

FOR OFFICIAL PUBLICATION

**SUPERIOR COURT OF THE VIRGIN ISLANDS
APPELLATE DIVISION OF ST. CROIX**

ELROI E. BAUMANN,	)	CASE NO. SX-11-CV-417
	)	
Appellant,	)	
	)	
v.	)	
	)	
PUBLIC EMPLOYEES RELATIONS BOARD,	)	
GOVERNMENT OF THE VIRGIN ISLANDS, and	)	
WAPA,	)	
	)	
Appellees.	)	
_____	)	

On Appeal from the Public Employees Relations Board

APPEARANCES:

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MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER is in the Appellate Division of the Superior Court of the Virgin Islands on appeal from the Public Employees Relations Board ("PERB"). Appellant Elroi E. Baumann

("Baumann") was fired by the Virgin Islands Water & Power Authority ("WAPA") for violating the company's sexual harassment policy. Baumann grieved his termination within WAPA, appealed to WAPA's Governing Board, and twice appealed to PERB. PERB never reached the merits, however. Instead, PERB dismissed each appeal with prejudice, concluding that it lacked jurisdiction because Baumann was not a "regular employee." Following each dismissal Bauman filed a petition in the Superior Court for review. This is his second court appeal. The Superior Court (Willocks, J.) dismissed Baumann's first appeal as untimely, which WAPA claims, bars this matter on *res judicata* grounds. Baumann rejects WAPA's *res judicata* claim and argues that PERB's decision should be reversed and this matter remanded "for adjudication on the merits," (Pet. 2, filed Sept. 2, 2011), because he is a regular employee.

For the reasons stated below, the Court concludes that, because this is an appeal and not a petition for writ of review, WAPA waived its *res judicata* defense by raising it for the first time on appeal. On the merits, the Court concludes that Baumann is not a regular employee, but on grounds different than those PERB stated. Since PERB reached the right result, its decision will be affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Baumann began working for WAPA as a human resources manager on October 6, 2003. WAPA later changed his position to personnel manager at some point between October 2004 and July 2005. The record is unclear when. WAPA again changed Baumann's position from personnel manager to either personnel manager/training or personnel manager/labor. Here too, the record is unclear.¹ But the record does show that Baumann's position at the time when he was terminated was personnel manager/labor.

¹ The record shows that Baumann's position changed from personnel manager to personnel manager/labor on May 14,

The background to Baumann's termination, while relevant to this review, is not at issue in this appeal because PERB did not reach the merits of Baumann's termination. The following summary is provided for context, however, because it bears on all the issues raised in this appeal.

On or about June 29, 2009, Appellant was notified by Hugo Hodge, Jr. ("Hodge"), Executive Director of the [WAPA, in writing, that a student intern within the personnel office, by the name of R.T., filed a complaint of sexual harassment against Appellant. R.T. alleged that during her employment at [WAPA, Appellant exhibited conduct or engaged in behavior towards her that was unwelcomed and made her feel uncomfortable in the workplace. Appellant was further advised that an investigation into the allegations were to be conducted pursuant to Section 2.14 of VIWAPA's Personnel Policies and Procedures Manual ("policy"), and that Rupert Pelle ("Pelle"), Director of Water Distribution, was appointed to conduct the investigation.

An investigation into the allegations was conducted from July 14, 2009 to August 4, 2009. Pelle interviewed R. T. and Appellant twice, as well as five (5) other employees of [WAPA. On or about August 12, 2009, Pelle issued his report on the outcome of the interviews, along with copies of the statement signed by each individual. Thereafter, Appellant was notified by memorandum dated October 20, 2009, from his supervisor, Denise Nibbs ("Nibbs"), Director of Human Resources, that a first step hearing will be conducted pursuant to Section 10.2 of VIWAPA's policy. This was an opportunity for Appellant to state why disciplinary action should not be taken against him.

The first step hearing was conducted on February 3, 2010. Appellant attended along with his representative. On or about February 17, 2010, Nibbs issued her first step recommendation to Hodge, in which she recommended that Appellant be terminated from his position with [WAPA. Appellant then appealed Nibbs' decision under Section 10.2 of [WAPA's policy. A second step disciplinary hearing was conducted on March 16, 2010, by former Chief Financial Officer. Nellon Bowry ("Bowry"), in accordance with Section 10.2 of [WAPA's policy. Bowry responded by issuing a memorandum indicating that based on the totality of the circumstances, he found no basis to contradict Nibbs' findings, and upheld the recommendation for termination. The recommendations were forwarded to Hodge.

Thereafter, Hodge notified Appellant in writing, on or about July 27, 2010, that after review of the reports, evidence presented, and recommendations, he found that

2007. But then, on October 7, 2008, Baumann's position changed to personnel manager/training. The October 7, 2008 notice of personnel action, or NOPA, noted that the change in job title and duties was effective from July 1, 2007 and superseded the May 14, 2007 NOPA. Thus, Baumann's position, as of July 1, 2007, was personnel manager/training. However, all subsequent NOPAs for Baumann in the record, including his final NOPA reflecting his termination, list his position title as personal manager/labor. The parties failed to raise or develop the distinction, if any, in the record.

Appellant violated []WAPA's sexual harassment policy. Hodge further stated that effective immediately Appellant is terminated from his employment at []WAPA. He was also advised of the right to appeal the decision pursuant to Section 14.2 of []WAPA's policy.

(R at 9-11 (footnotes omitted).)

Baumann appealed the July 27, 2010 termination to PERB on August 20, 2010. The appeal, numbered as PERB-GSA-10-32X and captioned *In the Matter of: Elroi E. Baumann v. Virgin Islands Water and Power Authority* ("2010 case"),² was heard by a hearing officer over six days in September and October 2010. Midway through the hearing, Baumann and WAPA "stipulated the PERB ha[d] jurisdiction over this matter," so the hearing officer then "proceeded to the merits of the case." (Decision and Order 2, *In re: Bauman v. Water & Power Auth.*, PERB-GSA-10-32X (§530) (V.I. PERB Nov. 3, 2010); attached as Ex. 1 to Petition, filed Dec. 20, 2010, in *Baumann v. Publ. Emples. Relations Bd, et al.*, SX-10-CV-567 (V.I. Super. Ct.), both attached as Ex. 2 to WAPA's Appellee Br., filed Dec. 16, 2013.) PERB rejected the parties' stipulation, however, concluding on November 3, 2010 that it lacked jurisdiction because Baumann had not proven that he was "a regular employee under Title 3, Chapter 25." *Id.* at 11; *cf.* 3 V.I.C. § 451 ("regular employee' means an employee who has been appointed to a position in the classified service in accordance with this chapter after completing his working test period."). Only regular employees can appeal to PERB, *see* 3 V.I.C. 530(a)(1), and Baumann could not be a regular employee because all employees of WAPA are exempt from the

² The proceedings before PERB are referred to both as an appeal and as a hearing. *See* 3 V.I.C. § 530(a)(1) ("The employee shall have ten days following the date of receipt of the statement of charges to *appeal* the proposed action to the Public Employees Relations Board." (emphasis added)); *id.* § 350(b) ("The Public Employees Relations Board shall meet within 30 days after the filing of the *appeal* and afford the department head and the employee an opportunity to be heard. The department head and the employee shall be entitled to call witnesses and to be represented by counsel. The *hearing*, including continuances thereof, shall in no event extend beyond 60 days." (emphasis added)). Final decisions from section 530 appeals/hearings can be further appealed to the Superior Court. *See id.* § 530a. Because this matter concerns four appeals (two before PERB and two before the Superior Court), the Court will refer to the appeals to PERB as cases and the appeals to the Superior Court as appeals to avoid confusion.

classified service, Hence, PERB dismissed Baumann's 2010 case with prejudice for lack of jurisdiction. Baumann later petitioned the Superior Court on December 20, 2010 for review of the November 3, 2010 Decision ("2010 appeal").

At the same time that PERB was hearing Baumann's 2010 case, Baumann was also pursuing a three-step internal grievance process that he initiated on August 16, 2010 pursuant to section 14.2 of WAPA's policy manual. However,

[b]y letter dated September 15, 2010, Nibbs responded to Appellant's grievance, indicating that there was no new information provided to support his appeal; hence, Nibbs recommended that the termination be upheld.

Appellant appealed Nibbs' recommendation to the second step grievance procedure, Bowry conducted the second step grievance termination hearing on September 24, 2010. By memorandum dated September 27, 2010, Bowry also determined that Appellant violated the sexual harassment policy and concurred with Nibbs' recommendation to uphold Appellant's termination.

Appellant also filed an appeal of the recommendation for termination to the third step of the grievance procedure. Hodge conducted the third step hearing on October 5, 2010. At that point, Appellant had a total of five (5) hearings in which he had an opportunity to present evidence to contradict Respondent's findings that he violated the Authority's sexual harassment policy. Afterwards, on October 8, 2010, Hodge issued his findings of the third step hearing. Hodge decided to deny Appellant's grievance, and to uphold Appellant's termination.

Then, on October 13, 2010, Appellant submitted his appeal of termination to the []WAPA's Governing Board. Appellant asserted that the online version of Section 14.2 of []WAPA's policy provided management personnel the right to appeal the Executive Director's decision to the Governing Board. However, by letter dated October 15, 2010, Ms. Juanita Young, Chairperson of the Governing Board, informed Appellant that the Personnel Policy does not provide him with the right to appeal to the Governing Board; therefore, his appeal was denied. On or about October 19, 2010, Appellant submitted a letter to the Governing Board requesting reconsideration of the Board's decision to deny his appeal.

... On or about December 30, 2010, []WAPA's Governing Board subsequently responded to Appellant's request for reconsideration of his appeal. Apparently, the Board, after conducting its own investigation, discovered that the website displayed an out-dated version of Section 14.2, which was since removed. The Board decided to

consider Appellant's appeal, and provided Appellant with a timeline of the appeal process.

After several extensions, the Governing Board ultimately issued its decision as to Elroi Baumann Appeal of Termination on June 20, 2011. The Board determined that Appellant did receive procedural due process and there was sufficient evidence presented to establish that Appellant violated the sexual harassment policy. As a result, the Board affirmed Appellant's dismissal.

(R. at 11-13.)

Baumann appealed from the Governing Board to PERB on June 28, 2011. The appeal, also captioned *In the Matter of: Elroi E. Baumann v. Virgin Islands Water and Power Authority* ("2011 case") but numbered PERB-GSA-11-23X, was heard over two days in July 2011 by the same hearing officer who heard the 2010 case. The hearing officer limited the scope of the July 2011 hearing to jurisdiction, however, since WAPA had moved to dismiss, claiming that Baumann could not appeal from the Governing Board to PERB.

PERB rendered its decision on August 9, 2011, concluding that Baumann could appeal from the Governing Board to PERB because the Board had "in essence 'revived' the appeal, and gave [Baumann] another opportunity to have Hodge's decision to terminate him reviewed." (R. at 15 (Decision and Order 9, *In re: Baumann v. V.I. Water & Power Auth.*, PERB-GSA-11-23X (V.I. PERB. Aug. 9, 2011)).) But the Board still dismissed Baumann's 2011 case, concluding that it lacked jurisdiction because Baumann was not a regular employee as he "was in a confidential relationship to a policy-maker . . . [and] further . . . that [his] position as the Personnel Manager/Labor is not a classified or career service position, but is an exempt position under 3 V.I.C. § 451a(b)(8) of the Personnel Merit System." (R. at 19.)

Baumann filed a petition for review with the Superior Court on September 2, 2011 ("the 2011 appeal"). On September 11, 2013, the Court (Donohue, P.J.) granted the petition, directed the

Board to forward the record, and issued a briefing schedule for the parties to follow. Baumann filed his appellate brief on November 13, 2013. WAPA filed its responsive brief on December 16, 2013 and PERB filed its responsive brief on December 24, 2013. Baumann filed reply briefs on January 15, 2014 and January 21, 2014, respectively. The Clerk's Office reassigned this matter to the undersigned judicial officer after the prior judge retired in 2013.

Meanwhile, after Baumann had filed the 2010 appeal but before the September 11, 2013 Order was issued in the 2011 appeal, the Superior Court (Willocks, J.) had issued an order on October 23, 2012, finding Baumann's 2010 appeal was untimely because it was filed forty-seven days after PERB issued its November 3, 2010 decision—not thirty days as required by section 530a of title 3 of the Virgin Islands Code. *See* 3 V.I.C. § 530a(a) ("An application for review must be filed within 30 days after the date of the Final Order and name the PERB as a party respondent."). The Superior Court then "ORDERED that summary judgment is entered in favor for Respondents PERB and WAPA, enforcing PERB's November 3, 2010 Order." (Order 3, entered Oct. 23, 2012, *Baumann v. Pub. Emples. Relation Bd., et al.*, SX-10-CV-567.) *See also* 3 V.I.C. 530a(a) ("An application not filed in a timely manner shall entitle the prevailing party or PERB to summary judgment enforcing the final order of the PERB."). Baumann did not appeal the October 23, 2012 Order to the Supreme Court of the Virgin Islands.

II. JURISDICTION AND STANDARD OF REVIEW

The Appellate Division of the Superior Court of the Virgin Islands has jurisdiction over all appeals from "[a]ny party aggrieved by any final order of the PERB issued under section 530 or 531" of title 3 of the Virgin Islands Code. 3 V.I.C. § 530a(a); V.I. R. Civ. P. 91(a) ("A writ of review may be granted by the court upon the petition of any party to any proceeding before, or aggrieved by, the

decision or determination of an officer, board, commission, authority or other tribunal established by statute. Such petition shall be filed with the Appellate Division.”).³ “An application for review must be filed within 30 days after the date of the Final Order” 3 V.I.C. § 530a(a). PERB issued its decision and order on August 9, 2011. Baumann timely filed a petition for review on September 2, 2011. Therefore, the Superior Court has jurisdiction over PERB’s August 9, 2011 decision and order.

“When hearing an appeal from the PERB, the Superior Court functions as an appellate court.” *V.I. Narcotics Strike Force v. Gov’t of the V.I. Pub. Emples. Rel. Bd.*, 60 V.I. 204, 218 (V.I. 2013) (citing 3 V.I.C. §§ 530a(a)-(c)). “[A]ll questions of fact determined by the PERB shall be conclusive, if supported by substantial evidence in the record considered as a whole.” 3 V.I.C. § 530a(b). “The rules of procedure of the Superior Court regarding a writ of Review shall govern the appeal proceeding.” *Id.* § 530a(a). However, “[n]o objection not made before the PERB shall be considered in a review by the Superior Court, unless the failure to make the objection is excused by the court because of extraordinary circumstances.” *Id.* § 530a(b). “In reviewing a final order of the PERB, the [Superior C]ourt may enforce the order, modify the order and enforce it, set the order aside, or return the matter to the PERB with instructions for further proceeding[s]” *Id.* § 530a(c).

³ When Baumann filed this appeal, Superior Court Rule 15 governed. Since then, the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure. Pursuant to Rule 1-1, the Virgin Islands Rules of Civil Procedure “govern . . . proceedings in any action pending on the effective date of the rules or amendments, unless: (A) the Supreme Court of the Virgin Islands specifies otherwise by order; or (B) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.” V.I. R. Civ. P. 1-1(c)(2). To date, the Virgin Islands Supreme Court has not exempted any category of cases, such as pending reviews from boards and agencies, from retroactive application of the new rules of procedure. And this Court does not find that applying Rule 91 to this matter would be infeasible or work an injustice. The only change applicable here—since the record has been submitted and the issues briefed, cf. V.I. R. Civ. P. 91(f)-(g)—concerns which division of the court the review is in. Since the judges of the Superior Court sit at present in all divisions of the court simultaneously, excepting the Family Division and those divisions within the jurisdiction of the Magistrate Division, deeming Baumann’s review as reassigned to the Appellate Division has no impact on the authority of the undersigned judicial officer to preside over it. However, the standard of review provided in Rule 91 does not govern here because a different standard is “otherwise provided by statute.” V.I. R. Civ. P. 91(i).

III. DISCUSSION

To grasp the issues raised on appeal the Court must first address how the Virgin Islands government classifies its public employees. The United States Court of Appeals for the Third Circuit addressed this same topic not long ago, explaining that

under Virgin Islands law, public employees are divided into (1) career service and (2) exempt service employees. . . . [A]n employee is in the career service unless the employee holds an exempt position described in 3 V.I.C. § 451a(b)(1)-(8). . . . The exempt designation is important because employees in that category can be terminated without cause. Employees who are not exempt are then considered career service employees. The career service category is further divided by § 451 into two subcategories: employees who are regular and those who are not regular, respectively. . . .

. . . [U]nder the employee termination procedures of § 530, employees who are regular employees may be terminated only for cause, thus granting them a property interest in continued employment. . . . [N]ot all career service employees have due process protection, but rather, only those who also meet the definition of regular employees.

....

. . . To be a regular employee and thus gain a property interest in employment, an employee must have been appointed to a position in the career service in accordance with this chapter after completing his working test period. This chapter refers to Title 3, Chapter 25 of the Virgin Islands Code, which in addition to §§ 451 and 451a, also includes Sections 521 through 535. These sections set forth the standards and requirements for tests, appointments, promotions, and dismissals of regular public employees. Under Section 521, to have been appointed to a position in the career service in accordance with this chapter requires that an employee have been appointed on the basis of merit and fitness, to be ascertained by competitive examinations.

Iles v. de Jongh, 55 V.I. 1251, 1257-59, 1261 (3d Cir. 2011) (quotation marks, brackets, and citations omitted).

The question here is whether Baumann is a regular employee. At first glance, the answer seems relatively straight-forward. Baumann worked for the Virgin Islands Water and Power Authority. Employees of the Virgin Islands Water and Power Authority are exempt from the career

service. *See* 3 V.I.C. 451a(b)(7)(ii) (“The exempt positions are those of . . . employees of the . . . Virgin Islands Water and Power Authority.”). However, the exemption of WAPA’s employees from the career service does not resolve this appeal because the career service is not the concern here. Rather, the dispute turns on the changes the Legislature of the Virgin Islands made to section 530 of title 3 of the Virgin Islands Code at the end of 2009. *See generally* Act No. 7144, 2009 V.I. Sess. L. 310, 310-11 (Jan. 27, 2010).

On January 27, 2010, Governor John P. de Jongh, Jr. approved Bill Number 28-0142 which, once signed, became Act No. 7144. Act No. 7144 rewrote subsection (a) of section 530 by further dividing it into multiple subsections. Before Act No. 7144 was enacted, section 530(a) read, in pertinent part, as follows:

Notwithstanding any other provision of law, in any case after January 1, 1977, where . . . the executive director or chief executive officer of any agency or instrumentality of the Government including, but not limited to, the Executive Director of . . . the Virgin Islands Water and Power Authority . . . decides to dismiss, demote, or suspend a regular employee of, or an employee, who is not on contract, is not temporary, and is not on probation, with . . . the Virgin Islands Water and Power Authority . . . for cause, he shall furnish the employee with a written statement of the charges against him. The employee shall have ten days following the date of receipt of the statement of charges to appeal the proposed action to the Public Employees Relations Board. The appeal must be in writing, and the Board must provide a copy to the department head, the agency head or the chief executive officer, as the case may be, and the Attorney General.

V.I. Code Ann. tit. 3, § 530(a) (2008 ed.), *amended by* Act No. 7144. However, section 530(a) now reads as follows:

(1) Notwithstanding any other provision of law, in any case after January 1, 1977, before a head officer of an executive department, agency or instrumentality of the Government dismisses, demotes or suspends a regular employee of a department, agency or instrumentality of the Government, the head officer shall furnish the employee with a written statement of the charges against the employee. The employee shall have ten days following the date of receipt of the statement of charges to appeal the proposed action to the Public Employees Relations Board. The appeal

must be in writing, and the Board must provide a copy to the head officer and the Attorney General.

(2) As used in this section:

(A) “head officer” means the Commissioner of an executive branch department, the director of an executive branch agency or instrumentality or the director, executive director, chief executive officer, president or other titular head of an instrumentality of the Government of the Virgin Islands.

(B) Instrumentality of the Government includes

(i) the Virgin Islands Water and Power Authority

....

(C) “Regular employee” means an employee who:

(i) has been appointed to a position in the classified or career service or served in a temporary position for more than two years in a department or agency of the executive branch or in an instrumentality, as defined in subparagraph (B) of this subsection **or and**

(ii) who is not on contract, is not on probation, and therefore subject to dismissal, demotion or suspension, only for cause.

3 V.I.C. 530(a) (emphasis added). This appeal concerns the words “or and” in section 530(a)(2)(C)(i).

PERB dismissed Baumann’s 2011 case, concluding that Baumann was not a regular employee—not because he worked for WAPA—but because his position within WAPA “require[d] a confidential relationship with a policy-making official.” 3 V.I.C. § 451a(b)(8). On appeal, Baumann rejects this determination as contrary to law. He claims that he was a regular employee pursuant to section 530(a)(2)(C)(ii) because he was not on contract and not on probation. He argues that the word “and” in section 530(a) is superfluous and the word “or” should control. He further claims he had a property interest in his employment, pursuant to *Virgin Islands Port Authority v. Government Employees’ Services Commission*, 983 F.2d 548 (3d Cir. 1993), and *Iles v. de Jongh*, and could only be fired for cause. Finally, he argues that “WAPA conceded that Baumann was a regular employee and that PERB had jurisdiction” during his 2010 case and then failed to “present evidence that Baumann was not a regular employee or make any such claims” during his 2011 appeal. (Mem. of L. in Supp.

of Mot. to Modify & Remand PERB's Decision of Aug. 9, 2011 Denying Pet. His Rights under 3 V.I.C. 530 (A) 6, filed Nov. 13, 2013 (hereinafter "Appellant Br.") So, PERB should have proceeded to the merits. He requests a remand to PERB for it to render a decision on the merits and an award of backpay and reinstatement to his former position from this Court with full pay to the date when he was dismissed until PERB reaches the merits.

WAPA rejects Baumann's claims, countering first that this appeal is barred by the October 23, 2012 order Judge Willocks issued in the prior appeal. WAPA further argues that even if PERB erred in applying section 451a(b)(8), the error was harmless because Baumann did not hold a position in the career service and because all employees of WAPA are exempted from the career service. WAPA further argues that PERB lacked jurisdiction over Baumann's 2011 case because Baumann appealed from the Board's decision, not the head officer's decision, and that Baumann's arguments pertaining to WAPA's employee manual are not properly before this Court. Finally, WAPA refutes Baumann's interpretation of section 530, rejects his due process claim, and further claims that the Court lacks the authority to award backpay.

PERB, like WAPA, rejects Baumann's construction of the words "or and" in section 530. Relying on an earlier version, PERB contends that the word "or" was just "a typographical error" because it was not present in the bill that was reported out of committee. (Resp. PERB's Resp. to Mot. to Modify & Remand PERB's Decision of Aug. 9, 2011 Denying Pet'r His Rights Under 3 V.I.C. § 530(A) 5-6, filed Dec. 24, 2013 (hereinafter "PERB Br.") PERB "implores the Court to reject" Baumann's "absurd argument" which would require "this Court to construe a typographical error as creating a new definition of a 'regular employee,' and to change the statutory structure of Section 530(a) by creating another category of employees who would be entitled to Section 530(a)'s

protections.” *Id.* at 6. PERB further argues that it did not err in concluding that Baumann was not a regular employee and that its decision “should be afforded great deference.” *Id.* at 11 (citing *Abramson v. Georgetown Consulting Group, Inc.*, 765 F. Supp. 255 (D.VI. 1991); *Herbert v. Gov’t Emples. Serv. Comm’n*, 21 V.I. 358 (D.V.I. 1985)). Finally, PERB too claims that the question of backpay is not before the Court because it was not raised below.

Baumann, in reply, rejects WAPA’s claim that Judge Willocks’s October 23, 2012 order bars this case because PERB’s “November 3, 2010 Decision was not a final appealable order” and further because “the Superior Court’s October 23, 2012 Order . . . was not based on the merits of whether Baumann was properly terminated or his employment status.” (Appellant’s Reply to WAPA’s Resp. to Mot. to Remand the Decision of PERB 4-5, filed Jan. 15, 2014 (hereinafter “Reply to WAPA”).) And in reply to PERB, Baumann reiterates that PERB should not have questioned whether he was a regular employee because WAPA conceded that he was. “That position by WAPA should stand.” (Appellant’s Reply to PERB’s Resp. to Mot. to Remand Decision of PERB 5, filed Jan. 21, 2014 (hereinafter “Reply to PERB”).)

A. Res Judicata Effect of the Superior Court’s October 23, 2012 Order

Because “[e]rrors raised on review can be rendered moot by subsequent events,” *Dennie v. People*, 66 V.I. 143, 159 (Super. Ct. App. Div. 2017) (citations omitted)), the Court must first consider WAPA’s claim that Judge Willocks’s October 23, 2012 Order bars this case. If WAPA is correct, this Court would need to decline to consider the other issues because a decision on those questions would “be hypothetical or academic or without any practical significance.” *Der Weer*, 60 V.I. at 99 (quotation marks and citations omitted).

WAPA argues that “[u]nder the doctrine of res judicata, Baumann’s claim that he is a regular employee is barred by th[e Superior] Court’s final judgment in favor of WAPA and PERB.” (Resp. of WAPA to Mot. to Modify & Remand PERB’s Decision of Aug. 9, 2011 3 & n.7, filed Dec. 16, 2013 (citing *Restatement (Second) of Judgments* § 17(2)-(3) (1982)) (footnoting *Sprauve v. CBI Acquisitions, LLC*, No. 09-165, 2010 WL 3463308, *6 (D.V.I. Sept. 2, 2010)) (hereinafter “WAPA Br.”).)⁴ “Res judicata, also known as claim preclusion, precludes relitigation of any claims that were raised or could have been raised in a prior action. It is premised on fairness to the defendant and sound judicial administration.” *Stewart v. V.I. Bd. of Land Use Appeals*, 66 V.I. 522, 531 (V.I. 2017) (quotation marks and citations omitted). Under Virgin Islands common law,

to bar the relitigation of a claim . . . an asserting party must demonstrate: (1) the prior judgment was valid, final, and on the merits; (2) the parties in the subsequent action are identical to or in privity with the parties in the prior action; and (3) the claims in the subsequent action arise out of the same transaction or occurrence as those in the prior action.

Id. at 533 (citing *Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247, 255 (V.I. 2014)).

“This proceeding involves the same parties as the prior proceeding,” the 2010 review, WAPA explains. *Id.* at 3. “The sole issue in that case was whether Baumann is a ‘regular employee’ whose challenge to WAPA’s personnel decision is within the jurisdiction of PERB under section 530.” *Id.* “Baumann’s Petition for Writ of Review in this case likewise raises the issue whether [he] is a ‘regular employee’ whose challenge to WAPA’s personnel decision is within the jurisdiction of PERB

⁴ While *Sprauve* is only persuasive authority, it is also the only case law that WAPA cited in support of its argument. Yet, rather than discuss *Sprauve* in the body of its brief, WAPA cited and discussed the case in a footnote. Like other courts, this Court too “strongly disfavors footnoted legal citations. Footnoted citations serve as an end-run around page limits and formatting requirements dictated by the Local Rules. Moreover, several courts have observed that citations are highly relevant in a legal brief and including them in footnotes makes brief-reading difficult. The Court strongly discourages the Parties from footnoting their legal citations in any future submissions.” *Alpert v. Nationstar Mortg. LLC*, 243 F. Supp. 3d 1176, 1179 n.1 (W.D. Wash. 2017) (quotation marks and citations omitted).

under section 530.” *Id.* Because the parties are the same, the claim is the same, and the “final judgment in favor of WAPA and PERB” was valid, this “claim,” WAPA argues, “is barred” by Judge Willocks’s October 23, 2012 order. *Id.*

Baumann rejects WAPA’s argument as “specious” because the November 3, 2010 decision “was NOT based on a final decision by WAPA to terminate Petitioner Elroi Baumann.” (Reply to WAPA 2.) Citing *Smith v. Turnbull*, 54 V.I. 369 (V.I. 2010) (*per curiam*), Baumann asserts that a prior judgment must have been “valid, final, and on the merits” “in order to bind the parties to a subsequent action.” *Id.* at 4 (quoting *Smith*, 54 V.I. at 375). But “a dismissal on jurisdictional grounds does not constitute a valid final judgment for claim preclusion purposes,” he argues, “except as to the question of jurisdiction itself.” *Id.* at 6 (brackets and ellipsis omitted) (quoting *Sprauve*, 2010 WL 3463308 at *6). “[T]he Superior Court never reached the jurisdictional question of whether Baumann was a ‘regular employee’ under § 530(a) because the Superior Court dismissed the Writ of Review as untimely filed.” *Id.* So, Baumann contends that he “is not precluded from asserting th[at] issue in the present case.” *Id.*

Res judicata is enticing at first glance. WAPA terminated Baumann’s employment because he violated its sexual harassment policy. Baumann appealed. His termination was the basis of two hearings before PERB. Although PERB dismissed both hearings on jurisdictional grounds, concluding that he was not a regular employee, Baumann appealed both decisions to the Superior Court. Summary judgment was entered in favor of PERB and WAPA in the first appeal case. Hence, the October 23, 2012 judgment does appear to bar relitigation of the same claim in this case. The issue is not straight-forward, however, because section 530a of title 3 of the Virgin Islands Code provides that “[a]ny party aggrieved by any final order of the PERB . . . may *appeal* to the Superior

Court of the Virgin Islands.” 3 V.I.C. § 530a(a) (emphasis added). Filing a petition for a writ of review, which is what Baumann filed with the Superior Court in 2010 and 2011, is not the same as filing a notice of appeal. Understanding the difference between appeal and review, otherwise known as certiorari, is crucial to disposing of WAPA’s claim.

i. Appeal and Review by Writ are Not the Same

“The right of appeal is a statutory right, not a common law right.” *Xavier v. Treasure Bay V.I. Corp.*, SX-09-CV-450, __ V.I. ___, ___, 2017 V.I. LEXIS 31, *16 (Super. Ct. App. Div. Feb. 23, 2017). “Writs of error and certiorari are common law writs,” however. *Id.* (quoting *Wilson v. Sch. Twp. No. 6*, 23 Mo. 416, 417 (1856), parenthetically). In some jurisdictions, including the Virgin Islands for a time, the writ of certiorari was referred to expressly as the writ of review. *See* Code of Laws for Munic. of St. Thomas / St. Jan, tit. III, ch. 52, § 1 (1921) (“The writ formerly known as the writ of certiorari is known in this title as the writ of review.”), *repealed by* 1 V.I.C. § 5; *see also* *Jackson v. Police Ct. for Subjudicial Dist. of Frederiksted*, 1 V.I. 563, 565 (3d Cir. 1923) (quoting same); *accord* *Cal. & Ore. Land Co. v. Gowen*, 48 F. 771, 775 (C.C.D. Or. 1892) (“A writ of review, under the Code, is the equivalent of the common-law writ of certiorari.”); *People ex rel. San Francisco v. Cty Judge*, 40 Cal. 479, 480 (1871) (“The writ of certiorari is a writ of review. Its office is to bring up for review final determinations and adjudications of inferior tribunals, boards or officers exercising judicial functions, when there is no appeal, nor any plain, speedy and adequate remedy.”); Guam Code Ann. tit. 7, § 31101 (“The writ of certiorari may be denominated the writ of review.”); *see also* *Tucker v. Resha*, 610 So. 2d 460, 466 (Fla. Ct. App. 1992) (“[T]he common-law writ of certiorari is ‘essentially a writ of review.’” (quoting William A. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 207 (1977))), *quashed on other grounds*, 648 So.2d 1187 (Fla.1994); 14 Am. Jur. 2d

Certiorari § 3 (“A writ of review, provided by statute in some jurisdictions, is substantially the common-law writ of certiorari with some modifications concerning when the writ may issue and the relief that may be granted, but these modifications do not materially enlarge the scope of the writ or substantially change its character or purpose.” (footnotes omitted)). Once a comprehensive code of laws was enacted in 1957 for the entire Virgin Islands, the provisions pertaining to writs of review were recodified and the language equating certiorari with review was omitted.⁵ *Cf.* V.I. Code Ann. tit. 5, § 1421 (rev. note) (“Sections 1, 3, 5–9 of the above-cited chapter 52 of Title III of the 1921 Codes, which related to the procedure to be followed with respect to the writ of review, have been omitted from this Code as covered by rules of court.”).

While review and certiorari are akin to appeal, they are not the same. *E.g., State ex rel. Massman Const. Co. v. Shain*, 138 S.W.2d 649, 650 (Mo. 1939) (“*Certiorari* is appellate in the sense that it involves a limited review of the proceedings of an inferior jurisdiction; it is original in the sense that the subject matter of the suit or proceeding which it brings before the court is not reinvestigated, tried and determined on the merits generally, as on appeal at law or writ of error.” (quotation marks and citations omitted)); *see also M.M. v. Fla. Dep’t of Children & Families*, 189 So. 3d 134, 138 (Fla. 2016) (“The difference between certiorari review and appellate review is

⁵ Whether the intent of chapter 52 of title III of the 1921 Codes and, subsequently, chapter 97 of title 5 of the Virgin Islands Code, was to codify the common law right to petition for a writ of certiorari, *cf.* Cal. & Ore. Land Co., 48 F. at 775, to derogate from the common law, or to provide additional statutory grounds for obtaining certiorari review are important questions, but not at issue here. *Compare Norwicki v. Evanston Fair Housing Rev. Bd.*, 338 N.E.2d 186, 188 (Ill. 1975) (“It may be that there was a time when the distinctions between common law certiorari and statutory certiorari served a useful purpose. With the development of numerous forms of statutory certiorari, however, the boundaries of the original common law action became blurred.”), *with G-W Dev. Corp. v. N. Palm Beach Zoning Bd. of Adjustment*, 317 So. 2d 828, 831 (Fla. Ct. App. 1975) (“[W]here the legislature fails to provide for statutory review, or statutory certiorari as it is called, common law certiorari is still available. This principle has been recognized rather uniformly by cases and legal writers alike.” (citations omitted)), and *Coballes v. Spokane Cty.*, 274 P.3d 1102, 1107 (Wash. Ct. App. 2012) (“[C]onstitutional, or common law, writ of certiorari is available as an avenue for review only when both direct appeal and statutory writ of review are unavailable.” (citation omitted)).

important, as the standard of review available when a district court considers a matter by common law certiorari is much higher than when a court reviews a matter as an appeal." (citation omitted)); *Plunkett v. First Nat'l Bank of Austin*, 115 N.W.2d 231, 237 n.2 (Minn. 1962) ("The writ of certiorari is a writ of review in the nature of a writ of error or an appeal.").

A certiorari proceeding invokes one of the oldest common law writs, tracing its origins to the Norman Kings. In England, the writ was used primarily by judges of the King's Bench to supervise the conduct of inferior court officers.

Briefly, certiorari is a writ issued by a superior to an inferior court of record, requiring the latter to send to the former the record and proceedings in some cause already terminated, to the end that a party who considers himself aggrieved by the determination of his rights by the inferior court may have justice done him. A certiorari proceeding differs fundamentally from an appeal in that the latter brings the case up on its merits while the former brings up the record only so that the reviewing court can merely look at the regularity of the proceedings.

....

Historically, an important function of certiorari was to provide a remedy for a party alleging that a lower court had acted without jurisdiction. . . . [T]he writ permits review for a party who considers himself aggrieved by the determination of his rights by the inferior court, without or in excess of its jurisdiction or without compliance with the requirements of law, so that justice may be done for him.

Shoemaker v. State, 375 A.2d 431, 436-37 (Del. 1977) (citations, footnotes, quotation marks, and parentheses omitted).

Review on certiorari is not the same as review on appeal because review on certiorari is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings. The reviewing court does not consider the case on its merits; rather, it considers the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly. A decision will be reversed on jurisdiction grounds only if the record fails to show that the matter was within the lower tribunal's personal and subject matter jurisdiction. A decision will be reversed for an error of law committed by the lower tribunal when the record affirmatively shows that the lower tribunal has proceeded illegally or manifestly contrary to law. A decision will be reversed for irregularities of proceedings if the lower tribunal failed to create an adequate record to review.

Christiana Town Ctr., LLC v. New Castle Cty., No. 334, 2000, 2004 Del. LEXIS 576, *4-6 (Del. Dec. 16, 2004) (quotation marks and footnoted citations omitted).

The scope of review is different between appeal and review and the means of invoking the two remedies also differs. “The right of ‘appeal’ means the right to *require* an appellate court to review a lower court’s decision. The right of ‘petition’, on the other hand, means the right to *request* an appellate court to review a lower court’s decision—a request which the appellate court may grant or deny as it sees fit.” *Rozkydal v. State*, 938 P.2d 1091, 1094 (Alaska Ct. App. 1997) (emphasis added) (citations omitted). For this reason, “[a]ppeals typically proceed by notice because they are of right.” *Xavier*, __ V.I. at __ n.7, 2017 V.I. LEXIS 31 at *18 n.7 (citations omitted); *cf.* V.I. R. App. P. 4(a) (“An appeal permitted by law as of right from the Superior Court to the Supreme Court shall be taken by conventionally or electronically filing a notice of appeal with the Clerk of the Supreme Court.”); *accord Brown v. Brown*, 337 P.3d 681, 683 (Idaho Ct. App. 2014) (“An appeal is commenced by filing a notice of appeal with the district court.” (citation omitted)); *Cepek v. Cepek*, 684 N.W.2d 521, 523-24 (Minn. 2004) (“An appeal is taken by filing a notice of appeal with the clerk of the appellate courts and serving the notice on the adverse party or parties within the appeal period.” (citation omitted)). By contrast, “petitions proceed by permission and thus must be granted.” *Xavier*, __ V.I. at __ n.7, 2017 V.I. LEXIS 31 at *18 n.7 (citations omitted); *cf. Rivera-Moreno v. Gov’t of the V.I.*, 61 V.I. 279, 311 (V.I. 2014) (a petition for a writ of habeas corpus is granted or denied when the pleading shows or fails to show a prima facie case for relief); *see also, e.g., Shook v. Huffman*, 43 S.W.3d 735, 736 (Ark. 2001) (“The party seeking to proceed by petition for writ of prohibition bears the burden of demonstrating that it is clearly entitled to so proceed.”); *State ex rel. Wischstadt v. Olson*, 57 N.W. 477, 477 (Minn. 1894) (“When a petition is presented to a court for the issuance of a

writ of *certiorari*, it should disclose a proper case upon its face.” (citations omitted)); *Belk’s Dep’t Store, Inc. v. Guilford Cty*, 22 S.E.2d 897, 904 (N.C. 1943) (Stacy, C.J., dissenting) (“It is true, on petition for *certiorari* the applicant must *show* merit” (emphasis added)).

But more importantly, an appeal is a continuation of the underlying case. *E.g., Slack v. McDaniel*, 529 U.S. 473, 481 (2000) (“[A]n appeal is a continuation of the litigation started in the trial court.”); *In re: Order on Reh’g & Mot. for Attys Fees*, 2016 OK 119, ¶ 4 (2017) (“An appeal is a continuation of the action brought in the trial court.” (footnote omitted)); *see also* 1 Am. Jur. 2d *Actions* § 4 (“An appeal is a continuation of an original proceeding and not a new action.” (footnote omitted)). That is, a petition for a writ of review or *certiorari* is not a continuation of another case, but rather an original proceeding. As with a petition for a writ of mandamus, of prohibition, of error *coram nobis*, which commence new proceedings, a petition for a writ of review also initiates a new, distinct, and separate proceeding from the underlying case to which it pertains. *Cf. State ex rel. Massman Const. Co.*, 138 S.W.2d at 650 (“Such proceeding (*certiorari*) is a new, distinct, and separate action from that decided by the Court of Appeals, and is *not a continuation* of the original suit or action decided by the Court of Appeals.” (emphasis added) (quotation marks and citations omitted)); *cf. Schreck v. Standridge*, 614 S.E.2d 185, 187 n.6 (Ga. Ct. App. 2005) (“Unlike a notice of appeal, which does not initiate a new case but merely initiates a new procedural stage in an existing case, a petition for writ of *certiorari* to the superior court does constitute a new legal action, requiring an answer.” (citation omitted)); *Ruby v. State*, 724 A.2d 673, 679 (Md. 1999) (“When petitioner filed his Petition for Writ of Error *Coram Nobis*, a new case file was opened because such a petition creates a separate civil action collateral to the underlying criminal matter.”); *Lynn Gas & Elec. Co. v. Creditors’ Nat’l Clearing House*, 126 N.E. 364, 366 (Mass. 1920) (“[A] writ of review is a

new proceeding and not a mere continuation of the earlier action.” (citing *Badger v. Gilmore*, 37 N.H. 457 (1850); *Page v. Brewster*, 58 N.H. 126 (1877); *McDonough v. Blossom*, 88 A. 89 (Me. 1913)); *Ferree v. Douglas*, 21 A.2d 472, 472 (Pa. Super. Ct. 1941) (“When filed the petition [for writ of habeas corpus] institutes a new proceeding in which the Commonwealth, at the relation of the particular prisoner seeking to be discharged, is the petitioner and the keeper of the prison detaining him is the respondent.”).

The most important distinction, however, between review and appeal is that a “writ of review can issue where there is no appeal; but where the right of appeal once existed, and is lost by lapse of time, the controversy cannot be reopened by means of the writ.” *Ramsey v. Pettingill*, 12 P. 439, 441 (Or. 1886); accord *Jackson*, 1 V.I. at 565-66 (“[T]he alleged aggrieved party had a right to appeal the case to the court below in the same way a party in a civil case could appeal. And such being his legal right, his legal remedy in due and orderly course was by such appeal, and not by way of a writ of review.”); *Black v. New Castle Cty Bd. of License*, 117 A.3d 1027, 1029 (Del. 2015) (“As we have long held, a petition for a writ of certiorari is not a substitute for a direct appeal, which must be authorized by the General Assembly.”); *State ex rel. Wischstadt*, 57 N.W. at 477 (“The law seems to be well settled that ordinarily a writ of certiorari will not be issued where the party may have adequate relief against the grievance of which he complains, and it should not be allowed or issued when there is a remedy by appeal, or some other mode of review is given by law.”). Thus, if a right of appeal exists by statute, then the right to seek review by writ is typically unavailable. See 5 V.I.C. § 1422 (“The writ of review shall be allowed in all cases *where there is no appeal* or other plain, speedy, and adequate remedy” (emphasis added)); see also *Jackson*, 1 V.I. at 565 (“The writ shall be allowed in all cases *where there is no appeal*” (emphasis added) (quoting Code of

Laws of St. Thomas / St. Jan, tit. III, ch. 52, § 4 (1921)); *Wash. Pub. Emples. Ass'n v. Personnel Resources Bd.*, 959 P.2d 143, 149 (Wash. Ct. App. 1998) (“Statutory *certiorari* provides a means for courts to review judicial actions of public officers or organs of government where there is no statutory right of appeal nor an adequate remedy at law. The opportunity for a court of law to review administrative determinations provides security against administrative injustice.” (quotation marks and citations omitted)).

Some jurisdictions limit review by writ to determining only whether a lower *court* exceeded its jurisdiction. *E.g., Brown v. State*, 245 A.2d 925, 926 (Del. 1968) (“The writ of *certiorari* is a writ of review to ascertain whether or not an inferior *court* has exceeded its jurisdiction.” (emphasis added)); *State v. Dist. Ct. Unit No. 1*, 274 A.2d 685, 685-85 (Vt. 1971) (“The review thus given is not the same as that of an ordinary appeal. It is limited to a review of *judicial* action by inferior courts and tribunals and confined to substantial questions of law affecting the merits.” (emphasis added)). *But cf. Cf. G-W Dev. Corp.*, 317 So. 2d at 831 (“[C]ommon law *certiorari* will only lie to review judicial or quasi-judicial action.” (emphasis added) (citations omitted)). In the Virgin Islands, however, the statutory right to petition for a writ of review has extended for more than half a century to “all cases where . . . the officer, board, commission, authority, or tribunal in the exercise of his or its functions appears to have *exercised such functions erroneously, or to have exceeded his or its jurisdiction*, to the injury of some substantial right of the plaintiff.” 5 V.I.C. 1422 (emphasis added); *see also id.* § 1421 (rev. note) (explaining that the “[w]ords ‘board, commission, authority,’ were inserted [when the Virgin Islands Code was adopted in 1957] to clarify the application of the section.”); *accord V.I. Gov’t Hosps. & Health Facilities Corp. v. Gov’t of the V.I.*, 47 V.I. 430, 441 n.11 (V.I. Super. Ct. 2006); *cf. Felix v. Gov’t of the V.I.*, 3 V.I. 399, 416-17 (D.V.I. 1958) (“For under 5 V.I.C. 1421 and 1422 this court is

empowered to review, as on certiorari, the proceedings for the dismissal of the plaintiff in order to determine whether the Governor or the Government Secretary, or both, exercised their functions erroneously or exceeded their jurisdiction to the injury of the plaintiff's substantial rights." (footnotes omitted)).

ii. The Superior Court Has Appellate, not Certiorari, Jurisdiction Over PERB

The distinction between appeal and review is raised in this case and begs the question, for *res judicata* purposes, what is the "conduct, transaction, or occurrence" that gave "rise to th[ese] action[s]." *Stewart*, 66 V.I. at 543. PERB reached the same decision in both cases—that Baumann is not a regular employee—but the rationale underlying each decision was different. Since the Superior Court has appellate, not original, jurisdiction over PERB, the question becomes, for *res judicata* purposes, what "conduct, transaction, or occurrence" is the same between the 2010 appeal and 2011 appeal: Baumann's termination or PERB's decision? The difference between appeals and certiorari also answers this question because an appeal is an extension of an existing case, whereas a certiorari petition commences a new case. *Cf. Dash, Inc. v. Alcoholic Beverage Control App. Bd.*, 683 F.2d 1229, 1235 (9th Cir. 1982) ("[P]etitions for writ of review of an administrative determination constitute review as of right, and even a summary denial of such a petition represents a judgment on the merits for *res judicata* purposes in California state courts." (citing *Consumers Lobby, etc. v. Public Utilities Comm'n*, 603 P.2d 41 (Cal. 1980)) (footnotes omitted)).

Courts in the Virgin Islands have observed that appeal and review are different. *See, e.g., V.I. Bd. of Educ. v. Gov't of the V.I., Dep't of Labor*, ST-16-CV-616, 2017 V.I. LEXIS 124, *3 n.11 (V.I. Super. Ct. Mar. 17, 2017) ("Petitioner titled its appeal as a writ of review. On October 24, 2016, this Court granted Petitioner's writ of judicial review, noting that it was really an appeal under 24 V.I.C. §

306.”); *Bridgewater v. Publ. Empl. Rel. Bd.*, ST-13-CV-534, 2016 V.I. LEXIS 77, *1 n.2 (V.I. Super. Ct. June 21, 2016) (“Although Petitioner entitled his submission as a ‘petition for writ of review,’ and VITC has similarly identified the submission as such, the submission is actually a notice of appeal under 3 V.I.C. § 530a.”). But none have addressed what it means. Counsel too did not raise the issue either in the 2010 or the 2011 court appeal, which further underscores how discounted this distinction is in Virgin Islands jurisprudence. “It is proper to say, in this connection, that no attorney or party is responsible for this practice. They did not introduce it, and they could not abolish it. It owes its origin entirely to what must be regarded as an oversight on the part of th[e] court[s].” *Ramsey*, 12 P. at 410-11. But in this instance, the distinction is dispositive. *Cf. Melton v. Personnel Comm’n of N.H.*, 401 A.2d 1060, 1063 (N.H. 1979) (“Certiorari is an *extraordinary remedy* and is not granted as a matter of right but rather at the *discretion of the court* ‘when the substantial ends of justice require such relief.’” (emphasis added) (quoting *State v. N.H. Retail Grocers Ass’n, Inc.*, 348 A.2d 360, 362 (N.H. 1975))).

In 2002, the Legislature of the Virgin Islands provided for appeal from final orders issued by PERB. *See generally* Act No. 6533, § 29, 2002 V.I. Sess. L. 423, 430 (July 5, 2002), *codified at* 5 V.I.C. 530a. “[P]rior to section 530a’s enactment in 2002, Virgin Islands courts consistently held that aggrieved parties could only obtain review of orders entered by PERB and its predecessor, the Government Employees’ Service Commission, through the general writ of review statute, codified a[t] 5 V.I.C. §§ 1421-23.” *Gov’t of the V.I. v. Crooke*, 54 V.I. 237, 247-48 (V.I. 2010) (footnotes and citations omitted). *But cf.* 24 V.I.C. § 380 (providing for appeal from PERB for final orders issued in complaint cases filed by or against unions) (“Any party aggrieved by any final order of the PERB made pursuant to section 379 of this chapter, may appeal to the Superior Court of the Virgin Islands

for review of such order.”). But once section 530a was enacted, orders issued by PERB should have been appealed to the Territorial and later Superior Courts. *Cf. Pichardo v. Benjamin*, S. Ct. Civ. No. 2007-061, 2008 V.I. LEXIS Supreme 25, *7 (V.I. Apr. 16, 2008) (*per curiam*) (holding that general writ of review statute is inapplicable where another, more specific statute governs), *aff’d* 55 V.I. 936 (3d Cir. 2010). In other words, before 2002, “[a]ny party to any proceeding before . . . [PERB could] have the decision or determination thereof reviewed for errors,” 5 V.I.C. § 1421, by petition for writ of review because “there [wa]s no appeal or other plain, speedy, and adequate remedy.” *Id.* § 1422. But after 2002, “[a]ny party aggrieved by any final order of the PERB . . . [should] appeal to the Superior Court of the Virgin Islands.” 3 V.I.C. § 530a(a).

Blame cannot be placed solely on the judiciary, however. The Legislature did use the word “appeal” in section 530a, but then provided that “[t]he rules of procedure of the Superior Court regarding a writ of Review shall govern the appeal proceeding.” *Id.* (emphasis added). This conflates two different, and contradictory, means of invoking a court’s jurisdiction. Nonetheless, courts must “presume that when the Legislature creates a statute, it is aware of the long-standing procedures and practices of the courts.” *Brooks v. Gov’t of the V.I.*, 58 V.I. 417, 428 (V.I. 2013) (citing *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011); 82 C.J.S. *Statutes* § 377 (2013)). Courts also must “presume that a legislature knows the meaning of words, has used the words of a particular statute advisedly, and has expressed its intent by the words as found in the statute.” *In re: Holcombe*, 63 V.I. 800, 835-36 (V.I. 2015) (quotation marks, brackets, and citations omitted). Territorial Court Rule 15, later renamed Superior Court Rule 15, was in effect in 2002 when the Legislature adopted section 530a and remained unchanged in 2010 and 2011 when Baumann filed his petitions for writ of review with the Superior Court. Rule 15(a) provides that “[a] writ of review may be granted . . . upon the

petition of any person aggrieved by the decision or determination of an officer, board, commission, authority or tribunal." Super. Ct. R. 15(a) (emphasis added); *accord* V.I. R. Civ. P. 91(a) ("A writ of review may be granted . . . upon the petition of any party to any proceeding before, or aggrieved by, the decision or determination of an officer, board, commission, authority or other tribunal established by statute."). Appeals proceed by notice, however, not by petition (since petitions must be granted). So, the question is: did the Legislature mean appeal when it said "appeal" or did it mean "writ of review" even though it said appeal.

"The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *In re: L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) (quoting *In re: Reynolds*, 60 V.I. 330, 334 (V.I. 2013)). Generally-speaking, courts "apply any specific definitions that are statutorily prescribed. When no statutory definition is provided, words that have an accumulated legal meaning will be given that meaning, and other words will be given their common, dictionary, meaning." *Ubiles v. People*, 66 V.I. 572, 590 (V.I. 2017); *accord* 1 V.I.C. § 42 ("Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to their peculiar and appropriate meaning.").

The Legislature defined certain key terms pertaining to the Personnel Merit System. *See generally* 3 V.I.C. § 451. But no particular meaning was ascribed to the word "appeal" as used in section 530a. Thus, the ordinary meaning of the word applies. Similarly, the Legislature also did not define the phrase "writ of Review" as used in section 530a, or as used in sections 1421 through 1423

of title 5, providing for writs of review generally. The Legislature did define the word writ, however. A “writ” signifies an order or precept in writing, issued in the name of the people or government of the Virgin Islands, or of a court or judicial officer.” 1 V.I.C. § 41. Taken together, the phrase “writ of review” signifies an order issued in writing in the name of a court directing “the officer, board, commission, authority, or tribunal,” 5 V.I.C. 1422, “to bring up the record of the proceedings” for review. *Broback v. Huff*, 4 P. 1130, 1130 (Ore. 1884); *see also Holmes v. Graham*, 80 P.2d 870, 872 (Ore. 1938) (“The purpose of a writ of review is to bring up the record from the inferior tribunal to determine whether or not that inferior tribunal acted without jurisdiction, or exceeded its jurisdiction, or exercised its functions erroneously.”). Clearly, “writ of review” is a technical phrase having acquired a peculiar and appropriate meaning in the law, a meaning also at odds with the meaning of appeal. *Cf. Davis v. Strople*, 39 So. 2d 468, 469 (Fla. 1949) (Barns, J., dissenting) (“Generally speaking, reviews by appeals and writs of error do not have to be applied for and allowed, and are not dependent upon the application being granted. They do not depend upon any favorable act of the reviewing court. As a rule, the appellate jurisdiction in respect to appeals and writs of error is obligatory upon the court and cannot be withheld or denied. However, a review by certiorari, in the absence of any special circumstances, is usually dependent upon the application being granted and is not to take the place of a writ of error or an appeal.” (paragraph break and citations omitted)); *State v. Heiner*, 683 P.2d 629, 642 (Wyo. 1984) (Rooney, C.J., concurring) (“One of the primary conditions for issuance of a writ of certiorari is that it will not lie when another remedy is available. This factor alone reflects the distinction between ‘appeal’ and ‘certiorari.’” (internal citations omitted)). Because appeal and writ of review are not synonymous, but antonymous, they cannot be reconciled.

When statutes conflict, or when terms within a statute conflict, courts strive to read them in harmony. *Cf. Phillip v. People*, 58 V.I. 569, 590 (V.I. 2013) (“[S]tatutes *in pari materia* must be harmonized unless there is a clear inconsistency between them” (citation omitted)). Here, harmonizing the words “appeal” and “writ of review” in section 530a is not possible because of the presumption that the Legislature knew of “the long-standing procedures and practices of the courts,” *Brooks*, 58 V.I. at 428 (citations omitted), and further, that writs of review proceed by petition. Since appeal is of right and certiorari is discretionary, the Legislature would not have granted the right of appeal from PERB, but then restricted that right to a petition being granted. *Cf. Crooke*, 54 V.I. at 246 (“[T]he plain text of this statute provides strong support for the proposition that the Legislature intended to allow litigants to appeal, *as of right*, any decision the Superior Court entered pursuant to section 530a(a), regardless of whether it would constitute a final order.” (emphasis added)). The only way to harmonize the language in section 530a(a)—that “[t]he rules of procedure of the Superior Court regarding a writ of Review shall govern the appeal proceeding,” 3 V.I.C. § 530a(a)—is to construe it as referring to those procedures other than the filing of a petition, such as setting forth the decision to be appealed and the errors alleged to have been committed, *see* Super. Ct. R. 15(a); V.I. R. Civ. P. 91(b), or the posting of a surety bond, *see* Super. Ct. R. 15(b); V.I. R. Civ. P. 91(c). *Cf. Gerace v. Bentley*, 65 V.I. 289, 302 (V.I. 2016) (“If a statute and a court rule cannot be harmonized, the court rule will generally prevail in procedural matters and the statute in substantive matters.” (quotation marks and citation omitted)), *writ granted sub nom Vooy v. Bentley*, No. 16-3912 (3d Cir. Mar. 23, 2017).

To be sure, this conclusion is not without its shortcomings. After all, section 530a does speak of “[a]n *application* for review” and entry of “summary *judgment* enforcing the final order of the

PERB” if the application is filed late. 3 V.I.C. 530a(a) (emphasis added). Applications, like motions and petitions, typically refer to papers filed in court that must be ruled on. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 128-29 (Super. Ct. 2016) (“Any application— whether orally or in writing— made to a court or judge for the purpose of obtaining a ruling or order directing some act to be done in favor of the applicant in a pending case is a motion.” (quotation marks, brackets, and citations omitted)); *see also* 5 V.I.C. § 1305 (“The writ [of habeas corpus] shall be directed to the person having custody of or restraining the person on whose behalf *the application* is made.”) (emphasis added). Additionally, appellate courts typically do not issue judgments. *E.g., Batson v. State*, 700 So. 2d 1244, 1246 (Fla. Ct. App. 1997) (“The appellate courts do not issue judgments. We issue orders and mandates which are the legal equivalents of judgments.”), *decision quashed on other grounds sub nom Ellspermann v. Batson*, 708 So. 2d 277 (Fla. 1998); *People v. Bachert*, 509 N.E.2d 318, 320 (N.Y. 1987) (“Appellate courts do not render judgments of conviction; they only affect them.”); *cf. Williams-Jackson v. Pub. Emples. Relations Bd.*, 52 V.I. 445, 456 (V.I. 2009) (“A court of appeals is not generally empowered to conduct a *de novo inquiry* into the matter being reviewed and to reach its own conclusions based on such an inquiry. Rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” (citation omitted)); *accord Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003) (“If we determine that there is no evidence to support the verdict, we do not enter judgment for the defendant, but instead remand the case for a new trial on the merits.” (citations omitted)); *see also* Charles A. Sullivan, *On Vacation*, 43 Houston L. Rev. 1143, 1156 (2006) (“With respect to this core function of dealing with judgments, an appellate court has very limited options. Whether the result is indicated by substantive or procedural law, the reviewing court has only five options: dismiss the appeal, which effectively

affirms the judgment below; explicitly affirm that judgment; modify the judgment; reverse that judgment; or vacate it.” (footnote omitted)).

Nevertheless, and notwithstanding the Legislature’s commingling of conflicting and contradictory terms pertaining to appeal and certiorari, to construe section 530a as anything other than a statute conferring appellate jurisdiction on the Superior Court from PERB would be unsound. First, the Legislature did not have to grant the right of appeal from PERB specifically because that remedy already existed under section 1421 of title 5. *Cf. Crooke*, 54 V.I. at 247-48. Second, statutory certiorari review is discretionary and limited to determining whether an officer, board, commission, authority, or other tribunal “exceeded its jurisdiction, committed errors of law, or proceeded irregularly.” *Christiana Town Ctr., LLC*, 2004 Del. LEXIS 576 at *6 (footnote omitted); accord 5 V.I.C. 1422 (“The writ of review shall be allowed in all cases where the officer, board, commission, authority, or tribunal in the exercise of his or its functions appears to have exercised such functions erroneously, or to have exceeded his or its jurisdiction, to the injury of some substantial right of the plaintiff.”). Appeal is not discretionary, but mandatory. Courts cannot decline to hear a timely-filed appeal from a final order. Third, in an appeal, the appellate court can consider the entire record including whether the facts found are supported by the record, which is what the Legislature expressly provided for in appeals from PERB. *See* 3 V.I.C. § 530a(b) (“[A]ll questions of fact determined by the PERB shall be conclusive, if supported by substantial evidence in the record considered as a whole.”). Finally, with appeals, arguments not raised before the lower court or tribunal are generally deemed waived. *Cf. Stewart*, 66 V.I. at 533 n.9; *see also Moore v. Walters*, 61 V.I. 502, 509-10 (V.I. 2014). This too is what the Legislature authorized for appeals from PERB. *See* 5 V.I.C. § 530a(b) (“No objection not made before the PERB shall be considered in a review by the

Superior Court, unless the failure to make the objection is excused by the court because of extraordinary circumstances.”). *But cf. Brooks v. Dieter*, 552 P.2d 533, 535 (Ore. 1976) (“The writ of review is an economical, expeditious and procedurally simple remedy which allows the reviewing court to examine the record made in the proceeding below. It has the beneficial effect of limiting the scope of review to those matters which were brought to the attention of the lower tribunal and passed upon by that body.” (emphasis added)). Accordingly, this Court holds that the word appeal as used in section 530a of title 3 of the Virgin Islands Code means appeal as of right and not review by petition.⁶ *Accord Crooke*, 54 V.I. at 246; *Pichardo*, 2008 V.I. LEXIS Supreme 25 at *7; *see In re: Holcombe*, 63 V.I. at 835-36 (“presume that a legislature knows the meaning of words, has used the words of a particular statute advisedly, and has expressed its intent by the words as found in the statute.” (quotation marks, brackets, and citations omitted)); *cf. A-1 Auto Body & Paint Shop, LLC v. McQuiggan*, 418 S.W.3d 403, 409 (Tex. Ct. App. 2013) (“Texas courts have made the distinction between appeal and certiorari too often and too long for us to regard them as synonymous. We presume that the Legislature enacts statutes with knowledge of the common law and court

⁶ Because appeal to the Superior Court of the Virgin Islands from the Public Employee Relations Board under section 530a of title 3 of the Virgin Islands Code is of right and not by petition for writ of review, Baumann should not have filed a petition. He should have filed a notice of appeal. The Superior Court also should not have granted his petition or issued a writ of review. But the remedy is not to dismiss the writ as improvidently granted. Courts can convert an appeal into a petition for a writ *sua sponte* or on motion. *E.g., H&H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 463 (V.I. 2009) (*per curiam*). It follows that courts can also do the opposite: convert a petition for a writ into a notice of appeal. *Cf. Grimm v. Wagoner*, 77 P.3d 423, 427 n.4 (Alaska 2003) (“Plaintiffs filed an emergency motion to convert their petition for review into an appeal. We denied the motion as moot because they had already filed a direct appeal.” (internal citations omitted)); *see also Grimm Golightly & Vannah, PLLC v. 2d Jud. Dist. Ct. of Nev.*, No. 67831, 2015 Nev. Unpub. LEXIS 621, *2 (S. Ct. May 20, 2015) (Cherry, J., dissenting) (“Because this writ petition was filed within the time frame to appeal, I would convert this writ petition into an appeal.”). The Court concludes that converting Baumann’s September 2, 2011 petition into a notice of appeal is appropriate here. Neither PERB nor WAPA would be prejudiced since Baumann timely brought this matter to the Superior Court and all sides have had a chance to raise and brief the issues on appeal. Although Baumann proceeded by filing a motion to modify and remand accompanied by a memorandum of law in support rather than by appellate brief, and PERB and WAPA similarly proceeded by filing responses in opposition rather than appellee briefs, the Court will also construe their respective submissions as appellate briefs rather than motion papers.

decisions. Thus, we presume that the legislature was familiar with the distinction long made by Texas courts between appeal and certiorari when it enacted former section 28.052(b).” (quotation marks and citations omitted)).

Having determined that this is an appeal from PERB’s August 9, 2011 order, the question then is how does this impact WAPA’s *res judicata* argument. “[R]es judicata is an affirmative defense that is ordinarily lost if not timely raised.” *Gumbs v. Koopmans*, 66 V.I. 429, 432 (V.I. 2017) (quotation marks, citations, and brackets omitted). It applies in proceedings before administrative agencies. *E.g., Cridland v. N.D. Workers Comp. Bureau*, 571 N.W.2d 351, 355 (N.D. 1997) (“Administrative *res judicata* is the judicial doctrine of *res judicata* applied to an administrative proceeding.” (citations omitted)); *Schultz v. State Bd. of Registration for Prof’l Eng’rs*, C.A. No. PC/05-5844, 2008 R.I. Super. LEXIS 60, *12 (R.I. Super. Ct. May 6, 2008) (“Both doctrines [*res judicata* and collateral estoppel] apply not only to judicial determinations, but also to administrative decisions, where the agency acts in a quasi-judicial capacity.” (citing *Dep’t of Corrections v. Tucker*, 657 A.2d 546, 549 (R.I. 1995))); *see also Restatement (Second) of Judgments* § 83 (1982) (“[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata* . . . as a judgment of a court.”). But here WAPA did not raise *res judicata* to PERB. WAPA did move PERB to dismiss Baumann’s 2011 appeal, arguing that WAPA’s Governing Board was not the “head officer” per section 530 of title 3 of the Virgin Islands Code and further, that Baumann’s second appeal was untimely if he sought to appeal the executive director’s decision as “finalized” by the Governing Board. (See R. at 959-69.) But WAPA did not move to dismiss Baumann’s second appeal on *res judicata* grounds.

To be clear, WAPA is not arguing to this Court that PERB's November 3, 2010 order is *res judicata*, but rather that the Superior Court's October 23, 2012 judgment order is. Section 530a's imprecise language further complicates the issue here because appellate courts do not issue judgments in appeals, whereas section 530a did require the Superior Court to enter judgment summarily in favor of WAPA if Baumann filed his appeal late. *See id.* § 530a(a) ("An application not filed in a timely manner shall entitle the prevailing party or PERB to summary judgment enforcing the final order of the PERB."). Notwithstanding, section 530a's summary judgment requirement, it was not the Superior Court's order that would have established *res judicata*, it is PERB's order. In other words, the relevant order here is PERB's November 3, 2010 order, not the Superior Court's October 23, 2012 order disposing of Baumann's appeal. The October 23, 2012 order was really a ministerial task to give preclusive effect to the underlying order on appeal. Therein lies the problem for WAPA.

WAPA did not argue to PERB that its November 3, 2010 order barred Baumann's 2011 case. Instead, WAPA argues for the first time on appeal to this Court that Judge Willocks's October 23, 2012 order bars this Court from hearing Baumann's 2011 appeal. WAPA's position might have had merit if appeals from PERB were discretionary and not of right. But an appeal from PERB is an appeal, i.e., a continuation of the underlying case. WAPA should have raised *res judicata* to PERB in the first instance, not to this Court for the first time on appeal. It did not. Hence, WAPA waived its *res judicata* defense because "[n]o objection not made before the PERB shall be considered in a review by the Superior Court, unless the failure to make the objection is excused by the court because of extraordinary circumstances." 3 V.I.C. § 530a(b).

That said, Baumann too failed to argue to this Court that WAPA waived *res judicata* by not raising it to PERB in the first instance. Instead, Baumann responded to WAPA on the merits, devoting much more time to *res judicata* in his reply brief than WAPA did in its own brief. Assuming that section 530a(b)'s waiver provision can itself be waived, then Baumann waived waiver here by failing to argue that WAPA waived *res judicata*. See *Simpson v. Golden*, 56 V.I. 272, 281 n.6 (V.I. 2012) (“[W]aiver of waiver generally occurs where a litigant fails to raise a procedural default that would result in waiver of the opposing party’s position, and therefore waives the right to assert the waiver.”).

Ultimately, however, it is not necessary for the Court to decide whether Baumann waived waiver, *cf. Simpson*, 56 V.I. at 281 n.6 (“‘[W]aiver of waiver’ is a discretionary doctrine which a court may use to permit it to reach waived issues where the party ‘suffers no prejudice from the appellant’s failure to properly raise the issue.’” (brackets omitted) (quoting *Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004))), because WAPA has asserted the wrong affirmative defense. Collateral estoppel is the defense that should have been raised to PERB, not *res judicata*. “*Res judicata* and collateral estoppel are not the same.” *Gargallo v. Merrily Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 660 (6th Cir. 1990).

Res judicata, or claim preclusion as it is more helpfully termed, is the doctrine, simply stated, by which a final judgment on the merits in an action precludes a party from bringing a subsequent lawsuit on the same claim or cause of action or raising a new defense to defeat a prior judgment. It precludes not only relitigating a claim or cause of action previously adjudicated, it also precludes litigating a claim or defense that should have been raised, but was not, in a claim or cause of action previously adjudicated. This last variation was formerly known as the rule against splitting a cause of action.

Collateral estoppel, or issue preclusion as it is better termed, precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the

same parties and necessary to the judgment, even if decided as part of a different claim or cause of action.

Id. at 660-61 (citations omitted). Baumann did not appeal to PERB to have PERB declare him a regular employee. Rather, he appealed his termination to PERB and, in deciding that appeal, PERB concluded that Baumann was not a regular employee.

Among the differences between collateral estoppel and *res judicata*, as properly defined, is that the former doctrine precludes only the re-litigation of matters (issues) that were actually adjudicated in a previous action, while *res judicata* also precludes the litigation of matters (claims) “that could have been adjudicated” in the previous action. “*Res judicata*, therefore, bars a party from asserting in a subsequent action a claim that it has already had an opportunity to litigate in a previous action.” Collateral estoppel, when applicable, thus prevents a litigant from trying to win in a second lawsuit on an issue it has already lost in the first, while *res judicata*, when applicable, prevents a litigant from trying to win in a second lawsuit on a claim it failed to raise in the first.

Dunavant v. Sirote & Permutt, P.C., 2014 U.S. Dist. LEXIS 86127, *25-26 (S.D. Ala. June 25, 2014) (quoting *Ex parte LCS, Inc.*, 12 So. 3d 55, 57 (Ala. 2008)).

Like *res judicata*, collateral estoppel is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . estoppel.”)), applicable via Super. Ct. R. 32(b), *repealed by In re: Amend. to the Rules Gov. the Super. Ct. of the V.I.*, ST-17-MC-19, 2017 V.I. LEXIS 60, *1 (Super. Ct. Apr. 6, 2017), *approved by* 2017 V.I. Supreme LEXIS 23 (V.I. Apr. 7, 2017)); *accord* V.I. R. Civ. P. 8(c)(1) (same). Here, termination is the claim. But Baumann’s termination claim was not decided in his first case because PERB never reached the merits. PERB instead dismissed for lack of jurisdiction, concluding that Baumann was not a regular employee. That dismissal would have barred Baumann from filing another case on the same termination claim because the merits of that claim were not reached. *But cf.* 3 V.I. R. & Reg. 530-7(c) (“All dismissals not within the meaning of subsection (a) shall be with

prejudice.”). PERB’s first dismissal would have estopped Baumann from filing a second case, however, because the same issue—whether Baumann was a regular employee—was decided by PERB on November 3, 2010 and affirmed, essentially, by the Superior Court’s October 23, 2012 order.

Res judicata and collateral estoppel “relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Stewart*, 66 V.I. at 531 (quoting *Cassidy v. Bd. of Educ. of Prince George’s Cty.*, 557 A.2d 227, 230 (Md. 1989), parenthetically). But, “it remains worth noting that [each] doctrine, at its most basic level, ‘requires that errors underlying a judgment be corrected on appeal or other available proceedings to modify the judgment or to set it aside, and not made the basis for a second action on the same claim.’” *Sprauve*, 2010 WL 3463308 at *6 (quoting *Restatement (Second) of Judgments* § 19 cmt. a (1982)). It is true that collateral estoppel “is a subset of the broader *res judicata* doctrine. *Ex Parte LCS*, 12 So. 2d at 57. But like any affirmative defense, *res judicata* and collateral estoppel must be pleaded separately. *Cf. Leather v. Ten Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (“The defendants argue that Leather’s claims are barred both by *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). . . . Under Rule 8(c) of the Federal Rules of Civil Procedure, both are affirmative defenses that must be pleaded by the defendant.”).

Although collateral estoppel is in part “premised, like the doctrine of *res judicata*, on promoting *judicial economy and efficiency*,” *Stewart*, 66 V.I. at 547 (emphasis added) (citations omitted), in the Virgin Islands, courts are prohibited from raising and adjudicating waived affirmative defenses. *See Malloy v. Reyes*, 61 V.I. 163, 175 n.9 (V.I. 2014) (“It is unquestionably error for the Superior Court to raise an affirmative defense *sua sponte* on behalf of a defending party

where that party has waived the issue by failing to raise it or support it with evidence.” (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 761 (V.I. 2014)); *see also Gumbs*, 66 V.I. at 433 (“The Superior Court acted contrary to this Court’s precedents when it *sua sponte* adjudicated a *res judicata* defense that had never been presented by the defendants without providing Gumbs with notice or an opportunity to be heard on that issue.”). WAPA did not raise collateral estoppel to PERB or to this Court. Consequently, WAPA’s argument that this appeal is barred by a prior proceeding must be rejected.

B. PERB’s Determination that Baumann Was Not a Regular Employee

Baumann’s principal argument on appeal concerns PERB’s determination that he was not a regular employee. In its August 9, 2011 decision, PERB found that, in his position as personnel manager/labor, Baumann

reported directly to the Director of Human Resources, who is responsible for overall personnel policy administration for the Authority. Additionally, Appellant was involved in employee grievance proceedings, and had to effectuate and interpret the personnel policies and procedures of the Authority.

Appellant *most likely* had to maintain confidential communication with the Director of Human Resources regarding the human resources operation of the Authority on St. Croix. . . .

Thus, the PERB rejects Appellant’s argument that he was not a management employee. Appellant’s title was Personnel Manager/Labor, and his job duties clearly indicated that he was part of management. Additionally, Appellant’s Notice of Personnel Action did not indicate that he is a regular employee

Consequently, the PERB finds that Appellant was in a confidential relationship to a policy-maker. To that end, we further find that Appellant’s position as the Personnel Manager/Labor is not a classified or career service position, but is an exempt position under 3 V.I.C. § 451a(b)(8) of the Personnel Merit System.

(R. at 18-19 (emphasis added).)

Baumann claims that PERB erred as a matter of law. He is correct. Section 451a(b)(8) exempts from the career or classified service

an officer or employee in a position of a policy-determining nature *when the position is so designated by the Governor and submitted to the Legislature*; and an employee who is a special assistant, or who is on special assignment to, or whose position requires a confidential relationship with a policy-making official *when the position is so designated by the Governor and submitted to the Legislature*.

3 V.I.C. § 451(b)(8) (emphasis added). The language of the statute plainly states that section 451(b)(8) governs only once (1) the Governor; (2) has designated a position; and (3) submitted the position to the Legislature. The question is not the “particular responsibilities of the employee’s job.” (R. at 18 (quoting *Molloy v. Gov’t Emples. Serv. Comm’n*, 42 V.I. 89, 98 (Terr. Ct. 2000).) The responsibilities of an employee are irrelevant to determining whether a position—not an employee—has been designated by the Governor and submitted to the Legislature as exempt. Section 451a(b)(8) exempts positions, not employees, and no “administrative regulation or practice can[] . . . contradict [this] clear legislative policy.” *Williams-Jackson v. Pub. Emples. Rel. Bd.*, 52 V.I. 445, 453 (V.I. 2009) (quotation marks, brackets, and citations omitted) (contractual designation of executive branch employee’s position as exempt held invalid because position did not fall within an exception under section 451a(b)).

But more importantly here, employees of WAPA could never hold an exempt position under section 451a(b)(8) because employee positions in WAPA are not “designated by the Governor and submitted to the Legislature.” 3 V.I.C. § 451a(b)(8). Employees of WAPA do not hold “positions in the Executive Branch of the United States Virgin Islands Government,” *id.* § 451a(c), because WAPA is “a public corporation and autonomous governmental instrumentality of the Government of the Virgin Islands . . . governed by a board consisting of nine persons,” 30 V.I.C. § 103(a), not the

Governor of the Virgin Islands. The Governor appoints the members of the board. *See id.* But the Governor has no authority to designate any position in WAPA as exempt, including “policy-making position[s] of a policy-determining nature,” “special assistant[s],” or “position[s that] require[] a confidential relationship with a policy-making official.” 3 V.I.C. § 451a(b)(8).

Each word in a statute must be given effect. *See Ubiles*, 66 V.I. at 590 (“We are to take the plain language as an accurate reflection of the legislative intent underlying the statute and are to give effect to all the words of the statute, unless to do so would undermine the statute’s purpose.” (citing *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009); *In re: Visteon Corp.*, 612 F.3d 210, 226 (3d Cir. 2010)). Here, however, the Board focused on the words “policy-making” and “confidential relationship” in section 451a(b)(8) while ignoring the words “designated,” “Governor,” “submitted,” and “Legislature.” That was in error. *See, e.g., Rhymer v. Rhymer*, 21 V.I. 176, 183 n.4 (Terr. Ct. 1984) (“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.” (quotation marks and citation omitted)); *accord Iles v. de Jongh*, 53 V.I. 723, 732 (D.V.I. 2009) (“No *evidence* was presented to show that the Governor had designated either of such positions as exempt and submitted such designation to the Legislature, as otherwise required by 3 V.I.C. § 451a(b)(8).” (emphasis added)), *rev’d on other grounds* 55 V.I. 1251. Further, it would undermine “clear legislative policy,” *Williams-Jackson*, 52 V.I. at 453, if only the words “policy-making” or “confidential relationship” were given effect, particularly since the Legislature, in 2000, amended section 451a(b)(8) to clarify that exempt means exempt. *See* Act No. 6348, 2000 V.I. Sess. L. 21, 21-22 (May 19, 2000) (“To amend title 3, chapter 25, Virgin Islands Code, to include government employees in exempt and unclassified positions that have been so designated by the Governor and Legislature and eliminate the exempt employees’ option to become classified after

two years in an exempt or unclassified position.”); *see also id.* § 1(a) (amending subsection (b)(8) generally). PERB erred in concluding that Baumann’s position as a personnel manager within WAPA was exempt pursuant to section 451a(b)(8) because no position within WAPA is designated by the Governor and confirmed by the Legislature.

Nevertheless, even though the Board misapplied the law, that does not mean the Board’s decision must be reversed.⁷ “It is well established that, under the ‘right result, wrong reason’ doctrine, where the record otherwise supports the trial court’s judgment, an appellate court may affirm that judgment for reasons other than those relied upon by the trial court, even if the trial court’s reasons are erroneous.” *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 438 n.23 (V.I. 2016) (citations omitted). “When hearing an appeal from the PERB, the Superior Court functions as an appellate court.” *V.I. Narcotics Strike Force*, 60 V.I. at 218 (citations omitted). It follows then that PERB functions as the trial court. Accordingly, if PERB reached the right result, albeit for the wrong reasons, the Superior Court can nonetheless affirm.

Section 451a(b)(7) exempts from the career service all “employees of the . . . Virgin Islands Water and Power Authority.” 3 V.I.C. § 451a(b)(7)(ii). The statute’s language is clear and unambiguous: employees of WAPA are not employees in the classified or career service of the Government. While it might seem as though this resolves Baumann’s appeal, it does not because in 2010, the Legislature amended section 530a to include employees of WAPA within the definition of “regular employees” but only insofar as appeals to PERB are concerned. That is, the Legislature

⁷ PERB’s assertion that that its construction of statutes governing it “should be afforded great deference,” (PERB Br. 11 (citations omitted)), is rejected. *See Bryan v. Fawkes*, 61 V.I. 201, 227-28 (2014).

made a change to one statute, but without making necessary changes to the correlated statutes, namely sections 451 and 451a of title 3 of the Virgin Islands Code.

C. Baumann's Assertion that He was a Regular Employee Fireable Only for Cause

Baumann argues that PERB erred in concluding that he was not a regular employee, not only because section 451a(b)(8) does not apply to him, but also because section 530 was amended to include employees like him who work for WAPA. Section 530 provides that

before a head officer of an . . . instrumentality of the Government dismisses . . . a regular employee of . . . [an] instrumentality of the Government, the head officer shall furnish the employee with a written statement of the charges against the employee. The employee shall have ten days following the date of receipt of the statement of charges to appeal the proposed action to the Public Employees Relations Board.

3 V.I.C. § 530(a)(1). WAPA is included in the definition of “instrumentalities” of the Government of the Virgin Islands. *See id.* § 350(a)(2)(B)(i) (“Instrumentality of the Government includes . . . the Virgin Islands Water and Power Authority.”). So, Baumann is correct; PERB does have jurisdiction to hear appeals of regular employees dismissed by WAPA. But that’s not new. PERB has had jurisdiction to hear appeals from WAPA’s employees since 1977.

Prior to 1977, section 530(a) of title 3 read as follows:

In any case where a department head decides to dismiss, demote, or suspend a regular employee, for cause, he shall furnish the employee with a written statement of the charges against him. The employee shall have ten days following the date of receipt of said statement of the charges to appeal the proposed action to the Government Employees Service Commission.⁸ Such appeal shall be in writing and a copy shall be furnished to the department head.

Act No. 1875, § 4, 1967 V.I. Sess. L. 41, 43-44 (Mar. 14, 1967). But in 1977, the Legislature revised the first sentence of section 530(a) to read:

⁸ Section 530(a) was amended in 1994 to change Government Employees Service Commission to Public Employees Relations Board. *See* Act No. 6011, § 1(g), 1994 V.I. Sess. L. 164, 164-65 (Sept. 2, 1994).

Notwithstanding any other provision of law, in any case after January 1, 1977, where a department head, including the Executive Director of the Virgin Islands Water and Power Authority, decides to dismiss, demote, or suspend a regular employee, or employee of the Virgin Islands Water and Power Authority, for cause, he shall furnish the employee with a written statement of the charges against him.

Act No. 3960, § 1, 1977 V.I. Sess. L. 37, 37 (Apr. 14, 1977). The intent behind the 1977 changes was “To Include Employees of the Virgin Islands Water and Power Authority in the Personnel Merit System for Purposes of Appealing to the Government Employees Service Commission.” *Id.* Governor Cyril E. King vetoed the legislature on April 5, 1977, but the Legislature, on April 14, 1977, overrode his veto. *See id.*

Section 530(a) was again amended in 1984 to include employees of the Virgin Islands Port Authority. *See generally* Act No. 4971, § 2, 1984 V.I. Sess. L. 209, 209 (July 24, 1984). Fifteen years later, in 1999, the Legislature amended section 530(a), first to include employees of public hospitals, *see* Act No. 6279, § 4, 1999 V.I. Sess. L. 8, 15-16 (May 14, 1999), and then that year to include employees of the Government Development Bank. *See* Act No. 6325, § 1, 1999 V.I. Sess. L. 155, 155 (Dec. 2, 1999). Two years later, in 2001, the Legislature made a significant change that is relevant here—amended section 530(a) to “stri[k]e the words ‘, or employee’ after the word ‘employee’ in the place where it appears for the first time.” Act No. 6426, § 9, 2001 V.I. Sess. L. 137, 138 (Aug. 7, 2001). And with this minor tweak the meaning of the statute fundamentally changed.

Until the 2001 amendments, section 530(a) read as follows:

Notwithstanding any other provision of law, in any case after January 1, 1977, where a department head, including the Executive Directors of the Government Development Bank, the Virgin Islands Water and Power Authority, the Virgin Islands Port Authority, and the Chief Executive Officer of a hospital under the jurisdiction of the Virgin Islands Hospitals and Health Facilities Corporation decides to dismiss, demote, or suspend a regular employee, or employee of the Government Development Bank, the Virgin Islands Water and Power Authority, the Virgin Islands Port Authority or a hospital under the jurisdiction of the Virgin Islands Hospitals and

Health Facilities Corporation, for cause, he shall furnish the employee with a written statement of the charges against him. The employee shall have ten days following the date of receipt of said statement of the charges to appeal the proposed action to the Public Employees Relations Board. Such appeal shall be in writing and a copy shall be furnished to the department head and the Attorney General by the Board.

V.I. Code Ann. tit. 3, § 530(a) (2000 ed.). Arguably, the statute could have been read to refer to two categories of public employees: regular employees within the executive branch who were dismissed, demoted, or suspended by a department head; and employees of WAPA and the other government instrumentalities named in the statute who were dismissed, demoted, or suspended by the respective executive director. However, by removing the words “or employees” from the statute in 2001, the Legislature clarified that only “regular employees”—regardless whether they worked for the executive branch directly or for an instrumentality of the government—could appeal to PERB. But unfortunately, the 2001 amendments made it less clear for employees of government instrumentalities who can appeal to PERB because, despite all the changes over the years, the Legislature never changed the definition of “regular employee” found in section 451 of title 3. *See* 3 V.I.C. § 451 (“‘regular employee’ means an employee who has been appointed to a position in the classified service in accordance with this chapter after completing his working test period.”). Employees who work for instrumentalities like WAPA are never appointed to positions in the classified service because they are exempt under section 451a(b)(7)(ii).

And then as discussed earlier, the Legislature amended section 530(a) in 2005 to include an array of government instrumentalities. Governor Charles W. Turnbull vetoed the legislation on October 17, 2005. His message to the Legislature was as follows:

It is my position that boards, commissions and independent, instrumentalities should have the full authority to manage their operations and that includes changing of their staff. We must give agencies flexibility. I believe enacting this bill will overwhelm the operation of the Public Employees Relations Board. Boards and authorities do not

arbitrarily terminate staff. They must have some cause for their action. There are avenues available for those who are terminated, demoted or suspended to find relief. This bill, if enacted, will ultimately lead to this government incurring unexpected financial responsibilities and tying up positions with those who should rightfully be disciplined, demoted or terminated.

Veto Msg. No. 7, 2005 V.I. Sess. L. 692, 693 (Oct. 17, 2005). The Legislature disagreed and overrode Governor Turnbull's veto on November 10, 2005. In so doing, they also reverted to the "regular employee, or employee of" language they had discarded in 2001.

As amended in 2005, section 530(a) again permitted appeals to PERB "where a department head . . . or . . . executive director decides to dismiss, demote, or suspend . . . for cause" "a regular employee of, or an employee"—but also for an employee "who is not on contract, is not temporary, and is not on probation." Act No. 6815, 2005 V.I. Sess. L. at 484. The "contract, temporary, probation" language was newly added in 2005. Presumably the 2005 amendments proved unworkable because five years later, the Legislature again amended section 530(a). But the 2010 amendments are also proving unworkable. Why? Because the "or and" language in section 503(a)(2)(C) is illogical.

In 2010, the Legislature revamped section 530(a) by removing the "or an employee of" language that had been removed in 2001 but reinstated in 2005. But the Legislature went even further, streamlining section (a) by dividing it into additional subsections that defined the term "head officer"—thereby removing the prior references to chief executive officer and executive director and collapsing under into one term; defined instrumentalities of the government; and (for the first time) added a definition of regular employee. Pursuant to section 530(a)(2)(C), a regular employee over whom PERB has jurisdiction is now someone who

has been appointed to a position in the classified or career service or served in a temporary position for more than two years in a department or agency of the executive branch or in an instrumentality . . . or and who is not on contract, is not on probation, and therefore subject to dismissal, demotion or suspension, only for cause.

3 V.I.C. § 530(a)(2)(C)(i)-(ii). The “contract, temporary, probation” language added in 2005 was pushed into a separate sub-subsection in the 2010 amendments. But the language that now joins the two sub-sections is “or and.”

Clearly, the use of “or and” is irreconcilable and is a fallacious use of words. It is either “or” or “and,” not both. Hence, the question is not whether “or” should be construed as “and” or “and” construed as “or.” Courts have done that in the past. *See, e.g., People v. Noel*, SX-16-CR-046, ___ V.I. ___, ___ 2017 V.I. LEXIS 169, *19-20 (Super. Ct. Dec. 13, 2017) (“In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe ‘or’ as meaning ‘and,’ and again ‘and’ as meaning ‘or.’” (quotation marks and citation omitted)); accord *State ex rel. Wis. Dry Milk Co. v. Cir. Ct. of Dodge Cty*, 186 N.W. 732, 734 (Wis. 1922) (“It is a familiar rule of construction that the words ‘or’ and ‘and’ are often used incorrectly, and that where a strict reading would render the sense dubious one may be read in place of the other, in deference to the meaning of the context.” (citations omitted)). Instead, the problem here is that the Legislature used both words in the same clause in a statute.

Generally-speaking, when two statutes are irreconcilable, the newer statute prevails over the older statute. *See Simmonds v. People*, 59 V.I. 480, 501 (V.I. 2013) (“[I]n the case of irreconcilable conflict between two acts, the latest legislative expression prevails.” (quotation marks, ellipsis, and citation omitted)); accord *Brown v. Cty Comm’rs*, 21 Pa. 37, 42 (1853) (“When two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier.”). The question here does not concern two statutes, but rather two words within the same statute. But “[t]his rule applies with equal force to a case of absolute and irreconcilable conflict between different sections or parts of the same statute. The last

words stand, and others which cannot stand with them go to the ground.” *Id.* at 42-43; *accord In re: Richards*, 96 F. 935, 939 (7th Cir. 1899) (“We are unable to reconcile these provisions. They are broadly and clearly in antagonism. It is not a question, therefore, how they may be reconciled, for that is impossible. The question is, which shall prevail? The rule in such cases is . . . [w]hen we meet with a seeming repugnancy in the terms, conjectures are necessary to work out the genuine sense, by reconciling it, if it is possible, to those terms that seem to be repugnant. But, if there be a clear, evident repugnancy, the latter vacates the former. This rule applies to the making of laws, wills, and contracts.” (citation, paragraph break, and quotation marks omitted)); *Van Horn v. State*, 46 Neb. 62, 77 (1895) (“[W]here there is an irreconcilable conflict between different sections, or parts of the same statute, the last words stand, and those in conflict therewith are repealed.” (citations omitted)); *Ex Parte Smith*, 33 Nev. 466, 482 (1910) (“[W]hen two provisions are irreconcilable the last one controls, as being the later expression of the legislative will.” (citations omitted)); *see also Lodge 1858, Am. Federation of Gov’t Emples. v. Webb*, 580 F.2d 496, 510 n.31 (D.C. Cir. 1978) (collecting cases)). Here, it is impossible to reconcile “or and” in section 530(a)(2)(C)(i) of title 3 of the Virgin Islands Code because if both words were given, they would yield inconsistent and contradictory results. Consequently, this Court holds that “or” was repealed in section 530(a)(2)(C)(i) because “and” is the last word of the two that are irreconcilable.

A regular employee for purposes of PERB’s jurisdiction cannot be an employee who was appointed to a position in the classified service **and** who is not on contract or on probation as well as an employee who was appointed to a position in the classified service **or** who is not on contract or on probation. Clearly, an employee who was appointed to a position in the classified service is not on contract. But an employee who was appointed to a position in the classified service may be

on probation because every classified service employee must complete a probationary period first. *See* 3 V.I.C. § 527 (“Every person appointed to a position in the classified service from a list shall serve a probational period or working test before being given a status as a regular employee. The probational period shall begin on the effective date of appointment to the position, and shall continue for such time as shall be determined by the rules.”). Likewise, persons serving in a temporary position with a department or agency of the executive branch or in an instrumentality of the government for more than two years may or may not be on contract. *Cf.* 30 V.I.C. § 104(c) (Virgin Islands Water & Power Authority) (“The Board may appoint an Executive Director of the Authority, and such officers, agents, or employees, permanent or temporary, and by contract or otherwise may employ such consulting engineers, superintendents, managers, fiscal, legal and other technical experts, as it may deem necessary.”); *accord, e.g., id.* § 202(e) (Virgin Islands Public Broadcasting System); 29 V.I.C. § 500(d) (Virgin Islands Waste Management Authority); *id.* § 542(c) (Virgin Islands Port Authority).

Baumann wants the word “or” to control because the Legislature “made significant changes . . . including [adopting] a new and complete definition of regular employee.” (Appellant Br. 4.) According to Baumann, this “new and complete” definition means that

[a]n employee is also a regular employee for purposes of Section 530(a) if he falls into one of the following three (3) categories: (1) appointed to a position in the classified or career service, (2) served in a temporary position for more than two years in a department or agency of the executive branch or in an instrumentality or (3) is not on contract and not on probation.

Id. at 5-6. But Baumann’s construction will lead to absurd results. “[A]n absurd result, in the statutory construction context, refers to an interpretation of a statute that would be clearly inconsistent with the Legislature’s intent and . . . undermine the entire regulatory regime.” *One St.*

Peter, LLC v. Bd. of Land Use Appeals, S. Ct. Civ. No. 2015-0120, 67 V.I. ___, ___, 2017 V.I. Supreme LEXIS 56, *12 (V.I. Aug. 28, 2017) (quotation marks, brackets, and citation omitted)).

If the word “or” controlled to the exclusion of the word “and” it would mean that an employee would be a “regular employee” if he fell into any of the three categories Baumann identified. A consulting engineer retained by WAPA as an independent contractor would be a regular employee because she “served in a temporary position for more than two years.” (Appellant Br. 4.) Her status as an independent contractor would be irrelevant after two years because section 530(a) should not be read “and not on contract” but rather “or not on contract.” Likewise, every commissioner, executive director, or person appointed to an exempt position would be a regular employee because they too are “not on contract and not on probation.” *Id.* But see *Howell v. U.S.V.I. Police Dept.*, SX-16-CV-351, ___ V.I. ___ 2016 V.I. LEXIS 210, *5 (Super. Ct. Dec. 29, 2016) (“[A]n employee who serves in an ‘exempt’ capacity for the Government of the Virgin Isla]nds has no property interest in his or her employment and can be terminated with or without cause.”) (citing *Fleming v. Cruz*, 62 V.I. 702, 715 (V.I. 2015); *Iles*, 55 V.I. at 1257-58)). Baumann fails to appreciate or deliberately ignores the consequences of his interpretation. If or did govern over and, then nearly all employees of the executive branch or an instrumentality listed in section 530(a) became regular employees in 2010. That is not what the Legislature intended. Baumann’s interpretation would “undermin[e] the entire regulatory regime established in chapter 25 of title 3.” *V.I. Narcotics Strike Force*, 60 V.I. at 214 (footnote omitted).

Baumann’s final argument, that “as a permanent employee of WAPA, [he] had a property right in his employment pursuant to 3 V.I.C. § 530,” is rejected. (Appellant Br. 9 (citing *V.I. Port Auth. v. Gov’t Emples. Servs. Comm’n*, 983 F.2d 548, 550 n.1 (3d Cir. 1993); *Iles*, 55 V.I. at 1259).) First,

property rights in public employment are provided either by contract or by statute. Baumann has repeatedly stated that he was not on contract, which leaves only the statute. However, the Court has concluded that the relevant statute here, section 530 of title 3 of the Virgin Islands Code, does apply. Baumann did raise a due process claim to PERB. (*See* R at 1068-69 (June 27, 2011 notice of appeal) (“Baumann appeals that his due process claims were violated . . .”). PERB did not reach Baumann’s claim. Instead, it dismissed his case on jurisdictional grounds. Although the Court disagrees with PERB’s reasoning, PERB’s result must be affirmed. Therefore, since PERB did not consider (and could not consider) Baumann’s due process claim in the first instance, this Court, sitting in an appellate capacity, cannot reach it on appeal.

“In preparing the laws to be published . . . the publisher . . . may . . . [c]orrect manifest typographical and grammatical errors.” 1 V.I.C. § 14(a)(8). The Code Revisor also may “[p]repare for submission to the Legislature bills to correct obvious errors, . . . correct defective section structure in the arrangement of the subject matter of existing statutes, correct faulty internal references and clarify existing laws.” 2 V.I.C. § 210(c). Even the Governor can “correct nonsubstantive errors in the text of a bill presented to him for signature . . . provided . . . that said errors are strictly typographical.” 1 V.I.C. § 202. The Legislature may have meant to say “or.” It may have meant to say “and.” It may even have meant to say “and/or.” But it said “or and.” No one has corrected section 530(a)(2)(C)(i) and it “is not the province of the judiciary” to correct, amend, enact, or revise legislation. *People v. Noel*, SX-16-CR-046, __ V.I. ____, 2017 V.I. LEXIS 69, *21 (V.I. Super. Ct. Dec. 13, 2017) (citation omitted). “Or and” cannot be reconciled in section 530(a). “Where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those which are in conflict with them . . . are repealed. . . . This rule is

applicable where no reasonable construction will harmonize the parts.” *Stevens v. State*, 159 S.W. 505, 507 (Tex. Ct. Crim. App. 1913). Baumann’s interpretation of section 530(a) would conflict and lead to absurd results and is rejected. The word “and” in Section 530(a)(2)(C)(i) controls and the word “or” is implicitly repealed.

D. Most Employees of Instrumentalities are not within PERB’s Jurisdiction

Although PERB erred in concluding that Baumann position was exempt and therefore he was not a regular employee (because the Governor does not submit any position in an instrumentality to the Legislature for exemption), and even though Baumann too is incorrect in how he construes the definition of “regular employee” under section 530(a), the Court is still left with the question who is a regular employees of an instrumentality such as WAPA who can appeal her or his demotion, suspension, or dismissal to PERB. If a regular employee is someone who was appointed to a position in the classified service or who has served in a temporary position for more than two years in the executive branch or an instrumentality and is also not on contract or on probation—then most employees of instrumentalities are not regular employees because most employees of an instrumentality like WAPA do not hold positions in the classified service.⁹

Section 530’s history clearly shows legislative intent to include employees of government instrumentalities like WAPA within the jurisdiction PERB. Employees of WAPA were added in 1977,

⁹ See, e.g., 30 V.I.C. § 104(c) (Virgin Islands Water & Power Authority) (“The Board may appoint . . . employees, permanent or temporary . . . and shall determine their qualifications, duties, tenure and compensation *without regard to* chapter 25 of Title 3.” (emphasis added)); *id.* § 202(e) (Virgin Islands Public Broadcasting System) (“The Board . . . by contract or otherwise may employ such consultants, consulting engineers, fiscal, legal, programming or other technical experts as it may deem necessary, and shall determine their qualifications, duties, tenure and compensation *without regard to* chapter 25 of Title 3, Virgin Islands Code.” (emphasis added)). *But see* 19 V.I.C. § 244a(b) (“The Chief Executive Officer shall serve as the head of the hospital to which he is appointed and shall . . . appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel, *subject to* the provisions of Title 3, chapter 25, section 530 relating to procedures for employee dismissals, demotions and suspensions.” (emphasis added)).

followed by employees of the Virgin Islands Port Authority in 1984, and in 1999 employees of the Government Development Bank and the hospitals. In 2010, the Legislature expanded PERB's jurisdiction to nine different government instrumentalities. But after the language "regular employee, or employee of" was removed, the same fatal flaw surfaced: tying PERB's jurisdiction to the definition of regular employee found in section 451 of title 3 of the Virgin Islands Code, a definition that has not been amended since it was adopted in 1960 and that does not encompass the employees of many instrumentalities. *Cf.* 3 V.I.C. § 451 ("regular employee' means an employee who has been appointed to a position in the classified service in accordance with this chapter after completing his working test period.").

Unfortunately, Baumann is not a regular employee because he did not hold "a temporary position for more than two years" with WAPA. 3 V.I.C. § 530(a)(2)(C)(i). Baumann was hired on a temporary basis on October 6, 2003. (*See* R. 644.) But once he successfully completed his medical examination, effective October 30, 2003, he was no longer a temporary employee. *See id.* at 636-43. This result is illogical—that only temporary employees of WAPA can appeal to PERB. But "if the Legislature's intent is contrary to what is expressed in the statute, it is incumbent upon it to enact legislation using language that properly expresses that intent." *Angelucci v. Dart Props., Inc.*, 836 N.W.2d 219, 216-17 (Mich. Ct. App. 2013). This Court cannot.

Employees of WAPA are not without a remedy, however. They can petition the Superior Court to issue a writ of review in the first instance. *See* 5 V.I.C. § 1421 ("Any party to any proceeding before or by any officer, board, commission, authority, or tribunal may have the decision or determination thereof reviewed for errors."). Baumann was a party to a proceeding before WAPA, which is an authority. He could have petitioned the Superior Court to review WAPA's "decision or

determination . . . reviewed for errors.” *Id.* He had “no appeal or other plain, speedy, and adequate remedy.” *Id.* § 1422; accord 2 William A. Sutherland, *A Treatise on Code Pleading and Practice* § 1993 (1910) (The writ of review “is used most commonly to review the proceedings of courts not of record, municipal corporations, special tribunals, commissioners, and officers exercising judicial powers and acting in a summary way.” (footnote omitted)); see also *id.* § 2000 (“Where there is no appeal the writ will lie; as where a new jurisdiction, unknown to the common law, is created by statute, a writ of error will not lie, but *certiorari* will Whether the error occurred in proceedings either civil or criminal, if it cannot be reached by appeal or some other statutory remedy, *certiorari* is the proper remedy.” (footnotes omitted)). Of course, the irony is that Baumann is already before the Court on a writ of review, but a writ that was issued in error to a different tribunal.

E. WAPA’s Argument that its Governing Board was not a “Head Officer”

WAPA raises an alternative argument, that if the Court were to conclude that Baumann was a regular employee, the Court should still affirm PERB’s decision to dismiss his appeal on another ground, “namely, that PERB’s jurisdiction is limited to reviewing decisions of a ‘head officer’ as defined by statute.” (WAPA Br. 11.) WAPA first raised this argument to PERB in a motion to dismiss the 2011 case. PERB denied that motion in its August 9, 2011 decision, concluding that “the Executive Director’s decision was not final. The Governing Board in essence ‘revived’ the appeal, and gave Appellant another opportunity to have Hodge’s decision to terminate him reviewed. The PERB is mindful that upon review, Hodge’s decision could have been reversed or affirmed by the Governing Board.” (R. at 15.) On appeal, WAPA renews its argument, asserting that “***the fact that the Governing Board ultimately accepted Baumann’s invitation to review Director Hodge’s decision (after originally rejecting that invitation on the grounds that WAPA’s Personnel***

Manual did not recognize any such procedure) does not render the Governing Board a ‘head officer’ within the meaning of section 530(a)(2)(A)." (WAPA Br. 12.) WAPA is correct.

Baumann’s 2011 case was appealed from WAPA’s Governing Board to PERB, not from WAPA’s executive director to PERB. PERB reasoned that the Governing Board “revived” Baumann’s appeal. That reasoning sounds like a court sitting in equity attempting to do what is fair and just between the parties. But “[e]quity must follow the law.” *Murray v. Willistown Twp.*, 169 A.3d 84, 93 (Pa. Super. Ct. 2017) (citations omitted). And even “[e]quity does not permit a court to substitute its own notion of what is right in a particular case for a determination of what the law demands.” *Wallace v. Wallace*, 800 S.E.2d 303, 307 (Ga. 2017). More importantly, PERB is not a court sitting in equity. “[T]he grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations.” *Kelley v. Gov’t of the V.I.*, 59 V.I. 742, 746 (V.I. 2013) (quotation marks and citation omitted)). “Administrative agencies . . . are subject to different standards than courts, even when performing quasi-judicial or adjudicative functions . . . and may not take actions that are inconsistent with their enabling statutes.” *Hansen v. O’Reilly*, 62 V.I. 494, 520 (V.I. 2015) (citations omitted).

Section 530 defines head officer as “the Commissioner of an executive branch department, the director of an executive branch agency or instrumentality or the director, executive director, chief executive officer, president or *other titular head* of an instrumentality of the Government of the Virgin Islands.” 3 V.I.C. § 530(a)(2)(A) (emphasis added). The word “titular” means “[r]elating to, having the nature of, or constituting a title; Existing as such in name only: Nominal.” *Webster’s New College Dictionary* 1185 (3d ed. 2008). The Governing Board is not the *titular* head of WAPA. Further, the word “board” does not appear anywhere in section 530. If the Legislature wanted to

give PERB jurisdiction over appeals from the governing boards of the various instrumentalities of the Government, it could have done so. The Legislature “cannot hide elephants in mouse holes.” *Cruzan Tires v. Gov’t of the V.I.*, SX-18-CV-042, 68 V.I. ___, 2018 V.I. LEXIS 24, *16 (V.I. Super. Ct. Feb. 26, 2018) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016)). PERB erred in concluding that Baumann’s appeal was timely. The error is harmless, however, because PERB nonetheless reached the right result: dismissal of the appeal.

F. Baumann’s Remaining Claims are Waived

i. Baumann’s Claim that WAPA Conceded He was a Regular Employee

Baumann argues in passing in his brief “that in the original §530 [h]earing before PERB, WAPA conceded that Baumann was a regular employee and that PERB had jurisdiction.” (Appellant Br. 6.) WAPA responded, but in a footnote, countering that “regardless of what the parties stipulated or agreed to in the PERB hearing . . . PERB always retains the jurisdiction to consider its jurisdiction.” (WAPA Br. 10 n.13 (quotation marks, brackets, and citation omitted).) WAPA further argues that “PERB’s examination of its jurisdiction is consistent with well-established law.” *Id.* (citing *Gov’t of the V.I. v. Trafton*, 14 V.I. 192, 206 (Terr. Ct. 1997); *Gov’t of the V.I. v. Gov’t Emples. Serv. Comm’n*, 30 V.I. 26, 28 (Terr. Ct. 1994)). In reply, Baumann reiterated that “WAPA conceded that [he] was considered a ‘regular employee’ of WAPA who could rightfully appeal his dismissal to the PERB.” (Reply to WAPA 7.) This “position by WAPA should stand,” Baumann argues, because “WAPA, as Baumann’s employer, and as an instrumentality of the V.I. Government, can determine what category of employee Baumann falls into and whether Baumann had a property interest in his position with WAPA.” *Id.*

The problem with Baumann's claim is that he presented it "in a perfunctory manner, unaccompanied by some effort at developed argumentation." *In re: People of the V.I.*, 55 V.I. 851, 858 n.5 (V.I. 2011) (*per curiam*) (quoting *Bernhardt v. Bernhardt*, 51 V.I. 341, 345-46 (V.I. 2009) (*per curiam*)). And "[i]t is well established that appellate courts generally do not review any claim of error that is not supported by argument or citation to legal authority." *People v. Ventura*, SX-12-CR-076, 2014 V.I. LEXIS 53, *32 n.5 (V.I. Super. Ct. July 25, 2014) (citing *Bernhardt*, 51 V.I. at 345). Not supporting an argument renders it waived. *See Bernhardt*, 51 V.I. at 346. The Court could overlook the failure, since WAPA responded on the merits (though in a footnote) rather than argue waiver, which would constitute waiver of waiver. *See Webster v. FirstBank P.R.*, 66 V.I. 514, 518 n.2 (V.I. 2017) ("[T]he fact that FirstBank has briefed the issue on the merits without contending that the issue has been waived is sufficient for FirstBank to have waived waiver." (citing *Simpson*, 56 V.I. at 281 n.6)). But the Court declines to consider Baumann's claim.

Baumann did assert in the 2011 case that WAPA had conceded in the 2010 case that PERB had jurisdiction. (*See Hr'g Tr.* 12:4-7 ("Based on the two attorneys indicating that they were not contesting jurisdiction and they agreed, the hearing officer moved right into the merits of the case.")) Arguably, that was sufficient to preserve the issue for appeal. But the issue Baumann is raising is quite complicated. In essence, what Baumann is arguing is that whether an appellant is a regular employee, and thus whether PERB has jurisdiction to hear an appellant's appeal, is akin to personal jurisdiction in a court of law. If PERB's jurisdiction over a regular employee is personal jurisdiction, not subject-matter jurisdiction, then it can be conceded or waived if not raised. The problem is that personal jurisdiction is typically raised by a defendant in a civil case and then only to show that the court has no power over it because the plaintiff's injury did not occur in that

jurisdiction or because the defendant's contacts with the jurisdiction are too insufficient for it to be hailed into that jurisdiction's courts. Baumann's claim would transform "regular employee" into an affirmative defense that must be raised by the Executive Branch or the Instrumentalities. This may have been the intent of the Legislature since the Legislature knows how to "speak in jurisdictional terms" when it wants to. *Stewart*, 66 V.I. at 537 n.11 (quotation marks and citation omitted)). Nowhere in section 530 did the Legislature include "a 'clear sign'" *id.* at 536 (quoting *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 300 (V.I. 2014)), that being a "regular employee" is a jurisdictional limitation on PERB's authority. But this Court cannot make a determination based on a passing reference in Baumann's brief and a footnoted response from WAPA. *See id.* ("To make this determination, we look to our established precedents distinguishing between jurisdictional requirements and claims-processing rules. Under those established precedents, we must consider the intent of the Legislature. This Court considers several factors to ascertain legislative intent, including, but not necessarily limited to, whether the statute contains language requiring dismissal as a remedy for non-compliance, and the existence of long-standing case law—including precedent from other jurisdictions—characterizing the statutory requirement as jurisdictional." (quotation marks and citations omitted)). So, without the benefit of briefing from the parties," *Ernest v. Morris*, 64 V.I. 627, 636 n.7 (V.I. 2016) (citation omitted), the Court declines to find waiver of waiver in order to reach Baumann's claim. *See Simpson*, 56 V.I. at 281 n.6 (waiver of waiver is discretionary).

ii. Backpay

Baumann's remaining claim—that he is entitled to backpay—is rejected. Both WAPA and PERB note that Baumann failed to raise the issue of backpay to the Board. "Absent compelling circumstances an appellate court will not consider issues that are raised for the first time on

appeal.” *Dennie*, 66 V.I. at 153 (quoting *Moore v. Walters*, 61 V.I. 502, 510 (V.I. 2014)); accord 3 V.I.C. § 530a(b) (“No objection not made before the PERB shall be considered in a review by the Superior Court, unless the failure to make the objection is excused by the court because of extraordinary circumstances.”). Moreover, because the Court is affirming PERB’s dismissal, Baumann is not entitled to backpay.

IV. CONCLUSION

For the reasons stated above, this Court concludes that the Superior Court sits as an intermediate appellate court on appeal from PERB and that appeals from PERB proceed as of right and not by petition. Baumann erred by filing a petition for a writ of review and the Court was mistaken in granting it. Dismissing the petition is unnecessary here as Baumann’s petition can be construed as a notice and the portion of the order that granted the petition vacated. The parties motion papers will be construed as their appellate briefs since this matter is here on appeal and not on review. Because an appeal is an extension of the underlying case, WAPA’s claim that a prior order issued by a Superior Court judge in an earlier appeal bars this appeal under the doctrine of *res judicata* is rejected. WAPA waived this claim by raising it for the first time on appeal. Baumann did not object and thereby waived waiver. But it is collateral estoppel, not *res judicata*, that could apply here and since WAPA did not assert this defense, the Court cannot raise it *sua sponte*. WAPA’s argument is rejected.

On the merits, the Court concludes that PERB correctly dismissed Baumann’s appeal on jurisdictional grounds, but its reasons were in error. PERB should have dismissed Baumann’s appeal because administrative agencies cannot expand their own jurisdiction and section 530 limits PERB’s jurisdiction to final decisions of head officers. The governing board of an instrumentality of

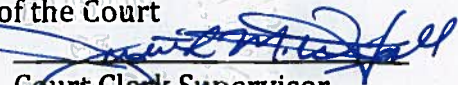
the Government of the Virgin Islands is not a head officer. So, PERB should have dismissed Baumann's appeal rather than hear it. PERB also erred in concluding that Baumann was exempt pursuant to section 451a(b)(8) of title 3 of the Virgin Islands Code. The Governor does not submit to the Legislature for exemption any position within the instrumentalities of the Virgin Islands Government. Instead, Baumann was exempt because all employees of WAPA are exempt from the career service. Baumann was also not a regular employee as defined by section 530 of title 3 of the Virgin Islands because he did not hold a position in the career service and was not in a temporary position for more than two years. Although the Legislature amended section 530(a) to expand PERB's jurisdiction to employees of instrumentalities, the Legislature did not amend the corresponding definition of "regular employee." The statute, as amended, is internally inconsistent and when construed according to canons of construction, excludes Baumann from PERB's jurisdiction. Both errors were harmless, however, because PERB reached the right result. Therefore, PERB's decision will be affirmed.

An appropriate order follows.

DONE AND SO ORDERED.

Date: March 16, 2018.

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 3/16/18


ROBERT A. MOLLOY
Judge of the Superior Court