

14-0679

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JENNIFER N. TAYLOR,

Plaintiff,

v.

**THE WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, ROCCO
FUCILLO, WARREN KEEFER AND
BRYAN ROSEN,**

Defendants.

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CATHY S. G. SMITH, CLERK
KANAWHA COUNTY CIRCUIT COURT

**Civil Action No. 12-C-2029
Honorable James Stucky**

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SUSAN S. PERRY,

Plaintiff,

v.

**THE WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, ROCCO
FUCILLO, WARREN KEEFER AND
BRYAN ROSEN,**

Defendants.

**Civil Action No. 12-C-2031
Honorable Jennifer Bailey**

**ORDER GRANTING DEFENDANTS' COMBINED MOTION
FOR SUMMARY JUDGMENT**

On April 16 2014, came the Plaintiffs Susan S. Perry ("Perry") and Jennifer Taylor ("Taylor"), by counsel Walt Auvil, Michele Rusen, and the law firm of Rusen and Auvil, PLLC, and the Defendants, the West Virginia Department of Health and Human Resources ("DHHR"), Rocco Fucillo ("Fucillo"), and Warren Keefer ("Keefer"), by counsel, Charles R. Bailey, Dawn E. George, Betsy L. Stewart, and the law firm of Bailey & Wyatt, PLLC, and

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presented this Court with their arguments pertaining to Defendants' Combined Motion for Summary Judgment. The Court has considered Defendants' Combined Motion for Summary Judgment ("Motion"), the Memorandum of the Defendants in Support of their Joint Motion for Summary Judgment ("Memo"), Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Opposition"), the Reply of Defendants to Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Reply"), the arguments of counsel, and the relevant legal authorities; and it hereby **GRANTS** Defendants' Combined Motion for Summary Judgment based on the Findings of Fact and Conclusions of Law that follow.

I. FINDINGS OF FACT

1. Perry filed her First Amended Complaint ("Perry Complaint") against DHHR, Fucillo, and Keefer with the Circuit Clerk of Kanawha County, West Virginia on October 9, 2013, as a result of her termination from employment with DHHR. Perry asserted a violation of the Whistle-Blower Act claim against the Defendants pursuant to *W.Va. Code* § 6C-1-1, *et seq.*, (Count I) as well as gender discrimination claims (Count V) and illegal termination (Count VI) claims. Further, Plaintiff's Amended Complaint is unclear as to whether Plaintiff claims Defendants' violations of honest legal advice (Count II), the Ethics Act (Count III), and false light/invasion of privacy (Count IV) led to retaliatory discharge.

2. Taylor filed her First Amended Complaint ("Taylor Complaint") against DHHR, Fucillo, and Keefer with the Circuit Clerk of Kanawha County, West Virginia on July 9, 2013, as a result of her termination from employment with DHHR. Taylor asserted a violation of the Whistle-Blower Act claim against the Defendants pursuant to *W.Va. Code* § 6C-1-1, *et seq.*, (Count I) and gender discrimination (Count V). Further, Taylor's Amended Complaint is unclear as to whether she claims that the Defendants' violations of honest legal

advice (Count II), the Ethics Act (Count III), and false light/invasion of privacy (Count IV) led to retaliatory discharge.

3. The allegations of both Amended Complaints relate to the awarding of a contract (“HHR12052”) under which the successful bidding vendor would provide advertising services to DHHR. **Perry Complaint ¶¶ 15 and 17, Taylor Complaint ¶¶ 14 and 16.**

4. The Plaintiffs allege that the bids on HHR12052 were solicited via a request for proposal (“RFP”) and that “Bryan Rosen, Purchasing Director for WVDHHR, issued RFP HHR 12052 seeking bids on the advertising contract.” **Perry Complaint ¶ 19 and Taylor Complaint ¶ 18.** That allegation is incorrect. The bids on HHR12052 were solicited via an RFP; however the RFP was not issued by Bryan Rosen (“Rosen”), who heads DHHR’s purchasing office. It was issued by the Purchasing Division of the Department of Administration **Aff. Tincher, Memo Ex. C ¶¶ 10-11, Aff. Wagner, Memo Ex. D ¶ 5.**

5. The Plaintiffs characterize the processing of the HHR12052 RFP as a task that DHHR had to do “right itself”; and they characterize the Department of Administration (i.e. its Purchasing Division) as “another State agency” at which DHHR’s “mistakes might be caught upon review.” **Walt Auvil Argument, p. 25.** Those characterizations are inaccurate. HHR12052 is a Department of Administration contract – not a DHHR contract – and that is why its RFP was issued by the Purchasing Division – not by DHHR. Because DHHR was to be the recipient of the services provided via the contract, its role in the process was to assign employees to evaluate the extent to which the proposals met its needs and to make recommendations to the Purchasing Division **Aff. Tincher ¶¶ 11-12, Aff. Wagner ¶ 7.**

6. The Plaintiffs are familiar with the difference between a contract that is processed by DHHR, “exempt contract”, and a contract that is processed, for the benefit of

DHHR, by the Purchasing Division, “non-exempt contract”, because they described that difference in their respective pleadings. **Perry Complaint ¶ 28, Taylor Complaint ¶ 27.**

7. The Plaintiffs cite problems that occurred during the processing of “the high profile MMIS contract” as justification for Perry’s insertion of Taylor into the processing of HHR12052. **Auvil Argument, pp. 13-14.** The processing problems in the MMIS contract were irrelevant to the processing of HHR12052 for two reasons. First, Perry inserted Taylor into the evaluation committee stage of the processing of HHR12052; and there is no evidence that the MMIS problems involved the evaluation committee stage of its processing. Second, MMIS was an exempt contract that was processed entirely by DHHR¹; and as indicated in the preceding finding, HHR12052 was processed, for the benefit of DHHR, by the Department of Administration contract with input from DHHR. **Perry Complaint ¶ 28, Taylor Complaint ¶ 27.**

8. David Tincher (“Tincher”) is the “executive officer” of the Purchasing Division; and he has the power and duty to “examine the provisions and terms of every contract entered into for and on behalf of the State of West Virginia that imposes any obligation upon the state to pay any sums of money for commodities or services and approve each such contract as to such provisions and terms.” *W. Va. Code* §5A-3-3(9). **Aff. Tincher, Memo Ex. C, ¶ 2.**

9. *W. Va. Code* § 5A-3, et seq. and *W. Va. Code R.* § 148-1-1, et seq. give Tincher the authority to “purchase or contract for, in the name of the State, the commodities, services or printing required by the spending units of State government” and to “prescribe the manner in which commodities, services or printing shall be purchased, delivered, stored, and distributed.” Those prescriptions are contained in the *West Virginia Purchasing Division*

¹ Bureau for Medical Services exemption by statute *W. Va. Code* § 9-2-9b.

Procedures Handbook (“*Purchasing Handbook*”), which is an online publication promulgated by the Purchasing Division in order to provide guidance to state agencies subject to Purchasing Division oversight in the procurement process. **Aff. Tincher, Memo Ex. C ¶ 3.**

10. Section 7.2.4 of the *Purchasing Handbook* requires that a vendor responds to an RFP by submitting two separate proposals, a “technical” proposal (that describes the services that the vendor is proposing to perform) and a “cost” proposal (the dollar amount that the vendor will charge for its proposed services). **Memo Ex. CC.** After each of the bidding vendors’ two proposals are received by the Purchasing Division, the technical proposals are forwarded to an agency “evaluation committee”, which compares the content of the technical proposals to the requirements of the RFP and recommends to the Purchasing Division a certain score for each proposal. Those recommendations are not accepted automatically by the Purchasing Division; and they may be preceded by discussions between a designated representative on the committee and a supervisory member of the Purchasing Division staff. **Aff. Tincher, Memo Ex. C ¶ 11.** After the technical score recommendations have been approved by the Purchasing Division, it opens the cost proposals. *Purchasing Handbook*, Sec. 7.2.4. Once the cost proposals are opened the technical scores cannot be changed. **Id. ¶ 11.**

11. After the Purchasing Division opens the cost proposals, it forwards them to the evaluation committee, which computes cost scores, combines them with the technical scores, and sends recommended total scores, and a recommendation to award the contract, to the Purchasing Division. **Memo Ex. CC.** After the Purchasing Division approves the total scores, it prepares the contract for award to the vendor with the highest total score and transmits the documentation to the Attorney General’s office for review and approval as to

form. After the Attorney General's office completes its review, and assuming approval as to form is granted, the contract will be encumbered and awarded to the highest scoring vendor.

Aff. Tincher ¶ 11.

12. Section 7.2.4 of the *Purchasing Handbook* requires that the recommendations made by the evaluation committee to the Purchasing Division be "consensus" recommendations agreed to by all voting members of the committee. **Memo Ex. CC.** For the technical proposals, this process entails each voting member comparing each proposal to the requirements specified in the RFP. After each voting member completes this process, all the members confer about their opinions and eventually agree on a score to be assigned to each proposal. *Id.* The "consensus" recommendation concept is important because it reduces the extent to which the personal biases of each committee member will skew the scores that the committee recommends to the Purchasing Division. *Id.* Section 7.2.4 provides that if the committee is unable to reach a scoring consensus Tincher can appoint new members or excuse existing members **Aff. Tincher, Memo Ex. C ¶12.**

13. During the proposal evaluation process, the function of DHHR's purchasing office acted as a liaison between the DHHR employees on the evaluation committee and the Purchasing Division.

14. Four vendors submitted technical and cost proposals in response to the HHR12052 RFP. Those vendors included Fahlgren Mortine and The Arnold Agency. The Arnold Agency held the advertising contract that was to be superseded by HHR12052. **Memo, p. 2.**

15. On April 5, 2012, Tincher and Assistant Purchasing Director Mike Sheets each reviewed and approved the technical-proposal scores that the HHR12052 evaluation committee had recommended to the Purchasing Division **Aff. Tincher ¶13.** That approval

was preceded by an initial Division-level review and approval by Roberta Wagner and Connie Hill **Aff. Wagner, Memo Ex. D ¶ 6**. The objective of the Division's two-tier review and approval was to ensure that the recommended scores were consistent and adequately justified. **Aff. Tincher ¶ 13**.

16. Based on the April 5 technical-score approvals by Connie Hill, Roberta Wagner, Mike Sheets, and David Tincher, the Purchasing Division opened the cost proposals on April 12, 2012, and forwarded them to the evaluation committee for it to process a total score recommendation. **Aff. Tincher ¶ 13**.

17. The requirement, in the *Purchasing Handbook*, that an evaluation committee score the technical proposals and obtain Purchasing Division concurrence before its members have an opportunity to learn the cost proposal amounts eliminates the possibility that any committee member will allow his or her evaluation of the technical proposals to be influenced, consciously or subconsciously, by an awareness of the price that the vendors propose to charge for the goods or services that they are proposing to provide. **Best Value Procurement Training, Memo Ex. NN**.

18. After receiving the HHR12052 cost proposals, the evaluation committee converted those proposals into cost scores, combined those scores with the technical proposal scores to produce the total scores. Fahlgren Mortine received the highest scoring vendor; and on April 16, 2012, the committee prepared a memorandum to the Purchasing Division recommending that the contract be awarded to Fahlgren Mortine. ***Purchasing Handbook, Sec. 7.2.4, Memo Ex. CC; Memo Ex. B***.

19. In late April 2012 – after technical and cost scoring was completed – DHHR's assistant secretary for communications and legislative affairs John Law ("Law") became aware that the evaluation committee was not going to recommend that the Purchasing

Division award HHR12052 to The Arnold Agency. Memo, p. 4.

20. During 2011, while the HHR12052 RFP was being prepared, Law had informed various individuals, including Perry, that because he had worked “closely” with The Arnold Agency (which he presumed would submit proposals for the advertising contract that would supersede the contract that it held), his involvement with the RFP process would be limited to reading the RFP. **Law August 23, 2011, e-mail, Memo Ex. F.**

21. During April 2012, Law became concerned that HHR12052 might not be awarded to The Arnold Agency; and he began predicting problems that would occur if the contract were awarded to Fahlgren Mortine. The problems that he anticipated included project delays due to a turnover from the current vendor (i.e. The Arnold Agency) to a successor vendor (presumably Fahlgren Mortine) and adverse publicity that would be generated regarding the Governor after the media learned that the contract had been awarded to an out-of-state company such as Fahlgren Mortine. **Memo, p. 5.**

22. Notwithstanding Law’s representations regarding Fahlgren Mortine, it is actually a West Virginia corporation. *Id.*

23. Law requested Perry to conduct a legal review of the technical score recommendations that the evaluation committee had made to the Purchasing Division; and Perry assigned Taylor to conduct the legal review. **Perry Complaint ¶¶ 20 and 32, Taylor Complaint ¶¶ 19 and 31.**

24. Between the time that Law requested the legal review and the time that Perry assigned Taylor to conduct the review, neither of them asked Law to explain why he had requested the review. **Perry Depo., Memo Ex. H, p. 332, Taylor Depo., Memo Ex. J, p. 187.**

25. Taylor believed that Law “didn’t care who got the contract”. **Taylor Depo., p.**

1. But in actuality, Law “would like to have seen The Arnold Agency awarded the contract” because he “worked well” with them. **Law Depo., Memo Ex. R, p. 512.** Notwithstanding what Taylor believed about his motives, Law thought that “everybody understood that” he preferred that the contract be awarded to The Arnold Agency. *Id.*, p. 514.

26. Although, as discussed in finding 7 above, the problems with the MMIS contract are irrelevant to Perry’s decision to insert Taylor into the processing of HHR12052, those problems are relevant to Perry’s and Taylor’s lack of concern about Law’s motive for requesting a review of the evaluation committee. This is because the MMIS problems related to a delay in identifying a conflict of interest contained in a vendor submission. **Perry Complaint ¶ 27, Taylor Complaint ¶ 26.** Consequently Perry assigned Taylor to “review” an issue in HHR12052 that had not been a problem in MMIS; however she failed to assign Taylor to “review” an issue in HHR12052 that had been a problem in MMIS.

27. The provisions of the *Purchasing Handbook* applicable to the processing of the HHR12052 technical and cost proposals *do not provide for a legal review to be conducted at the DHHR level.* **Aff. Tincher, Memo Ex. C ¶ 15.**

28. Although neither Perry nor Taylor had any previous involvement with the evaluation committee for HHR12052 and although DHHR’s purchasing office was responsible for conducting liaison between the committee and the Purchasing Division, neither Perry nor Taylor notified the purchasing office of their review until after it had been completed. **Taylor OIG statement, Memo Ex. Q, pp. 10-11.**

29. Taylor’s legal review consisted only of critiquing the scores that the evaluation committee had assigned to each of the four technical proposals; and it “could have been accomplished by someone without a law degree.” **Taylor Depo., Memo Ex. J, p. 689.** It involved “no legal analysis” and consisted only of a determination by Taylor that she “didn’t

think (the scoring) was consistent and fair”. *Id.*, p. 636.

30. Because the evaluation committee’s technical proposal scores had resulted in a recommendation, to the Purchasing Division, that assigned the highest score to Fahlgren Mortine, whatever critique Taylor made of those scores could not possibly have improved Fahlgren Mortine’s position; but it could have improved The Arnold Agency’s position.

31. According to the Plaintiffs’ pleadings, Taylor’s legal review demonstrated that the evaluation committee’s scores of the technical proposals were “inconsistent, arbitrary and deficient” and “legally indefensible” to the point of being “a poster child for arbitrary and capricious.” **Perry Complaint ¶¶ 42 and 43, Taylor Complaint ¶¶ 41 and 42.** When she was deposed, she testified that if she had known about the Purchasing Division approval, she “probably would have cut the whole process short.” **Taylor Depo., Memo Ex. J p. 390.** She testified, in hindsight, that the Purchasing Division “seems to be satisfied”; and she went on to testify: “I’m not real sure myself but maybe it’s enough to let it go. And maybe we wouldn’t have been where we were.” *Id.*, p. 392.

32. The DHHR purchasing office became aware of Taylor’s legal review on May 4, 2012, when the chairperson of the evaluation committee Marsha Dadisman sent an e-mail to, among others, Rosen and Taylor. Taylor responded by advising DHHR to “(1) send the proposals back for a review by a new committee or (2) send them back for a review by the old committee after a refresher course in how to rate a proposal.” **Taylor May 4, 2012, e-mail, Memo Ex. L.** Rosen responded by asking Ms. Dadisman: “(W)hat legal review are you talking about?” And he informed her and, among others, Law, Perry, and Taylor: “The technical scoring was complete and the cost bids have been opened.” **May 4, 2012, Legal Review E-mail chain, Memo Ex. K.** Rosen subsequently explained to Law that “the technical scoring has already been submitted to and accepted by DOA” (i.e. the Purchasing

Division of the Department of Administration); that the “legal review is not part of the procurement process”; and that “if we try to change our scoring based on the subsequent input of a non-committee member I think we are going to have an issue. *Id.*

33. The Plaintiffs characterize Taylor as having had procurement related experience, having been “familiar with state purchasing requirements” and therefore having been “well-qualified to perform the review” of the evaluation committee’s scoring. Perry Complaint ¶ 36 and Taylor Complaint ¶ 3). However if DHHR had taken either of the actions that Taylor advised it to take, it would have violated Purchasing Division procedures in the following two ways: (1) By causing the opinion of a single person, who was not a procurement professional, to override the consensus opinion of three persons (one who was a purchasing professional and two others who were familiar with the DHHR advertising needs along with two non-scoring members, one procurement professional and one knowledgeable in advertising needs), who also were not procurement professionals but whose consensus opinion had been reviewed and approved by four procurement professionals (see finding 15 above) and (2) by having an evaluation committee score technical proposals after – instead of before – the cost proposals were opened (see finding 10 above).

34. Taylor received the May 4, 2012, e-mails (referenced in finding 32 above) from Rosen explaining that the technical scores, with which Taylor disagreed, had already been approved by the Purchasing Division and that the cost proposals had been opened; however she “wasn’t very clear what he was talking about in the E mails” **Taylor Depo., Memo Ex. J, p. 382**. She “did not know that the cost portions (of the proposals) had been opened” because it “never crossed (her) mind to ask about the cost scores” *Id.*, pp. 248 and 288.

35. On May 16, 2012, Perry and Taylor met with Rosen and Keefer to discuss the legal review and the relationship between Perry’s and Taylor’s advice that the technical

proposals be scored a second time and the fact that (1) the original technical scores had already been approved by the Purchasing Division; and (2) even if those scores had not been approved, it would be a procedural violation to score those proposals for a second time because the cost proposals had been opened after the initial technical proposal scoring. **Memo, p. 9.**

36. The May 16, 2012, meeting was the point at which Taylor “finally understood that the – the cost bids had been opened and technical scores had been sent – both of them had been sent to State Purchasing” **Taylor Depo., p. 382.** The meeting was also the point at which Taylor learned that Tincher “had approved” the same scores with which she had disagreed. **Id., p. 261.** However Taylor’s reaction to Rosen’s and Keefer’s efforts to impart that knowledge to them was to feel “insulted” **Id., p. 395.**

37. Taylor described her impression of Rosen’s and Keefer’s demeanor at the May 16, 2012 meeting as follows: “I took that as a public officer threatening and intimidating me to get me to change my legal opinion and I’m not going to do it. Not for anybody. I went to law school as a single mother. I worked my way through law school. I mean I was divorced, I had a child, I had a baby, I worked, I got no support from anybody. Mom and Dad didn’t put me through college or undergrad or law school, I paid my own way. I worked too hard for this degree. I’m not going to lie. I’m not going to change my legal opinion for anybody.” **Taylor OIG statement, Memo Ex. Q, p. 17.**

38. Ms. Perry and Ms. Taylor have attempted to justify their decision not to involve the purchasing office in – or even notify it of – the “legal review” by citing the office’s supposed incompetence. The result of that decision was a two-month scenario during which the Plaintiffs (1) made one mistake (i.e. violating Purchasing Division procedures by inserting themselves into the procurement process); (2) compounded with a second mistake

(i.e. disregarding Purchasing Division procedures by critiquing the subjective consensus judgments that had been exercised by the members of the evaluation committee); and then (3) made the most serious mistake of advising DHHR to make a mistake of its own (i.e. violating Purchasing Division procedures by having the evaluation committee repeat the scoring process or have a new evaluation committee score them after the scores had already been approved by the Purchasing Division and costs bids had been made public).

39. Viewing herself as having been “insulted” by Rosen and Keefer at the May 16, 2012 meeting, Perry and Taylor disregarded their explanation of why it would be impossible, under the requirements of the *Purchasing Handbook* (Ex. CC), for DHHR to follow her advice to repeat the technical proposal scoring. Perry, Taylor, and Law maintained their position that DHHR would be in legal jeopardy if it did not repeat that scoring; and they decided to seek out influential individuals who, being less familiar with procurement procedures than Rosen and Keefer, might be receptive to assisting them in their efforts to have DHHR do what Rosen and Keefer had explained that the agency could not do.

40. In June 2012, Perry, Taylor, and Law began attempting to convince the Office of the Governor that the technical proposal scoring should be repeated during the June 1, 2012, meeting with Rob Alsop (“Alsop”), the Governor’s chief of staff. Perry and Law informed him that “there could be problems with the scoring,” and “there could be challenges.” *Law Depo., Memo Ex. R, p. 576*. They did not inform Alsop that the scoring had been approved by Tincher almost two months earlier, on April 5, 2012. Perry later updated this Memo to detail that the group reviewing the bids did not include an attorney, the attorneys were not asked to participate or review the scores until it was ready to go to DOA, they reviewed the scoring and believed there were potential issues. Other employees in DHHR were informed of the issues but they believed pulling the contract would taint the

process. **July 3, 2012, Perry Memo to Fucillo, Opposition Ex. 27.** Perry further indicated that Alsop was notified that she and Taylor felt there were flaws in the scoring and that legal challenges were possible. *Id.*

41. Being unaware that Tincher had approved the technical proposal scores, Alsop contacted Ross Taylor (“Taylor”), the Cabinet Secretary of the Department of Administration, and “asked Secretary Taylor to look – have his purchasing division look into the matter.” **Alsop Depo., Memo Ex. S, p. 109.** Tincher personally reviewed the technical scores again and approved them again. **Aff. Tincher, Memo Ex. C ¶ 14.** Taylor reported that to the Office of the Governor; and Alsop took the position “that there were no issues and the contract could be awarded in due course.” **Alsop Depo., Memo Ex. S p. 110.**

42. Law subsequently resurrected the scoring issue with Erica Mani (“Mani”), the Governor’s deputy chief of staff. He cautioned her that “DHHR legal counsel had major concerns with the way the contract was scored.” **Mani Depo., Memo Ex. T, p. 27.** He asked if DHHR’s legal counsel could contact her, to which she responded that they could. *Id.*, p. 29. Taylor subsequently phoned Mani and after exchanging phone messages, the two spoke on July 10, 2012. *Id.*, pp. 30-32. Taylor indicated that she did have “concerns about the scoring of the contract,” and Mani made plans to meet with her. *Id.*, pp. 34-35. As of July 10, 2012, when Taylor was informing Mani about the “major concerns” that she had regarding the scoring, that scoring had already been reviewed and approved by five procurement professionals within the Purchasing Division on three separate occasions; first by Roberta Wagner and Connie Hill in April, second by Tincher and Mike Sheets in April 2012 and third by Tincher in June 2012. **Aff. Tincher, Memo Ex. C, ¶¶ 13-14, Aff. Wagner, Memo Ex. D ¶¶ 6, 10.**

43. Mani never met with Taylor because, after she discussed the situation with

Also, he told her: “No, purchasing’s looked at it. We’re done. We’re out. They can talk to purchasing, whoever they want, but as far as we’re concerned, the contract can be awarded in due course.” **Alsop Depo., p. 116.** Mani then contacted Tincher to determine if he would be willing to discuss Taylor’s concerns directly with her. After Tincher indicated he would speak to Taylor, Mani cancelled her meeting with Taylor and advised Taylor of the same. **Mani Depo., p. 45.**

44. During late June 2012, it became evident that DHHR cabinet secretary Michael Lewis was going to retire and Rocco Fucillo (“Fucillo”) was selected as the acting cabinet secretary effective July 1, 2012. On June 29, 2012, the day that his selection was announced, Warren Keefer telephoned Fucillo to congratulate him and discuss various DHHR issues. **Fucillo OIG Statement, Memo Ex. U.** One of the topics discussed by Keefer and Fucillo was the status of HHR12052. *Id.* Keefer was aware that the contract had not yet been awarded; however, he had been informed by Ross Taylor “that the release would occur soon.” **Keefer OIG Statement, Memo Ex. M.** Keefer told Fucillo about Perry’s and Taylor’s involvement with the evaluation committee. He mentioned being concerned about interference with the procurement process as a result of the contracting scandal that involved the administration of Governor W. W. Barron. He also discussed the May 16, 2012 meeting with Perry and Taylor regarding Taylor’s review of the scoring. **Fucillo Depo., Memo Ex. V, pp. 143-144.**

45. During the first week in July 2012, immediately after Fucillo’s July 1, 2012, appointment as acting secretary of DHHR, Law resurrected the scoring issue with Fucillo. He approached Fucillo regarding HHR12052 and said that the contract was “not good.” **Law Depo., p. 613.** Fucillo declined to discuss the issue and told Law that “there was a process in place and to let it work through the system.” *Id.*, p. 613. Fucillo recalled another

conversation, which Law admits “may have happened,” during the second week in July in which Law again brought the subject up and Fucillo again reminded him that it was inappropriate to discuss concerns about the contract because there was a “process in place” that needed to be allowed to “proceed.” *Id.*, p. 615.

46. During a conference call on the afternoon of July 13, 2012, Perry and Taylor informed Fucillo that essentially, he was already involved. Taylor had accomplished that via the July 10, 2012, telephone conversations with Mani. However Taylor waited three days to inform Fucillo about the conversation with Mani and waited to inform him until the telephone conference on July 13, 2012. Perry and Taylor once again raised the issue of their position that the scoring was “arbitrary and capricious”. *Memo*, p. 12.

47. After the July 13, 2012, conference call with Perry and Taylor, Fucillo telephoned Keefer, Molly Jordan, deputy secretary for policy and procedure, and Mani to discuss the situation with them. **Fucillo Depo., Memo Ex. V, p. 11, 139-141, 295; Mani Depo., Memo Ex. T, p. 47.** Fucillo asked Mani if the Office of the Governor really expected him to contact Tincher. Mani informed him that the Governor’s Office had no interest regarding which vendor was awarded the contract and that it was not going to be involved in the contracting process. **Fucillo Depo., p. 11, Mani Depo., p. 47.**

48. Based on the three preceding conversations and his own understanding of Purchasing Division procedures that Perry, Taylor, and Law seemed inclined to violate, Fucillo made the following decision, “I needed a legal opinion to help give me guidance, independent legal opinion as to whether or not the advice (Perry and Taylor) had given me was appropriate or not.” **Fucillo Depo., p. 120, 149.** He, “then contacted David Bishop, who is an attorney, who’s a report to me [...] and asked him not as the (DHHR) Inspector General, but rather as an attorney, to look into these matters for me and give me a legal opinion.” *Id.*,

p. 121. On July 15, 2012, after David Bishop (“Bishop”) considered the situation, he decided that he could not advise Fucillo and, instead, needed to authorize the commencement of an Office of the Inspector General (OIG) investigation. **Aff. Bishop, Memo Ex. W ¶ 2.** OIG was legislatively created, pursuant to *W. Va. Code* § 9-2-6(6), as semi-autonomous and independent branch of DHHR. Although the OIG inspector generally reports to the DHHR Cabinet Secretary, his investigations cannot be controlled or interfered with by the Secretary. *Id.* The employees within OIG report directly to the Inspector General. To provide security to the Inspector General, the position has been given civil service protection; therefore, not even the Secretary could discharge him without cause. *Id.*

49. On July 16, 2012, the day after Bishop decided to authorize the OIG investigation, there was a meeting among Fucillo, Alsop, and Peter Markham, the Governor’s General Counsel, to discuss the situation pertaining to HHR12052. **Alsop Depo., Memo Ex. S, p. 47.** After the meeting, the Plaintiffs were administratively reassigned to work out of their homes. **Clifton Depo., Memo Ex. Z, pp. 66, 101, 118, 148; Alsop Depo., Memo Ex. S, p. 48.** This was consistent with DHHR policy to remove employees from their work sites when they are under investigation. **Clifton Depo., pp. 104, 114.**

50. Bishop assigned OIG Investigator Christopher Nelson to conduct the investigation. On October 12, 2012, he produced a detailed Report of Investigation. **OIG Report, Memo Ex. X.** The report is 125 pages long, includes 88 exhibits, and an appendix of applicable laws, rules, regulations and policies. The OIG concluded that Perry, Taylor, and Law had violated criminal statute *W. Va. Code* § 5A-3-31, which prohibits interference with a state contract award. *Id.*, p. 118. The OIG also concluded that they had violated *W. Va. Code* § 6B-2-5(b), which outlines ethical standards for elected and appointed officials and public employees. *Id.* Furthermore, the OIG concluded that they had violated

Purchasing Division procedures and DHHR Policy Memorandum 2018, which governs employee conduct. *Id.*

51. Bishop provided a copy of the OIG report to Kanawha County Prosecuting Attorney Mark Plants (“Plants”) and Fucillo. **Aff. Plants, Memo Ex. Y, ¶ 2.** Despite the fact that the Prosecuting Attorney’s Office elected not to prosecute the three DHHR officials, Plants noted there appeared to have been violations of internal policy and the exercise of bad judgment by Perry, Taylor, and Law. He also stated in a press release that the investigation by the Inspector General was “complete, thorough, and independent investigation.” **Prosecuting Attorney’s Office Press Release, Memo Ex. AA** In light of the fact that Plaintiffs were at will employees, Plants’ recognition that Perry and Taylor exercised bad judgment serves as further support that DDHR had legitimate non-discriminatory grounds to administratively reassign them and to take other necessary employment actions.

52. Based upon the findings of the OIG Report that confirmed the substantial concerns raised by Fucillo, Keefer, Jordan, Rosen, and Dadisman Taylor and Law’s employment was terminated. Taylor and Law were only terminated with the concurrence of the Governor’s Office. Law’s employment was terminated during January 2013; and Taylor’s employment was terminated February 4, 2013. **Taylor Complaint ¶¶ 71, 73.** On June 28, 2013, Perry declined a position of equal pay and benefits offered to her. Harold Clifton, DHHR’s human resources director, was directed by the Office of the Governor to prepare a letter dismissing Perry. **Clifton Depo., Memo Ex. Z, p. 175.**

II. CONCLUSIONS OF LAW

This Court previously ruled on two separate Motions for Partial Summary Judgment from the Defendants regarding Plaintiffs’ respective wrongful discharge claims. In the *Order Granting Defendant Warren Keefer’s Motion for Partial Summary Judgment on Plaintiffs’*

Discharge Claims, this Court held that Plaintiff, Taylor was terminated by Mr. Fucillo, with the consent of Mr. Alsop, and no wrongful, retaliatory or illegal discharge claims under the West Virginia Human Rights Act are cognizable against Mr. Keefer. In the *Order Granting Defendants' Motion for Partial Summary Judgment on Plaintiffs' Discharge Claims*, this Court held none of the Defendants terminated Ms. Perry's employment as that decision originate with the Governor's Office and granted summary judgment on Ms. Perry's wrongful termination claims as there was no evidence supporting a claim of wrongful, retaliatory or illegal discharge by any of the Defendants.

A. Conclusions of law regarding the standard for summary judgment

1. "Summary judgment is appropriate where the record, taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 4, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va.1994).

2. The Supreme Court of West Virginia has previously established that "[t]he function of summary judgment is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually necessary.'" *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 877 (W.Va. 1996) (quoting *Hanlon v. Chambers*, 464 S.E.2d 741, 748 (W.Va. 1995)). The party opposing a motion for summary judgment may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial. *Crum v. Equity Inns, Inc.*, 685 S.E.2d 219, 227 (W.Va. 2009). Summary judgment may not be denied on the basis of unidentified "disputed material facts" which

refer to allegations contained in the Plaintiffs' complaint particularly in instances where the Court must consider qualified immunity defenses. *West Virginia Department of Health and Human Resources v. Payne*, 746 S.E.2d 554, 561 (W.Va. 2013).

3. In order meet its burden, the nonmoving party must offer more than a scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor." *Gooch v. West Virginia Department of Public Safety*, 465 S.E.2d 628, 636 (W.Va. 1995). "A non-moving party cannot create a genuine issue of material fact through a mere speculation or the building of one inference upon another." *Chafin v. Gibson*, 578 S.E.2d 361, 368 (W.Va. 2003). "The evidence illustrating the factual controversy cannot be conjectural or problematic" and "[u]nsupported speculation is insufficient to defeat a summary judgment motion." *Gibson v. Little General Stores, Inc.*, 655 S.E.2d 106, 110 (W.Va. 2007).

4. Wherefore, the Defendants have made a properly supported motion for summary judgment supported by affirmative evidence that there is no genuine issue of material fact, and the Plaintiffs have failed to: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Syllabus Point 3, *Harbaugh v. Coffinbarger*, 543 S.E.2d 338 (W.Va. 2000). Based upon the following the Court finds that summary judgment is appropriate in favor of the Defendants.

B. Conclusions of law regarding the Plaintiffs' contention that "the entire Tincher affidavit is completely worthless"

5. During the April 16, 2014 oral arguments, the Plaintiffs took the position that "the entire Tincher affidavit is completely worthless" because the *Purchasing Handbook*

contains nothing that “addresses a review of DHHR’s actions by the DHHR’s own lawyers” **Auvil Argument, p. 14.** That assessment of the Tincher affidavit is not legally valid because it is based on the premise that the Defendants’ primary concern about Taylor’s review was her action in conducting it. *Id.* The actions about which the Defendants were primarily concerned were Perry’s, Taylor’s, and Law’s continued advocacy that, based on the review, the scoring of the technical proposals should be repeated in spite of the fact that the scores had been approved by the Purchasing Division and, based on that approval, the cost proposals had been opened. **Memo, p. 17.** This legal review violates the clear statutory construct of the Purchasing Division’s statutory authority.

6. As discussed in finding 10, the *Purchasing Handbook* expressly provides that the technical proposals must be scored before the cost proposals are opened and made public. Finding 17 explains the rationale behind that requirement. **Memo Ex. CC.**

7. As discussed in finding 35, the “legal advice” that the Plaintiffs provided to DHHR (i.e. that the scoring of the technical proposals be repeated even though the cost proposals had been opened and made public) was in direct contravention of the procedural requirements of the *Purchasing Handbook*. *Id.*

8. The Plaintiffs’ related contention, that they “never contended that the Defendants were required to follow their advice” and that the Defendants “would have to decide to accept or reject it on their own” is irrelevant because attorneys are employed not only to identify actions that clients are required to take, but also to advise clients on which actions they can benefit by taking and, as will be discussed in conclusion 37, on the “practical implications” of actions that they are advised to take. **Auvil Argument pp. 5-7.**

C. Conclusions of law regarding Taylor’s violation of attorney-client privilege

9. During the course of the OIG investigation, it came to light that Taylor sent

confidential internal discussions of HB4554 on March 6, 2012, to her husband, Steve Haid. **October 16, 2012, Supplemental OIG Report, Memo Ex. DD.** Mr. Haid previously served as a lobbyist for K12, Inc. and West Virginia Kids Count Fund, both who had potential interests in this legislation. *Id.* Taylor acknowledged that the submittal of this e-mail was a breach of the attorney-client privilege for William Jones, Assistant Attorney General assigned to the Bureau for Children and Families and Kim Hawkins, Director, Division of Early Care & Education DHHR, from whom the e-mail chain originated. This e-mail contained attorney advice from Jones to Hawkins regarding the legislation:

Q: So would you agree with me that the disclosure, this E-mail, was a breach of the attorney-client relationship between Ms. Jones—Mr. Jones and Ms. Hawkins.

A: I believe that I should not have sent this E-mail, that it probably did disclose inappropriate information. **Taylor Depo., Memo Ex. J, pp. 516-17.**

10. Ms. Taylor also acknowledged that she attached the bill document and the entire chain of e-mails to her e-mail to Mr. Haid. *Id.*, p. 518. This action was a clear violation of the *West Virginia Rules of Professional Conduct* Rule 1.6, *W. Va. Code* § 6B-2-5, ethical standards for elected officials and public employees, DHHR Memorandum 2108, Employee Conduct, and IT-0512 IT Information Security, Confidentiality of Information. Ms. Taylor was an at-will employee of the DHHR. At will employees, may be terminated at any time, without reason, unless this termination violates some substantial public policy. *Armstrong v. W. Va. Div. of Culture & History*, 729 S.E.2d 860, 866 (W.Va. 2012). In this instance, the investigation uncovered independent and separate grounds for Ms. Taylor's termination from DHHR and no public policy was violated in terminating her. These grounds, the absolute breach of attorney-client privilege, were sufficient for her termination even in the absence of the underlying investigation involving HHR12052. Mr. Fucillo also

averred that his decision to terminate Ms. Taylor was based upon the OIG report and Taylor's disclosure of attorney-client information. **Fucillo Depo., Memo Ex. V, pp. 254-255, Memo Exs. X and DD.** Under the doctrine of qualified immunity, Defendants certainly are shielded from any liability, given the serious nature of Ms. Taylor's breach of the attorney-client privilege. Therefore, based upon the breach of the attorney-client privilege the Defendants are entitled to Summary Judgment on all Taylor's claims as there is no genuine issue of material fact that she breached attorney-client confidentiality.

D. Conclusions of law regarding the doctrine of at-will employment

11. The fact that the Plaintiffs were at-will employees of DHHR is uncontroverted.

12. In West Virginia, the employers of at-will employees "retain the right to restructure jobs and exercise business judgment, including even bad judgment. Employees can be let go for any reason or for no reason, provided that the reason is not a prohibited one." *Skaggs v. Elk Run Coal Company*, 479 S.E.2d 561, 589 (W.Va. 1996). And "an employer has an absolute right to discharge an at will employee" unless "the employer's motivation for the discharge is to contravene some substantial public policy principle." Syllabus Point 4, *Armstrong v. W.Va. Div. of Culture & History*, 729 S.E.2d 860 (W.Va. 2012). Based on the fact that the Plaintiffs were at-will employees of DHHR and based on the principles set forth in *Skaggs* and in *Armstrong*, a decision to restructure their jobs or terminate their employment could have been made without cause unless that decision was made because of a motivation to contravene some substantial public policy principle.

13. For purposes of relating the conduct of the Defendants to the doctrine of at-will employment, the *West Virginia Rules of Professional Conduct* do not constitute a "substantial public policy principle" because those *Rules* regulate the conduct of attorneys, not the conduct of the employers of attorneys.

14. For purposes of relating the conduct of the Plaintiffs to the doctrine of at-will employment, the statement, in the Preamble to the *West Virginia Rules of Professional Conduct*, that an attorney's responsibilities as an "advisor" to a client include providing the client with "an informed understanding of the client's legal rights and obligations" and explaining "their practical implications" provides a standard of performance that DHHR was entitled to expect the Plaintiffs to meet during their respective employments.

15. For purposes of relating the conduct of Jennifer Taylor to the doctrine of at-will employment, the requirements, in the *West Virginia Rules of Professional Conduct*, that an attorney maintain the confidentiality of client information provides a standard of performance that DHHR was entitled to expect Ms. Taylor to meet during her employment.

E. Conclusions of law regarding the doctrine of qualified immunity

16. The doctrine of qualified immunity – in West Virginia and at the federal level – is based on the premise that: (1) decision making is one of the primary functions that governmental officials are appointed or elected to perform; (2) those officials will not be able to perform that function effectively if they are preoccupied by the prospect of, or participation in, litigation; and (3) consequently, there must be limits on the types of claims that can be asserted against those officials.

17. West Virginia law on the issue of the "qualified immunity" of public officials from law suits has been consistent for the past three decades. The doctrine originated in 1982 with the United States Supreme Court case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); and principles established by *Harlow* have been carried forward since then. *See The West Virginia Department of Health and Human Resources v. Payne*, 746 S.E.2d 554 (W.Va. 2013); and *Clark v. Dunn*, 465 S.E. 2d 374 (W.Va. 1995).

18. The *Harlow* ruling, as subsequently articulated by the West Virginia Supreme

Court, is as follows:

Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.

Clark, supra, at Syl. Pt. 2 (citing *Bennett v. Coffman*, 361 S.E.2d 465 (1987)). In explaining its decision in favor of qualified immunity, the *Harlow* Court observed, "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813. It indicated that an absence of the qualified immunity doctrine would involve "a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. The Court did limit its decision by stating that "qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the (plaintiff), or if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury.'" *Id.* at 815.

19. With regard to the issue of intention, the *Harlow* Court recognized that "substantial costs attend the litigation of the subjective good faith of government officials" and that "judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." *Id.* at 816. Consequently, it ruled that qualified immunity would be a function of "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.* at 818. The Court characterized this as "defining the limits of qualified immunity essentially in objective terms." *Id.* at 819.

20. In *State v. Chase*, 424 S.E.2d 591 (W.Va. 1992), the Supreme Court of Appeals of West Virginia acknowledged the objective standard that *Harlow* established and clarified that an analysis of the presence or absence of qualified immunity does not include an analysis of the motives of defendant public officials. The *Chase* Court observed that *Harlow* had characterized the immunity afforded to Mr. Harlow and Mr. Butterfield as “good faith” immunity; and it indicated that “qualified” immunity would be a “more appropriate term” because the “use of the words ‘good faith’ tends to imply that the public official’s motives should be examined. This type of subjective analysis was expressly rejected in *Harlow*.” *Id.* 424 S.E.2d at 597. Notably, the doctrine of qualified immunity applies not only to individuals, but also to governmental agencies. *See generally, Clark v. Dunn, supra.*

21. In *Payne, supra*, the Supreme Court of Appeals of West Virginia reaffirmed its adherence to the principles of *Harlow* and to its prior ruling in *Hutchison v. City of Huntington*, 479 S.E. 2d 649, (W.Va. 1996), that the presence or absence of qualified immunity is an issue for the court, not for the jury:

The ultimate determination of whether qualified immunity or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition. Syl. Pt. 5, *Id.*

22. The issue of whether or not this case is barred by the doctrine of qualified immunity does not depend on what motivations Defendants had for whatever actions they took regarding Plaintiffs. It depends on whether (1) those actions were discretionary, and if so (2) whether those actions violated any of Plaintiffs’ rights that were clearly established and about which reasonable individuals would have known.

23. There are no genuine issues of material fact as to whether Defendants’ actions were discretionary. All of their actions were – in the verbiage of *Harlow* – the results of

“judgments” that were “influenced by the decisionmaker’s experiences, values, and emotions.” *Harlow* 457 U.S. at 816. The Plaintiffs do not assert that they were damaged because Defendants failed to take some specific action that some specific authority required them to take. Instead, the Plaintiffs assert that they were damaged because of decisions that Defendants made, but did not have to. This is exactly the kind of decision-focused scenario that requires an application of qualified immunity. As stated by the United States Supreme Court and cited by the Supreme Court of Appeals of West Virginia:

The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make [] officials unduly timid in carrying out their official duties[.]” *Payne* 746 S.E.2d at 568, (citing *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)).

24. There are also no genuine issues of material fact as to whether the defendants’ decisions violated any “clearly established” rights of Plaintiffs about which “reasonable defendants” would have known. In West Virginia, clearly established “rights” means clearly established “laws”. *Id.* at FN17. In the context of qualified immunity, a “law” means just that. In other words, it means a specific legal requirement, which is different from – in the words of the Supreme Court of Appeals of West Virginia – “vague or principled notions of government regulation.” *Id.* at 565. Because of circumstances in which Plaintiffs and Law had placed Defendants beginning in May 2012, Defendants had no choice but to make the decisions that they made.

25. For purposes of relating the conduct of the Defendants to the doctrine of qualified immunity, the *West Virginia Rules of Professional Conduct* do not constitute “clearly established statutory or constitutional rights of which a reasonable person would have known” because, as discussed in conclusion 13, those *Rules* regulate the conduct of attorneys not the conduct of the employers of attorneys.

26. The July 13, 2012, decision by Fucillo to convene a July 14, 2012, conference call to discuss Plaintiffs' involvement with HHR12052 and the July 15, 2012, decision by Bishop to have the DHHR Office of the Inspector General initiate an investigation of that involvement were absolutely necessary. **Fucillo Depo., Memo Ex. V p. 123.** This was because DHHR needed to determine the extent to which the actions of the Plaintiffs and Law might be perceived as being similar to prior instances in which the integrity of the public procurement system was undermined by circumventions of procedural checks and balances incorporated within that system. **Fucillo Depo, Memo Ex V, p. 123.** Those instances of public contractual interference included a 1968 scandal in which six individuals, including the Governor, the Commissioner of Finance and Administration, the State Road Commissioner, and the Deputy State Road Commissioner were indicted for participating in a scheme procure state contracts for particular vendors and a to potential vendors that payment of money to those corporations would facilitate the procurement of State contracts and a 1993 scandal in which counsel for the West Virginia Lottery confiscated the records of an RFP evaluation committee in an effort to conceal the fact that an advertising contract had been awarded to a vendor other than the one that had received the committee's highest score.. *U.S. v. Bryan*, 58 F.3d 933 (4th Cir. 1995).

27. The two scenarios discussed above provide a frame of reference for considering the decisions that Fucillo made after his July 13, 2012, telephone conversation during which Plaintiffs informed him that the Office of the Governor had directed him to contact Tincher regarding the RFP for HHR12052. **Fucillo Depo., Memo Ex V, pp. 10-11.** At this point, Tincher had already twice reviewed and approved it, and notified Taylor of his findings. **Aff. Tincher, Memo Ex C, ¶ 13-14.** Fucillo telephoned Keefer, who had previously warned him against becoming "like people in Wally Barron's administration." **Fucillo Depo., p. 9.**

Based upon Keefer's prior discussions with Jordan about her concerns regarding the Law-Perry-Taylor consortium, Fucillo then telephoned her. *Id.* Based on her recitation of those same concerns, he contacted Mani, who informed him that the Office of the Governor was not going to become involved in RFP processing issues. *Id.* This left Fucillo in the following situation:

So at that point with my two senior attorneys at DHHR giving me that opinion that I had concerns about, I then contacted David Bishop, who is an attorney, who's a report to me. . .and asked him not as the Inspector General, but rather as an attorney, to look into these matters for me and give me a legal opinion.

All I had asked for was an opinion as to what I should do in regards to the advice given to me by Ms. Taylor and Ms. Perry on the telephone on (July) 13th, 2012.

Mr. Bishop ended up telling me, after looking into the matter, that he could not. . .act as my attorney any longer to provide advice because he. . .made an independent determination to do an OIG investigation. **Fucillo Depo., Memo Ex V, pp. 121-24.**

28. When considering Fucillo's situation as of July 13, 2012, the Court is cognizant of the contrast between (1) the intense level of concern about the evaluation committee's scoring that the Plaintiffs' persisted in expressing between May and July 2012, and (2) their total absence of concern about Law's obvious conflict of interest, which had been the catalyst for their involvement in the scoring process. The Plaintiffs infiltrated the evaluation committee process at Law's request, after he had admitted that it would be a conflict of interest for him to be involved directly. Perry knew from her copy of his August 23, 2011 e-mail that because of his close working relationship with The Arnold Agency, it would be a conflict of interest for him to be involved with the RFP for HHR12052. **August 23, 2011, Law E-mail. Memo Ex F.** During 2012, Law (1) publicly expressed his hope that the contract would be awarded to The Arnold Agency, (2) publicly explained the reasons for his preference for The Arnold Agency, and (3) requested Perry to conduct a legal review on learning the contract would not go to The Arnold Agency. **Memo, p. 25.** Consequently,

although any action that Perry ultimately took might or might not improve The Arnold Agency's position, that action could not possibly worsen that position. In response to Law's request for their intervention, Perry and Taylor did exactly what he asked them to do without ever (1) considering the conflict-of-interest aspect of what they were doing or (2) notifying any of the procurement specialists in either DHHR's purchasing office or the Purchasing Division about their unauthorized legal review.

29. The extent to which Perry and Taylor ignored Law's conflict of interest is apparent from her August 17, 2012, OIG Statement when she stated that "John didn't care who got the contract." **Taylor OIG Statement, Memo Ex. Q, p. 17.** Taylor's assessment of Law and his vendor preference was completely wrong. When Law was deposed, he testified: "I have said from the beginning that I worked well with the Arnold Agency and would like to have seen the Arnold Agency awarded the contract." **Law Depo., Memo Ex. R, p. 446.** He later confirmed that testimony: "As I have testified before, I wanted the Arnold Agency to get the contract." **Id., p. 512.** He was subsequently asked, with specific regard to Taylor: "And did she understand that you had preferred that the Arnold Agency get the contract?" He replied: "I think everybody understood that." **Id., p. 514.**

30. Based on the Plaintiffs' lack of concern about Law's motivation, when Fucillo was talking with the Plaintiffs by telephone on the evening of July 13, 2012, he was dealing with individuals who were oblivious to a conflict of interest in which they had become enmeshed. However Fucillo was intuitive enough – and familiar enough with Purchasing Division procedures – to realize that some sort of problem existed.

31. There were a number of similarities between the factual situation that faced Fucillo on July 13, 2012, and the factual situation that was revealed by the 1993 investigation of the 1991 awarding of the Lottery advertising contract. Each situation involved (1) a duly-

appointed proposal evaluation committee that made a valid recommendation for the awarding of a contract, (2) individuals outside the committee who desired to change the committee's recommendation, (3) the application of outside influence on the committee in order to have the committee's work papers transferred to an agency attorney, and (4) a subsequent attempt to void the committee's recommendation at the Purchasing Division level. However, the scheme to void the recommendation of the DHHR evaluation committee failed unlike the Lottery contract scheme. That difference in outcome was attributable primarily to how much more obvious the underlying conflict of interest was in 2012 than it had been in 1991. In the 2012 situation, many people – such as Rosen, Keefer, and Molly Jordan – realized that the Plaintiffs' efforts to expand the two-stage process (i.e. technical scoring, followed by total scoring) into a five-stage process (i.e. technical scoring, followed by total scoring, followed by a "legal review", possibly followed by a repeat of the technical scoring, possibly followed by a repeat of the total scoring) were being driven by a conflict of interest. However, no one was in a position to stop, and begin correcting, that situation until July 13, 2012, when Perry and Taylor placed Fucillo in a position of having to choose between (1) ratifying – without understanding – what Taylor and Perry had been doing or (2) taking steps to gain an understanding of what they had been doing.

32. Fortunately for DHHR, Fucillo decided to seek guidance – from Bishop – about what he accurately viewed as a steadily worsening situation. **Fucillo Depo., Memo Ex. V, p. 121.** Bishop decided to initiate an official investigation of that situation. **Aff. Bishop, Memo Ex. W, ¶ 2.** The decisions that resulted in the investigation and determinations regarding the Plaintiffs' employment were entirely discretionary; and no comparably situated public official would have believed that those decisions violated any clearly established laws. Consequently, Defendants are entitled to qualified immunity and each of the claims against

them should be dismissed. Therefore, Summary Judgment should be granted.

33. The Plaintiffs argue that this court should deny qualified immunity to the defendants on the basis of *Brown v. City of Montgomery*, in which qualified immunity was denied to the defendants on the basis of the “public policy of this State articulated in the West Virginia Human Rights Act.” Syllabus Point 5, *Brown v. City of Montgomery*, 2014 W.Va. LEXIS 157 (W.Va. Feb. 20, 2014). The Plaintiffs here reason that because their gender discrimination claims – like the racial discrimination claim in *Brown* – are based on the Human Rights Act, the Defendants here –like those in *Brown* – should be denied qualified immunity. This court is not persuaded by that reasoning because the ruling denying qualified immunity in *Brown* was made at the motion to dismiss stage, during which the court was required to accept, as true, all of the plaintiff’s allegations. This case has proceeded to the summary judgment stage; and as will be discussed below beginning at conclusion 97, the Plaintiffs’ gender discrimination claims are not supported by the evidence. Consequently, as was discussed in the preceding conclusions, the Defendants are entitled to qualified immunity; and the claims against them should be dismissed.

F. Conclusions of law regarding the Plaintiffs’ public policy claims based on the theory of “honest legal advice”

34. The Plaintiffs contend in their respective pleadings that each of them provided “legal advice. . .to the best of her professional ability and according to her ethical obligations as an attorney”, that the Defendants took adverse employment action against each of them because of the “honest” legal advice that they provided, and that the taking of that action violated a “substantial public policy” (Perry Complaint ¶ 105 and Taylor Complaint ¶ 83).

35. In the Plaintiffs’ Opposition, they identify, as the source of that “substantial public policy”, the *West Virginia Rules of Professional Conduct*; and they cite, as the basis

for that association, Syllabus Points 7 and 10 of *Wounairs v. W.Va. State College*, 588 S.E.2d 406 (W.Va. 2003) (Opposition at 36). However *Wounairs* neither cites nor discusses the *Rules of Professional Conduct* because the employee whose employment was terminated in that case was a college administrator, not an attorney.

36. For purposes of a retaliatory discharge analysis, the “substantial public policy,” that an employer cannot contravene, has to be one that “will provide specific guidance to a reasonable person.” Syllabus Point 3, *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606 (W.Va. 1992). Consequently DHHR could only be liable for taking adverse action against the Plaintiffs if it was motivated to take that action by a desire to violate some authoritative “specific guidance” that was applicable to DHHR.

37. For purposes of the Plaintiffs’ claims against DHHR, the source of that requisite “specific guidance” cannot be the *Rules of Professional Conduct* because the *Rules* offer guidance only to attorneys, not to the employers of attorneys. Specifically, the Preamble to the *Rules* states: “The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.” It also states: “[F]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” Consequently the *Rules* governed the Plaintiffs’ obligations to DHHR – as their client – however they did not impose any obligations on DHHR by virtue of it being their client. If an attorney complies with the *Rules* and a client of the attorney files an adverse report with the Office of Disciplinary Counsel, the attorney is entitled to have that report dismissed by virtue of the attorney’s compliance with the *Rules*. However that compliance does not entitle the attorney to perpetual employment by the client; and an at-will attorney-employee, which is what each of Plaintiffs was, is not elevated into some protected class of employee because he or she complies with the *Rules*.

38. For purposes of the Plaintiffs' "honest legal advice" claim, the operative issue is not whether the "legal advice" provided by Plaintiffs was "honest." The issue is whether that advice was legally correct, in that DHHR would have benefited from following it. As discussed in finding 35, DHHR would not have benefited from the Plaintiffs' "legal advice" to repeat the technical proposal scoring.

39. To the extent that the *Rules of Professional Conduct* are relevant to the Defendants' employment actions regarding the Plaintiffs, they militate in favor of those actions. The Preamble to the *Rules* also states: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." The legal advice that the Plaintiffs provided to DHHR did not meet the standard of the Preamble. The advice – to have the scoring of the technical proposals repeated – did not provide DHHR with an "informed understanding" of its "legal rights and obligations" or explain the "practical implications" of following that advice. This was because (1) the actions that DHHR could – or could not – take regarding the scoring depended on how far the procurement process established by the Purchasing Division had progressed; (2) as discussed in finding 34, neither Perry nor Taylor was aware of how far the process had progressed; and (3) the process had progressed too far for DHHR to do what the Plaintiffs advised it to do. Despite the fact that as lawyers they should have known, based upon information readily available to them within DHHR or by making reasonable inquiry to Law or DHHR Purchasing how far in the contract process it had advanced before initiating the legal review. Or at a minimum they would have learned this information in Rosen's May 4, 2012, e-mail response. If DHHR actually had followed the Plaintiffs' advice, it might have led to the criminal prosecution of Mr. Rosen, who was duty-bound to follow the Purchasing Division's procedures. *Purchasing Handbook*, Sec. 1.3 and 1.4,

Memo Ex. CC.

40. If, as the Plaintiffs contend, their decision to provide “honest legal advice” to DHHR regarding the processing of HHR12052 was motivated by a desire to prevent the reoccurrence of the kind of problems that had occurred in MMIS, it would have been prudent for Perry to assign Taylor to “review” Law’s conflict of interest in HHR12052, however she failed to assign Taylor to “review” the conflict of interest and that was the issue with the MMIS contract.

41. The Plaintiffs contend that it was necessary for them to provide their “honest legal advice” because the technical proposal scoring “might fail to meet the legal requirement to pass muster if the award were challenged by an unsuccessful vendor”. **Auvil Argument, p. 5.** According to the plaintiffs: “It’s their job to prepare for things like that and to be ready in case it happens”. **Auvil Argument, p. 14.** That reasoning overstates the importance of avoiding challenges by unsuccessful vendors and understates the extent to which Purchasing Division procedures forestall those challenges. In discussing the role of an RFP evaluation committee, the *Purchasing Handbook* states: “Since subjective *criteria* are used for the evaluation it is not uncommon for vendors to *challenge* the award of an RFP.” ***Purchasing Handbook, Memo Ex. CC.*** The *Purchasing Handbook* also states, in reference to the procedural framework that it establishes for the processing of RFPs: “Any exception to these procedures must be approved by the Purchasing Director.” *Id.* The combined significance of those two provisions is that adherence to procedures is the best defense against the vendor challenges that are more likely to arise when contracts be awarded on the basis of subjective criteria than when contracts are awarded on the basis of cost alone.

42. Even if Taylor’s subjective evaluation of the technical proposals had been more accurate than the consensus subjective evaluation of the four committee members and if

DHHR had followed her “honest legal advice” and repeated the scoring of the technical proposals, that would not have reduced the chances of a successful vendor challenge because the “burden of proof in any action challenging the award of a contract by an unsuccessful bidder or a taxpayer is upon the challenger who must show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience.” Syllabus Point 3, *State ex rel. E.D.S. Federal Corp., etc. v. Leon H. Ginsberg, Comm’r, Department of Welfare, etc., et al.*, 259 S.E.2d 618 (W.Va. 1979). All other factors being equal, a disagreement regarding subjective judgments will not meet the *E.D.S.* criteria for voiding the award of a contract. Moreover, “when price alone is not the exclusive criteria for awarding the contract, the unsuccessful bidder has to overcome the strong presumption that the contracting agency properly exercised its discretion when price was not the sole criteria for the award of a contract.” *E.D.S.*, 259 S.E.2d at 624.

43. Even if Taylor’s subjective evaluation of the technical proposals had been more accurate than the consensus subjective evaluation of the four committee members and if DHHR had followed her “honest legal advice” and repeated the scoring of the technical proposals, that would have increased the chances of a successful vendor challenge because it would have been a direct violation of the Purchasing Division requirement that technical proposals are scored before – not after – cost proposals are opened. All other things being equal, a direct violation of a procedural requirement might meet the *E.D.S.* criteria for voiding the award of a contract.

44. As attorneys, Perry and Taylor should have been aware, when Law requested a review of the technical proposal scoring, of the substance of conclusions 41, 42, and 43.

G. Conclusions of law regarding the Plaintiffs’ whistleblower claims

45. Count I of each Plaintiffs’ First Amended Complaint alleges that Defendants

violated West Virginia's Whistle-Blower Law, *W. Va. Code* § 6C-1-1, *et seq.* In order to prevail on this claim, Plaintiffs must prove, by a preponderance of the evidence, that they had "reasonable cause to believe" that there had been a "violation. . .of a federal or state statute or regulation" (i.e. "wrongdoing") and/or "conduct or omissions which result(ed) in substantial abuse, misuse, destruction or loss of funds or resources" (i.e. "waste") and that they made a "good faith report" of that wrongdoing or waste. *W. Va. Code* § 6C-1-2(d), (f), and (h).

46. The Defendants can defeat the Plaintiffs' whistleblower claims by proving by a preponderance of the evidence that the employment actions occurred for separate and legitimate reasons which are not merely pretexts. *W. Va. Code* § 6C-1-4. The evaluation committee's work involved neither "wrongdoing" nor "waste." Plaintiffs lacked "reasonable cause to believe" that the work had involved wrongdoing or waste and they did not make their report in "good faith." However, even if all of those factors actually had been present, Plaintiffs would still not have qualified as whistleblowers. This is because their report was made, as they allege, in the performance of their assigned responsibilities as counsel for DHHR. **Perry Complaint ¶ 33; Taylor Complaint ¶ 32.**

47. This issue of the extent to which a report by an organization's in-house counsel would provide that attorney with whistleblower protection against adverse employment action was addressed by the Supreme Court of Minnesota in the 2010 case of *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 2010 Minn. Lexis 335 (2010). The plaintiff in that matter was in-house general counsel for a manufacturing company and was "responsible for providing advice on any legal affairs of the company." *Id.* at 221. During the course of his employment, he obtained information that allegedly caused him to believe that there was a "pervasive culture of dishonesty" at his company which he communicated to the company via e-mail along with his intent to advise the appropriate authorities about the issues. *Id.*, 221

and 223. The Supreme Court of Minnesota declined to afford whistleblower protection to the plaintiff and upheld the termination of his employment. With regard to the contents of the plaintiff's report, the Supreme Court of Minnesota found that the text of the e-mail confirmed that his "purpose was not to 'expose an illegality,' but was to provide legal advice to his client." *Id.* at 230. It denied an extension of the whistleblower protection to Mr. Kidwell.

48. Plaintiffs cited in oral argument the case of *Mosley v. Alpha Oil & Gas Servs* as a case that takes a different position than the Minnesota case of *Kidwell*. 962 F. Supp. 2d 1090, 1098 (D.N.D. 2013). The case is factually different in that the plaintiff was not an attorney but a "straw boss" on a pipe bending crew for the defendant company. He was discharged allegedly for making safety complaints and he filed a claim under the North Dakota whistleblower act. *Id.*, 962 F. Supp. 2d at 1092-93. The district court referred to the *Kidwell* case and expressed concern as to its applicability under North Dakota law, but did not discount the fact that it might be wrong, discussed the legal principles set forth in *Kidwell* and distinguished the facts of straw bosses case from that of the attorney's role in *Kidwell*. *Id.*, 962 F. Supp. 2d at 1098-99. The fact there may be a difference of opinion between or among courts regarding the breadth and scope of the holding in *Kidwell*, does not defeat the qualified immunity afforded to these Defendants. In *City of Saint Albans v. Botkins*, the Supreme Court of Appeals adopted the two levels of immunity afforded public officials as described in *Maciariello v. City of Lancaster*, 973 F.2d 295 (4th Cir. 1992). 719 S.E.2d 863, 872 (W. Va. 2011). As ruled in *Maciariello*, "Moreover, there are two levels at which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which this right applies to the action of the official must also be apparent. 973 F.2d at 298 (quoting *Tarantino v. Baker*, 825 F.2d 772, 774-75 (4th Cir. 1987) (cert denied 489 U.S. 1010, 103 L. Ed. 2d. 180, 109 S. Ct. 117 (1989))). Officials are not

liable for bad guesses in gray areas; they are liable for transgressing bright lines. *Botkins*, 719 S.E.2d at 872. (citation omitted). Clearly, the reassignment of two attorneys because of an OIG investigation involving questionable interference with a nearly completed procurement contract and legal advice that the procurement officers of DHHR could not follow, did not transgress any bright line legal principle to which a reasonable public official would know.

49. Plaintiffs' situation in this case was legally identical to that of the plaintiff in *Kidwell*. Plaintiffs were both in-house counsel to an organization; and their objective in reporting Ms. Taylor's concerns about the technical proposal scoring was not – in the language of *Kidwell* – to “expose an illegality” within that organization. Quite the contrary – both Plaintiffs have represented frequently and consistently that (1) their objective was basically to save DHHR from being exposed to a vendor challenge of the committee's scoring; and (2) they gave “legal advice” to DHHR in furtherance of that objective. As pointed out in the *Kidwell* concurring opinion:

The client has the right to decline to follow the lawyer's legal advice, no matter how strongly the lawyer feels about the advice. A lawyer who disagrees with his or her client's conduct can withdraw from representation, but cannot force the client to act consistently with the lawyer's advice.

Kidwell, 784 N.W.2d at 232.

Plaintiffs take an entirely different view of the attorney-client relationship. As argued herein, Plaintiffs believe that DHHR had no right to decline to follow their legal advice and actually had a positive obligation to follow it – in spite of the fact that it would have been procedurally impossible for DHHR to have followed it. **Aff. Tincher, Memo Ex. C, ¶ 15; Aff. Wagner, Memo Ex. D, ¶¶ 6-10.**

50. The report upon which Plaintiffs base their whistle-blower claim was the explanation of the critique of the evaluation committee's scoring which Ms. Taylor

completed in early May 2012 and discussed during the May 16, 2012, meeting involving her, Ms. Perry, Mr. Keefer, and Mr. Rosen. This is the same meeting that she, Ms. Perry, and Mr. Law subsequently discussed with multiple other people within DHHR and the Office of the Governor. Although Plaintiffs characterized the critique as a “legal review,” it was actually nothing more than Ms. Taylor’s comparison of her individual subjective opinions regarding advertising proposal technical scores to the consensus subjective opinions of the members of the evaluation committee.

51. The purported factual connection between the “legal review” and the whistleblower claims is set forth as follows in the Plaintiffs’ respective amended complaints:

The legal review of the evaluation committee scoring conducted by [Plaintiffs] revealed that there was an approximate one-half point (.50) difference between the prevailing vendor and the next vendor who bid upon this contract. Given the very close scoring results in conjunction with the inconsistency issues noted by (Ms. Taylor) in the technical scoring, the concerns of (the plaintiffs) that there was wrongdoing and/or waste within the WVDHHR Purchasing Division were well justified.” **Perry Complaint ¶ 94, Taylor Complaint ¶ 79.**

52. The Plaintiffs’ representations about the “one-half point” difference in scores and the “very close scoring results” are after-the-fact adjustments to reality. As indicated by **Memo Ex. B**, there was a six-point difference – not a one-half point difference – between the technical scores that Taylor “reviewed.” The “very close scoring results” – a .96 point difference – were in the total scores. Plaintiffs assert that when Taylor was critiquing the technical scores, they were unaware of the total scores. So the information that Plaintiffs now say put them hot on the trail of “wrongdoing and/or waste” was information that they did not possess until after they had already blown the whistle, so to speak, on the evaluation committee.

53. There is an even more significant reason why this Court should rule, as a matter of law, that Plaintiffs did not have the required “reasonable cause to believe” that there had

been “wrongdoing and/or waste” within DHHR. *W. Va. Code* § 6C-1-2(d). This is because, as indicated on the February 15, 2012 technical score recommendation that the evaluation committee made to the Purchasing Division (*Id.*, p. 2) and as explained in Tincher’s affidavit (**Aff. Tincher, Memo Ex C**, ¶13-14), the scores that were the subject of the “legal review” that Taylor began in early May 2012 had been approved approximately a month earlier at the Purchasing Division level, not only by its buyer supervisor, Roberta Wagner, and Connie Hill, who assisted Ms. Wagner, but also by its assistant director of purchasing, Mike Sheets and Tincher himself. *Id.*

54. Tincher’s “powers and duties,” as director of purchasing, are statutorily prescribed. They include the following: “Examine the provisions and terms of every contract entered into for and on behalf of the State of West Virginia that impose any obligation upon the state to pay any sums of money for commodities or services and approve each such contract as to such provisions and terms.” *W. Va. Code* § 5A-3-3(9). That function is exactly what Tincher performed regarding HHR12052 and the technical scores with which Taylor so vocally disagreed. As explained in his affidavit, Tincher not only reviewed and approved the scores on April 5, 2012, as part of the normal contract processing, but also reviewed and approved them a second time, in June 2012, after the Governor’s deputy chief of staff and the cabinet secretary of the Department of Administration had discussed with him the concerns about the scoring that Taylor was continuing to express. *Martin v. Hamblet*, and its holding of statutory construction: “[E]xpressio unius est exclusion alterius, the express mention of one thing implies the exclusion of another” eliminates any possibility that the legal review fell under the statutory authority conferred on Tincher. Syllabus Point 4, 737 S.E.2d 80 (W. Va. 2012).

55. Tincher’s two approvals of the technical scores – the first prior to Taylor’s

“legal review” and the second after it – are dispositive of the issues of (1) whether the Plaintiffs had “reasonable cause to believe” that DHHR had committed wrongdoing or waste regarding the scoring of HHR12052 and (2) whether DHHR had actually committed wrongdoing or waste regarding that scoring. According to *W. Va. Code* § 5A-3-3(9) and Purchasing Division procedures derived from that legislation, Tincher was the final scoring authority – subject only to any protests that could have been – but were not – filed within five days of the award of the contract. So if this Court were disinclined to rule to be resolved by the jury, on the basis of the conflicting testimony of Tincher and Taylor, because the only authorized method or resolving such issues, if the technical proposal scores have been approved by the Purchasing Division and the cost proposals have been opened, is the procedure for protesting the awarding of a contract during the five day period (*Purchasing Handbook, Memo Ex. CC*), that the Plaintiffs had no reasonable cause to believe that the evaluation committee’s scoring constituted “wrongdoing and/or waste”, that issue could have to be determined by allowing Taylor – who is not a procurement professional and who rendered an individual opinion regarding the evaluation committee’s procedurally-required consensus opinion – to testify that the committee’s scoring was erroneous; (2) have Defendants call the Purchasing Director of the State of West Virginia as a witness to explain why he approved – on two separate occasions – the scores that Taylor contends were erroneous; and (3) let the jury decide whether Taylor or Tincher knows more about the proper scoring of proposals from vendors who desire to do business with the State of West Virginia?

56. Plaintiffs’ whistleblower claims are based on (1) Taylor’s “report” that her individual subjective opinion of the technical proposals differed from the consensus opinion of the evaluation committee and (2) Taylor’s “report” that DHHR had an obligation to have

the committee's scoring repeated – either by the existing evaluation committee (after Taylor had provided its members with “a refresher course on how to rate a proposal”) or by a new evaluation committee. According to Plaintiffs, the rescoring was the only way to correct the “wrongdoing” and/or “waste” that the evaluation committee’s “erroneous” (by Taylor’s standard) scoring had caused. **Taylor, May 4, 2012 e-mail, Memo Ex. L.**

57. The Plaintiffs could not possibly have made the preceding two reports in “good faith.” This is because (1) the evaluation committee’s reportedly erroneous scoring, which supposedly constituted “wrongdoing” and supposedly resulted in “waste,” had already been approved by the Purchasing Division, which was statutorily authorized to make the final approval of the scoring; and (2) because that action that DHHR was reportedly obligated to take in order to remedy the supposed “wrongdoing” and “waste” would have been a violation of the procedural rules that the Purchasing Division had issued pursuant to its legislative authorization. The two recommendations made by the Plaintiffs would have allowed the existing evaluation committee to re-score the proposals or to form a new committee to re-score the proposals. **Taylor, May 4, 2012 e-mail, Memo Ex. L.** These recommended courses of action were unprecedented, and were not authorized under any law, rule, regulation, or procedure. **Aff. Tincher, Memo Ex. C, ¶ 15.** In summary, the reports that the Plaintiffs assert were made in “good faith” (1) informed DHHR of a problem that did not actually exist and then (2) recommended that DHHR correct the (nonexistent) problem by taking action that would have caused an actual problem if it had, pursuant to their advice, been taken.

H. Conclusions of law regarding the Plaintiffs’ False Light Invasion of Privacy Claims

58. The Plaintiffs in Count III of the Complaints allege that Defendants violated the

West Virginia Governmental Ethics Act (“Ethics Act”), *W. Va. Code* § 6B-1-1, *et seq.* and seek to litigate a separate statutory claim outside the statutory framework of the Ethics Act and/or litigate a common law public policy claim based upon the Ethics Act. The Defendants state that the Circuit Court lacks—in this instance—original subject matter jurisdiction over Plaintiffs’ alleged claims arising under the Ethics Act and only has appellate jurisdiction under the Act by the clear and unambiguous language of the statute.

59. The Ethics Act requires the Plaintiffs to file a verified complaint before the Ethics Commission which then sets in play the statutory mechanism to adjudicate claims arising from alleged violations of the Act. The Probable Cause Review Board determines if probable cause exists for the complaint and if there is such a determination an administrative hearing is held, findings of fact and rulings of law of the Administrative tribunal are sent to the Commission for a final decision. The complaining party or parties must prove the allegations beyond a reasonable doubt. If the respondent is found guilty of the charge(s) the respondent may appeal the decision to the Circuit Court of Kanawha County under the Administrative Appeals Act, *W. Va. Code* § 29A-5-4.

60. The Court for reasons set forth below agrees that no separate statutory private cause of action is created by the Ethics Act and there is no legislative intent to create a separate, private common law cause of action, “*Harless* claim”, grounded on the Ethics Act. The Ethics Commission is the exclusive forum in which to adjudicate claims made under the Act, and permitting claimants to seek redress from any other judicial body would obviate the exclusive remedy provisions of the Ethics Act. While the plaintiff or aggrieved party may seek other statutory remedies in circuit court for alleged wrongdoing, such claims fall under the Whistleblower Act or the Human Rights Act, the Ethics Commission is empowered by the legislature as the unique tribunal before which a charge that a violation of the Act has

been made is adjudicated. The Plaintiffs could have filed a separate verified complaint with the Ethics Commission, but they elected not to and this Court lacks original jurisdiction to adjudicate the claims pled under the Ethics Act.

1. ***Plaintiffs' claims under the West Virginia Ethics Act are barred because the Court lacks subject matter jurisdiction***

61. This Court must review the Ethics Act and the provisions contained therein to determine whether it may exercise subject matter jurisdiction over Plaintiffs claims. *W.Va. Code* § 6B-1-1, et seq. The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act. Syllabus Point 1, *Hicks v. Mani*, 2736 S.E.2d 9 (W. Va. 2012)²; Syllabus Point 1, *Daurelle v. Traders Fed. Sav. & Loan Ass'n*, 1104 S.E.2d 320 (W. Va. 1958). Where an administrative remedy is provided by statute, relief ordinarily must not only be sought initially from the appropriate administrative agency but such remedy usually must be exhausted before a litigant may resort to the courts. *Daurelle*, 1104 S.E.2d at 326. The rule which requires the exhaustion of administrative remedies is a long settled rule of judicial administration and applies alike to relief at law and relief in equity. *Id.* It has been held that the exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. *Id.*

62. “Under the exhaustion of administrative remedies doctrine, where a claim is cognizable in the first instance by an administrative agency alone, judicial interference is withheld until the administrative process has run its course. This doctrine applies when *exclusive* jurisdiction exists in the administrative agency and the courts have only appellate, as opposed to original, jurisdiction to review the agency’s decision.” *Hicks*, 736 S.E.2d at 13

² Affirmed in Part, Reversed in Part, Remanded With Instructions.

(quoting Franklin D. Cleckley et al., *Litigation Handbook on the West Virginia Rules of Civil Procedure*, § 12(b)(1), at 339-40 (4th ed. 2012)) (emphasis added). The *Hicks* decision further held that original jurisdiction on the statutory and substantive claim did not rest in the circuit court. *Hicks*, 736 S.E.2d at 17. In West Virginia, various administrative agencies and commissions have been established to oversee particular areas of governmental functioning. Included within the statutory authority of these agencies is the power to hear and decide matters within an agency's specific field of expertise and to render final decisions in these disputes. *Walker v. West Virginia Ethics Comm'n*, 492 S.E.2d 167, 174 (W. Va. 1997).³ The Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine. Syllabus Point 1, *Appalachian Power Co. v. Public Serv. Comm'n*, 296 S.E.2d 887 (1982).

63. The state agency charged with enforcement of the Ethics Act is the Ethics Commission. *Walker*, 2492 S.E.2d at 170. Pursuant to the Ethics Act, violations are brought to the attention of the Ethics Commission by way of verified complaint. *W.Va. Code* § 6B-2-3a. The complaint is assigned to an investigative panel who makes a probable cause finding as to whether the named employee committed violations of the Ethics Act. If so, the Commission issues a statement of charges and a notice of hearing notifying the employee of specific instances of alleged unethical behavior an evidentiary hearing is then scheduled. *W.Va. Code* § 6B-2-4(b). Following the hearing before the hearing board or hearing examiner, the findings are submitted to the Ethics Commission who issues a final decision. *W.Va. Code* § 6B-2-4(c).

64. The Ethics Commission is charged with protecting the rights of the individual to the fullest extent possible. *W. Va. Code* § 6-1-1(e). There is no language conferring original

³ Affirmed in part, reversed in part and remanded with instructions.

subject matter jurisdiction on any other entity or the circuit court. Plaintiffs never litigated their claims before the Ethics Commission prior to filing their civil actions against the Defendants. This court may only exercise appellate jurisdiction after Plaintiffs' claims are first addressed under the original jurisdiction of the Ethics Commission. *Hicks* is illustrative of the subject matter jurisdiction of an administrative body designed to adjudicate certain rights. In *Hicks*, 736 S.E.2d at 9, the plaintiffs appealed a ruling by this court which held that the Public Employment Retirement Board had original jurisdiction to interpret and decide whether a statute was constitutional. *Id.*, 736 S.E.2d at 14-15. The court ruled" thus, in view of our holding, it is clear that the Board had authority under *W. Va. Code* 29A-4-1 to address the substantive issues raised by the Petitioners with respect to the application of the 2007 version of *W. Va. Code* § 15-2-31...the court was correct in dismissing the statute based claims for failure to exhaust administrative remedies. *Id.*, 736 S.E.2d at 16-17. The court did rule, however, that the doctrine of exhaustion of administrative remedies does not apply to challenges to the agency's own rules pursuant to the plain language of *W. Va. Code* § 29A-4-2a. *Id.*, 736 S.E.2d at 17. The plaintiffs here are not challenging an agency rule but are seeking to first litigate in this court a substantive statutory violation under the Ethics Act which they cannot do.

65. Moreover, decisions of the commission involving the issuance of sanctions may be appealed to the circuit court of Kanawha County, only by the respondent and only upon the grounds set forth in section four, article five, chapter twenty-nine-a of the West Virginia Code. *W. Va. Code* § 6b-2-4(t). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 165 S.E.2d 108 (W. Va. 1968).

66. The "legislative findings, purpose, declaration and intent" the Ethics Act is

prominently and effusively set forth in *W.Va. Code* § 6B-1-2. The “legislative findings, purpose, declaration and intent” are devoid of any reference to a claimant’s right to seek damages in state court for purported violations of the Ethics Act. The Ethics Act, as per *W.Va. Code* § 6B-1-2 is intended “to provide a means to *define ethical standards*; to provide a means of *investigating and resolving ethical violations*; and to provide administrative and criminal penalties for specific ethical violations herein found to be unlawful.” (Emphasis supplied). Had the Legislature intended to provide a remedy through the filing of an action in circuit court, it could have easily included such language in *W.Va. Code* § 6B-1-2. It did not, because there was never such intention.

67. Furthermore, A private cause of action is simply not consistent with the quasi-criminal nature of proceedings before the Ethics Commission which imposes a higher standard of proof than found in civil causes of action; i.e., “beyond a reasonable doubt.” *W.Va. Code* § 6B-2-4(r)(1). Any attempt to bring a private cause of action circumvents the provisions of the Ethics Act that protects public employees and officials from false accusations of impropriety by imposing the sanction of reimbursement of fees and costs by the complainant for an unsubstantiated complaint or request for investigation in reckless disregard for the truth or falsity of the statements contained therein. *W.Va. Code* § 6-2-4(u)(2)(A)-(C). The purpose of the Ethics Act is to provide an administrative forum whereby complaints are instituted against government officials and employees for ethical misconduct, such as when public officials and public employees “exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who seek to benefit narrow economic or political interests at the expense of the public at large.” *W.Va. Code* § 6B-1-2(a). The Ethics Act does not provide grounds for a civil cause of action and is devoid of any language creating one.

68. The Supreme Court of Appeals recently declined to extend a private cause of action under the *Hurley* test in a similar situation when the statutory language does not contemplate a private cause of action. In *Arbaugh v. Board of Education*, the Supreme Court of Appeals held that *W. Va. Code* § 49-6A-2 does not give rise to an implied private civil cause of action, in addition to criminal penalties imposed by the statute, for failure to report suspected child abuse where an individual with a duty to report under the statute is alleged to have had reasonable cause to suspect that a child is being abused and has failed to report suspected abuse. Syllabus Point 3, 591 S.E.2d 235 (W. Va. 2003). The *Arbaugh* decision adopted the *Hurley* legislative scheme test for determining whether a private cause of action exists under the statute. Syllabus Point 2, *Id.*; Syllabus Point 1, in part, *Hurley v. Allied Chemical Corp.*, 262 S.E.2d 757 (W. Va. 1980). In *Fucillo v. Kerner* the Supreme Court of Appeals refused to recognize a cause of action under *W. Va. Code* § 48-19-103(f) against the state or independent contractors for damages arising out of the failure to reduce child support payments or arrearages to judgment and/or renew such judgments. 744 S.E.2d 305, (W.Va. 2013).⁴

69. Plaintiffs are members of the class contemplated by the Ethics Act but they do

⁴ Compare *Hill v. Stowers*, 224 *W. Va.* 51, 680 S.E.2d 66 (2009) (no private cause of action under *W. Va. Code* §§ 3-8-11, 3-9-12 or 3-9-13, for one who alleges that he lost election as the result of unlawful vote-buying); *Yourtee v. Hubbard*, 196 *W. Va.* 683, 474 S.E.2d 613 (1996) (no private cause of action under unattended motor vehicle statute, *W. Va. Code* § 17C-14-1, for one who steals automobile); *Reed v. Phillips*, 192 *W. Va.* 392, 452 S.E.2d 708 (1994) (no private cause of action under *W. Va. Code* § 29-3-16a(g) for plaintiff whose decedent died in fire as the result of landlord's failure to install smoke detectors, although violation of statute may be prima facie evidence of negligence); *Adams v. Nissan Motor Corp. in U.S.A.*, 182 *W. Va.* 234, 387 S.E.2d 288 (1989) (no private cause of action under *W. Va. Code* § 46A-6A-8, for consumer seeking to act as private attorney general); and *Machinery Hauling v. Steel of W. Va.*, 181 *W. Va.* 694, 384 S.E.2d 139 (1989) (no [**15] private cause of action under *W. Va. Code* § 61-2-13, criminal extortion statute, for one alleging threats to sever business relations unless payment made for defective product); with *Barr v. NCB Mgmt. Servs., Inc.*, 227 *W. Va.* 507, 711 S.E.2d 577 (2011) (private cause of action exists under *W. Va. Code* professional debt collector for engaging in debt collection practices prohibited by the West Virginia Consumer Credit and Protection Act, *W. Va. Code* § 46A-1-101); *Shaffer v. Acme Limestone Co.*, 206 *W. Va.* 333, 524 S.E.2d 688 (1999) (private cause of action exists under *W. Va. Code* § 17C-17-9(b) for plaintiff whose decedent was killed in accident with overloaded truck); and *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 *W. Va.* 597, 280 S.E.2d 252 (1981) (cause of action may exist under unfair settlement practice provisions of *W. Va. Code* § 33-11-4(9)),⁷ rev'd on other grounds, *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 *W. Va.* 155, 451 S.E.2d 721 (1994).

not have the legal right to bring their Ethics Act claim in this Court

70. Further, the Ethics Act requires the complaining party to set for specific instances of alleged unethical behaviors by way of a verified complaint. *W.Va. Code* § 6b-2-3a. Plaintiffs have merely pled a bare bones allegation that the Defendants engaged in prohibited conduct pursuant to the Ethics Act without providing any specific instances of misconduct. *W. Va. Code* § 6B-2-3a. **Taylor Complaint ¶¶ 91-93, Perry Complaint ¶¶ 107-09.** To allow this method of bringing a complaint for violations of the Ethics Act would usurp the protective role of the Ethics Commission to vet all claims of unethical behavior prior to proceeding with a full blown administrative hearing. *W.Va. Code* § 6b-2-4(b). The principles of *Martin*: “[E]xpressio unius est exclusion alterius, the express mention of one thing implies the exclusion of another” clearly shows that the Ethics Act does not contemplate this Court exercising subject matter jurisdiction over the Plaintiffs’ Claims. Syllabus Point 4, 737 S.E.2d at 80. In this instance, Plaintiffs are asking the Court to bypass the probable cause requirement under the Act and have a jury rule that there were violations by the Defendants without having a full and complete investigation by the Ethics Commission regarding Plaintiffs’ claims.

2. *The Ethics Act does not contemplate the ability of an individual to bring a Harless type claim for violations of the Ethics Act*

71. Plaintiffs also seek to maintain a cause of action under the Ethics Act for violation of public policy as defined in *Harless*. A similar application of statutory authority was considered in *Hill v. Stowers*, where an individual sought to bring a public policy private cause of action under the Election Act. 224 W.Va. 51, 51, 680 S.E.2d 66, 66 (2009). In that case, the Court refused to create a private cause of action since this would usurp the legislative scheme and create an alternative means by which an unsuccessful candidate could

contest the results of an election. *Id.* *Wiggins v. Eastern Associated Coal Corp.* is distinguishable from the instant cause of action. 178 W.Va. 63, 357 S.E.2d 745 (1987). In *Wiggins* the Court allowed a private cause of action under *W. Va. Code* § 22A-1A-20 and 30 U.S.C. § 815(c)(2) because the statute prescribed rehiring or reinstatement of the miner with back pay without providing for other remedies. The Ethics Act clearly contemplates and makes allowances for the restitution of money, things of value, or services taken or received in violation of the Act. *W. Va. Code* § 6B-2-4(r)(1)(C). Further, the Ethics Act specifically provides that “[t]he provisions of this chapter shall be in addition to any other applicable provisions of this code and...shall not be deemed to be in derogation of or as a substitution for any other provisions of this code.” *W. Va. Code* § 6B-1-4. Quite simply, the Ethics Act contemplates that an individual may pursue their claim before the Ethics Commission without giving up their concomitant rights to pursue other statutory claims.

72. Of further note, while the Plaintiffs assert that the Ethics Act was violated by the Defendants, they ignore the realities of the Defendants’ obligations under the Department of Administration procedures, *W. Va. Code* §§ 5A-3-3(9) (requiring review of all contract provisions by the DOA), 5A-3-17 (penalties for violations of the Act), 5A-3-29 (misdemeanor conviction for violation of act), 5A-3-31 (conspire or collude to benefit a vendor), 6B-2-5(b) (use of position for private gain or that of another person) and *W. Va. Code R.* §§. 148-1-3.2, 148-1-4.1, 148-1-10.1, and 148-1-10.3. The Best Value Procurement training from the DOA specifically instructed agency participants that *no changes were possible* after cost proposal opening. *Best Value Procurement Training, Memo Ex. NN.* Had the Plaintiffs succeeded in convincing the Defendants and/or the numerous other individuals they approached that there were issues with HHR12052, those individuals would be subject to personal liability for violations of the purchasing statutes, rules, and regulations.

73. The Ethics Act is intended to provide a mechanism to govern the ethical behavior of elected and appointed public officials. The fact that the Legislature limited jurisdiction of the circuit courts to adjudicate on substantive claims establishes there is no intention to allow such claims to be prosecuted by a private common law cause of action. Defendants are further entitled to qualified immunity pursuant to *Clark*, since all actions fell under the normal job functions of the Defendants and they did not violate any clearly established statutory or constitutional rights of which a reasonable person would have known. Syllabus Point 2, *Clark*, , 465 S.E.2d at 374.

I. Conclusions of law regarding the Plaintiffs' False Light Invasion of Privacy Claims

74. An invasion of privacy includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. Syllabus Point 8, *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983). This right to privacy does not extend to communications which are privileged under the law of defamation; which concern public figures or matters of legitimate public interest; or which have been consented to by the plaintiff. Syllabus Point 9, *Id.* The Defendants have asserted the Plaintiffs are not entitled to bring a False Light Invasion of Privacy claim based upon (1) the information published involved a matter of legitimate public interest, (2) Plaintiffs were public officials and are not entitled to bring a claim under this provision, (3) Plaintiffs also qualify as public figures; (4) Plaintiffs are involuntary public figures; (5) truth of information disseminated contained in the search warrant and (6) failure to seal the search warrant.

1. Under Crump the Defendants are entitled to immunity for any potential publication based upon the newsworthiness and consent doctrines which allow the avoidance of

liability

75. The Defendant in an invasion of privacy claim enjoys a privilege for communications that concern public figures or matters of legitimate public interest. Syllabus Point 9, *Crump*, 1320 S.E.2d at 70. Newsworthiness is separated into two classes, including public figures and matters of legitimate public concern. *Id.* The public figure immunity is only lost in circumstances where there is actual evidence of abuse, excess or actual malice. *Id.*, 320 S.E.2d at 83-4. All publicity of which Plaintiffs' complain resulted from the dissemination of information regarding an investigation into Plaintiffs' administrative reassignments, which was a matter of public interest. However, Defendants did not disseminate any information to the public.

76. Initially, the newspaper articles merely speculated on the basis for Plaintiffs' reassignments and extrapolated that it resulted from involvement in HHR12052 by the Plaintiffs.⁵ In fact, a review of the newspaper articles clearly establishes that confirmation regarding Plaintiffs' reassignments came from the Governor's Office following a Freedom of Information Request related to Ms. Perry's Memorandum on June 1, 2012, to Chief of Staff Rob Alsop, and not from any employee within the DHHR. *See* Ry Rivald, *DHHR lawyer raised flag on pending contract*, Charleston Daily Mail, July 27, 2012, available at www.charlestondaily mail.com/News/statenews/201207250143. The employment status of two senior employees and questions surrounding their involvement in a procurement contract are certainly newsworthy events. This is especially true following the criminal convictions and civil lawsuit stemming from the 1968 Baron Administration investigation and the Lottery

⁵ "Friction over the awarding of the contract might have been a contributing factor resulting in three top DHHR administrators being placed on administrative leave earlier this week, sources say." Phil Kabler, *WVDHHR publicity contract awarded to Ohio-based firm*, West Virginia Gazette, July 19, 2012, available at: <http://www.wvgazette.com/News/201207190106>.

contract schemes. **Memo, p. 43.**

77. Consent operates to provide immunity when the person either expressly or implicitly permits the publication of information. *Id.*, 320 S.E.2d at 84. The privilege is only lost when the conduct is in excess of that consented to by the individual. *Id.* The protection afforded under this theory is restricted to persons of ordinary sensibilities and does not extend to the supersensitive. *Id.*, 320 S.E.2d at 85. This protection has traditionally served to prevent the emotional harm which results from the unauthorized use of an individual's name or likeness to promote a particular product or service. *Id.*, 320 S.E.2d at 85. It also extends to circumstances in which the person's name or likeness is appropriated to the noncommercial advantage of another. *Id.* The prohibition against appropriation is limited by First Amendment considerations of which:

The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his *public activities*; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution does not become liable...to every person whose name or likeness it publishes. *Id.* (quoting Comment d, § 652C of the *Restatement (Second) of Torts* (1977)).

The defendant must take for his own use or benefit the reputation, prestige or commercial standing, public interest or other value associated with the name or likeness published. *Id.*

78. This cause of action stems from the legal review of HHR12052 which provided advertising services to the DHHR. **Taylor Complaint ¶ 32, Perry Complaint ¶ 33.** The legal review culminated in an OIG investigation, Plaintiffs being removed from their normal worksite, and the issuance of a search warrant. **Taylor Complaint, ¶¶ 63, 80; Perry**

Complaint ¶¶ 65, 95. As a result Plaintiffs claim they suffered emotional distress, mental anguish, embarrassment, humiliation, and damage to their professional reputations. **Taylor Complaint, ¶ 84, Perry Complaint, ¶ 99.** This is not a case in which Plaintiffs likeness was appropriated for personal or commercial use as was the case in *Crump*. None of these Defendants appropriated Plaintiffs reputation, prestige or commercial standing, public interest or other value associated with Plaintiffs' names or likeness. Plaintiffs seek to extend False Light Invasion of Privacy claims to alleged publication by Defendants who are not employed by a newspaper. *Crump* specifically addressed the publication of the likeness of a private individual in a story for which the newspaper was not authorized to use the likeness. *Crump*, 320 S.E.2d at 70.

2. Plaintiffs became public figures based upon their involvement in HHR12052 which involved matters of legitimate public concern thus the Defendants are entitled immunity under Crump for matters of legitimate public concern

79. Two classes of newsworthiness exist including public figures and matters of legitimate public interest. *Crump*, 1320 S.E.2d at 83. In determining whether a [matter] of legitimate public interest is involved, the inquiry “focuses on the information disclosed by the publication and asks whether truthful information of legitimate public concern to the public is publicized in such a manner that is not highly offensive to a reasonable person. *Id.* (quoting *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). Public interest includes both the dissemination of current events and any informational material of legitimate public interest. *Id.* (internal quotes omitted).

80. The determination of whether a matter of legitimate public interest is present requires an inquiry into the legal review of HHR12052. First, Plaintiffs argued during the hearing that the result of the scoring for HHR12052 was to award the contract to the highest bidder of the four bidders, to a vendor whose bid was hundreds of thousands of dollars higher

than other bidders, and that Plaintiffs believed this was improper and a waste of public funds. **Opposition, p. 34.** Second, Plaintiffs plead that they were the two highest ranking attorneys for the DHHR. *Id.*, p. 2, **Taylor Complaint, ¶ 4, Perry Complaint, ¶ 5.** Third, a prior contract, MMIS, was extensively covered in the press during a Legislative Auditor investigation in which both Plaintiffs participated. *Id.*, pp. 32-35, **Taylor Complaint ¶ 26, Perry Complaint ¶ 27.** Fourth, Mr. Law desired Plaintiffs to undertake a legal review because he was concerned about the contract going to an “out-of-state” company, that the award would “be bad for” the governor, and his desire for The Arnold Agency to retain the contract. **Memo, p. 5.**

81. DHHR is charged with and responsible for substantial purchases involving federal and state taxpayer funds. *Id.*, p. 43. HHR12052 involved approximately \$4 million annually in funding from state and federal funds for advertising needs within the agency. *Id.* This is fully set forth in Mr. Law’s request for HHR12052 to be processed as an RFP with the DOA since the contract involved “an agreement of great magnitude, essential to the advertising and public relations operation of the department.” *Id.* DHHR retains the use of an advertising agency to inform the State’s population about health and human services which requires employing the most professional and credible methods and approaches to achieve improved health, and offer life-saving services to the citizens of the State. *Id.* This does not necessarily translate into an award to the “lowest cost” vendor since a Best Value Procurement takes into consideration cost and technical merit of the highest scoring responsive and responsible bidder whose bid is determined to be the most advantageous to the State. *W. Va. Code* § 5A-3-10b(c)-(d). Thus, the public legitimately has an interest in the results of a contract involving substantial public funds utilized by the largest State agency, DHHR.

82. Plaintiffs' reliance upon *A.P. v. Canterbury*, and its discussion of "public interest" and "the public interest" further lends credence to the public interest in the results of HHR12052. 688 S.E.2d 317 (W. Va. 2009). In *Canterbury*, Justice Workman noted, that when considering a request for private e-mails under the Freedom of Information Act, the Court must consider the difference between "public interest" and "the public interest."⁶ *Id.*, 688 S.E.2d at 340. Justice Workman defined "public interest" as the population's curiosity or fascination with an issue or person, such as interest in some aspect of a public figure's personal life. "The public interest" is found when the information involves something in which the public as a whole has a stake. *Id.* This investigation stemmed from Plaintiffs' decision to undertake a legal review of HHR12052 which involved the expenditure of public taxpayer funds. **OIG Report, Memo Ex. X, p. 1.** Plaintiffs argued that their job was to keep the DHHR out of legal trouble, to act as counselors and advisors, and review significant legal issues involving the DHHR. **Taylor Complaint, ¶ 34, Perry Complaint, ¶ 35.** Plaintiffs' activities clearly centered on the DHHR's public business and related to concerns within the purview of the agency's duties, functions, and jurisdiction. *Canterbury*, 688 S.E.2d at 324. All this clearly falls under the definition set forth by Justice Workman as all involved issues directly affecting the services provided by the DHHR.

83. In determining whether an individual should be afforded "public figure" status it is necessary to focus on the person to whom the publicity relates and ask whether the individual either by assuming a role of special prominence in the affairs of society or by thrusting himself to the forefront of a particular public controversy...has become a public figure. *Crump*, 320 S.E.2d at 83 (quoting *Campbell v. Seabury Press*, 614 F.2d at 397 (5th Cir. 1980)). Although a person may not actively seek publicity, he or she may become a

⁶ Justice Workman filed a concurrence in part and dissent in part.

public personage by the force of consequences which make his or her activities of legitimate interest to the public. *Id.* Therefore, based upon the foregoing the Court hereby finds that the legal review thrust Plaintiffs into the forefront of any controversy related to HHR12052 and this is a legitimate public concern for the public and any publication by the Defendants of the same is protected by the immunity principles set forth in *Crump*. Plaintiffs made no attempts to damper the discussions of their administrative reassignments and subsequent terminations in the press which included their attorney speaking on their behalf to numerous media outlets throughout the case regarding their employment status. There was always the option of not commenting on any inquiry from the press.

3. Plaintiffs positions and responsibilities within the DHHR were such that they exercised considerable latitude and discretion in contracts and other matters of importance necessary for determining that Plaintiffs qualify as public officials

84. The only definition of “public official” appearing in our statutes is found at *W.*

Va. Code § 6B-1-3(k):

“Public official” means any person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is neither ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimus nature on the interest or interests of any person.

85. Ministerial tasks are those which are “absolute, certain, and imperative, involving merely the execution of a set task, and when the law imposes it prescribes the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.” *State v. Chase* Sec. 1 424 S.E.2d 591, 598 (W. Va. 1992). It is also useful to look at *Rosenblatt v. Baer*, a case from the United States Supreme Court which considered when an employee should be defined as a public official. 383 U.S. 75, 85 (1996). *Rosenblatt*

held that the public official designation at least applies to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

86. Plaintiffs enjoyed and exercised considerable discretion in conducting their various duties within the DHHR and enjoyed latitude in proceeding with those tasks. **Memo, pp. 45-47.** Ms. Perry had signatory authority from Secretary Lewis and Mr. Fucillo which authorized Ms. Perry to review the final approval of all grant requests to the DHHR. *Id.* Ms. Taylor even acknowledged that Ms. Perry fulfilled a policymaking position within the DHHR. Plaintiffs also claim an extensive involvement and outreach in the MMIS contract during the rewrite and rebidding process. *Id.*, **Taylor Complaint ¶ 26, Perry Complaint ¶ 27.** This included correcting the mistakes of Mr. Keefer, Mr. Rosen and others in the DHHR purchasing office. *Id.* Ms. Taylor also acknowledged her job duties included drafting rules for pain clinics and reviewing, suggesting, and approving changes to legislative rules. **Memo, p. 45-47.** None of these tasks are ministerial in nature and all require the independent judgment and decision process of the Plaintiffs in reaching a best course of action for the DHHR as a whole. While Plaintiffs consulted with other employees of the DHHR on issues, they ultimately determined a course of action and informed DHHR employees of these decisions. **Taylor Complaint ¶ 25-26, Perry Complaint ¶ 26-27.** Due to their high ranks and job functions Plaintiffs certainly qualify, as they acknowledge, as public officials.

87. As public officials Plaintiffs must prove that any publication occurred as a result of malicious intent and not mere negligence by the Defendants. *Crump*, 320 S.E.2d at 78. A review of the newspaper articles discussing the investigation and comments from the DHHR shows that no Defendant commented on Plaintiffs' administrative reassignment and

involvement in an investigation.⁷ Plaintiffs, on the other hand, did engage in substantial communications with the press regarding their administrative reassignment and the basis for the investigation.⁸ The defining information came from the Governor's Office following a Freedom of Information Request regarding Ms. Perry's Memorandum on June 1, 2012, to Mr. Alsop and was limited to discussions of the advertising contract. Ry Rivald, *DHHR lawyer raised flag on pending contract*, Charleston Daily Mail, July 27, 2012, available at www.charlestondaily.com/News/statenews/201207250143. Further, Plaintiffs acknowledged during hearing that these Defendants *did not publish* the search warrant which was actually published by the Prosecuting Attorney's Office. Auvil Argument, p. 25.

88. At the summary judgment stage, Plaintiffs must set forth some material factual basis for asserting that they are aggrieved by actions of the Defendants which caused them injury. This is absent in Plaintiffs' Response to the Defendants' Motion for Summary Judgment. A claim may not be maintained merely because Plaintiffs' assert their evidence at trial will establish a claim, such claims must be in existence and supported by proper evidence of a genuine issue of material fact to defeat a properly pled Motion for Summary

⁷ "Dadisman also said she would not comment on the three DHHR officials being placed on administrative leave, calling it a personnel matter. Kabler, *WVDHHR Publicity Contract Awarded to Ohio-based Firm*, West Virginia Gazette, July 19, 2012, available at <http://www.wvgazette.com/News/201207190106>. "[Fucillo] has declined to comment on why three of his most senior employees are no longer reporting to work as normal." Rivard, *DHHR Lawyer Raised Flag on Pending Contract*, Charleston Daily Mail, July 27, 2012, available at www.charlestondaily.com/News/statenews/201207260143. "I think, the best that I'm going to respond to that is with personnel matters, that I don't think that it's...that I should comment on the investigation at all." Waste Watch Looks at the Status of Three Employees Working from Home, WCHSTV, August 21, 2012, available at www.wchstv.com/newsroom/wastewatch/waste120621_15.shtml. DHHR Secretary Rocco Fucillo has refused steadfastly to discuss why the three employees were suspended. He uses the old, familiar excuse, that "personnel matters" are involved." Corruption Again Present in W.Va., The Intelligencer / Wheeling News-Register, September 9, 2012, available at www.theintelligencer.net/page/content.detail/id/574176/Corruption-Again-Present-in-W-Va-.html. "Fucillo told committee members he could not speak to the issue for reasons of personnel and confidentiality." Ali, *Search Warrant Issued for DHHR Employee Records*, WVNSTV, September 12, 2012, available at <http://www.wvnstv.com/story/19525978/search-warrant-issued-for-dhhr-employee-records>.

⁸ Messina, *WV State Police Looks at WV DHHR Advertising Contract*, West Virginia Illustrated, September 11, 2012, available at <http://www.wvillustrated.com/story/19518037/state-police-look-at-wv-dhhr-advertising-contract>. *DHHR Firings, Taxpayers Have a Right to Know*, Parkersburg News and Sentinel, November 29, 2012, available at <https://newsandsentinel.com/page/content.detail/567983>. Rivard, *W. Va. DHHR Whistleblower Lawsuit Alleges Pattern of Failure*, Charleston Daily Mail, October 10, 2012, available at www.charlestondaily.com/News/statenews/2012090248.

Judgment. The Court finds that Plaintiffs have presented no evidence of malice by the Defendants during the discussions of Plaintiffs' administrative reassignments in the press. It is further evident that Plaintiffs are seeking to impose liability on the Defendants for the actions and independent judgment of third parties, namely the Kanawha County Prosecuting Attorney and this Court's own independent judgment in signing the search warrant.

4. Even under the involuntary public figure doctrine Plaintiffs qualify as involuntary public figures due to their involvement in HHR12052 and the legitimate public interest generated by the use of taxpayer monies

89. An individual becomes an involuntary public figure when that individual becomes a central figure in a significant public controversy and that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter. *Wilson v. Daily Gazette Co.*, 219, 588 S.E.2d 197, 208 (1996). It is undisputed that between July 2012 and August 2013, the reassignments of Plaintiffs were discussed in the various news media outlets throughout the state. *See Footnote 6.*

90. The individual does not need to seek to publicize his/her views on the relevant controversy, all that is required is that he/she assumed the risk of publicity. 588 S.E.2d at 220. Throughout the investigation in Plaintiffs' activities employees of the DHHR refused to provide any information regarding the status of Plaintiffs and would not even confirm the reassignment was related to their legal review of HHR12052. **Memo, pp. 48, Memo Ex. FF.** This culminated into the publishing of the search warrant on September 11, 2012, by the Kanawha County Prosecuting Attorney's Office. ***Id.*, Memo Ex. GG.** This occurred after Mr. Plants reviewed and approved the search warrant contents which were presented to this Court by Corporal Kelly who is not employed by the DHHR. **Aff. Plants, Memo Ex. Y, ¶¶ 5-6.** The very day after the warrant was approved Plaintiffs' own attorney appeared on Talkline with Hoppy Kercheval to discuss the investigation. **Memo, p. 48.** Thus, it is

necessary to conclude that even if Plaintiffs did not qualify as public officials and public figures that their actions resulted in their designation as involuntary public figures.

5. *The information contained within the Search Warrant is truthful information and no cause of action accrues under the False Light Invasion of Privacy doctrine for its contents since Defendants are entitled to immunity pursuant to Crum*

91. Plaintiffs attack the credibility of the search warrant by stating that it contained salacious nature, Rob Alsop suggested that it be sealed after reading it, that it reads more like a press release than a search warrant, and is a malicious and intentional effort by the Defendants to smear Plaintiffs in the media by portraying them as corrupt criminals. **Opposition, p. 46.** A close review of Plaintiffs' Response and arguments reveals no direct information establishing that it contains salacious materials or that it was more of a press release than a search warrant. This is simply opinion by the Plaintiffs who disagree with the contents of the search warrant which was independently reviewed by the Prosecuting Attorney's Office and signed by this Court on a finding of probable cause.

6. *In the absence of a compelling governmental interest there is no basis for sealing the search warrant*

92. Generally a criminal matter is open and accessible to the public and includes filings contained in criminal cases. The Prosecuting Attorney's Office reviewed the search warrant after requesting Mr. Bishop to prepare a draft of it and an affidavit in support of the search warrant. **Aff. Plants, Memo Ex. Y, ¶ 1.** The search warrant was then presented to this Court and executed by this Court. *Id.*, ¶¶ 6-7.

93. "Where...the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989). The *Goetz* court recognized that the press

and public have a common law qualified right to access to judicial records and alternatives must be considered such as providing some documents or redaction. *Id.*, 886 F.2d at 66. The Baltimore Sun sought the affidavit used in approving a search warrant by the magistrate in an FBI investigation of fraud and organized crime in the health insurance industry which the district court ordered sealed when the warrant was issued. *Id.*, 886 F.2d at 62. The district court denied the request and the Baltimore Sun filed a writ of mandamus to compel the magistrate to unseal the warrant affidavits. *Id.*, 886 F.2d at 62-3. Although the affidavit was provided to the Baltimore Sun during the Fourth Circuit's consideration of the issues the Court still determined the magistrate and district court improperly declined to make the affidavit available. *Id.*, 886 F.2d at 66.

94. Mr. Fucillo testified that he notified Mr. Bishop that the Governor's Office wished for the search warrant to be sealed only to learn that the warrant was already issued. **Depo. Fucillo, Memo Ex. V, p. 187.** In the absence of some compelling basis for sealing the search warrant there is no liability for any perceived or actual failure to seal the search warrant. The Prosecuting Attorney's Office reviewed the search warrant and ultimately determined there was no compelling basis for requesting this Court to seal it. **Aff. Plants, Memo Ex. Y ¶ 5.** The Prosecuting Attorney's Office felt the search warrant was necessary given the potential for any of the named individuals to have private information on their work computers and telephones. *Id.*, ¶ 4. An additional basis for requesting the search warrant centered on the complexity and unique issues arising from conducting a legal review during the state procurement process. *Id.* The Prosecuting Attorney's Office further stated he did not request the warrant be sealed because he did not see any risk of flight or eminent danger to the investigating officer. *Id.*, ¶ 9.

95. Each of the decisions regarding the warrant, drafting of the warrant, the manner

of filing the search warrant were independently made by Mr. Plants. *Id.*, ¶¶ 10-13. This clearly establishes the decision to issue the warrant rested in the Kanawha County Prosecuting Attorney's Office. The affiant for the warrant was Corporal Kelly of the West Virginia State Police, not an employee of the DHHR. There is no civil liability available for the Defendants based upon Mr. Bishop's drafting the search warrant since he enjoys independent rights to investigate employees and has civil service protection to conduct those investigations. *W. Va. Code* 9-2-6(6).

96. Plaintiffs' claims for False Light Invasion of Privacy rest on their assertion that the Defendants published confidential information related to their administrative reassignments. This claim is not supported by the clear evidence of this case wherein Mr. Keefer was never quoted in the press and Mr. Fucillo and Ms. Dadisman refused to discuss the administrative reassignments. Plaintiffs also fail to present any evidence that there was an actual bona fide basis for sealing the search warrant. Therefore, there are no genuine issues of material fact have been raised by the Plaintiffs through affidavit or other facts that Defendants intentionally or otherwise placed Plaintiffs in a false light or invaded their privacy. Defendants are further shielded by qualified immunity under *Clark*, did not violate any clearly established statutory or constitutional rights governing a search warrant that was approved by the Court. Syllabus Point 2, *Clark*, 1465 S.E.2d at 374.

J. Conclusions of law regarding the Plaintiffs' Gender Discrimination Claims

97. Under the West Virginia Human Rights Act, it is unlawful "[f]or any employer to discriminate against an individual with respect to...tenure, terms, conditions or privileges of employment[.]" *W. Va. Code* § 5-11-9(1) (1998). The term "discriminate" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familiar status and

includes to separate or segregate[.] *W. Va. Code* § 5-11-3(h) (1998). In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, *W. Va. Code* § 5-11-1, et seq. (1979), the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class[;] (2) that the employer made an adverse decision concerning the plaintiff[; and] (3) but for the plaintiff's protected status, the adverse decision would not have been made." Syllabus Point 2, *Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423 (W. Va. 1986). When an employee makes a prima facie case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge. In rebuttal, the employee can then offer evidence that the employer's proffered reason for the discharge is merely a pretext for the discriminatory act. Syllabus Point 2, *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717 (W. Va. 1991).

1. Plaintiff Perry has not presented any evidence supporting a claim that she was administratively reassigned based upon her report of a hypothetical gender discrimination issue prior to the effective date of her administrative reassignment

98. Ms. Perry bases her gender discrimination claim upon a discussion she had with Dawn Jordan Adkins, EEO Officer DHHR, on July 13, 2012, regarding hypothetical gender discrimination where Ms. Perry asserted she was approached by a DHHR employee who felt she was being discriminated against because of her gender and the proper route to take to resolve the issue. **Aff. Dawn Adkins, Memo Ex. HH, ¶ 2.** The initial contact regarding this hypothetical issue occurred on June 28, 2012, prior to Mr. Fucillo being named as Acting Secretary. **Id.** Mr. Clifton confirmed Ms. Perry discussed the hypothetical issue with him but never stated she was the employee. **Memo, p. 50.** Ms. Perry initially requested travel reimbursement from Secretary Nausbaum who denied her request and Ms. Perry did not renew the issue with Secretaries Walker, Harding, Lewis, or Fucillo. **Id., Reply, p. 38, Perry**

Depo., Memo Ex. H 169-70. Ms. Perry indicated that Mr. Nausbaum did not discriminate against her because she did not know of any other Commissioner who received reimbursement for travel when he denied her request. *Id.*, p. 172. Although Ms. Perry asserts Mr. Fucillo violated the terms of the travel policy she has never articulated what particular provision of the policy was violated by Mr. Fucillo receiving travel reimbursements. Mr. Fucillo negotiated the travel reimbursement along with his home office remaining Fairmont, West Virginia on assuming the Commissioner for the Bureau of Children and Families. **Memo, p. 51.** This is not a situation where Ms. Perry and Mr. Fucillo were both assigned to Charleston and only Mr. Fucillo received travel reimbursement. On questioning about the specific issue Ms. Perry testified that she believed Mr. Lewis, not Mr. Fucillo, discriminated against her by authorizing Mr. Fucillo to receive travel reimbursement. *Id.*

99. Plaintiff bears the burden of establishing a nexus between the receipt of travel pay by Mr. Fucillo and an intention to discriminate against her based upon her gender. Mr. Fucillo was not the employee whom Ms. Perry asserts discriminated against her. *Id.* Nor did Mr. Fucillo have any knowledge of Ms. Perry's hypothetical questions until months after her reassignment when she filed her complaint. *Id.*, 50. Mr. Fucillo never knew that Ms. Adkins, a female and the DHHR EEO Officer, reviewed the gender discrimination claim and opined no discrimination occurred. **Aff. Dawn Adkins, Memo Ex, HH ¶ 8.** Mr. Clifton, contrary to Plaintiffs' unsupported assertions, clearly testified that he never discussed this issue with Mr. Fucillo prior to Ms. Perry filing a Complaint against the DHHR. **Memo, p. 50.** Mr. Clifton did discuss the hypothetical situation with Don Raines who was Ms. Adkins direct supervisor. **Reply p. 39.**

100. The evidence of this case clearly establishes that on the same day that Plaintiffs'

approached Mr. Fucillo and asserted there were issues with the scoring with HHR12052 was the same day Ms. Perry and Ms. Adkins finally met to discuss Ms. Perry's hypothetical issue. **Aff. Dawn Adkins, Memo Ex. HH, ¶ 4.** Mr. Fucillo placed Plaintiffs on administrative reassignment while the OIG was investigating the issues surrounding the legal review of HHR12052. **Memo, p. 13.** The administrative reassignment was consistent with internal policy to remove an employee from a worksite during an investigation. *Id.* While Plaintiffs argued they are entitled to protection because they did not know of the DOA involvement in reviewing the scores for HHR12052, they also seek to impose liability on the Defendants for a gender discrimination inquiry by Ms. Perry that Mr. Fucillo knew nothing about. Both DHHR employees directly involved in Ms. Perry's gender discrimination question have testified they did not inform Mr. Fucillo of Ms. Perry's hypothetical situation.

101. This Court Previously ruled in favor of the Defendants on Ms. Perry's wrongful termination claim and held that the Defendants did not participate in her termination from the DHHR. *See Order Granting Defendants' Motion for Partial Summary Judgment on Plaintiff's Wrongful Termination Claims.* Mr. Fucillo learned of Ms. Perry's termination from Mr. Jones and did not question the decision because it was made by the Governor's Office. *Defendants' Motion for Partial Summary Judgment on Plaintiff's Discharge Claims,* p. 2. Despite her strenuous argument that she made an actual gender discrimination claim, there is no evidence that Ms. Perry filed a claim or pursued any avenues to address her gender discrimination claim including filing a formal complaint, a grievance, or a claim with the Equal Employment Opportunity Commission. This Court may not infer that Ms. Perry's administrative reassignment occurred as a direct result of her gender discrimination inquiry. John Law, a male employee, was administratively reassigned also once the OIG investigation was initiated: Mr. Law was not treated any differently than Ms. Perry. Actually, his

treatment was different in that he was fired long before the Governor's Office terminated Ms. Perry. The Plaintiffs argues pretext for the OIG investigation but submitted no evidence creating a genuine issue of material fact to defeat Defendants' evidence that the administrative reassignment was a result of the OIG investigation. **Opposition, p. 50.** Therefore, the Court hereby **GRANTS** summary judgment in favor of the Defendants on Ms. Perry's Gender Discrimination claim.

2. *Plaintiff Taylor's claim that her position was filled by a male employee who was never intended to be a permanent placement does not create a cause of action for gender discrimination*

102. Plaintiffs acknowledged during the hearing that Ms. Taylor's claims regarding gender discrimination are weak. **Auvil Argument, p. 27.** During the hearing it became evidence that Ms. Taylor's gender discrimination claim rests solely Mr. Jones being appointed Acting General Counsel during her administrative reassignment. The Defendants do not dispute that William Jones was borrowed from the Attorney General's Office to fill the role as Acting General Counsel. **Memo, pp. 51-52.** Nancy Sullivan testified that Mr. Jones was requested to fill the position by Mr. Fucillo on an acting basis. *Id.* Mr. Jones was never intended to remain as a full-time employee of the DHHR and was ultimately replaced with Ms. Taylor's permanent replacement, a female, Karen Villanueva-Matkovich. *Id.* During the administrative reassignments Ms. Perry continued to complete many of the functions she handled while Deputy Secretary of Legal Affairs. *Id.* These activities included drafting an RFP for the DHHR, reviewing and commenting on the department wide breastfeeding policy, and providing guidance on various rules for the DHHR. *Id.* Some of the policy functions were filled by Chris Harich who also served in an acting capacity and did not remain an employee of the DHHR or file Ms. Perry's role on an acting basis. *Id.*

103. The Defendants have presented evidence that Mr. Jones and Mr. Harich filled

some roles within the DHHR on an acting capacity during Plaintiffs' administrative reassignments. **Memo, pp. 51-52.** This decision was not made on the basis of gender, but as a result of the necessity of Acting Secretary Fucillo to continue receiving necessary advice and services during and after the OIG investigation. In response to the evidence from Defendants, Plaintiffs merely assert during the hearing that Mr. Fucillo competed for Ms. Taylor's job and ultimately was not successful in obtaining employment as General Counsel. Plaintiffs also assert Ms. Villanueva-Matkovich was hired after their gender discrimination claims and only as a result of their raising the issue of gender discrimination. **Opposition, p. 50.** This is mere speculation, conjecture, and surmise since none of the Defendants made the decision to hire Ms. Villanueva-Matkovich. **Memo, pp. 51-2.** These claims do not even establish *de minimus* evidence of discrimination under *Powell*. Ms. Perry's position was never filled even when she was on administrative reassignment and no longer exists. *Id.* Therefore, it is evident that Plaintiffs have presented no rebuttal evidence raising a genuine issue of material fact that the decisions to place them on administrative reassignment and the use of male employees during this time period was motivated by a discriminatory animus based upon their genders. The Defendants are entitled to summary judgment on Plaintiffs' gender discrimination claims.

3. Plaintiffs' have no evidence supporting a disparate impact claim against these Defendants and their claim fails on this ground

104. Plaintiffs and Mr. Law were all placed on administrative reassignment during the OIG investigation. Under a disparate impact claim Plaintiffs bear the burden of establishing but for their protected class the employer would not have made the adverse decision regarding their employment. *Conaway*, 358 S.E.2d at 423. In this case, three individuals, one male and two females, were placed on administrative reassignment during

the OIG investigation. **Memo, p. 52.** Mr. Law was terminated on January 23, 2013, and Ms. Taylor was terminated on February 4, 2013. *Id.* Ms. Perry was later terminated by Charlie Lorenson, Chief of Staff for Governor Tomblin. *Id.* Each individual received identical reassignments to their residences and all were terminated (Ms. Perry was not terminated by the Defendants).

105. All three individuals were engaged in wrongful conduct by interfering with HHR12052. **Memo, p. 52.** Ms. Perry received an offer for a different position, which she declined to take and was removed by Mr. Lorenson. *Id.* The action to terminate Ms. Perry's employment was necessary for the new DHHR secretary to establish her own leadership team. *Id.* Ms. Taylor was terminated for her involvement in the legal review of HHR12052 and her disclosure of confidential attorney-client privileged information to her husband, Steve Haid, who had previously lobbied for two entities concerned with the legislation under discussion. *Id.* Mr. Law was terminated and did not receive any preferential treatment different to or of greater benefit than Plaintiffs. *Id.* There is no evidence supporting a disparate impact gender discrimination claim by the Plaintiffs. This Court further finds that the Defendants did not violate any clearly established statutory or constitutional rights related to the Gender Discrimination claims and are entitled to qualified immunity under *Clark*. Syllabus Point 2, *Clark*, 465 S.E.2d at 374. Therefore, the Court rules that no gender discrimination claim is supported in this cause of action and Defendants are entitled to summary judgment on these claims.

III. CONCLUSION

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law the Court finds that summary judgment is appropriate under Rule 56(c) of the *West Virginia Rules of Civil Procedure*. The Plaintiffs' failed to create a genuine issue of material fact for each of their

claims. Furthermore, the Defendants' are entitled to qualified immunity based upon the evidence developed through discovery to the claims as pled by the Plaintiffs. Therefore, pursuant to Rule 56(c) of the *West Virginia Rules of Civil Procedure* the Defendants' are entitled to summary judgment as a matter of law. The Plaintiffs' objections and exceptions are noted and preserved.

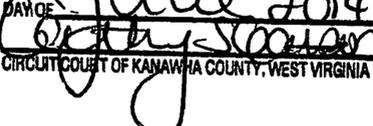
The Clerk is directed to forward a copy of this Order to all counsel of record.

Entered this 13 day of JUNE, 2014.


The Honorable James C. Stucky

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF June 2014
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 