THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES RATCLIFF,

Grievant,

v. **Docket No. 2009-0671-DEP**

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

DECISION

Grievant James Ratcliff is employed by the Department of Environmental Protection ("DEP") where he is classified as an Environmental Resource Program Manager 1 in the Office of Explosives and Blasting ("OEB"). On November 13, 2008, Mr. Ratcliff filed a level one grievance. As the Statement of Grievance he wrote:

> I have been told to change my work schedule from the current AWS, [alternative work schedule] I have been working since I came to work here. It was discussed and understood that I could work a 4 day week M-Th, when I was interviewed and hired. There are other options available. My job duties and programs have been effective. This effects my current visitation schedule with my children. I have been told to work 5-8's.

As relief Grievant seeks:

> I wish to be made whole by keeping my current work schedule of 4-10's and allow my duties to continue functioning as they were.

A level one hearing was held on February 26, 2009, and an Order denying the grievance was adopted on April 9, 2009. The grievance was appealed to level two for mediation and an Order was entered regarding the mediation on August 7, 2009.

Grievant filed an appeal to level three of the grievance procedure and a level three hearing was held on January 27, 2010, in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant was present at the hearing and was represented by Gordon J. Simmons, UE Local 170, WVPWU.[1] Respondent DEP was represented by Kristin A. Boggs, DEP Associate General Counsel. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. The last of these fact/law proposals was received at the West Virginia Public Employees Grievance Board on March 8, 2010. The grievance became mature for decision on that date.

Synopsis

Grievant had been allowed to work an alternative work schedule for a number of years. Pursuant to that schedule, Grievant worked ten hours per day on Monday through Thursday and was off duty on Friday, Saturday and Sunday. The OEB, where Grievant is employed, was reorganized and he received a new supervisor. The new supervisor changed the work schedule of all managers in the OEB to require them to work a regular work schedule of eight hours per day, Monday through Friday. Grievant argues that the change in his work schedule was discriminatory as well as arbitrary and capricious.

Respondent counters that the change in the work schedule was necessary to properly staff the office and have a management personnel available when they were needed. Grievant was unable to prove that the change in his work schedule was unreasonable or based upon discrimination. The grievance is denied.

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[1] West Virginia Public Workers Union.

Additionally, the DEP revised the AWS Policy while this grievance was pending. This revision requires all managers to work a five-day work week unless they receive approval for an AWS from their Office Chief. For reasons more fully set out below, this revision renders the remedy sought by Grievant to be wholly unavailable and the grievance must be dismissed.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant James Ratcliff is employed by the Department of Environmental Protection ("DEP") where he is classified as an Environmental Resource Program Manager 1 in the Office of Explosives and Blasting ("OEB").

2. Grievant was originally hired by DEP and placed in the OEB in January, 2002, as an Assistant Chief. He became a Program Manager 1 in February, 2006. Grievant is responsible for blasting certification for coal operators throughout West Virginia.

3. When Grievant Ratcliff was originally hired, he was told by the Chief of the OEB, Mike Mace, that he would be allowed to work an Alternative Work Schedule ("AWS"). Pursuant to the AWS, Grievant worked four days per week, ten hours per day. Grievant was in the office Monday through Thursday and was off work Friday through Sunday, each week. Mike Mace is no longer the OEB Chief.

4. While Mr. Mace was the OEB Chief he required Grievant to go off of the AWS on two occasions. On both occasions Grievant Ratcliff filed a grievance.[2] The first time Chief Mace allowed Grievant to return to the AWS. The second grievance was denied at level one and appealed to level two. By letter dated February 17, 2006, DEP Director Randy Huffman granted the grievance and allowed Grievant Ratcliff to remain in his alternative work schedule. After granting the grievance, Director Huffman added the following:

> As you know, however, there are changes currently being contemplated by the new Acting Chief of the Office of Explosives and Blasting, which may impact your duties and work schedule in the future. If and when those changes occur, you may grieve those changes at the appropriate time.

Grievant Exhibit 4.[3]

5. David Vande Linde became the chief of the OEB on February 16, 2006. Shortly after taking over the OEB, Chief Vande Linde reorganized the personnel structure of the Office. Vande Linde is in charge of the overall operation of the Office and he has two managers who report directly to him. One of those managers is Darrell O'Brien who supervises up to nine Environmental Inspection Specialists. Grievant is the other manager. Grievant supervises an Office Assistant 3 and an Environmental Inspection Specialist.

6. When Chief Vande Linde took over the OEB, most if not all, of the employees were working an AWS including the two managers.

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[2] Both of these grievances were filed under the old grievance procedure which was replaced in July 2006. In that procedure, level two was decided by the agency's Chief Administrator.

[3] Mr. Mace had left the OEB by the time Director Huffman decided the grievance at level two. Obviously, he saw no need to go forward with this grievance since the new Chief might want to make new scheduling assignments which could render the entire issue moot.

7. The DEP has adopted an Alternative Work Schedule Policy ("AWS Policy") which became effective in 1995 and has been occasionally revised. The Policy Statement section of the AWS Policy provides:

> Utilizing the minimum Standards defined here, each Division within the DEP shall allow all employees to vary their work schedules from the Standard Work Day. Provided, however, that in all cases the effective and efficient operation of the Work Unit shall be the primary consideration in approving and denying an employee's request for a particular Schedule Option.

Grievant Exhibit 2.

8. The "Eligibility" section of the policy provides the following:

> An employee's eligibility to participate in the AWS Program is a privilege. In order for an employee to be eligible for participation in the AWS Program, they must meet the following criteria:
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> 1. The employee's participation in the AWS Program will not reduce the effectiveness or efficiency of their Division, Office Section, Work Unit, or any member thereof.
> 2. Employees in a Disciplinary status shall have their schedules determined by their supervisor.
> 3. Each Division Director shall identify key personnel who are not eligible, due to the nature of their job responsibilities, to participate in any AWS Program option other that those which are made of five (5) consecutive working days (i.e. Monday through Friday).

Grievant Exhibit 4.

9. The term "Key Personnel" is defined in the AWS Policy as follows:

> Those employees for whom it can be determined that their absence from the work place , for the purpose of participating in a Schedule Option which does not include five (5) consecutive work days (i.e. Monday through Friday), would significantly impair the Division's, Office's, Section's, and/or Work Unit's ability to either function as mandated or efficiently manage its employees.

Grievant Exhibit 4.

10. On October 23, 2008, Chief Vande Linde sent an e-mail to all of the employees in the OEB and a copy to Tom Clarke, the Division Director over the OEB. In that e-mail Chief Vande Linde issued the following directions regarding Alternative Work Schedules for OEB employees:

> To comply with the governor's mandate to properly staff all state offices 5 days a week and to insure OEB is adequately staffed to perform its assigned duties, changes to the OEB's AWS will be implemented. Effective November 1, 2008, the following changes to work schedules will be implemented until further notice:
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> 1. All managers will be required to work a normal eight (8) hour day, five day work week.
> 2. All field staff wishing to work a 4 day week will submit a new alternative work schedule to their supervisor. Only two field staff will be allowed to be scheduled off through AWS on the same work day.
> 3. All office staff will be required to work a normal eight (8) hour day, five day work week. Within a reasonable time for filling the administrative secretary position AWS changes to the office staff may be re-evaluated.

Grievant Exhibit 1.

11. Chief Vande Linde discussed this change with Division Director Tom Clarke prior to issuing the directive. Vande Linde felt that the two managers were "key personnel" for the OEB and Director Clarke told Vande Linde he could do what he thought was best.

12. Before the directive was issued more than sixty percent of the OEB's staff was off on the same regular work day. With respect to Grievant, Chief Vande Linde felt it was important for him to be in the office every day to manage staff. Additionally, Grievant has the most expertise in the office regarding explosives and blasting and Chief Vande

Linde felt it was important for Grievant to be available for consultation with the other employees.[4]

13. After issuing the AWS directive, Chief Vande Linde met with the two clerical employees and allowed them to work four-day weeks if neither one took the same day off. By doing this, someone was available in the office every day of the week and since each one worked ten hour days the office was open more hours for their constituents.

14. Both managers in the OEB felt that the AWS was a benefit of their jobs that made the job more desirable and did not disrupt their ability to provide services. Grievant scheduled visitation with his children for Fridays because under the AWS he did not have to work that day. Mr. O'Brien noted that communication between he and Chief Vande Linde had improved but that the change in the work schedule was not a contributing factor.

15. On October 1, 2009, the DEP revised it's AWS Policy for the entire agency[5]. The revised policy contains the following provision:

> 3.3(c)(1). Managers are not eligible for any work schedule other than five (5) consecutive work days (i.e. Monday through Friday) without the approval of the appropriate division director/office chief. For the purposes of this policy, a manager is defined as an exempt or classified employee who plans, organizes, directs, and controls staff, methods and resources. The employee oversees a formally designated organizational unit or program that requires extended planning of work activities, control of resources, and all the means used to accomplish work within the assigned area of responsibility. The employee coordinates the work of the unit or program with the agency and external interest group and is held accountable for establishing and meeting the objective (sic) and goals of the unit or program.

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[4] While Grievant does have a cell phone, he does not get cell reception at his home and does not have an answering machine on his phone. Consequently, he is difficult to contact when he is not in the office.

[5] This grievance was originally filed on November 13, 2008. The revision to the AWS policy took effect nearly eleven months later.

DEP's Alternative Work Schedule Policy (Revised, October 1, 2009).

16. Grievant is the manager of the state-wide program for blasting certification and supervises two employees in his unit. He meets the definition of a "manager" as that term is defined in section 3.3(c)(1) of the recently revised AWS policy.

Discussion

Motion to Dismiss:

Before addressing the merits of this grievance, it is necessary to address Respondent's assertion that the grievance is moot and should therefore be dismissed. Respondent notes that the remedy sought by Grievant is to be allowed to continue to utilize the AWS and report to work four days per week for ten hours each day. Respondent avers that the most recent revision to the AWS policy renders this relief unavailable to Grievant regardless of the ruling on the merits of this grievance.

The revised AWS Policy specifies that all DEP managers must work a schedule that includes five consecutive work days (i.e. Monday through Friday) unless the manager receives specific approval to do otherwise from his division director/office chief. Grievant's position is classified as an Environmental Resource Manager 1 and he manages a unit that oversees the state-wide program for blasting certification. He supervises the employees and the use of resources in that unit. Grievant meets the definition of "manager" as that term is defined in the revised AWS Policy. Findings of Fact 15 and 16 *supra.* Grievant's Office Chief, David Vande Linde, made it clear during his sworn testimony that he would not authorize managers in the OEB to work four-day schedules. Respondent argues that, as a result of the AWS Policy revision, Grievant will not be able to return to the four day per

week AWS work schedule regardless of the outcome of the grievance contesting the decision made under the policy. Because the remedy sought is unavailable to Grievant, the Respondent argues that the Grievance is moot and should be dismissed.

Grievant counters that he will lose opportunities to meet with his children and perform automotive and household repairs if he is not allowed to work the four-day schedule. However, Grievant presented no evidence of specific damages he would incur as a result of working a standard employment schedule and he did not move to amend the remedy he seeks.

"Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Harrison v. Cabell County Bd. of Educ.,* 351 S.E. 2d 604 W. Va. 1985); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-5-073 (May 30, 2003).

Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." *See: McGill v. Reg'l Jail and Corr. Facility Auth.,* Docket No. 2009-0260-MAPS (July 8, 2010).

When it is not possible for any actual relief to be granted, any ruling regarding the question raised by this grievance would merely be an advisory opinion. The Grievance Board will not issue advisory opinions. *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.21(2008).

Harrison v Cabell County Bd. of Educ., supra, is instructive in this matter. In that case, Mr. Harrison alleged that the Cabell County Board of Education had violated the law by not hiring him for a guidance counselor position. After Harrison had filed his action contesting his non-selection, the Board of Education eliminated the position for which he had applied. The West Virginia Supreme Court of Appeals found Mr. Harrison's claim to be moot because the remedy he sought - placement in the guidance counselor position - was no longer available since the position had been abolished.

Similarly, the remedy Grievant seeks - a four-day work week - is no longer available because the AWS Policy has been revised to exclude managers without the permission of their Office Chief. Grievant is a manager and his Office Chief has given sworn testimony that he will not approve a four-day work week for the managers in the OEB. Since the remedy Grievant seeks is wholly unavailable to him, the grievance must be dismissed as moot. *See: Harrison v. Cabell County Bd. of Educ.,supra; McGill v. Reg'l Jail and Corr. Facility Auth., supra;* 156 C.S.R. 1 § 6.11 (2008).

Ruling on the Merits

Even though this grievance is dismissed as moot, the merits will be addressed in the interest of judicial economy if this decision is appealed.

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

DEP has a specific policy that controls the granting of an AWS to specific employees. The main policy statement is as follows:

> Utilizing the minimum Standards defined here, each Division within the DEP shall allow all employees to vary their work schedules from the Standard Work Day. Provided, however, that **in all cases the effective and efficient operation of the Work Unit shall be the primary consideration in approving and denying an employee's request for a particular Schedule Option**.

(Emphasis added) DEP AWS Policy.

The emphasized language makes it clear that an AWS may be denied to an employee if that is necessary to accommodate the effective and efficient operation of the work unit.

In the present case the work unit is the OEB. As the OEB Chief, Mr. Vande Linde determined that the effective and efficient operation of the OEB would be enhanced if the managers of that unit work a five-day work week. He gave specific rationale for that conclusion. First, the Governor had directed that all state offices be staffed all five days of the typical work week. Chief Vande Linde felt that having the managers there each day was consistent with that directive. Second, if there was staff in the office in each unit, each day, it was necessary for the manager of the unit to be in the office to provide direction and supervision. Finally, Grievant was the blasting expert for the OEB and his expertise was especially important to the employees of the Office. Chief Vande Linde noted that Grievant was particularly difficult to contact at home.[6] Therefore, he felt it was necessary for

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[6] *See;* Footnote 4 *supra.*

Grievant to be available at the office five days a week so that the remainder of the employees had access to him for consultation.

The West Virginia Supreme Court of Appeals has consistently held that interpretations of statutes and policies by bodies charged with their administration are given great weight unless clearly erroneous. *CB&T Operations Co., Inc. v. Tax Comm'r,* 211 W.Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting *Syl. Pt. 4, Security Nat'l Bank & Trust Co.v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981). *See* Syl. Pt. 2 of *W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993)*per curiam* (applying this principal to an agencies rule). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). *Guertin v. Tax Dep't and Div. of Pers.*, Docket No. 2009-1687-DOR (July 27, 2010). 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 is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

Chief Vande Linde gave rational reasons for his determination that denying a four-day work week to his managers, including Grievant, served the effective and efficient

operation of the OEB.[7] While reasonable people might differ regarding this opinion, that is not sufficient to find that Chief Vande Linde's decision was clearly erroneous or arbitrary and capricious.

Finally, Grievant argues that the decision to make him work a standard work schedule while allowing other employees in the OEB to work AWS's constitutes prohibited discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and'
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant is not similarly situated to all of the employees of the OEB. Because managers have supervisory duties, their job responsibilities differ from non-managers. Both

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[7] Grievant also contends that, under the AWS Policy provisions, only Division Director Tom Clarke had authority to designate the OEB managers as "key personnel" who are exempt from the AWS policy. This argument fails because the policy does not require an employee to be designated as "key" to be denied AWS. More to the point, Vande Linde discussed his proposed change with Director Clarke prior to making them and Director Clarke delegated the authority to designate "key personnel" in the OEB to Chief Vande Linde.

managers in the OEB are required to work a standard five-day work week and with the revision of the AWS Policy all DEP managers, as defined in that Policy, will have to work that schedule. Grievant did not prove that he was being treated differently than other similarly situated employees. Consequently, Grievant has not met his burden of proof and the grievance must be denied.

Conclusions of Law

1. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Harrison v. Cabell County Bd. of Educ.,* 351 S.E. 2d 604 W. Va. 1985); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-5-073 (May 30, 2003).

2. When it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. "This Grievance Board does not issue advisory opinions." *Collins*, *supra*. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.21(2008).

3. Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." *See:*

McGill v. Reg'l Jail and Corr. Facility Auth., Docket No. 2009-0260-MAPS (July 8, 2010).

4. Subsequent to the filing of this grievance, DEP revised its AWS Policy to prohibit managers from working a schedule that did not include a five day work week without the approval of their Office Chief. This revision makes the remedy Grievant seeks wholly unavailable and the grievance moot.

5. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

6. Interpretations of statutes and policies by bodies charged with their administration are given great weight unless clearly erroneous. *CB&T Operations Co., Inc. v. Tax Comm'r,* 211 W.Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting *Syl. Pt. 4, Security Nat'l Bank & Trust Co.v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981). *See* Syl. Pt. 2 of *W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993)*per curiam*.

7. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483

(1996)). *Guertin v. Tax Dep't and Div. of Pers.*, Docket No. 2009-1687-DOR (July 27, 2010).

8. 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 is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

9. Grievant did not prove by a preponderance of the evidence that Chief Vande Linde's decision was clearly erroneous or arbitrary and capricious.

10. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

11. Grievant did not prove that he was being treated differently than similarly situated employees.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: AUGUST 17, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE