THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT PAUL TATE,
Grievant,

v. **Docket No. 2020-0711-MAPS**

DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF COMMMUNITY CORRECTIONS/
PARKERSBURG CORRECTIONAL CENTER AND JAIL,
Respondent.

DECISION

Grievant, Robert Paul Tate, was employed by Respondent, Division of Corrections and Rehabilitation ("DCR") in the Bureau of Community Corrections. He was assigned to the Parkersburg Correctional Center and Jail ("PCCJ"). Pursuant to W. VA. CODE § 6C-2-4(a)(4), Mr. Tate filed an expedited grievance form directly to level three dated December 17, 2019. Grievant alleges that he was dismissed from employment based upon retaliation in violation of Workers' Compensation and Whistleblower laws.[1]

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on August 17, 2020, and August 21, 2020. Grievant Tate personally appeared and was represented by Kirk Auvil, Esquire, The Employment Law Center, PLLC. Respondent DCR appeared in the person of Aaron Westfall, PCCJ Superintendent, and was represented by Briana Marino, Esquire, Assistant Attorney General. This matter became mature for decision on October 5, 2020, upon receipt of the last Proposed Findings of Fact and Conclusions of Law from the parties.

[1] Grievant attached a lengthy supplemental statement to his grievance form which is hereby incorporated into the record in its entirety.

Synopsis

Grievant was dismissed from employment for violating DCR Policy 129.03 which requires employees to immediately report any arrest for a misdemeanor or felony to their immediate supervisor. Grievant was arrested on a felony charge in North Carolina and pled guilty to a reduced misdemeanor charge. Grievant did not report either event to his supervisor. The charges were later discovered during a routine records check performed for other reasons. Grievant admits that he did not report the arrest and conviction but argues that in truth, Respondent terminated his employment in retaliation for him previously reporting alleged violations of policies by others at PCCJ and his Workers' Compensation claim. Respondent proved that it had valid non-retaliatory reasons for terminating Grievant's employment. Grievant did not prove that those reasons were pretextual.

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, Robert Tate, has been employed for approximately four and a half years by Respondent DCR as a correctional counselor. During that time, he has been assigned to the Parkersburg Correctional Center and Jail.

2. While working at the PCCJ, Grievant also collected and sold NASCAR[2] memorabilia and souvenirs, including sheet metal sheared off the race cars during and after races. Grievant's participation in this venture was generally known by employees at PCCJ including supervisors.

[2] National Association of Stock Car Auto Racing.

3. Grievant routinely removed the discarded scrap metal from dumpsters and racers' garages located near various racetracks, including The Charlotte Motor Speedway located in Cabarrus County, near Concord, North Carolina.

4. In October 2019, DCR began to prepare to complete Prison Rape Elimination Act (PREA) audits which included a criminal background check on all employees. Background checks were performed on all employees in 2019. Each employee, including Grievant,[3] signed a consent for release of information to conduct a background check.

5. Grievant's background check was returned to PCCJ on October 25, 2019.

6. Grievant's background check revealed a felony larceny arrest by the Mount Airy, North Carolina Police Department dated November 14, 2018. Grievant's background check further revealed a misdemeanor larceny disposition on June 24, 2019, with a $50.00 fine, $382.00 court costs, 12 months unsupervised probation, and restitution of $6,000.00.

7. These charges were the result of a trip Grievant and his teenage son made to Charlotte Motor Speedway on March 9, 2018. While at the grounds surrounding the Speedway, Grievant and his son climbed over two fences and took sheet metal from a rack which was situated near a dumpster. The rack was on the property of a private company, Stewart Haas Racing, which collects and resells race related sheet metal.

8. The misadventure of Grievant and his son was caught on a closed-circuit video camera set up on the company's property. The video camera showed them climbing two fences and handing twelve pieces of scrap race car metal, worth approximately

[3] Respondent Exhibit 6. Release form signed by Grievant on October 23, 2019.

$6,000, over the fence. Grievant offered the scrap metal for sale on Twitter and Facebook accounts.

9. Warrants and an extradition order were issued for Grievant's arrest. When he was notified that he was being sought by law enforcement, Grievant turned himself in to the Mount Airy North Carolina Police Department on November 14, 2018. Grievant was charged and held until he was released on a property bond.

10. Respondent initiated an internal investigation to validate the background report and concluded the report was accurate. As part of the investigation, Respondent researched Grievant's personnel file to determine if it included any information indicating Grievant self-reported the arrest and disposition in North Carolina. None was found. Grievant's supervisors confirmed that Grievant had not reported verbally or in writing any information about the North Carolina criminal charges or the disposition.

11. On October 29, 2019, Grievant sustained an alleged injury at work, filed a Workers Compensation claim, and remained off work on compensation until his dismissal on December 2, 2019.

12. At the conclusion of the internal investigation, Superintendent Aaron K. Westfall and Deputy Superintendent Brian Moler held a predetermination conference with Grievant on December 2, 2019. The predetermination letter with the arrest and disposition information was read to the Grievant. The Grievant responded that:

- He believed the self-reporting of arrests policy had been "archived" and was no longer in effect;
- He did not "know how background checks were part of PREA";
- He was currently on leave for a work-related injury and believed the allegations against him in the predetermination meeting were "retaliation for being on worker's compensation; and,
- Grievant believes that he "had a target on his back" for reporting a matter involving other employees to the news media.

13. Superintendent Westfall issued a letter dismissing Grievant from employment at the PCCJ dated December 2, 2019.[4] The letter stated that Grievant was dismissed for violating the following policies:

- **WVDCR Policy 129.03** *Self-Reporting Arrests and Domestic Violence Protection Orders by Employees.*
  Section I – Any Employee who is arrested for a misdemeanor or felony crime shall report the following information via memorandum to his/her immediate supervisor on their next workday following said arrest; place, date, time, arresting agency, and crime.
  Section III - The employee will notify his immediate supervisor in writing of the final disposition of any arrest or domestic violence protection order on their next workday after receiving the disposition by submitting a copy of the disposition.

- **WVDOC Policy 100** *Purpose and Mission*
  Section 4 – B Integrity
  the WVDOC must maintain its integrity because it is held accountable by all parties affected by the correctional system . . . The WVDOC through its staff demonstrates its integrity by modeling appropriate behavior to its inmates. Also, the WVDOC, through its staff, demonstrates integrity by exhibiting ethical behavior in all dealings with all parties.

- **WVDOC Policy 129.00** *Progressive Discipline*
  1. The Division of Corrections expects its employees to:
  a. Conduct themselves in such a manner that their activities both on and off duty will not discredit either themselves, other employees, or the division;
  b. Conduct themselves in a matter that creates and maintains respect of the Division of Corrections and the State of West Virginia;
  c. Avoid any action which might result in, or create the appearance of, affecting adversely the confidence of the public in the integrity of the Division or the State; and
  d. Discuss with their immediate supervisors any problems arising with matters within the scope of this policy.

14. Grievant had previously been investigated for not reporting a domestic violence incident with the police involving his wife. Grievant was ultimately not disciplined

[4] The letter was amended from a previous letter which had an error regarding the fifteen-day notice provision.

for failure to report this incident because he was not formally charged. After this incident, Grievant clearly was aware of the mandatory reporting policy.

15. When Grievant was arrested he was aware of the policy requiring him to report the arrest to his supervisor. He looked up former WVDOC Policy 129.03 on the Department's database and found that it had been archived. He called his supervisor Pat Shreves and asked what it meant for a policy to be archived. Mr. Shreves told him that it generally meant that the policy was no longer in effect. The WVDOC policy had been replaced by WVDCR Policy 129.03 when the Division of Corrections was incorporated into the Division of Corrections and Rehabilitation by the legislature.

16. WVDCR Policy 129.03 and WVDOC Policy 129.03 are virtually identical. WVDCR Policy 129.03 was in place when Grievant was arrested and the charges against him in North Carolina were resolved.

17. Grievant signed a "certificate of understanding" acknowledging that he read, understood, and would comply with WVDCR Policy 129.03 on December 8, 2018.[5] (Respondent Exhibit 4)

18. Grievant had reported what he believed to be policy violations by other employees during his employment with Respondent.

19. Grievant reported Superintendent Westfall for giving an inmate a pair of pants. It is prohibited for staff to give gifts to the inmates. The inmate had torn his pants while performing work at the facility and Superintendent Westfall had received prior permission before giving him a new pair of pants. Superintendent Westfall was angry with Grievant for making that report without talking to him first.

[5] Grievant denies that he signed the acknowledgment.

20. Grievant reported a correctional officer for hugging an inmate. Grievant believed that the officer's action was inappropriate conduct in violation of the Prison Rape Elimination Act. Superintendent Westfall concluded that the hug was not in violation of the Prison Rape Elimination Act, because the correctional officer had known the inmate from previous facility and the hug was simply a friendly greeting.

21. In October 2018, two female correctional officers made an EEO complaint alleging they had been sexually harassed by their male supervisor. An EEO investigation was underway. A month later, one of the complainants confided with Grievant that she was frustrated with the amount of time the investigation was taking. Grievant contacted WTAP, a local TV station in Parkersburg, West Virginia, and gave a reporter information on Respondent's inaction regarding the sexual harassment of two of its employees. Grievant gave the names of the victims and alleged perpetrator of the harassment to WTAP during this conversation.

22. A WTAP reporter called Respondent for comment, whereupon Respondent sought the identity of the person who reported the harassment to WTAP. During this discussion, the reporter divulged Grievant's telephone number to Respondent as the person who had made the report. From the telephone number Respondent discerned that Grievant had contacted the television station regarding the EEO investigation.

23. Superintendent Westfall issued a written reprimand to Grievant dated November 8, 2018, for improperly releasing information regarding an EEO investigation to the public rather than voicing his concerns through proper internal channels. Grievant did not contest this disciplinary action.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). 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).

Since Grievant was a tenured employee in the state's classified service, the Respondent must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk*

v. Civil Service Comm'n, [175 W. Va. 279,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin*., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965*)." Scragg v. Bd. of Dir./W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994); *Humphrey v. Div. of Corr.,* Docket No. 2013-0366-MAPS (June 12, 2014).

It is uncontested that Grievant was charged with felony larceny in the state of North Caroline and pled guilty to a reduced charge of misdemeanor larceny on June 24, 2019. He received a $50.00 fine, $382.00 court costs, 12 months unsupervised probation and paid court ordered restitution of $6,000.00. The theft occurred in March 2018, and the final disposition of the charge occurred in June of 2019. Grievant did not report to his supervisor at the PCCJ or any agent of the Respondent that he had been arrested on a felony charge and had been adjudged guilty of a misdemeanor charge. It is also undisputed that Respondent first discovered the charges and plea while conducting criminal record checks on its employees on October 25, 2019.

WVDCR Policy 129.03, *Self-Reporting Arrests and Domestic Violence Protection Orders by Employees* states the following:

> Section I – Any Employee who is arrested for a misdemeanor or felony crime shall report the following information via memorandum to his/her immediate supervisor on their next workday following said arrest; place, date, time, arresting agency, and crime.
> Section III - The employee will notify his immediate supervisor in writing of the final disposition of any arrest or domestic violence protection order on their next workday after receiving the disposition by submitting a copy of the disposition.

Grievant clearly violated this policy by failing to report his arrest and conviction for charges in North Carolina. Grievant argues that he was unaware that the policy was still

in effect and that the real reasons he was dismissed was retaliation for his reporting other employees for violating policy and for his being on Workers' Compensation.

WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating:

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

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

The critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was the motivation for the adverse personnel action. *Freeman, supra.* After *Freeman,* the Court has reiterated that retaliatory motive can be inferred due to the short passage of time between the injury and the adverse action. *Frost v. Bluefield State Coll*., No. 14-0841 W. Va. Supreme Court, June 12, 2015 (memorandum decision).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See, Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant argues that he has reported what he believed to be violations of law and policy which are protected activities. He reported Superintendent Westfall for what he believed to be giving a gift to an inmate and a correctional officer for hugging an inmate which Grievant believed was in violation of the Prison Rape Elimination Act. Grievant also believes that reporting the slowness of a sexual harassment investigation at the jail to the

news media was a protected activity as well. No one contests that Grievant is required to report good faith beliefs that DCR policies and PREA are being violated. Making such good faith reports are protected activities.

Grievant is also required to report suspected sexual harassment occurring in the PCCJ. As Grievant points out it is illegal for an employer to "engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." WEST VIRGINIA CODE §5-11-9(7)(C).[6] However, in this case, the alleged harassment had already been reported by the alleged victims and an investigation was underway. Grievant had appropriate avenues to report any additional information he had regarding the allegations which did not include making an anonymous tip to the news media, such investigations are generally confidential. Grievant was given a written reprimand for reporting this investigation to the media and did not contest that reprimand.[7] It is unlikely that Grievant reporting to the media, rather following internal channels, is a protected activity.[8] But it is clear that Grievant had made reports that were protected acts.

Additionally, Grievant's making of a Worker's Compensation act is a protected act. The following provisions of the Workers' Compensation Act make that clear:

> No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

[6] This provision is part of the West Virginia Human Rights Act.
[7] That would have been the obvious time to raise the issue of participating in a protected activity. However, it is not unreasonable to believe that Grievant simply did not think it was worth the trouble of fighting over a minor penalty.
[8] Because this issue is not dispositive of the case it is left for another time.

W. VA. CODE § 23-5A-1.

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. . .

W. VA. CODE § 23-5A-3.

The West Virginia Public Employees Grievance Board does not have jurisdiction to hear and decide claims pursuant to the procedures set out in WEST VIRGINIA CODE §23-5A-1. However, the Grievance Board has jurisdiction to determine if employees are the subject of retaliation, as that term is defined in W. VA. CODE § 6C-2-2(o), for exercising their protected rights to seek Workers' Compensation. *See generally Vest v. Board of Educ*., 193 W. Va. 222, 227, 455 S.E.2d 781 (1995).

Grievant proved that he engaged in protected activity. There is no doubt that he has subsequently been treated in an adverse manner since his employment has been terminated. Likewise, Respondent's representatives were clearly aware of Grievant's protected activities. The decisive issue is whether Grievant proved that his protected activity motivated the adverse personnel action.

Grievant was injured and was off work on Workers' Compensation on October 29, 2019. He was dismissed from employment on December 2, 2019, less than five weeks later. This is a short enough period of time to infer that Respondent had a retaliatory motivation. *Frost v. Bluefield State Coll*., *supra.* By a preponderance of the evidence, Grievant made out a *prima facia* case that he was subject to reprisal as defined in the

grievance statute. Now it falls upon Respondent to rebut the presumption of retaliation by proving legitimate, non-retaliatory reasons for its action. *Id.*

As stated previously, it is uncontested that Grievant was arrested for felony larceny charges in North Carolina and ultimately pled guilty to misdemeanor charges related to the same incident. WVDCR Policy 129.03 unequivocally required Grievant to immediately report those events to his supervisor, which he did not do. Grievant knew about the policy based upon an earlier incident where an investigation had occurred to determine if he had failed to report an arrest for domestic battery. Respondent proved by a preponderance of the evidence that it had legitimate, non-retaliatory reasons for the termination of Grievant's employment.

Grievant counters that these reasons were merely a pretext to allow Respondent to jettison an employee who had been a thorn in managements side. He points out that he believed the reporting policy was no longer in effect and he did not sign the Certificate of Understanding form indicating that he had read and understood the most recent version of WVDCR Policy 129.03. He also argues that the circumstances around his arrest indicate that he mistakenly believed that the sheet metal had been discarded. He argues that Respondent's failure to take these factors into account demonstrates that the real reason he was dismissed was his reporting activities and his Workers' Compensation Claim.

In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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); *Pine v. W. Va. Dep't of Health & Human*

Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant testified that he did not sign the form acknowledging that he read and would comply with for Policy 129.03,[9] even though the form indicates that he did on December 8, 2018. The only actual letters appearing on the form in the signature area are "R" and "T" with a line after each letter. At first blush, it appears that this might not be an actual signature. However, Grievant did not contest that he did not sign the Authorization for Release of Information[10] related to his background check. The signature

[9] Respondent Exhibit 4.
[10] Respondent Exhibit 6.

Grievant placed on that form is substantially similar to the one appearing on the acknowledgment form.

Grievant's claim that he did not realize that he was trespassing at the racetrack and that the sheet metal had been thrown away also does not bear scrutiny. He admitted that he had to scale two fences to get to the sheet metal and it was placed on racks instead of in the nearby dumpster.

Grievant has an obvious motive for not being truthful. He is trying to keep his job. Additionally, Grievant's testimony on these issues are not consistent with the facts. The documentary evidence shows more likely than not that Grievant signed the Certificate of Understanding. Further, his statement that he believed the sheet metal taken at the racetrack had been discarded as trash is not consistent with his testimony related to the incident. Grievant's testimony on these issues is simply not credible.

Grievant did not prove that the non-retaliatory reasons give by Respondent for dismissing him were pretextual. Accordingly, the Grievance is **DENIED.**

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. 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).

2. Since Grievant was a tenured employee in the state's classified service, the Respondent must also demonstrate that misconduct which forms the basis for the

dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989).

3. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n,* [175 W. Va. 279,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin*., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965*)." Scragg v. Bd. of Dir./W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994); *Humphrey v. Div. of Corr.,* Docket No. 2013-0366-MAPS (June 12, 2014).

4. WVDCR Policy 129.03 *Self-Reporting Arrests and Domestic Violence Protection Orders by Employees* states the following:

> Section I – Any Employee who is arrested for a misdemeanor or felony crime shall report the following information via memorandum to his/her immediate supervisor on their next workday following said arrest; place, date, time, arresting agency, and crime.
> Section III - The employee will notify his immediate supervisor in writing of the final disposition of any arrest or domestic violence protection order on their next workday after receiving the disposition by submitting a copy of the disposition.

5. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

6. In syllabus point six of *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004), the West Virginia Supreme Court of Appeals

specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

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

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

7. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was motivating factor in the adverse personnel action. *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004).

8. An inference can be drawn if the "complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004).

9. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989).

10. "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See, Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

11. Due to the short time between Grievant's most recent protected activity it is inferred that Respondent has a retaliatory motivation. By a preponderance of the evidence, Grievant made out a *prima facia* case that he was subject to reprisal as defined it the grievance statute. *Freeman supra,* 215 W. Va. 272, 277, 599 S.E.2d 695.*Id.*

12. Respondent proved by a preponderance of the evidence that it had legitimate non-retaliatory reasons for the termination of Grievant's employment.

13. Grievant did not prove that the non-retaliatory reasons given by Respondent for dismissing him were pretextual.

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: October 23, 2020

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE