms. Arthur's conversation with Grievant. Director Boggess was not required to perform an investigation. Grievant was an at-will employee. She was not entitled to due process protections. Nothing in Respondent's policy required Respondent to perform a disciplinary investigation. While it would certainly have been more prudent for Director Boggess to speak with Ms. Arthur

directly, Ms. Arthur had made it clear that she did not want to be involved. Director Boggess' stated desire to not further damage Respondent's relationship with an important business partner is plausible. Further, Ms. Bowe's report of what Ms. Arthur said has proven to be accurate. Ms. Arthur's testimony at level three confirms Ms. Bowe's report to Director Boggess, so Director Boggess' decision would not have been altered if she had spoken with Ms. Arthur.

Respondent's former HR director, Ms. Miller, was not provided with all the relevant facts of the termination when offering her opinion. While Ms. Miller testified that she did not believe any Fund employee had previously been disciplined for seeking a reference letter, that is not actually what Grievant did. She sought a letter of support to use in her conflict with the Fund after having been instructed specifically not to do so. Further, the main reason for Grievant's termination from employment were the comments Grievant made to Ms. Arthur, which Director Boggess believed were damaging to the Fund's reputation. Ms. Miller's opinion is of no use when she was not provided all the relevant facts upon which to base an opinion.

Although Grievant had been employed by Respondent for seventeen years with a generally good performance history, Grievant's performance had clearly began to change in more recent years. That change pre-dated any allegation that Grievant made of discrimination by two and a half years. At the time Director Boggess terminated Grievant, she had shown escalating performance issues and hostility towards Respondent. Grievant had made errors costing Respondent three hundred thousand dollars. Grievant had violated policies by saving information to her computer rather than to the network and for inappropriately retaining documents that were to be deleted.

When Grievant's supervisor attempted to address these issues with Grievant, Grievant accused her of harassment. When Grievant was later disciplined, Grievant was dishonest and refused to take responsibility for her errors. Grievant then chose to air her grievances with Respondent to an important business partner and asked that partner for a letter of support in direct defiance of Director Boggess' instructions not to ask for such a letter.

Grievant also argued that she had been treated disparately from Ms. Bowe, Ms. Shamblin, and Mr. Brown. Grievant argues that Ms. Bowe and Ms. Shamblin shared Grievant's confidential grievance information and were not disciplined, that Mr. Brown had shared Grievant's confidential EEO activity and was not disciplined, and that Ms. Bowe also involved the business partner in an internal personnel dispute and was not disciplined. Ms. Bowe, Ms. Shamblin, and Mr. Brown are Caucasian.

Grievant failed to prove Ms. Shamblin and Ms. Bowe shared "confidential" grievance information. The grievance procedure states, "All grievance forms decisions, agreements and reports shall be kept in a file separate from the personnel file of the employee and may not become a part of the personnel file, but shall remain confidential except by mutual written agreement of the parties." W.VA. CODE § 6C-2-3(q)(1). Ms. Shamblin did not share any grievance documents with Ms. Bowe. Ms. Shamblin shared with Ms. Bowe the statement that Grievant had made during the level one grievance conference that she wanted to seek letters of support from business partners, which was not regarding the substance of the grievance itself. Ms. Shamblin shared this with Ms. Bowe as a member of the management team of the department in which Grievant was employed and for a business purpose. Ms. Bowe did not share with Ms. Arthur

which employee might request a letter, although Ms. Arthur guessed that Ms. Bowe was referring to Grievant because Grievant had already asked her for a letter.

To the extent that this information may have been confidential, as it appears the information was shared in an effort to prevent damage to the agency's relationship with a business partner it is not evidence that Grievant was treated disparately from Ms. Bowe and Ms. Shamblin. Grievant's communication with Ms. Arthur was either made with the intention to disparage Respondent and damage Ms. Arthur's relationship with Respondent or with complete disregard to the negative consequences for Respondent. The same reasoning applies to Ms. Bowe's involvement of Ms. Arthur in the internal personnel dispute. While, in the end, it appears Ms. Bowe's decision to warn Ms. Arthur about the letter was itself harmful to Respondent's relationship with Ms. Arthur in that it put her in an uncomfortable situation and also resulted in Ms. Bowe breaking Ms. Arthur's confidence, it is still a matter of intent. Ms. Bowe was trying to act in Respondent's best interests; Grievant was not.

Grievant also failed to prove Mr. Brown improperly shared EEO information. Respondent's handbook states that once an employee reports discrimination or harassment, "a prompt investigation will be conducted and, to the extent that it does not compromise the integrity of the investigation, confidentiality will be maintained concerning the allegations." Once Grievant shared her allegations, Mr. Brown was required to investigate them. Mr. Brown's disclosure of information was only in the course of the investigation or in response to Grievant's allegation of discrimination in the grievance. Mr. Brown's documentation of Grievant's complaint by informal memo sent to senior management and the HR Director was not prohibited by the handbook and

appears to be a reasonable business practice. Further, Grievant's own witness, former HR Director, Adola Miller stated that, although the EEO officer would not typically send a formal memorandum unless there was an investigation, the officer would give her and management a "heads up."

Grievant last argues that Grievant's termination left the agency with only two African American employees out of one hundred. Grievant did not assert that any other African American employee was fired, only that one other African American employee had retired and that that person had retired due to harassment. As Grievant did not call this employee to testify, offer any written statement from the employee, or explain why the employee was unavailable to testify, Grievant's bare assertion carries little weight. While the low number of African American employees could possibly be evidence of a hiring disparity, that is not enough to show that Director Boggess was motivated to terminate Grievant's employment because she was African American.

Although Grievant ultimately failed to make a *prima facie* case of protected class discrimination she did make *prima facie* case of protected activity discrimination as discussed above. The burden therefore shifts to Respondent to prove legitimate, nondiscriminatory reasons for Grievant's termination from employment. Respondent asserts Grievant was fired solely because Director Boggess believed that Grievant's decision to involve an important business partner in Grievant's dispute with Respondent was egregious and unprofessional. As discussed above, Director Boggess had specifically told Grievant in the level one conference not to involve business partners by asking for letters of support. Grievant disregarded that direction and asked for a letter, complained about her alleged treatment by Respondent to Ms. Arthur, and told Ms.

Arthur that other Fund employees "talked trash" about Ms. Arthur and Grievant was the only one that defended her. Grievant's communications with Ms. Arthur were unprofessional and did put Respondent's reputation and business relationship at risk. This stated reason successfully rebuts the presumption that Grievant was terminated for her protected activities as it is a legitimate, nondiscriminatory reason to terminate Grievant's employment.

Grievant appears to assert that this stated reason is pretextual for the reasons already discussed above, for Respondent's offer of a separation agreement, for Director Boggess' alleged statement that she did not like issues going outside of the agency, and for the lack of actual harm to Respondent.

Grievant asserts that Respondent's offer of a separation agreement proves that Grievant was terminated because she was seeking to adjudicate her legally protected rights. It does not. Offering settlement in exchange for dismissing a grievance is common practice. Attempting to reach an agreement with an employee being terminated in order to avoid further litigation is not nefarious.

It is unclear exactly what statement Director Boggess was alleged to have made during the level one conference. During cross examination, Director Boggess was asked if she said that she "liked to keep things in house." Director Boggess answered that she did not recall that specific statement. In her PFFCL, Grievant stated that Director Boggess said she "did not like issues going outside of the agency." Grievant's testimony on this issue was vague and her credibility is questionable. It was not clear from Grievant's testimony what exact statement Director Boggess is alleged to have said and what was Grievant's perception of the situation, but it appears that Grievant

asserts Director Boggess said “We would rather have handled it inside the Fund.” While similar, each of these statements would have varying connotations depending on the context. Further, no other witness testified that they heard any such statement. Even it if is true that Director Boggess said something to that effect, Respondent, through its EEO officer was the one to tell Grievant she had the right to file a grievance. Such a statement is also not enough to show that Respondent’s stated reason for terminating Grievant’s employment was pretextual given the clear misconduct on Grievant’s part.

While Respondent may not have suffered direct financial loss because of Grievant’s communication with Ms. Arthur there was certainly harm to Respondent’s reputation. Grievant, who Ms. Arthur trusted and considered a friend, told Ms. Arthur that other Fund employees “talked trash” about her and that Grievant was the only one that defended her. That is harmful. That is damaging to Respondent’s reputation. That fosters distrust between Ms. Arthur and Fund employees. That is a valid reason to terminate an at-will employee.

The best evidence that Grievant’s termination was not pretextual is that Respondent could very easily have fired Grievant for the three hundred thousand dollar mistake and for Grievant’s dishonesty surrounding that mistake. Instead, Grievant only received a written warning and Director Boggess immediately offered training and was personally involved in trying to resolve the issues Grievant brought up during the level one conference which she stated were negatively impacting her ability to do her job. The clear precipitating event is when Director Boggess learned of Grievant’s unprofessional statements to Ms. Arthur. While it is true the termination would not have

been proper if Grievant had civil service protection, she did not. While it is true that Director Boggess might have given Grievant another chance because she was a long-term employee, she was not required to do so. The stated reason for the termination is not pretextual.

Grievant also appears to argue mitigation of the termination is warranted. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is

clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

It is unclear if mitigation is a properly available remedy to an at-will employee. To the extent that it is, Grievant has failed to prove that mitigation is warranted. Although Grievant was a long-term employee who had a previously good work history, over the last few years that had changed. Although Grievant appears to have gone through some difficult personal issues that likely contributed to the decline in her work, it appears that Grievant was unwilling to adapt to the changes in the office. Grievant refused to take correction from her supervisor, was dishonest when confronted with her initial mistakes, and then escalated the situation by involving an important business partner in her dispute with Respondent. Further, she reacted to her termination by inappropriately contacting the business partner, essentially accusing her of lying, and vaguely threatening her by saying that she should find out who had "lied on her." Although Respondent's former HR Director Adola Miller testified that she believed that termination was excessive, Ms. Miller was not familiar with the entirety of the situation and Respondent had chosen to make changes in recent years to be more strict with employees, which is not improper. Termination of her employment was not clearly excessive and there appears to be little hope of rehabilitation. Mitigation is not warranted.

As a separate grievance issue, the written reprimand is moot as the termination of Grievant's employment is upheld. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)). "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ*., Docket No. 92-35-270 (Feb. 19, 1993). The discipline did not result in a loss of pay so a determination of whether it was proper to issue the written reprimand in not necessary. Any evidence relating to the written reprimand that pertained to the termination of Grievant's employment have been addressed in that context.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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).

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. Grievant failed to prove her employment was other than at will.

4. “[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)).

5. “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)).

6. “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).

7. Therefore, a grievant employed at will alleging she was wrongfully terminated has the burden to prove by a preponderance of the evidence that the termination of her 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).

8. "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. The West Virginia Human Rights Act also prohibits retaliation against employees for asserting rights conveyed by the Act. W. VA. CODE § 5-11-9(7)(C).

9. The West Virginia Supreme Court of Appeals has further found that the grievance procedure "advances a substantial public purpose, and that public policy considerations demand that an employer not be permitted to violate the rights an

employee enjoys under this process." *Wounaris v. W. Va. State Coll*., 214 W. Va. 241, 249, 588 S.E.2d 406, 414 (2003) (per curiam).

10. Grievant successfully alleged violation of substantial public policies.

11. The Grievance Board analyzes cases of at-will employees alleging the violation of substantial public policy due to protected class or protected activity discrimination 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); *Hooker v. Offices of the Ins. Comm'r*, Docket No. 2019-0505-DOR (Feb. 28, 2020).

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

13. In order to make a *prima facie* case of protected class discrimination Grievant must prove "(1) That [Grievant] is a member of a protected class. (2) That the employer made an adverse decision concerning [Grievant]. (3) But for [Grievant'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).

14. Grievant made a *prima facie* case of protected activity discrimination but not protected class discrimination.

15. Once Grievant has made a *prima facie* case of either protected activity or protected class discrimination the burden then shifts to Respondent to provide some legitimate, nondiscriminatory reason for the dismissal. *Conway*, 178 W. Va. at 171, 358 S.E.2d at 430; *Roach*, 198 W. Va. at 701, 482 S.E.2d at 686. "The reason need not be a particularly good one. It need not be one which the judge or jury would have acted upon. The reason can be any other reason except that the plaintiff was a member of a protected class. If the fact finder believes that the proffered reason was the true reason for the decision, then the employer, while he may be guilty of poor business practices, is not guilty of discrimination." *Conaway*, 178 W. Va. at 171, 358 S.E.2d at 430.

16. Respondent provided a legitimate, nondiscriminatory reason for Grievant's termination from employment.

17. "Of course, after the employer has set out his reason for the decision, the employee will have the chance to rebut the employer's evidence with a showing that the stated reason was merely a pretext for discriminatory motive." *Id*.

18. Grievant failed to prove that Respondent's stated reason was pretextual.

19. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the

offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

20. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

21. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

22. Grievant failed to prove mitigation of the punishment is warranted.

23. “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)).

24. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ*., Docket No. 92-35-270 (Feb. 19, 1993).

25. As the termination of Grievant’s employment is upheld, the grievance protesting the written reprimand is moot.

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: June 25, 2020

Billie Thacker Catlett
Chief Administrative Law Judge