**JOHN MILLER,**

**Grievant,**

**v. Docket No. 03-CORR-091**

**DIVISION OF CORRECTIONS,**

**Respondent.**

## D E C I S I O N

**John Miller ("Grievant"), employed by the Division of Corrections ("DOC" or "Respondent") as a Correctional Officer V at the Huttonsville Correctional Center, filed a level one grievance on March 5, 2003, in which he alleged that his time in service was reduced in retaliation for his having testified at a level four hearing, and contrary to a decision of the Circuit Court of Kanawha County. For relief, Grievant requested reinstatement of the sixty-two days deducted from his service. Grievant's immediate supervisor lacked authority to resolve the matter at level one. After the grievance was denied at levels two and three, appeal was made to level four on April 1, 2002. The parties, represented by counsel, Scott Curnutte and Charles Houdyschell, Jr., respectively, agreed to submit the matter for decision based upon the record developed at level three. The grievance became mature for decision on August 19, 2003, upon receipt of the level three transcript.** (See footnote 1)

**The following facts are derived from the evidence presented at level three.**

## Findings of Fact

**1. Grievant has been employed by DOC for approximately eighteen years, andhas served as a Correctional Officer at the Huttonsville Correctional Center at all times pertinent to this grievance.**

**2. Grievant was absent from September 8, 1992 to November 8, 1992, due to a work-related injury. Grievant received temporary total disability (TTD) benefits from Workers' Compensation for the period of his absence.**

**3. DOC inadvertently failed to deduct the period of the absence from Grievant's service time or seniority credit.**

**4. On January 10, 2003, several individuals, including Grievant, testified at the level four**

**hearing in the matter of Canfield v. Division of Corrections, Docket No. 02- CORR-269 ( May 30, 2003), that they continued to accrue leave time and seniority credit during the time they received Workers' Compensation benefits.**

**5. By letter dated January 29, 2003, HCC Warden William Haines notified Grievant that his service credit would be reduced by sixty-two days, the period of time he received Workers' Compensation benefits.**

**Discussion**

**As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Grievant alleges that the reduction of his time in service was taken in reprisal for his testifying at a grievance hearing involving a similar matter. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:**

**1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**

**2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**

**3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;**

**4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**

**5) the adverse action followed the employee's protected activity within such a period of time**

**that retaliatory motivation can be inferred.**

**Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish bya preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.**

**Grievant testified in the related grievance on January 10, 2031. Warden Haines' letter advising Grievant that his service time was to be reduced, was issued on January 29, 2003. "The adverse action" followed "within such a period of time that retaliatory motivation can be inferred." Grievant has established a prima facie case of reprisal, and the burden thus shifts to Respondent to rebut the presumption of retaliation.**

**DOC argues that it simply acted to correct an error as soon as it was discovered, and to calculate Grievant's service time in compliance with the policies and administrative regulations of the Division of Personnel ("DOP"), which apply to all classified state employees. DOP Administrative Rule, 143 CSR 3 (2000), provides that an employee who elects to receive TTD benefits must apply for a medical leave of absence without pay. While on leave, the employee continues to accrue credit for increment pay, but does not receive years of service credit, annual leave, or sick leave, in accordance with DOP's "Workers' Comp/Sick Leave Policy" (2000).** (See footnote 2) **While Warden Haines learned of the error as a result of Grievant testifying in another hearing, the reduction of his service time was to correct an error, not to retaliate for his participation in the grievance process. Respondent has demonstrated a legitimate, non-retaliatory reason for the adverse action.Grievant does not allege the reason offered for the adjustment of his service time is pretextual.**

**Grievant next argues that DOC is prohibited from reducing his service time by W. Va. Division of Corrections and W. Va. Division of Personnel v. McCauley, Civil Action No. 99-AA-72 (Circuit Court of Kanawha County Apr. 17, 2000). Circuit Judge James Stucky affirmed theGrievance Board decision in McCauley, holding that the denial of annual leave, sick leave, and seniority time to an employee receiving temporary total disability benefits, but not to an**

**employee who opts to use sick leave, resulted in discrimination against the employee who elected to receive Workers' Compensation, in violation of West Virginia Code § 23-5A-1.**

**However, prior to Judge Stucky's ruling, the Grievance Board expressly overruled the McCauley decision in Lohr v. West Virginia Division of Corrections, Docket No. 99-CORR-191 (Aug. 31, 1999). The pertinent portion of that decision states:**

**Unfortunately, the McCauley decision did not include consideration of [DOP's policy], which requires an employee electing to receive TTD benefits to request a Medical Leave of Absence Without Pay. This important factor places employees receiving TTD benefits in exactly the same circumstances as every other employee who is absent from work for medical reasons, and is off the payroll. As stated in the policy, employees on a medical leave of absence without pay experience a break in their employment, during which time they do not accrue leave and seniority, and do not receive holiday pay. Under these circumstances, employees receiving TTD benefits are not subject to discrimination . . . . Because the [DOP] policy is a controlling factor in these matters, but was not considered, it is concluded that McCauley was clearly wrongly decided, and it is therefore overruled.**

**As a general rule, this Grievance Board adheres to the doctrine of stare decisis in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & HumanResources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied.**

**Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20-085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).**

**A decision from a circuit court reversing a Grievance Board decision, while instructive, does not mandate that the circuit court's reasoning be followed by the Grievance Board in**

**future cases dealing with the same issue. See Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-176 (Aug. 29, 2002). Reviewing the reasoning set forth in Lohr, supra, the undersigned is not persuaded that the decision in that case is legally incorrect. The circuit court opinion in McCauley neither discusses nor addresses the reasoning set forth in Lohr regarding the status of employees receiving Workers' Compensation vis-a-vis all other employees who are in a non-paid status due to a medical leave of absence. Accordingly, the circuit court's holding in McCauley does not present a reasoned determination sufficient to overrule the Grievance Board's decision in Lohr, finding that employees receiving temporary total disability benefits are not victims ofdiscrimination, because they are treated equally to all other employees on leave of absence. Canfield v. Div. of Corr. Docket No. 02-CORR-269 (Apr. 18, 2003).**

**The above-discussion will be supplemented by the following conclusions of law.**

**Conclusions of Law**

**1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).**

**2. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."**

**3. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:**

**1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**

**2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**

**3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;**

**4) that there was a causal connection (consisting of an inference of a retaliatory motive)**

**between the protected activity and the adverse treatment; and/or**

**5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.**

**Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.**

**4. Grievant established a prima facie case of reprisal, as he demonstrated the reduction of his service time, "the adverse action," followed his participation in the grievance process "within such a period of time that retaliatory motivation can be inferred."**

**5. Respondent demonstrated a legitimate nondiscriminatory reason for the decision to reduce Grievant's service time, and for the timing of the action. Grievant did not assert the reason was pretextual.**

**6. The circuit court's holding in McCauley does not present a reasoned determination sufficient to overrule the Grievance Board's decision in Lohr, finding that employees receiving temporary total disability benefits are not victims of discrimination, because they are treated equally to all other employees on leave of absence. Canfield v. Div. of Corr. Docket No. 02-CORR-269 (Apr. 18, 2003).**

**Accordingly, this grievance is DENIED. Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit**

**court.**

**DATE: SEPTEMBER 5, 2003** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1***

***.The parties were given the opportunity to file proposed findings of fact and conclusions of law; however, only DOC elected to do so.***

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***Footnote: 2***

***[2]Grievant did "buy back" thirty-nine days of sick leave, pursuant to DOP's Administrative Rule, Section 3.1(b)(2), which states: "[u]pon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick leave, or sick and annual leave paid, after which his or her sick leave and annual leave, if used, shall be restored."***