THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANNA-MARIE WILSON, M.D.,

Grievant,

v. **Docket No. 07-HE-040**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Anna-Marie Wilson ("Grievant"), employed by the West Virginia University School of Medicine ("WVU") as a second-year resident, filed a grievance on July 30, 2004, following her placement on a six-month surgical and clinical skills probation. The grievance was granted in part at level one when a three-month assignment in Fairmont was rescinded; however, the probation was upheld. Further relief was denied at level two, and appeal was then made to level three. On January 13, 2005, Grievant filed a second grievance following her termination from the Obstetrics and Gynecology ("OB/GYN") program. Grievant alleges the action was arbitrary and capricious, contrary to department by-laws and policy, discriminatory, and the result of retaliation by her immediate supervisor for her having filed previous, pending, grievances. For relief, Grievant seeks reinstatement to the OB/GYN program, promotion from PGY-II to PGY-III effective June 2004, back pay, damages, and attorney fees. The grievance was denied at levels one and two. At level three the grievances were consolidated and following an extensive hearing, denied. Appeal to level four was made on February 2, 2007. Grievant, represented by Bader C. Giggenbach, Esq., of Brewer & Giggenbach, PLLC, and WVU counsel Samuel R. Spatafore, Assistant Attorney General, agreed to submit the grievance for decision basedon the extensive record developed at level three, supplemented with proposed findings of fact and conclusions of law filed on May 15, 2007.

The following facts are derived from a preponderance of the credible evidence made part of the level three record, including a fourteen volume transcript, and three volumes of exhibits.

Findings of Fact

1. Grievant, a citizen of Commonwealth of Dominica, West Indies, graduated from Kurnool Medical College in India in 1992, and practiced medicine for approximately ten years prior to her appointment in the Obstetrics/Gynecology ("OB/GYN") Residency program in the WVU School of Medicine, effective July 1, 2002.

2. At the time of Grievant's appointment, the OB/GYN Department was assigned the status of "Probationary Accreditation" by the Accreditation Council for Graduate Medical Education ("ACGME"). Among the citations cited were insufficient collection of data regarding residents, and the lack of an Education Committee.

3. These deficiencies were addressed with the creation of an Education Committee which is responsible for various matters, including the review of residents about whom concerns are expressed. Also implemented was a resident evaluation procedure referred to as "Focused Assessment Competency" cards. These cards are provided by the residents to the faculty member after they had participated in a surgical procedure. The faculty member would rate the resident in various areas, and return it to the resident for immediate feedback. In turn, the resident was to submit the card to the Residency Coordinator for placement in his/her file. 4. Due to a misunderstanding by Grievant that WVU would assist her in obtaining necessary immigration documents, Grievant did not arrive in West Virginia until July 12, 2002. Upon receipt of a Social Security card , Grievant assumed her position on August 1, 2002, exactly one month late.

5. The OB/GYN residency is a four-year program. The first year ("PGY I") schedule consists of eight rotations: Emergency Medicine; Family Medicine Clinics; Internal Medicine Clinics; Ultrasound; and Obstetrics (all one month each); Night Float (four months); and Gynecology (two months).

6. Grievant's scheduled rotations for her PGY I year were Ultrasound, Family Medicine, Gynecology, and Student Health (all one month); Obstetrics (four months); Night Float (4 months). All three residents were one month short of the required two-month Gynecology rotation.

7. ACGME provides that Residents are expected to master six "Core Competencies": patient care; medical knowledge; interpersonal and communication skills; professionalism; practice-based learning and improvement; and systems-based practice. 8. Residents are expected to develop the ability to perform certain procedures at various stages of their training. A PGY I must demonstrate the ability to perform a D&C, tubal ligation, and normal delivery.

9. Despite the fact that Grievant entered the program one month late, and had missed the Ultrasound rotation, she began her PGY II year on July 1, 2003.

10. The PGY II schedule consists of six rotations: Surgical Intensive Care Unit (SICU); Internal Medicine Clinics; Reproductive Endocrinology & Infertility (one month each); Maternal-Fetal Medicine Clinics; Obstetrics; and Gynecology (three months each). 11. Grievant's assigned rotations for PGY II were: SICU, Reproductive Endrocrinology & Infertility, Emergency Department, and Internal Medicine Clinics (all one month each); High Risk Obstetrics (two months); Obstetrics and Gynecology (three months each). However, Grievant missed one of the Gynecology rotations while on a leave of absence.

12. The competencies required of a PGY II resident are laparoscopy, abdominal hysterectomy, and cesarean section.

13. At a regular weekly meeting on July 24, 2003, Dr. Hashmi advised the residents that the rotation schedule had been revised to address issues which had placed the WVU program on probation. Dr. Wilson was angry about the changes to her schedule and, visibly upset, left the meeting. She later returned and stated that she would quit the program. Dr. Hashmi offered to remove one month of Family Medicine and substitute Obstetrics; however, Grievant remained hostile, accused her of lying, and restated her intention to quit the program.

14. On July 25, 2003, Grievant declined to repeat a report on a patient when asked to do so by senior resident, Dr. Mark Dresbach, who had not heard her first report because he was still writing a treatment plan for the previous patient. Rather than repeat her report, Grievant stated that she had already told him about the patient, and walked out of the room, leaving Dr. Dresback, medical students, and other residents.

15. On July 28, 2003, Grievant reported one hour late for her assigned duties, requiring that other physicians cover her patients. Dr. Hashmi asked that she submit any documented reason, such as a doctor's appointment for her absence. Grievant respondedthat she had forgotten to set her alarm clock. She further noted that she had covered for other residents in similar situations, and that she had called to report she was running late.

16. By memorandum dated August 4, 2003, Grievant advised Dr. Hashmi that

[i]f I am considering resignation, it may be because of the fact that my expectations of this program, in terms of schedule and work environment have changed more markedly than could be reasonably

expected from what [I] obtained when I signed up and in a manner so totally unexpected as to leave little room for the necessary adjustments in my personal life.

Grievant further stated that a few minor adjustments to the schedule could address her concerns that she was one month short of GYN and High Risk OB, and had missed the ultrasound rotation. Grievant asked that instead of three additional months of OB, that she be given one month each of GYN, ultrasound/HROB and primary care. Grievant's schedule was modified to include an additional GYN rotation, but did not include the Reproductive Endocrynology or Ultrasound rotations.

17. Dr. Dresbach notified Dr. Hashmi by memo of August 5, 2003, that Grievant had exhibited an increasingly poor and disrespectful attitude toward her coworkers, had twice reported late the previous week, and refused to see some assigned patients on another day.

18. Dr. Erin Stoehr notified Dr. Hashmi on August 15, 2003, that Grievant had refused to discharge a patient the night shift had not been able to complete, and pushed the chart away. Dr. Stoehr stated that she was simply delegating chores, and that she “was less than satisfied with [Grievant's] response to my requests.”

19. On August 15, 2003, Dr. Hashmi and Angela Obringer, Ph.D. met with Grievant to discuss the above-cited incidents of “unprofessional behavior.” Grievant was also offered, and declined, the opportunity for psychological counseling. 20. Grievant requested, and received, a leave of absence from October 5 through November 1, 2003, causing her to miss a second month of experience.

21. By letter dated March 16, 2004, Dr. Hashmi memorialized a meeting with Grievant and Interim Chair, Dr. Roger Toffle, of that same date to discuss concerns regarding Grievant's substandard professionalism. Dr. Hashmi noted that on March 1, 2004, Grievant had refused to cover labor and delivery in the absence of a colleague. Grievant had been assigned the duty because she had just left the Labor & Delivery (L&D) rotation and knew the patients, and no other resident was available. Her refusal caused patients to be placed at risk, as well as causing unnecessary stress and strain on fellow residents and supervisors. Based on this, and the previously documented incidents, Grievant was placed on a three-month probationary period, and assigned to mentor with Dr. Allison Alexander.

22. Grievant met with Dr. Toffle on March 30, 2004, to request that the probation be lifted. The

previously cited incidents were again discussed, and Dr. Toffle reviewed the Organization/Departmental structure, comparing the medical training model with the Navy model. (See footnote 1) Grievant also complained about her work hours, and non-compliance with the 80- hour workweek. Specifically, Grievant stated that she could not do morning rounds due to child care issues, and that she worked too many hours covering for absent colleagues. Records did not support this claim, and the probation was left in place.

23. Dr. Douglas Glover expressed his concerns regarding Grievant to Dr. Hashmi by letter of April 19, 2004, stating Over the past nine months certain performance deficiencies in outpatient care provided by Dr. Wilson have been noted. Unfortunately, little improvement has resulted in these areas. Overall, her greatest deficiency appears to be in communication.

Early on it was noted that after patient evaluation, she would write a prescription, hand it to the patient with no explanation of the nature of the drug, instructions for dosing, discussion of adverse effects and what results the patient should expect from that therapy. On two occasions when I accompanied her to the examination room, I performed these tasks myself to illustrate what I expect of a physician prescribing for a patient. Over time there has been some improvement but insufficient for my satisfaction. Two copies of the USP-DI, volume II, are available in the clinic, one copy in the residents' room and another in room 3. These volumes are published specifically to be photocopied as a hand-out for all drugs prescribed in the United States and Canada. However, they serve little purpose for the patient who is functionally illiterate, as are some of our patients. I have yet to see her utilize these books.

On this date I accompanied her to see a patient in the afternoon resident clinic. After completing the examination and while the patient was supine on the examining table, she instructed the patient to get up and dress and prepared to exit the room. No effort was made to help the patient up or to push back the foot of the table. Had the patient stepped over the foot of the table it might have tipped over and resulted in injury to the patient as I have witnessed in the past. Courtesy is certainly not one of her strengths.

In my opinion, Dr. Wilson's communication skills are insufficiently developed to merit advancement to the next level of residency.

24. By letter dated May 11, 2004, Dr. Thomas Harman advised the department faculty that he had called Dr. Hashmi to discuss Grievant's surgical skills, having worked with her on multiple occasions. Dr. Harman observed that Grievant's

basic skills and surgical skills are extremely weak. I've watched her prep a patient more than once and have had to reinstruct her patient preparation. During a laparoscopy she has had consistently [sic] unable to coordinate her laparoscopic instruments, and during open cases she is uncoordinated. I called Dr. Hashmi and am writing this letter to express my strong concern that Dr. Wilson is not ready to proceed to third year. I think that she would be unsafe to be a third year resident and very well should be advised to seek another career. 25. At the May 18, 2004, Education Committee Meeting, Dr. Hashmi advised the members that she had received reports from Drs. Harman and Glover in which they recommended that Grievant not be promoted to PGY III. Dr. Allison Alexander reported that when working with Grievant in a clinic, she had to ask her to do a more complete exam since the patient had not seen her primary care physician recently (Grievant had completed a breast and pelvic exam only). Dr. Alexander also opined that she had worked with Grievant on Labor and Delivery, and it appeared that Grievant avoided doing caesarian sections, and that Grievant had reported only completing one post-partum tubal ligation. Dr. Alexander additionally expressed concern regarding Grievant's ability to correctly tie a knot. Dr. Hashmi stated her concern that Grievant did not know the proper hand position for delivering a baby, and had discussed this with Grievant. Following a group discussion regarding Grievant's argumentative attitude, her deficient skills, lack of professionalism, and resistance to following instructions, it was the consensus of the committee that Grievant should not be advanced to PGY III, and the matter would be further discussed with the faculty.

26. A special faculty meeting was held on June 1, 2004, to discuss whether Grievant should be promoted to PGY III. The specifics of the two letters of concern were addressed. Differences of opinion were expressed, and options were discussed. Dr. Hashmi provided a time frame for members, including those who were absent, to provide a written assessment of the situation which would be taken to the Education Committee for consideration.

27. Ten individual responded in writing, stating their opinion that Grievant should receive additional experience, either in continuation at rank and/or remediation, including:Dr. James Holehouse

It is my opinion that Anna would benefit from additional surgical training and structured evaluation prior to her advancing to a PGY III status. A primary concern for me is that I have had limited experience with her in surgery as a first assistant. The limited experience that I have had with her in surgery shows me that she is not comfortable working [in] an independent or semi independent way. This is in contrast to her colleagues Marla Hardenbergh who shows much more confidence in the OR. I do think that Anna can catch up to her colleagues at a PGY III status however additional focused surgery time will be required such as 3 - 6 months of gyn and gyn surgery.

Linda Linger, DO

[I]t is my opinion that Dr. Anna Marie Wilson is not performing at the level of an incoming 3rd year resident. Although she has made great strides in the past year, I feel she is behind the early [3rd] year level. She has difficulty with differential diagnoses at times and coming up with a variety of treatment plans. When she has no experience at a procedure, she has an even more difficult time admitting that she needs guidance in performing that procedure. Her attitude toward the other residents has improved and there seems to be less turmoil in that regard. I do not feel she is ready to be teaching and supervising the junior residents at this point.

Dr. Loraine Tyre stated

I have not had any experience with her in a clinic situation and the only comment I can make is based on operative skills observed by myself during several c-sections. I would comment that I feel her skill level is below average and would rate this as moderately below average. It would be my suggestion to have her in a situation where she could get increased exposure to surgery.

Dr. Susan Capelle

I believe Ms. Wilson has some serious deficiencies in her clinical skills that warrant remedial training. While her clinical judgement and medical decision making is generally sound and she pays attention to medical detail, her surgical skills and intra-operative decisions reflect a level of training that is barely acceptable at the level of a second year resident. Her knot tying is inconsistent and unreliable _she ties a knot as if it were a shoelace so that the knots are not consistently tight. Despite my having admonished her on numerous occasions that she must learn proper knot tying techniques with one and two hands and using either the left or the right hand as the throwinghand _ she has not taken the

initiative to learn these skills. I do not know if this deficiency exists because she is lacking in desire, initiative or basic ability but it has not be remedied and this is very concerning. Please take this information into account when considering Dr. Wilson for promotion to the level of a third-year resident.

Dr. Wanda Hembree

I would recommend a six month remediation period for Dr. Wilson, during which time we will emphasize gyn surgery training.

28. After considerable discussion, the Education Committee determined that Grievant would be placed on a six-month probation to remedy her surgical skills. If Grievant did not improve to a satisfactory level, she would be terminated.

29. In a letter dated June 23, 2004, the Education Committee members notified Grievant that "there has been no significant reoccurrences of the particular issues that would warrant the extension of your professionalism probation" which would expire on June 16, 2004.

30. The Committee continued in part:

However, upon review by the committee of your overall skills, there was significant concern regarding your surgical and clinical skills. As we realize the importance of this issue, a thorough investigation was undertaken by the committee to ascertain the validity and seriousness of these issue . . . Specific issues that have been raised as deficient, and should be addressed with regard to your ability level include:

1. Reliably performing a surgical knot
2. Properly prepping a patient for surgery
3. Properly positioning a patient for surgery
4. Ability to perform a basic laparoscopy/hysteroscopy procedures
5. Ability to contribute at level during open cases
6. Appropriate evaluation of patients in clinical settings
7. Communication with patients

As a result of the committee's sincere and genuine desire to see you succeed and become a competent surgeon and skilled physician, the Education Committee has made a unanimous decision

to retain you at yourcurrent position, PGY II, for at least an additional six months in an effort to give you an opportunity to resolve these problematic areas.

During this period, the committee will offer you an additional six months of GYN surgical training. The first three months will occur with Drs. Bonasso, Stewart, and Jarem, in Fairmont, where you will be performing surgical procedures with them, as well as being involved with the associated clinical time, to augment your skills. . . The following three months will entail an additional three months of GYN surgery experience at WVU. During these three months you will be operating with Drs. Holehouse, Ashraf, and Alexander. You will be responsible for submitting a 'competency form' to the attending surgeon following each procedure, which will document your performance for the Education Committee. . . .These evaluations will be reviewed, as will your overall progress, by the Education Committee on a monthly basis. If there are any remaining deficiencies of the seven listed above at the end of the six month remediation, it would be grounds for dismissal.

At the end of the six-month remediation period, the Education Committee will meet to decide whether your skills have improved, and you can be advanced to a PGY III level. If advanced to a PGY III level, your training will be extended by six months to meet RRC [Residency Review Committee] regulations, with the anticipation of the probation ending December 31, 2004. (See footnote 2) If the remediation is deemed unsuccessful at the end of the six-month period, dismissal from the program would be in order. . . .

31. On July 30, 2004, Grievant filed a grievance challenging her retention at the PGY II level, and the probationary period. Grievant asserted that she was essentially functioning as a student with the medical group in Fairmont, and was not receiving the surgical experience in which she was to participate at that assignment.

32. At level one of the grievance procedure, Dr. Hashmi agreed to allow Grievant to return to WVU to complete the remediation period, effective September 1, 2004, and denied the remaining claims. The grievance was denied by Dr. Dawood at level two on August 30, 2004, and was consolidated with the present grievance at level three. 33. The Education Committee met on December 9, 2004, to review Grievant's probationary status. After reviewing all the available information, it was determined that due to variations in technique, properly prepping a patient for

surgery would be deleted from the list of skills to be improved. Grievant was found to have successfully demonstrated the ability to properly position a patient for surgery, to appropriately evaluate patients in clinical settings, and to communicate with patients. Grievant remained deficient in her ability to reliably complete a surgical knot, to perform a basic laparoscopy/hysteroscopy procedure, and to contribute at level during open cases.

34. The Education Committee unanimously decided that Grievant should not be promoted to a PGY III position.

35. By letter dated December 20, 2004, Dr. Dawood notified Grievant of his intent to terminate her employment as a PGY II Resident, effective December 31, 2004, for failure to meet the requirements necessary for advancement to a PGY III position.

36. In Dr. Dawood's absence, Grievant met with Dr. Hashmi on December 28, 2004, to discuss the pending termination. By letter of December 29, 2004, Dr. Hashmi notified Grievant that the decision of the Education Committee to terminate her residency would be upheld.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is moreprobable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which is allocated based on the witnesses' opportunity for knowledge, information possessed, and manner of testifying. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

WVU asserts that Grievant could not be retained because she failed to meet the standards required for promotion to PGY III. Grievant argues that her placement on remediation, and subsequent termination, were an abuse of discretion, arbitrary, capricious, unwarranted, without factual basis and excessive. Grievant asserts that she was evaluated and treated unfairly in the area of surgery because she had two months less surgical experience than the other residents. Grievant

asserts that she should have been given an appropriate opportunity to correct perceived problems with her surgical skills with provision of adequate feedback prior being forced to remain a PGY II. Further, Grievant asserts that WVU violated its rules regarding promotion since she met all the departmental requirements for promotion to third year. Next, Grievant asserts that WVU violated its by- laws when she was not given a four-month advance written notice of the decision not to appoint her as a third year resident. In addition to these violations, Grievant argues that she was subject to reprisal, *i.e.*, the first grievance served as a basis for termination. Finally, Grievant asserts that she is a victim of discrimination since she received a harsher punishment than other residents whose surgical skills were rated less than, or equal to, her own.

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." *Trimboli, supra*.

Residents are in unique position as their employment is part and parcel of their educational program. Continued employment as a resident is contingent upon satisfactory educational progress demonstrated during the various rotations and the promotion to the next PGY. Thus, a review of the decision not to continue Grievant's employment necessarily requires a review of the decision not to promote her to PGY III. Certainly, not all faculty and staff members believe Grievant should be dismissed from the program. Several individuals expressed their opinions that Grievant was progressing well, even above average. It is not unusual for reasonable minds to differ on such matters. However, the Education Committee members who were charged with making the decision ultimately determined that Grievant had not met the established criteria for promotion to PGY III. A careful review of information provided on the Trainee Rank Reports, surgical competencycards, written comments from faculty/staff, and their own observations served as the basis for the decision. While Grievant places much emphasis on the competency cards, which nearly always rated her as

average and on level, the record does not reflect the weight accorded by each member to each of the factors considered. The evidence establishes that on December 6, 2004, Grievant was observed to be unable to tie a surgical knot. Further, the committee members found that Grievant remained unable to satisfactorily perform a basic laparoscopy/hysteroscopy procedure, or to contribute at level during open cases. These are valid reasons for finding that she had not satisfactorily met the criteria for promotion to PGY III, and the decision was not arbitrary and capricious.

Neither was the decision based on reprisal for Grievant's having filed a prior grievance. *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 engaged in protected activity, e.g. filing or participating in a grievance;

2) that he 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.

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 v. Mason County Bd. of Educ*., Docket No. 89-26-56 (Sept. 29, 1989).

Because Grievant's employment was terminated less than five months after she filed the prior grievance, she has established a *prima facie* case of reprisal. Grievant supports this claim with the testimony of Dr. Obringer, a committee member who stated that the “number one” reason Grievant

was terminated was due to a lack of willingness to complete the Fairmont assignment at the beginning of the remediation.

Although the termination followed the prior grievance within a relatively short period of time, WVU has proven by a preponderance of the evidence that the separation was based on good cause. While the comment of Dr. Obringer may indicate that she, and possibly other committee members, perceived a lack of cooperation by Grievant, the evidence in its entirety does not support the claim that Grievant was terminated due to her lack of willingness to complete the Fairmont assignment. It is also important that Grievant prevailed at level one regarding the Fairmont assignment portion of the grievance. It is not logical that the complaint would be granted, and then Grievant terminated in retaliation for the filing of the grievance when a legitimate basis for the decision existed.

Grievant next argues that WVU violated certain by-laws when failed to prove Grievant a four-month advance notice of the decision not to reappoint her as a third-yearstudent. Any such requirement was substantially met when Grievant was placed on a six- month probationary period. Grievant was clearly notified of the deficiencies to be corrected, and the time period available to her, prior to a final decision regarding her promotion. Similarly, Grievant's claim that she met all departmental requirements for promotion is inaccurate inasmuch as her performance was viewed as unsatisfactory in three areas.

Grievant also argues that she has been subject to discrimination because other residents whose surgical skills were rated less than, or equal to her's were promoted. Discrimination is defined by *W. Va. Code* § 29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). Grievant refers to another resident who experienced difficulty with knot tying, but was not terminated. Because any comparison must be made with similarly-situated employees, and Grievant did not establish that any resident with her entire set of deficiencies were treated differently, the claim of discrimination is not supported by the record.

Finally, Grievant asserts that because she had unfairly been assigned two fewer months of surgical experience than the other residents, termination is excessive. The argument that mitigation

is appropriate, given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportionbetween the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects forrehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

While Grievant has missed two Gynecological rotations she was given an additional six months to improve the stated deficiencies, and in the view of the committee, failed to do so. This situation has been regrettable for both parties who have two years invested in the education of an OB/GYN resident. The relationship started on a negative footing with Grievant feeling frustrated regarding the immigration matters, and then receiving what she perceived to be a “questionable reception.” Grievant was also stressed as a single mother managing the health care and day care needs of a three year old. Lacking a driver's license and car only made things more difficult.

Personal matters aside, Grievant was reasonably concerned regarding the ultrasound and gynecological rotations which she had missed. Undoubtedly, however, WVU would have insured that she received all the program requirements necessary for graduation. Grievant's concern based on her second-year colleague's schedule, which differed somewhat from her own, was misplaced as that individual's education and experience was not the same as her's. In summary, Grievant was given an additional six months to correct the listed deficiencies, and mitigation is not warranted.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). 2. WVU has proven by a preponderance of the evidence that Grievant was properly terminated from employment as a resident due to her failure to achieve promotion to PGY III.

3. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997).

4. WVU's decision to terminate Grievant's employment as a resident was not arbitrary and capricious.

5. Discrimination is defined by *W. Va. Code* § 29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

6. Grievant has failed to prove that WVU treated a similarly-situated resident differently or otherwise acted in a discriminatory manner.

7. “Reprisal" is "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." *W. Va. Code* § 29-6A-2(p). 8. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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

2) that he 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.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

9. 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 v. Mason County Bd. of Educ*., Docket No. 89-26-56 (Sept. 29, 1989).

10. Because Grievant's employment was terminated less than five months after she filed the prior grievance, she has established a *prima facie* case of reprisal.

11. WVU rebutted the *prima facie* case of reprisal by establishing good cause for the action taken.

12. Mitigation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s]discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

13. Grievant failed to prove that mitigation is appropriate in this case.

Accordingly, the grievance is **DENIED.**

Any party 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)(*but see Executive Order No. 2-07*, May 8, 2007). 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: AUGUST 29, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *This was apparently to reinforce Grievant's understanding as to where she stood in the chain of command, and to whom she was responsible.*

Footnote: 2 *The RRC accredits OB/GYN programs as well as establishing requirements for resident education.*