

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA SPURLOCK,

Grievant,

v.

Docket No. 2022-0015-DOT

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Lisa Spurlock, filed a grievance dated July 9, 2021, against her employer, Respondent, Division of Highways (DOH), stating, in part, as follows: "This grievance is about nepotism and harassment such as nepotism by calling me in and taking what he should have had his nephew Noah to take the same vehicle as he would have me to take. . . harassment is asking about my work and saying he likes pissing me off. . . ." ¹ On this statement of grievance form, Grievant did not state any relief sought, but it is implied that she was asking for the activity grieved to stop, otherwise she would not have filed a grievance. On August 30, 2021, Grievant, by counsel, filed an amended statement of grievance which states as follows: "Supervisor Jessie Ferrell has violated West Virginia Human Rights Act, W. Va. Code section 5-11-11 *et seq.* by discriminating against me based on my gender. Further, Supervisor Jessie Ferrell violated whistle blower law by his actions. . ." Grievant then attached a one-page typed narrative, which is included herein by reference, as if stated *verbatim*, and is part of the record of this grievance. As relief sought, Grievant states, "I would like to be provided

¹ Grievant attached a five-page narrative to her original grievance form in which she further explained her grievance. These five pages are included in the record of this grievance and the same are included by reference herein as if stated *verbatim*.

with safe transportation to use during the course of my employment, for my Supervisor to stop retaliating against me in the workplace, and whatever else the Grievance Board deems just.”

A level one conference was held on September 28, 2021, and the grievance was denied by letter dated October 20, 2021.² Grievant filed her appeal to level two of the grievance procedure on October 28, 2021, and the grievance was mediated on December 13, 2021. Grievant perfected her appeal to level three on December 21, 2021. A level three hearing was conducted on April 13, 2022, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office.³ Grievant appeared in person and by counsel, Ambria Britton, Esquire, Klie Law Offices. Respondent appeared by counsel, Jack E. Clark, Esquire, DOH Legal Division, and by its representative Kathleen Dempsey. Lori Counts-Smith, Esquire, DOH Legal Division, attended this hearing as an observer. Grievant had no objection to Ms. Counts-Smith being present during the hearing. This matter became mature for decision on June 6, 2022, upon receipt of the last of the parties’ proposed “Findings of Fact and Conclusions of Law.”

² During the level three hearing, counsel for Respondent stated that there had been a hearing at level one; however, no transcript of that proceeding had been submitted into the record of this grievance. This ALJ ordered Respondent to submit the transcript of the level one hearing to the Grievance Board, as well as a copy to Grievant’s counsel, by April 22, 2022. After the level three hearing, counsel for Respondent emailed the Grievance Board and counsel for Grievant advising that he had been mistaken, and that the proceeding at level one was an unrecorded conference and not a hearing. Therefore, there was no transcript to submit.

³ This grievance was originally scheduled to be held on April 25, 2022. Respondent requested a continuance, and for good cause shown, this ALJ granted the continuance. The level three hearing was rescheduled for April 13, 2022.

Synopsis

Grievant is employed by Respondent as a Transportation Worker II Equipment Operator (TW2EQOP). Grievant asserts that her supervisor has discriminated against her and favored other employees over her in the assignment of work duties, vehicles, and equipment which lead to a heated exchange with her district's Assistant Supervisor on June 25, 2021. Grievant further alleges that Respondent failed to provide her the same opportunities to operate equipment for which she was qualified as her coworkers were given. Respondent denies all of Grievant's claims and asserts that the Assistant Supervisor did nothing inappropriate on June 25, 2021, and it was Grievant who "blew up" on him over being assigned to drive a vehicle that had no air conditioning. Grievant proved her claims of discrimination and favoritism by a preponderance of the evidence. Therefore, the grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker II Equipment Operator (TW2EQOP) in Division of Highways (DOH) District 2 in Cabell County, West Virginia. Grievant has been employed by Respondent since November 14, 2018. Grievant was the only woman on her work crew, and one of only two women employed in non-administrative positions in District 2. There are only nine women employed in Transportation Worker (TW) classification in the entire region.⁴

⁴ See, testimony of Kathleen Dempsey.

2. Grievant works well with her crew, does her work as directed, and her supervisors and co-workers have made no complaints about her or her work performance. Grievant has no history of discipline.⁵

3. Allan Midkiff was employed by Respondent as the Highway Administrator/Supervisor in DOH District 2 at the times relevant herein and was Grievant's top-level supervisor. Mr. Midkiff was responsible for overseeing the operations of his district. As of the date of the level three hearing, Mr. Midkiff was serving as both the Acting Supervisor of the Cabell County DOH Headquarters and the Highway Administrator/ Supervisor in District 2.

4. Jesse Ferrell is employed by Respondent as the Assistant County Administrator/Assistant Supervisor in District 2. In this position, Mr. Ferrell assigned vehicles and equipment to crews and assigned daily work duties to certain transportation workers who were not assigned to work on crews. His other duties included responding to complaints from the public and looking at job sites and work completed. Mr. Ferrell's position required him to travel to District 2 Headquarters in Huntington, at times. Mr. Ferrell served as Grievant's supervisor when she was not assigned to work on a crew.⁶

5. Kathleen Dempsey is employed by Respondent as the DOH District 2 Human Resources Director.

6. Joe Nance is a Transportation Worker 3 Crew Chief. Mr. Midkiff and Mr. Ferrell are his direct supervisors and he answers to them. Grievant has been assigned

⁵ See, testimony of Joe Nance; testimony of Alan Midkiff; testimony of Jesse Ferrell.

⁶ See, testimony of Jesse Ferrell; testimony of Lisa Spurlock; testimony of Alan Midkiff; testimony of Joe Nance; testimony of Robert Newlon.

to work on Mr. Nance's crew on and off since 2020. When she is working on Mr. Nance's crew, he assigns and supervises her work.

7. When Grievant was first employed by DOH, she was classified as a Transportation Worker 1 Craft Worker (TW1CW),⁷ and she was paid at the rate of \$11.9095 per hour.⁸ At first, Grievant was assigned to flag for a work crew, but before the end of 2018, Mr. Midkiff and/or Mr. Ferrell reassigned Grievant to work full-time in the storeroom at the garage. Grievant was the only employee assigned to the storeroom, and she continued to be classified and paid as a TW1CW Tier 1.⁹ During this time, Grievant did not regularly perform transportation worker duties and was not assigned to a crew. However, during mowing season and snow removal and ice control (SRIC) season, Grievant was sent out to flag for those operating mowers and to operate snowplows.¹⁰

8. When Mr. Ferrell first told Grievant to operate a snowplow, while she was still working in the storeroom, she had never operated one before and had no training. Grievant informed Mr. Ferrell that she had never operated a snowplow and had never been provided any training on such. Still, Mr. Ferrell told Grievant that she had to do it. Shortly thereafter, Mr. Ferrell told Grievant something to the effect of, "I don't have to do this, but I'm going to," then took Grievant out in the truck for about thirty minutes to show her how to operate it. Mr. Ferrell acted as if he were doing Grievant a favor. After

⁷ See, Grievant's Exhibit 6, Transportation Worker 1 job posting dated September 20, 2018.

⁸ See, Grievant's Exhibit 7, "Transportation Worker Placement Form."

⁹ See, Grievant's Exhibit 7; Grievant's Exhibit 8, "West Virginia Division of Personnel Application for Employment;" Grievant's Exhibit 9, "West Virginia Division of Highways Transaction Form," Form GL-5 dated September 1, 2020.

¹⁰ See, testimony of Lisa Spurlock; testimony of Joe Nance; testimony of Alan Midkiff; testimony of Jesse Ferrell.

that, Mr. Ferrell sent Grievant out on public roads to perform SRIC duty by herself.¹¹ Since that time, Grievant has operated snowplows nearly every day during the last two SRIC seasons.

9. Grievant worked in the storeroom until sometime in the fall of 2020, performing the duties of the “storekeeper” position, including filling orders, ordering parts, purchasing, picking up parts, entering data into the computer system, and doing inventory.¹² Her duties were largely clerical. “Storekeeper” is a job classification separate from TW1CW.¹³ The record is silent as to the “storekeeper” qualifications, full list of duties/responsibilities, and rate of pay.¹⁴

10. On or about October 15, 2019, while Grievant was working in the storeroom, Grievant received a “tier advancement” to TW1CW, Tier 2. This increased her hourly pay from \$11.9095 to \$12.5495.¹⁵ Also during this time, Grievant obtained her Class B CDL through a program offered by DOH.

11. For reasons unknown, on August 28, 2020, while still working in the storeroom, Grievant completed a West Virginia Division of Personnel Application for Employment stating that she was applying for the position of “TW2.” However, Grievant was not applying for an open, posted position. On or about that same date, Mr. Midkiff completed a DOH Human Resources Division “Position Description Form” (PDF) regarding Grievant in which he listed Grievant’s “current/official classification title” as “TW1CW,” but her “working title” as “TW2EQOP” even though this was not her working

¹¹ See, testimony of Lisa Spurlock.

¹² See, testimony of Lisa Spurlock; testimony of Alan Midkiff.

¹³ See, testimony of Lisa Spurlock; testimony of Alan Midkiff.

¹⁴ See, testimony of Lisa Spurlock; Grievant’s Exhibit 7.

¹⁵ See, Grievant’s Exhibit 7.

title. Given the language on the PDF and the “West Virginia Division of Highways Transaction Form (Form GL-5),” the PDF and employment application were somehow used to change Grievant’s classification from TW1CW to TW2EQOP. This was not a tier advancement. Grievant’s classification change was approved by Scott Eplin on September 1, 2020.¹⁶

12. On the August 2020 PDF, Mr. Midkiff noted the following: “[s]ince the employee’s most recent review, the employee has obtained their (sic) CDL. As such, the employee is now able to operate a greater variety of equipment[,] including those that require a CDL. This includes, but is not limited to, motorized equipment such as a tractor with mower, front-end loader, skid steer, roller, passenger vehicle, single and tandem axle trucks, a snowplow during snow removal and ice control (SRIC) operations, etc. all in a safe and productive manner.”¹⁷

13. In or about the fall of 2020, Respondent hired Tony Edmunds to fill the Storekeeper position. Mr. Edmunds’ hiring date is unknown, as is his rate of pay. After Mr. Edmunds was hired, Mr. Midkiff reassigned Grievant to work on Mr. Nance’s crew doing road work.¹⁸

14. There are various training programs for DOH workers; however, for some trainings, supervisors select the employees who are to attend. Employees are not allowed to simply sign-up for these types of trainings. However, when there have been trainings offered to anyone who signed up, Grievant has done so. Grievant has not been sent to any trainings away from her region or district.¹⁹

¹⁶ See, testimony of Lisa Spurlock; testimony of Alan Midkiff; Grievant’s Exhibit 8; Grievant’s Exhibit 7; Grievant’s Exhibit 9.

¹⁷ See, Grievant’s Exhibit 8, p. 9 of 12.

¹⁸ See, testimony of Lisa Spurlock; testimony of Alan Midkiff; testimony of Joe Nance.

15. Mr. Nance has worked with Grievant since Mr. Midkiff and/or Mr. Ferrell reassigned her from the storeroom to work on his crew. Mr. Nance has had no problems with Grievant's work performance since being assigned to his crew. He described Grievant as "hardworking and agreeable to do any task she is given," and that she "works well with myself and other members on the crew." He also noted that Grievant was a team player, always at work, gets there before he does, and never argues about the tasks she is assigned.²⁰

16. Mr. Midkiff assigned crews their daily work duties, and Mr. Ferrell assigned them the vehicles and equipment to perform such. Mr. Ferrell informed the crew leaders of their assignments by putting the keys and paperwork in the crew chiefs' boxes located at the garage. Once the equipment is assigned, there is no changing it.²¹

17. While Grievant is qualified to operate several types of heavy equipment, she was not assigned to operate the same, except for one time when she was allowed to run a roller. Instead, Mr. Nance routinely assigned the more experienced, male workers on his crew to operate the equipment. Mr. Nance is charged with running his crew as efficiently as possible, and to do that, he assigns the crew member who is best at each job to perform the same.²² As a result, Grievant has gained little to no experience operating equipment. Grievant has never been assigned to operate a front-

¹⁹ See, testimony of Kathleen Dempsey; testimony of Grievant; Grievant's Exhibit 7; Grievant's Exhibit 8, Respondent's Exhibit 1, "Transportation Worker Tier Advancement Form."

²⁰ See, testimony of Joe Nance; Grievant's Exhibit 3, August 13, 2021, written statement by Joe Nance; see testimony of Alan Midkiff.

²¹ See, testimony of Joe Nance.

²² See, testimony of Joe Nance; testimony of Alan Midkiff.

end loader, skid steer, or mower.²³ Since the filing of this grievance, Grievant has been assigned to operate dump trucks and tandem trucks.

18. Mr. Nance regularly assigned Grievant to flagging. Grievant had asked to be trained on-the-job to do blacktopping work, but she was not given that opportunity. During blacktopping season 2021, Grievant was assigned to drive Van 211-1001 to flag for Terry Conrad, a Transportation Worker 3 Equipment Operator (TW3EQOP), while he operated a sealer. Since the filing of her grievance, Mr. Nance has given Grievant the opportunity to do some blacktopping work. Mr. Nance testified that Grievant was still flagging for him a lot, but she had operated a dump truck, and that she had been “blowing out holes,” “putting down tack” in them, and raking the blacktop some.”²⁴

19. In addition to heavy equipment such as a roller, skid steer, and grader, work crews are assigned vehicles, such as pickup trucks, crew cab trucks, and Van 211-1001. There was a truck that was mainly kept at the garage, commonly referred to as “Jesse’s truck” or “the parts truck.” This truck was not officially assigned to anyone. Mr. Ferrell used the truck for some of his duties and travel to the district headquarters in Huntington. The truck was also used by Tony Edmunds, the storekeeper, to travel to get parts during the 2021 mowing season. Mr. Ferrell also assigned the truck to people who were on mowing duty.²⁵ This truck had no identified mechanical or safety issues.²⁶

²³ See, testimony of Lisa Spurlock; testimony of Joe Nance; Grievant’s Exhibit 8, pg. 9 of 12.

²⁴ See, testimony of Lisa Spurlock; testimony of Joe Nance; testimony of Terry Conrad.

²⁵ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon; testimony of Philip Hale; testimony of Joe Nance; testimony of Joe Nance; testimony of Robert Newlon; testimony of Jesse Ferrell; testimony of Alan Midkiff.

²⁶ See, testimony of Philip Hale; testimony of Lisa Spurlock; testimony of Robert Newlon; testimony of Jesse Ferrell.

20. Sometime after Grievant was assigned to Mr. Nance's crew, Mr. Ferrell began assigning Van 211-1001 to that crew. After which, Mr. Nance regularly assigned Grievant to drive Van 211-1001 to flag for other transportation workers. Van 211-1001 was driven by other employees at times; however, Grievant was assigned to drive the van more than other DOH employees.

21. In 2021, Grievant drove the van nearly every day when she was working on Mr. Nance's crew, then she was assigned to drive it daily to flag for mowers during mowing season through June 25, 2021. During this mowing season, Grievant was assigned to flag for Philip Hale, who was assigned to operate a mower. Grievant and Mr. Hale were assigned to use the parts truck for this assignment. However, soon thereafter, Mr. Ferrell told them that they had to use Van 211-1001 instead. Mr. Ferrell gave them no explanation for the change. It is unclear from the record exactly when Grievant and Mr. Hale began mowing duty, but it appears most likely to have been in May 2021.²⁷

22. Every motor vehicle registered in this state is required to be in good working order and have a safe mechanical condition so that it does not endanger the driver, any occupant, or anyone on any highway. To ensure this, West Virginia law requires that every motor vehicle registered in the state be inspected. Once inspected, vehicles that meet the mechanical and safety requirements are issued an official certificate of inspection, otherwise known as a "state inspection sticker," which must be placed on the vehicle's windshield. Only those vehicles registered in West Virginia

²⁷ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon; testimony of Terry Conrad; testimony of Philip Hale; testimony of Robert Newlon; Respondent's Exhibit 3, "Daily Checklists."

having valid state section stickers are permitted to be driven on the roads within this state. Operating a vehicle that has no valid state inspection sticker is a misdemeanor.²⁸

23. At the times relevant herein, DOH was not replacing vehicles and/or equipment that were beyond repair, and, because of the COVID-19 pandemic, there were supply chain disruptions that delayed the receipt of parts needed to make repairs. Given this, District 2 had fewer vehicles and equipment than it would usually have.²⁹

24. Van 211-1001 had mechanical problems that caused it to breakdown, or stall-out, frequently. There were rusted out, or “rotted,” areas on the body of the vehicle, including around the exhaust pipe and back tire. Also, the gear shift was known to “pop out” on occasion, exhaust fumes leaked into the van’s cab, and its air conditioning system did not work.³⁰ The van was so unsafe, it could not pass the state motor vehicle inspection; therefore, it had no valid state inspection sticker. Despite this, Mr. Midkiff and Mr. Ferrell required Grievant and other employees to regularly operate this van on public roads.³¹

25. From the time Grievant started being assigned the van, she was concerned about its safety, especially the possibility of carbon monoxide poisoning, and she wrote it up for its various mechanical problems, including its air conditioning being

²⁸ See W. VA. CODE § 17C-16-1, *et seq.*

²⁹ See, testimony of Tommy Lawhon; testimony of Joe Nance; testimony of Alan Midkiff.

³⁰ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon; Grievant’s Exhibit 1 written statement of Tommy Lawhon; testimony of Terry Conrad; Grievant’s Exhibit 2 written statements of Terry Conrad; testimony of Philip Hale; testimony of Robert Newlon; testimony of Joe Nance; Grievant’s Exhibit 10, photos of Van 211-1001.

³¹ See, testimony of Lisa Spurlock; testimony of Joe Nance; testimony of Tommy Lawhon; testimony of Terry Conrad; Grievant’s Exhibit 1; Grievant’s Exhibit 2; testimony of Robert Newlon; Grievant’s Exhibit 5 (written statement of Robert Newlon); testimony of Philip Hale; Grievant’s Exhibit 4 (written statement of Philip Hale); Grievant’s Exhibit 10 (photos of Van 211-1001).

out.³² On several occasions, Grievant talked to Mr. Ferrell about the van's condition and she told him it was unsafe. Mr. Ferrell minimized Grievant's concerns and asserted that she was simply complaining because the air conditioning was not working. Grievant had also spoken with Mr. Midkiff about the van's mechanical problems, its unsafe condition, and the exhaust leak. Mr. Nance had also discussed the van's condition with Mr. Midkiff and Mr. Ferrell.³³

26. When Grievant had problems with the van, she took it to Tommy Lawhon, the DOH Mechanic III in District 2, and she would write it up for the problems she was experiencing using a DOH form called a "State 28 Sheet" or "28 Sheet." Each time Grievant completed a 28 Sheet on Van 211-1001, Mr. Lawhon would prepare a work order, staple it to Grievant's 28 Sheet, and place it on a clipboard on his desk so that he would know what repairs were needed and which parts he would need to make them.³⁴

27. At first, Grievant carefully detailed every problem she experienced with the van on each 28 Sheet. As time went on, Grievant continued to write-up the van using 28 Sheets, as did other employees, but she stopped detailing every single problem on them because everyone knew about the van's condition, its mechanical problems, and the exhaust leak, and the van had still not been repaired. Given this, Grievant concluded that detailing every issue on each 28 Sheet was a waste of time. Grievant continued to write-up the van using 28 Sheets, but Grievant started writing things like, "the van is junk," "needs to go to the junkyard," and something like, "needs to be put out to pasture."³⁵

³² See, testimony of Lisa Spurlock.

³³ See, testimony of Lisa Spurlock; testimony of Joe Nance; testimony of Jesse Ferrell.

³⁴ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon; testimony of Robert Newlon.

28. Grievant discussed Van 211-1001's exhaust leak with Mr. Lawhon. He explained to her that the van needed to be sent out for body repairs before the exhaust leak and other mechanical problems could be fixed properly and pass inspection, and that parts were needed to repair the exhaust leak.³⁶

29. In addition to Grievant, other employees had written-up Van 211-1001 on numerous occasions for the same or similar problems, as well as for the air conditioning system not working.³⁷ Lack of air conditioning alone is not a reason to take a vehicle out of service, also known as "downing" a vehicle. Exhaust fumes leaking into the cab of the van is far more serious than lack of air conditioning.

30. At some point before the events discussed in this grievance, Mr. Lawhon had downed Van 211-1001 because of its mechanical problems and it being unsafe. However, despite this, Mr. Midkiff and Mr. Ferrell kept assigning the van to crews and the crews used it as directed. Mr. Lawhon did not down the van again because Mr. Midkiff and Mr. Lawhorn "did not care" whether it was downed; they kept assigning it to crews.³⁸

31. Mr. Lawhon had discussed the Van 211-1001's condition, mechanical problems, and the write-ups he had received with Mr. Midkiff and Mr. Ferrell. Mr. Lawhon had informed them that the van was unsafe. Mr. Lawhon explicitly told Mr. Midkiff that he would not put a state inspection sticker on the van because it could not pass inspection, but it made no difference. As such, the van was regularly operated

³⁵ See, Respondent's Exhibit 3, Daily Checklists; testimony of Lisa Spurlock.

³⁶ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon.

³⁷ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon; testimony of Terry Conrad; testimony of Philip Hale; testimony of Robert Newlon; testimony of Joe Nance.

³⁸ See, testimony of Tommy Lawhon; Grievant's Exhibit 2.

without a valid state inspection sticker, including when Grievant was assigned to drive it.³⁹

32. Mr. Lawhon went on medical leave on or about July 29, 2021, and he was off work for nine months. During this time, another DOH mechanic, Chris Webb, filled-in for Mr. Lawhon.⁴⁰ The record is unclear as to where Mr. Webb worked before filling-in for Mr. Lawhon, or after Mr. Lawhon returned to work. Mr. Webb was not called as a witness at the level three hearing.

33. When Mr. Lawhon returned to work in early April 2022, just prior to the level three hearing, he found that his work orders that he had stapled to each 28 Sheet for Van 211-1001 were missing from his office. These missing 28 Sheets included those Grievant had completed, and, apparently, ones completed by Terry Conrad, Philip Hale, and Robert Newlon.⁴¹

34. The missing 28 Sheets were never found. Despite there being witnesses who saw Grievant fill out numerous 28 Sheets on the van and/or saw the completed 28 Sheets she submitted, Respondent has contended that Grievant never submitted any 28 Sheets about the van.

35. The full list of those who had access to Mr. Lawhon's work area and desk while he was on leave is unknown. However, Mr. Webb had access because he was filling in for Mr. Lawhon. Tony Edmunds possibly had access because he was the

³⁹ See, testimony of Tommy Lawhon; testimony of Grievant; Grievant's Exhibit 10, photos of Van 211-1001.

⁴⁰ See, testimony of Tommy Lawhon; Grievant's Exhibit 10, photos of Van 211-1001.

⁴¹ See, testimony of Lisa Spurlock; testimony of Tommy Lawhon; testimony of Robert Newlon; testimony of Philip Hale.

“parts man” and Mr. Lawhon’s work orders listed the parts that would be needed to make the various repairs.

36. In addition to 28 Sheets, there are other forms called “Daily Checklists.” These are two separate, distinct forms with different purposes. Both forms are supposed to go to management, but the main difference is that the 28 Sheets are specifically designed to go to the mechanic so that he or she can prepare the work orders and determine which, if any, parts are need to be ordered to repair the vehicle or equipment.⁴²

37. 28 Sheets and/or Daily Checklists are processed several different ways in District 2. Some employees turn the 28 Sheets into the mechanic, while others turned them in to their crew chiefs, supervisors, Mr. Midkiff, or Mr. Ferrell.⁴³ At least one employee, Mr. Newlon, scans the 28 Sheets and Daily Checklists into the computer, and in doing so, they are sent to Mr. Ferrell by email. Mr. Ferrell “worked out” this system for Mr. Newlon. As of the date of the level three hearing, Mr. Newlon was still following Mr. Ferrell’s system, and had been doing so for “a couple of years.”⁴⁴

38. Both Mr. Midkiff and Mr. Ferrell were well-aware of all the mechanical problems with the van, that it had no valid state inspection sticker and could not pass inspection, the condition of its body, and they knew that exhaust fumes leaked into the cab of the van. Despite this, they kept the van in use.⁴⁵

⁴² See, testimony of Joe Nance.

⁴³ See, testimony of Lisa Spurlock; testimony of Philip Hale, testimony of Terry Conrad; testimony of Tommy Lawhon; testimony of Joe Nance; testimony of Robert Newlon.

⁴⁴ See, testimony of Robert Newlon.

⁴⁵ See, testimony of Grievant; testimony of Tommy Lawhon; testimony of Terry Conrad; testimony of Philip Hale; testimony of Joe Nance; testimony of Robert Newlon.

39. At the level three hearing, Respondent presented a stack of form “Daily Checklists,” and all but three of which Grievant had initialed during the months of May 2021 through September 2021.⁴⁶ However, these checklists are only for certain days during these months, and not for every workday during this time period. Two of these checklists from early May 2021 were initialed by Mr. Conrad, not Grievant. It is unknown whether these are all the checklists Grievant completed during this time, or if some were not presented. Near the bottom of these forms, there is a section for “remarks” where an operator may write comments about the vehicle or equipment used. On a few of these checklists, Grievant wrote comments, such as, “[n]eeds to be put in a junk yard.”⁴⁷

40. Despite all the 28 Sheets employees completed on Van 211-1001 regarding its mechanical problems, the exhaust leaking into the cab, and its unsafe condition, the daily checklists confirm that Grievant operated Van 211-1001 many workdays between May 13, 2021, through June 24, 2021. Again, the checklists presented do not cover every consecutive workday during this time period. Respondent included no checklists for the following dates: June 11, 2021 through June 15, 2021; June 17, 2021 through June 21, 2021; June 23, 2021; and, June 25, 2021 through June 29, 2021. It is undisputed that Grievant was assigned to operate the van on June 25, 2021, and that she was not assigned to drive it after that date. The checklists further establish that Grievant was assigned to operate various trucks and dump trucks from June 30, 2021, through September 24, 2021, after the filing of this grievance.⁴⁸

⁴⁶ See, Respondent’s Exhibit 3, Daily Checklists. The Daily Checklists dated May 5, 2021, May 12, 2021, and May 18, 2021, were initialed “TC,” presumably standing for Terry Conrad, based upon his testimony and that of Grievant.

⁴⁷ See, Respondent’s Exhibit 3.

41. On June 24, 2021, Grievant was assigned to drive Van 211-1001 for flagging, but it kept stalling-out while she was driving it on Interstate 64. The next day, June 25, 2021, Grievant was assigned the van to flag for Mr. Hale, who was assigned to operate a mower on WV 10.

42. When Grievant was assigned to mowing duty, Mr. Ferrell acted as her supervisor and assigned her duties and the vehicles she was to use.⁴⁹ Out on the jobsite, Mr. Hale, as the operator, supervised Grievant's work flagging and signed-off on her daily timesheets.⁵⁰ Such was the case on June 25, 2021. When Mr. Hale operated the mower like this, he received a temporary upgrade, presumably to TW3EQOP, and received an increase in his hourly pay for that day.⁵¹

43. Grievant began her employment at DOH in 2018 before Mr. Hale came to work for DOH in 2019. Both Grievant and Mr. Hale were hired in as TW1EQOPs and were TW2EQOPs on June 25, 2021.⁵²

44. On June 25, 2021, when Grievant and Mr. Hale were getting ready to leave the garage to mow on WV 10, "Jesse's truck" was sitting at the garage, not being used. Mr. Ferrell was not there. Grievant and Mr. Hale decided to use it to mow. Mr. Midkiff and others were at the garage at the time, and no one voiced any problems or

⁴⁸ See, Respondent's Exhibit 3; testimony of Lisa Spurlock; testimony of Tommy Lawhon; testimony of Joe Nance; testimony of Philip Hale; testimony of Philip Hale.

⁴⁹ See, testimony of Philip Hale; testimony of Lisa Spurlock; testimony of Joe Nance.

⁵⁰ See, testimony of Philip Hale; testimony of Lisa Spurlock; testimony of Terry Conrad. No policy stating that operators supervised the people who were flagging for them was presented at the level three hearing; however, no one challenged the evidence presented on this issue given during the level three hearing, or in the parties' post-hearing written submissions.

⁵¹ See, testimony of Lisa Spurlock. Respondent did not contest Grievant's testimony concerning the temporary grade. Neither party presented any policy abouts temporary upgrade at the level three hearing.

⁵² See, testimony of Lisa Spurlock.

concerns with Grievant and Mr. Hale taking the truck. Grievant and Mr. Hale rode together in the truck to the jobsite with Grievant driving. When they arrived, Mr. Hale exited the truck, got on the mowing equipment, and started mowing. Grievant followed him in the truck.⁵³

45. Grievant and Mr. Hale were not out on WV 10 very long before Mr. Ferrell called Mr. Hale's cell phone while Mr. Hale was operating the mower and asked if they had his truck. When Mr. Hale said they were using it, Mr. Ferrell demanded that Mr. Hale tell Grievant to bring it back to the garage. Mr. Hale did as he was told, as did Grievant. Because Mr. Hale had no one to flag for him while Grievant was taking the truck back to the garage, he had to stop mowing and sit on the side of the road. Therefore, work was halted so that Mr. Ferrell could get his truck back.⁵⁴

46. Robert Newlon and others were in Mr. Ferrell's office when Mr. Ferrell made the call demanding that Grievant return the truck to the garage. During this call, Mr. Ferrell stated that the truck was assigned to him. After the call, Mr. Ferrell said that he "liked messing with people," referring to Grievant, and he did not make this statement in a joking manner. Mr. Ferrell further said that he was putting his nephew, Noah, in the truck to flag for a mower, the same assignment Grievant had that day, and that he was putting Grievant in Van 211-1001.⁵⁵

47. Grievant was upset when she arrived at the garage with the truck. She went to Mr. Ferrell's office at which time he asked Grievant why she took his truck

⁵³ See, testimony of Lisa Spurlock; testimony of Philip Hale; Grievant's Exhibit 4, written statement of Philip Hale.

⁵⁴ See, testimony of Philip Hale; testimony of Grievant; testimony of Jesse Ferrell; Grievant's Exhibit 4, written statement of Philip Hale.

⁵⁵ See, testimony of Robert Newlon; Grievant's Exhibit 5, written statement of Robert Newlon.

instead of Van 211-1001. Grievant explained to Mr. Ferrell that the van was unsafe, as she had told him before, and it had been stalling out on her the day before, so they took the truck. Mr. Ferrell raised his voice and remarked to Grievant that the only reason she did not want to drive the van was because the air conditioning did not work. Grievant raised her voice in response to Mr. Ferrell, refuted his allegation, and again brought up the van's mechanical and safety problems. She also said something like, "you just don't want me to drive your truck." Mr. Ferrell told Grievant that the van "was all he had for her to drive." This exchange has been described as "heated," and Mr. Ferrell was loud enough for employees working in the garage to hear what he said.⁵⁶ It was unusual for Grievant to raise her voice at work. In fact, it was the first time Mr. Midkiff had ever heard Grievant raise her voice.⁵⁷

48. Mr. Midkiff, Mr. Newlon, and others at the garage witnessed the exchange between Mr. Ferrell and Grievant. However, Mr. Midkiff took no action to intervene, to redirect Mr. Ferrell, or to modify his directives. Soon thereafter, employees began talking about it and word spread that "Jesse really got onto Lisa" and/or that "Jesse got really heated" when Grievant "took his truck out." Mr. Nance heard such talk when he returned to the garage.⁵⁸ While both Mr. Hale and Grievant made the decision to take the truck, Mr. Ferrell was not upset with Mr. Hale at all even though he was acting as Grievant's supervisor on this mowing assignment.

49. After the incident with Mr. Ferrell, Grievant again followed his orders and prepared to leave in the van and return to mowing on WV 10. However, before Grievant

⁵⁶ See, testimony of Lisa Spurlock; testimony of Alan Midkiff; testimony of Robert Newlon.

⁵⁷ See, testimony of Lisa Spurlock; testimony of Alan Midkiff.

⁵⁸ See, testimony of Joe Nance; testimony of Alan Midkiff; testimony of Robert Newlon.

left the garage, she witnessed Mr. Ferrell give the truck to his nephew, Noah, to drive flagging for Thomas Walker mowing on WV 193, just like Grievant had been doing on WV 10 with Mr. Hale.⁵⁹

50. Noah's last name is unknown; however, it is undisputed that Noah is Mr. Ferrell's nephew, and he was either temporary "summer help" and/or just working there during the summer. The parties also do not dispute that Mr. Ferrell gave Noah the truck to drive that day to flag for Mr. Walker on WV 193, and that Noah did so. It is unknown when Noah began and left employment with DOH. Noah was not called to testify.

51. After seeing Mr. Ferrell give Noah the truck, Grievant drove back out to WV 10 to mowing duty with Mr. Hale and resumed working when she arrived. Soon thereafter, Mr. Ferrell called Mr. Hale again, and told him to tell Grievant that she was to bring the van back in to the garage, which he did. Once more, Grievant headed back to the garage in Van 211-1001 as she was ordered. Again, Mr. Hale had to stop mowing and sat on the side of the road because he had no one to flag for him.

52. The record is unclear as to everything that occurred when Grievant arrived back at the garage this second time, but it is undisputed that Mr. Ferrell called Grievant in to put her in yet another vehicle, truck "585," to take back out to mow. It is unknown where truck 585 was when Mr. Ferrell made Grievant take the van and told her that he had nothing else for her to drive. After everything Mr. Ferrell had said and done to Grievant that day, she decided to take leave for the rest of the day. Grievant did not go back out to WV 10. Grievant's use of leave was approved by management, and she was not disciplined in any way for taking leave that day.⁶⁰

⁵⁹ See, testimony of Lisa Spurlock; testimony of Robert Newlon; testimony of Jesse Ferrell.

53. Before she left work on June 25, 2021, Grievant went to speak with Kathleen Dempsey at District 2's Human Resources office about what had happened. Grievant told Ms. Dempsey about Mr. Ferrell calling her back to the garage to return his truck, the way he had treated her in his office, and that she witnessed him give the truck to his nephew to perform the same job she had been performing. Grievant also told Ms. Dempsey that after Mr. Ferrell put his nephew in the truck and had sent her back out in the van, he again called her to return the van to the garage without explanation and that he was going to send her back out in another truck. Grievant told Ms. Dempsey how she was always assigned to drive the van despite it being unsafe and having the exhaust leak into the cab, and that Mr. Ferrell and Mr. Midkiff were aware of the van's condition and mechanical problems. She stated that Mr. Ferrell was discriminating against her because she was a woman and voiced her concerns that Mr. Ferrell was violating DOH's anti-nepotism policy.⁶¹ Ms. Dempsey told Grievant to give her a few days to look into the matter, and that she would contact Grievant.⁶²

54. After meeting with Grievant, Ms. Dempsey spoke to Mr. Midkiff and Mr. Ferrell about what occurred on June 25, 2021. Ms. Dempsey did not speak to any of the employees who witnessed Mr. Ferrell's actions and conduct toward Grievant, nor did she speak to Mr. Hale, Mr. Lawhon, Mr. Nance, Mr. Newlon, or any other members of Grievant's crew about the van's condition and its safety, or lack thereof. Instead, Ms.

⁶⁰ See, testimony of Lisa Spurlock; testimony of Philip Hale; testimony of Kathleen Dempsey; testimony of Joe Nance.

⁶¹ No such policy was presented as evidence at the level three hearing and Grievant has abandoned that claim in this grievance.

⁶² Neither party submitted any DOH policies. See, testimony of Lisa Spurlock; testimony of Kathleen Dempsey.

Dempsey took what Mr. Midkiff and Mr. Ferrell's said as the truth, then failed to get back in touch with Grievant.

55. No one, including Mr. Ferrell, has offered any explanation as to why he ordered Grievant to return the van to the garage after he had been so adamant that she use it to mow on June 25, 2021, and stated in front of witnesses that he had nothing else for her to drive. However, Mr. Nance heard from his other employees that Mr. Ferrell and/or Mr. Midkiff realized that they had "screwed up by sending Grievant out in the van because it was not supposed to be off the lot," so he called her back to the garage.⁶³

56. When Noah and Mr. Walker were ready to go out to mow on WV 193, Van 211-1001 was at the garage and available for their use. However, Mr. Ferrell did not assign them the van. Instead, mowing on WV 193 was delayed until Grievant returned the truck to the garage. At the same time, mowing was halted on WV 10 while Grievant was returning the truck and it was halted until she returned in the van. Mowing on WV 10 was halted a second time when Mr. Ferrell ordered Grievant to return the van.

57. Mr. Ferrell and Mr. Midkiff's decisions and actions taken on June 25, 2021, regarding the assignment of vehicles for mowing on WV 10 and WV 193 caused the work on each jobsite to be done inefficiently and delayed the completion of the mowing on both roads given the number of times Grievant had to drive from her jobsite to the garage and back.

58. Until June 26, 2021, Van 211-1001 followed Grievant to just about every work assignment she was given.

⁶³ See, testimony of Joe Nance.

59. Mr. Ferrell and/or Mr. Midkiff knowingly required Grievant to drive Van 211-1001 almost daily, despite her conversations with them about the van, the numerous write-ups she and other employees had completed on it, its mechanical problems, the exhaust leak into the cab, its lack of a state inspection sticker, and it being unsafe.

60. After the June 25, 2021, incident between Mr. Ferrell and Grievant, someone at District 2 took Van 211-1001 out of service. The identity of the person or persons who did this is unknown. The van was finally sent out to get the body repairs made so that the exhaust leak could be fixed. The exact date this occurred is unknown; however, it was in the body shop being repaired in November 2021.⁶⁴

61. Neither Grievant nor Mr. Nance's crew has been assigned the van since it was finally repaired.⁶⁵

62. Since Grievant's 28 Sheets went missing after she filed this grievance, Mr. Nance has had Grievant give him any 28 Sheets that she completes to prevent such from happening again.⁶⁶

63. Grievant filed this grievance on July 9, 2021. Rumors about her grievance filing began to circulate though District 2 soon after.⁶⁷

64. As of July 29, 2021, Mr. Lawhon had the 28 Sheets for Van 211-1001 stapled to his work orders in his office.⁶⁸ Therefore, the 28 Sheets Grievant and other employees completed on the van went missing sometime after July 29, 2021.

⁶⁴ See, testimony of Tommy Lawhon; Grievant's Exhibit 1, written statement of Tommy Lawhon.

⁶⁵ See, testimony of Joe Nance.

⁶⁶ See, testimony of Joe Nance.

⁶⁷ See, testimony of Terry Conrad.

⁶⁸ See, testimony of Tommy Lawhon.

65. Soon after Grievant filed this grievance, Mr. Ferrell and/or Mr. Midkiff took Grievant off mowing duty and moved her to operating a tandem truck to haul dirt and gravel. When Grievant was assigned to mowing, she was scheduled to work ten-hour days, but on her new assignment, Grievant was scheduled to work only eight-hour days. Therefore, Mr. Ferrell and/or Mr. Midkiff's decision to change Grievant's assignment has resulted in Grievant's pay being decreased. Respondent notes in its *Proposed Findings of Fact and Conclusions of Law* that Grievant was still eligible for overtime in this new assignment, but Respondent has not scheduled Grievant for any overtime. Grievant cannot work overtime without Respondent's assignment and/or approval.

66. Grievant received a tier advancement to TW2EQOP, Tier 2 effective December 23, 2021. The "Transportation Worker Tier Advancement Form" used to make this change is dated August 10, 2021, but the signatures required to effect this change were obtained in December 2021.⁶⁹ As of August 10, 2021, Grievant had held her TW2EQOP Tier 1 status for ten months.⁷⁰

67. According to Ms. Dempsey, Grievant was eligible for a tier advancement to TW2EQOP Tier 2 in 2021 when Grievant had worked in the TW2EQOP Tier 1 position for ten months, that being August 10, 2021.⁷¹ Ms. Dempsey stated that tier advancements are not automatic and that it was Grievant's responsibility to go to her supervisor to inform him that she was eligible for a tier advancement in order to start the tier advancement process. Ms. Dempsey also acknowledged that she did not have a tier advancement coordinator around that time, that she was having to do that job in

⁶⁹ See, Respondent's Exhibit 1, "Transportation Worker Tier Advancement Form.

⁷⁰ See, testimony of Kathleen Dempsey; testimony of Alan Midkiff; testimony of Grievant.

⁷¹ See, testimony of Kathleen Dempsey.

addition to her other duties, and that such contributed to the delay in Grievant receiving her tier advancement.⁷²

68. If the evidence presented regarding tier advancements is correct, Grievant would be eligible for a tier advancement to TW2EQOP Tier 3 after working ten months in the TW2EQOP Tier 2 classification.

69. As of the date of the level three hearing, Grievant had not been assigned to operate any of the heavy equipment she is qualified to run on a regular basis. Further, Grievant has never received a temporary upgrade to operate any of the heavy equipment she is qualified to operate which would have increased her hourly pay. Other TW2EQOPs who were hired around the same time as Grievant and after, such as Mr. Hale, have received such temporary upgrades.

70. As of the date of the level three hearing, Grievant's main duty continues to be flagging, despite her now having a Class B CDL and being a TW2EQOP Tier 2 qualified to operate various types of heavy equipment.

71. During the time Grievant was assigned to work in the storeroom, she was not given the opportunity to work on a crew to gain experience in any of the duties listed in her 2018 job posting, such as "performing unskilled or semi-skilled work in the maintenance and construction of highways and rights of way, using light motorized highway maintenance equipment to repair or replace concrete and bituminous road surfaces, clean culverts and repair shoulders, and operating wheeled tractors or concrete mixers."⁷³ However, others hired as TW1CWs at or about the same time were assigned to work on crews and were given this opportunity.

⁷² See, testimony of Kathleen Dempsey.

⁷³ See, Grievant's Exhibit 6.

72. Since becoming a TW2EQOP, Grievant has mostly flagged for her male coworkers despite her qualifications to operate equipment. The “nature of work,” duties, and responsibilities listed in the TW2EQOP job description states, in part, as follows:

[t]he Transportation Worker 2 performs full-performance level skilled work in the construction and maintenance of highways. . . Operates motorized highway maintenance equipment such as skid steer, utility tractor, aerial bucket truck, front-end loader, tandem-axle truck, and snowplow. Makes major repairs to highways, culverts. . .

Transportation Worker 2—Equipment Operator

- Drive dump, flatbed, or tandem-axle trucks
- Operate power vegetation equipment and attachments
- Operate highway maintenance equipment and attachments
- Operate heavy vehicles/GVWR 26,001 or greater
- Clean and lubricate equipment and check fluid levels
- Makes minor mechanical repairs in the field such as changing tires, blades, or filters
- Repair and construct various culvert types
- Patch cement, pavement, and bridge decks
- Seal joints and cracks in paved surfaces
- Clean equipment and workshop
- Transport fuel to equipment . . .⁷⁴

73. Mr. Midkiff and Mr. Ferrell assigned Grievant to drive a tandem-axle truck to haul gravel and dirt when they took her off mowing duty following the filing of this grievance. Since the filing of this grievance, she has also operated dump trucks.

74. Grievant has not been permitted to gain experience operating the equipment she is trained and qualified to operate because she was almost exclusively assigned to flagging once she was sent from the storeroom to Mr. Nance’s crew. Mr. Nance has been “charged” with running his crews as efficiently as possible, and to do

⁷⁴ See, Respondent’s Exhibit 2, Transportation Worker 2 job description.

so, Mr. Nance assigns the workers who are the best at running each piece of equipment to those jobs so that the work done is properly and efficiently. Without the opportunity to gain the experience required to become one of the best operators, Grievant will not be assigned to operate equipment.

75. Grievant has never been assigned to operate a mower, even though Mr. Hale, who is also a TW2EQOP, was regularly given a temporary upgrade to operate a mower and supervises Grievant work flagging for him.

76. Allegations were made during the level three hearing that Mr. Ferrell and/or Mr. Midkiff approached the employees who were subpoenaed to testify at this hearing and offered them positions and/or other incentives if they would agree not to appear and testify. However, each of the subpoenaed employees appeared and testified. All also denied being offered anything in exchange for their failure to so appear.⁷⁵ Mr. Hale, Mr. Conrad, and Mr. Nance denied Mr. Midkiff and/or Mr. Ferrell approaching them about the hearing entirely.

77. When Mr. Midkiff and Mr. Ferrell delivered to Mr. Lawhon the subpoena issued by this ALJ requiring him to appear on April 13, 2022, to testify at the level three hearing, they told him that he did not have to appear, he would not get into any trouble for failing to appear, and no one could do anything to him for failing to appear. However, Mr. Lawhon denied Mr. Midkiff and/or Mr. Ferrell offering him any position or other incentive in exchange for his failure to appear to testify.⁷⁶

78. Neither party called any other crew chiefs to testify at the level three hearing. There was no evidence presented as to whether crew chiefs other than Mr.

⁷⁵ See, testimony of Robert Newlon.

⁷⁶ See, testimony of Tommy Lawhon.

Nance received the same “charge” from Mr. Midkiff, or whether other crew chiefs assign workers who may not be the best operators to regularly operate equipment to allow those workers to gain experience.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

In her statement of grievance, Grievant asserted that Respondent, discriminated against her on the basis of sex, in violation of the West Virginia Human Rights Act, W. VA. CODE § 5-11-1, *et seq.*, that Respondent retaliated against her in violation of the Whistle-blower Law, W. VA. CODE § 6C-1-1, *et seq.* Further, in the narrative portion of her amended statement of grievance, Grievant asserted claims of retaliation and hostile work environment.⁷⁷ In Grievant’s original grievance filing, she, then *pro se*, asserted claims of discrimination, favoritism, harassment, sexual harassment, nepotism, and retaliation, but did not mention the West Virginia Human Rights Act or The Whistle-Blower Law. At level three, Grievant presented evidence in support of all her claims. However, in her proposed Findings of Fact and Conclusions of Law, Grievant

⁷⁷ Grievant states in her amended statement of grievance to state that Mr. Ferrell “created an unpleasant work environment and bullying.” This ALJ interprets this language to be a hostile work environment claim.

addressed only her claims of discrimination and favoritism pursuant to W. VA. CODE § 6C-2-1 *et seq.*⁷⁸ In accordance with the Grievance Board's regular practice, the claims of discrimination on the basis of sex in violation of the West Virginia Human Rights Act, retaliation in violation of The Whistle-Blower Law, retaliation, hostile work environment, harassment, sexual harassment, nepotism, and harassment for filing a grievance, otherwise known as reprisal, are deemed abandoned and will not be discussed further herein.⁷⁹

Respondent denies all Grievant's claims and asserts that Grievant simply did not want to drive Van 211-1001 on June 25, 2021, because its air conditioning system did not work. Respondent argues that Mr. Midkiff and/or Mr. Ferrell did nothing inappropriate on June 25, 2021, and that Grievant just "blew up" at Mr. Ferrell over his decision to call her back to the garage to return the truck, then send her back out in the van, seemingly portraying Mr. Ferrell as the victim of Grievant's unreasonable, emotional outburst. Respondent further contends that Grievant's claim amounts to nothing more than an employee disagreeing with a management decision made by her supervisor. Respondent's argument is summarized by the following statement in its proposed Findings of Fact and Conclusions of Law: "Grievant did not like her vehicle

⁷⁸ It is unknown whether Grievant has filed any other administrative action pertaining to the claims she has made in her statements of grievance, such as with the West Virginia Human Rights Commission or the West Virginia Equal Employment Opportunity Office (EEO). It is also unknown whether Grievant has filed any action in the judicial system related to these claims. Even if Grievant has initiated any such action, such would have no impact of this decision.

⁷⁹ See, *Hall v. Div. of Juvenile Services/Industrial Home for Youth*, Docket No. 2011-0100-MAPS (June 23, 2011); *Sprangle v. Dep't of Health & Human Res./Bureau for Children & Families*, Docket No. 2021-2173-CONS (July 20, 2021); *Jones v. Workforce West Virginia*, Docket No. 2022-0669-DOC (Aug. 9, 2022).

assignment, plain and simple[,] and has tried to work backwards to make various claims “stick” against her supervisors.”⁸⁰

While Respondent admits that Grievant was assigned to drive the van more than the other employees, Respondent denies treating Grievant differently from her coworkers. Respondent argues that because some male employees had to drive the van as well, as had several of the witnesses who testified at level three, and had complained to management about its poor condition, Respondent could not have discriminated against Grievant by making her drive it because she was not singled out. Respondent also appears to argue that because Mr. Midkiff properly granted Grievant tier advancements, from TW1CW Tier 1 to Tier 2 in 2019, and, again, from TW2EQOP Tier 1 to Tier 2 in 2020, both of which resulted in increases to Grievant’s hourly pay, Respondent did not discriminate against Grievant. This second argument is wholly without merit. Just because Mr. Midkiff granted Grievant a tier advancement does not mean that he has not discriminated against Grievant in another aspect of her job.

Discrimination for purposes of the grievance process has a very specific definition. “‘Discrimination’ means 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). “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h). Therefore, to establish discrimination

⁸⁰ See, Respondent’s “Proposed Findings of Fact and Conclusions of Law,” pp. 4-6.

and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

- (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., 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008). Further, the

West Virginia Supreme Court of Appeals has stated that,

[t]he Grievance Board can entertain grievances claiming that a particular employment action was the result of discrimination based on sex or any of the other prohibited motivations listed in the Human Rights Act. If a grievant can prevail on the claim that she has been the victim of "discrimination," "harassment," or "favoritism," it necessarily follows that the employee also can prevail by showing that the "discrimination," "harassment," or "favoritism," was motivated by sexual, racial, or some other invidious ground. Conversely, an employment decision that treats an employee differently because of the employee's race or gender, etc., is, by definition, not one that is related to the actual job responsibilities of the employee. *W. Va. Code* § 18-29-2(m).

Vest v. Board of Educ., 193 W. Va. 222, 225, 455 S.E.2d 781,784 (1995). All Grievant must prove are the elements of her claims by a preponderance of the evidence; the motive for such treatment is irrelevant.

As most of the facts in this grievance are disputed, credibility assessments must be performed. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility

determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).⁸¹

Grievant testified at the level three hearing. She answered the questions asked of her and she was not evasive. Grievant was calm and appeared to have a good recollection of the events and actions leading to this grievance. As Grievant filed this grievance, she has an interest in its outcome, which could be a motive to be untruthful. However, Grievant did not appear untruthful. Grievant largely appeared frustrated at Mr. Ferrell over work assignments, being assigned to operate the van to flag most days in 2021 despite reporting her concerns that the van was unsafe, Mr. Ferrell’s actions on June 25, 2021, and how he treated her both before and after she filed her grievance. Also noticeable was Grievant’s frustration over receiving her tier advancements late, not ever being assigned to operate equipment she is qualified to operate to gain

⁸¹ This ALJ considered the testimony of all witnesses in making her decision.

experience, and the complexities of the tier advancement system and equipment operator training. Grievant's frustration appeared to interfere with her concentration and, at times, result in her being confused by questions.

While Grievant was being questioned by Respondent's counsel, she largely remained calm and direct; however, she became a bit defensive when counsel was asking her about the "Daily Checklists" Respondent presented during the hearing. While defensiveness can diminish a witness's credibility, such was not the case here. Grievant was not generally defensive during this questioning. Grievant's frustration with counsel for Respondent's questions appeared to be more from his suggestion that Grievant had not completed any 28 Sheets for the van, that she completed only some Daily Checklists, and that Mr. Ferrell had treated her the same as everyone else. Overall, Grievant's credibility was not diminished.

While both her attorney and Respondent's counsel questioned her, Grievant was forthright in her responses and largely consistent. However, as noted above, Grievant had difficulty recalling specific dates, but such can be explained by frustration and the passage of time, especially since the events leading up to his grievance occurred in 2021. Moreover, Grievant was asked about events that occurred as far back as 2018. Grievant was able to provide estimates of the same by relating them to other events. For example, Grievant could not recall the date on which she left working in the storeroom to go work on Mr. Nance's crew, but she knew that such occurred when Respondent hired Tony Edmunds to fill the storekeeper position. Grievant also knew that given her DOH employment start date, her first brief flagging assignment, and when Mr. Edmunds was hired, she had worked in the storeroom for about two years before

being sent to work on Mr. Nance's crew. These estimates were shown to be reasonably accurate by the testimony of other witnesses and relevant exhibits.

Grievant's testimony demonstrated that she was quite confused about the tier advancement process and procedures, as well as the DOH procedures for getting into specialized trainings. Neither party presented any policies during the hearing. For instance, Grievant appeared to believe that she was given a tier advancement in 2020 before going out to work for Mr. Nance's crew, but the evidence presented demonstrates that she was not. Somehow, by using forms appearing to normally be used for "reallocations," Grievant's classification was changed from TW1CW, Tier 2, to TW2EQOP, Tier 1, which would have been a reclassification. The reason for such is unknown, and neither counsel mentioned this at the hearing or in their proposals. Thereafter, in August 2021, Grievant was eligible for a tier advancement to TW2EQOP Tier 2, having held that position for ten months. Grievant's confusion on this issue has no impact on her credibility. Based upon the evidence presented, or lack thereof, the tier advancement process and procedures appear to be extremely confusing, and the parties presently no evidence that fully resolved this confusion. Neither party presented any DOH policies or procedures regarding the same that could have explained these things, and neither asked Ms. Dempsey's the questions to do so. Overall, Grievant was credible.

Tommy Lawhon testified at level three. Mr. Lawhon answered the questions asked of him and he was not evasive. Mr. Lawhon was calm and respectful, and he displayed the appropriate demeanor. Mr. Lawhon's answers were direct and matter of fact. He had a good recollection of the events relevant to this grievance. Further, his

testimony was consistent with his written statement. Mr. Lawhon has no interest in this grievance, and he showed no indication of bias. Mr. Lawhon was credible.

Mr. Lawhon's testimony regarding the 28 Sheets Grievant completed on Van 211-1001, the van's mechanical problems, including the exhaust leak, its being unsafe, its lack of inspection sticker, Grievant's use of the van, and the 28 Sheets disappearing from his office was consistent with that of Grievant, Mr. Conrad, Mr. Nance, Mr. Hale, and Mr. Newlon. Mr. Lawhon had firsthand knowledge of the van's condition, and testified that he, personally, had downed the van in the past because it was unsafe. He further testified that despite this, Mr. Midkiff and Mr. Ferrell kept returning it to service. Mr. Lawhon testified that he had told both Mr. Midkiff and Mr. Ferrell that the van was unsafe, and that he had specifically told Mr. Midkiff that he would not issue the van a state inspection sticker because it could not pass the inspection. Mr. Lawhon's testimony is consistent with the photographs of the van showing that it had no valid state inspection sticker when Grievant was required to operate it.

Mr. Lawhon testified that prior to the level three hearing, when Mr. Midkiff and Mr. Ferrell delivered his subpoena for this proceeding to him, they told him that he did not have to appear at the level three grievance hearing and that he would not get into trouble if he did not appear. He further testified that they told him no one could do anything to him if he failed to appear. When asked whether Mr. Midkiff and/or Mr. Ferrell offered him anything in exchange for not appearing to testify, he said no. Mr. Lawhon's testimony on this subject is mostly consistent with Mr. Newlon's testimony. However, Mr. Newlon testified that Mr. Lawhon told him that in addition to the above,

Mr. Midkiff and Mr. Ferrell offered him a position if he did not testify. While Mr. Lawhon was largely credible, this casts some doubt on Mr. Lawhon's credibility.

Terry Conrad testified at level three. Mr. Conrad answered the questions asked of him, but he appeared somewhat reluctant to speak about certain issues, such as the van not having a valid state inspection sticker. He was calm and displayed the appropriate demeanor. Mr. Conrad is not known to have any interest in this matter or bias. Mr. Conrad provided two written statements to Grievant after the June 25, 2021, incident. In his first statement, dated August 10, 2021, he wrote that Van 211-1001 "didn't have a state sticker on it because the body was rotten out on the back quarter side beside tires. Lisa had wrote it up about the sticker and Lisa Spurlock drove it too!! and it had a (sic) exhaust leak coming in from the rusted holes in the back."⁸² However, at the level three hearing, Mr. Conrad testified that he could not remember if the van had a valid sticker because it was happened too long ago.⁸³

As of the date of the hearing, it had been several months since he was assigned to the van with Grievant. However, Mr. Conrad prepared two handwritten statements about the van, he had ridden in the van with Grievant regularly during blacktop season, he and Grievant had complained to Mr. Nance⁸⁴ about the van's safety issues, and he had written the van up himself. It does not seem plausible that Mr. Conrad could not recall something as unusual as the van not having a state inspection sticker, especially when he mentioned it in his written statement. Given that Mr. Conrad contradicted his written statement, his credibility is somewhat diminished. However, it is also unknown if

⁸² See, Grievant's Exhibit 2. This is a quote from Mr. Conrad's written statement.

⁸³ This ALJ has not corrected any typographical errors. See, testimony of Terry Conrad.

⁸⁴ See, testimony of Joe Nance.

Mr. Conrad had access to his written statements before the hearing, or whether he retained copies of his statements. While the passage of time may explain some inconsistencies, it is unlikely that Mr. Conrad could not remember whether the van had a valid state inspection sticker. Nonetheless, Mr. Conrad testified consistently with other several other witnesses stating that the van's poor condition and the exhaust leak made it unsafe to drive. Mr. Conrad further testified that the exhaust fumes inside the cab caused him to have headaches, and that he was present when Grievant completed and submitted at least one 28 Sheet about the van to the mechanic. This testimony is more consistent with his two written statements, the testimony of Grievant, Mr. Lawhon, Mr. Nance, and Mr. Newlon, and Mr. Lawhon's handwritten statement.

Mr. Conrad ultimately answers to Mr. Midkiff and/or Mr. Ferrell, just like all the other witnesses who testified at the hearing, and they have the authority to make decisions that could affect his job. Mr. Conrad testified something to the effect of, he "tried to stay out of it" and "tried to keep his distance from all of it," referring to Grievant's issues with Mr. Ferrell and/or this grievance action. This suggests that Mr. Conrad was wary of being involved with things that had the potential to upset Mr. Midkiff and/or Mr. Ferrell. If Mr. Conrad feared adverse employment action for telling the truth during his testimony, such could be viewed as him having an interest in this grievance, or bias, which would impact his credibility, even though reprisal, or retaliation, for participating in a grievance action is prohibited by law and is grievable.⁸⁵ Finally, Mr. Conrad denied that Mr. Midkiff and/or Mr. Ferrell approached him before the level three hearing, attempted to dissuade him from testifying, or offered him anything in exchange for not

⁸⁵ See, W. VA. CODE § 6C-2-3(h) (2018).

testifying. Mr. Conrad's credibility on some issues is questionable; however, he appeared at the hearing and testified, and much of his testimony was consistent with that of Grievant, Mr. Nance, Mr. Lawhon, Mr. Newlon, and Mr. Hale.

Joe Nance testified at the level three hearing. Mr. Nance was polite and respectful, and he appeared to have a good recollection of the matters relevant to this grievance. His demeanor and attitude toward the grievance were appropriate. Mr. Nance answered the questions asked of him; however, he admitted having trouble remembering dates and the timeline of some of the events he was asked about because of the passage of time, which is not unusual. Mr. Nance's testimony was consistent with the statements he made in the written statement he provided Grievant. However, in his statement he mentioned nothing about the van or any of the actions, events, or incidents, relevant to this grievance. Mr. Nance only wrote about what a good employee Grievant is and has been.

Mr. Nance was largely credible, but, at times, he appeared to be nervous, or hesitant, about saying anything that could reflect poorly upon Mr. Midkiff and/or Mr. Ferrell. They were his direct supervisors. Given this, it is possible that his testimony may have been influenced by fear of adverse personnel action. For example, Mr. Nance stated more than once that Mr. Midkiff and Mr. Ferrell are his bosses and that they can tell him what to do. Mr. Nance's hesitancy and his comments about Mr. Midkiff and Mr. Ferrell's authority over him suggests an interest in the grievance, or bias, which would diminish his credibility.

When asked if he had heard or witnessed anything to suggest that Grievant was being treated differently or being subjected to a hostile work environment, Mr. Nance

was quick to state, “not on [his] crew.” When asked if he had observed any such behavior toward Grievant occurring in the garage, he hesitated, then answered, “just hearsay,” and explained that he had not witnessed anything personally. When pressed on this topic, Mr. Nance testified that he heard things from his crew members suggesting that Grievant was being treated poorly at the garage, but he could not be “specific” as to how. Mr. Nance denied hearing anyone call the truck “Jesse’s truck,” and testified that said truck was used “for a lot of things,” not strictly Mr. Ferrell’s use, or for Mr. Edmunds picking up parts.

Mr. Nance testified that he learned about the events of June 25, 2021, by “hearsay” from other employees who had witnessed the exchange between Mr. Ferrell and Grievant in the garage. Mr. Nance was not at the garage when the incident occurred. Mr. Nance confirmed that talk about Mr. Ferrell’s treatment of Grievant that day was circulating among the employees. Mr. Nance further testified that he heard things like “Jesse really got on to Lisa,” “Jesse got pretty mad, or heated, when he found out she took the truck.” Mr. Nance testified that through “hearsay” from other employees, he learned that on June 25, 2021, Mr. Ferrell made Grievant return the truck to the garage, sent her back out in the van, then again called Grievant ordering her to return the van to the garage because “they realized that they had screwed up because that van was not supposed to be off the lot, then there was a heated discussion, but it was all hearsay.” Mr. Nance also testified that Grievant came to him after June 25, 2021, upset and she confided in him about the events of the day, and he listened to her “vent,” but he did not mention the same to Mr. Ferrell or Mr. Midkiff.

Mr. Nance confirmed that Grievant and other crew members told him about the van's condition and that it was unsafe. He also confirmed that Grievant had, in fact, been completing and submitting 28 Sheets on the van. Mr. Nance confirmed that Grievant was assigned to drive the van most, if not all of the time she was assigned to his crew, he was aware that Grievant's 28 Sheets on the van disappeared after the filing of this grievance, the van was pulled out of service right after the June 25, 2021, incident, the van was sent out for repairs after that date, and that he and his crew, including Grievant, have not been assigned to use the van since it was repaired. Mr. Nance also testified that Grievant had spoken to Mr. Ferrell and/or Mr. Midkiff about the van's condition and her safety concerns.

Mr. Nance appeared knowledgeable about the 28 Sheet write-up process and the Daily Checklists. He confirmed that they are two, separate sheets, and that the two forms have different purposes. Mr. Nance also explained that Mr. Ferrell requires him to scan the 28 Sheets into the computer system and send them to him electronically. He also testified that Mr. Midkiff told him that Grievant had not completed any 28 Sheets on the van, even though Mr. Nance knew she had. Mr. Nance also testified that since the June 25, 2021, incident, he has had Grievant give him any 28 Sheets she completes to prevent them from going missing again, which is consistent with Grievant's testimony.

Mr. Nance stated in his testimony that he is charged to run his crew efficiently as possible and as he sees fit, echoing Mr. Midkiff. Mr. Nance explained that because of this, he assigns the best people to do each job, and that he is not going to put anyone who is slow doing a job because it would not be efficient. He admitted that, at times, he assigns crew members to the same jobs and same equipment each day. Mr. Nance

testified that he has discretion as to how to assign his crew members to the different jobs; however, Mr. Midkiff and Mr. Ferrell, being his bosses, could make him assign a person to a specific job and has in the past. As an example, he recounted a time when Mr. Midkiff and/or Mr. Ferrell said that crew chiefs could not operate equipment. So, Mr. Nance did not operate a grader himself, instead assigning crew members to do it. After that, a crew member got a grader “stuck” and “they had to bring in a wrecker to get it out.” Mr. Midkiff and Mr. Ferrell came to him and asked if he could have got it out and Mr. Nance told them something to the effect of “yes, but [Mr. Ferrell and Mr. Midkiff] had said he could not operate the equipment and that he would get into trouble if he did.” After that, Mr. Midkiff and/or Mr. Ferrell allowed Mr. Nance to run the grader and crew chiefs to operate equipment again. However, Mr. Nance denied that Mr. Midkiff and/or Mr. Ferrell had ever told him what specific duties or equipment to assign Grievant. Mr. Nance’s testimony was mostly credible and affirmed much of Grievant’s and other witnesses’ testimony. Further, his testimony about assignments, his duties, his “charge,” and the van was largely consistent with that of Grievant, Mr. Lawhon, Mr. Conrad, and Mr. Hale.

Mr. Hale testified at the level three hearing. Mr. Hale has worked with Grievant since 2019. Mr. Hale was calm, quiet, respectful, and displayed the proper demeanor during his testimony. At times, Mr. Hale seemed a bit nervous, but his behavior was not unusual, and it did not affect his credibility. He is not known to have any bias or interest in this grievance. However, like others, Mr. Ferrell and Mr. Midkiff were, ultimately, his supervisors. Mr. Hale appeared to be hesitant about saying anything that could open him up to possible adverse employment action, and he was careful about how he

worded his answers. As with other witnesses, such could indicate bias, or a motive to be untruthful. Mr. Hale seemed to have a fair recollection of the events of June 25, 2021, but he had trouble remembering dates and time periods, as had other witnesses, which can be explained by the passage of time. However, some of his responses were vague. Mr. Hale denied that Mr. Midkiff and Mr. Ferrell tried to persuade him not to testify at the grievance hearing, and he denied being offered anything in exchange for not testifying.

Mr. Hale confirmed that he was out on mowing duty with Grievant when the June 25, 2021, events began to unfold. Mr. Ferrell called Mr. Hale on his personal cell phone and directed him to tell Grievant to return the truck to the garage, but Mr. Ferrell gave him no explanation as to why. Therefore, Mr. Hale was a direct witness to much of what happened that day. Mr. Hale testified that he had to stop mowing and sit on the side of the road each time Grievant was required to return the vehicles back to the garage because he could not mow without someone flagging for him. Mr. Hale also testified that from the second phone call about returning the van, he learned that “they” had intended to send Grievant back out to WV 10 in yet another vehicle. Mr. Hale confirmed Grievant’s testimony that she did not return to mowing after the second time she was called to the garage, and that he had to wait to resume mowing until management sent out another flagger to him. Mr. Hale could not remember the full name of the person sent out to flag for him after Grievant left that day, but he believed the man’s first name was Ed. The record is unclear as to which vehicle Ed used to flag for Mr. Hale.

Mr. Hale testified about the van’s poor condition, that it kept quitting on them, and that Grievant had written it up for the same using 28 Sheets. He testified he had also

written the van up. However, Mr. Hale testified that he did not recall the van having an exhaust leak. He testified that maybe he did not remember it because the van had not “warmed up enough” before he got out to mow. Mr. Hale referred to the truck as “Jesse’s truck” throughout his testimony and stated that “everybody” calls it that. He further testified that he and Grievant were first assigned to drive “Jesse’s truck” at the beginning of their mowing assignment in 2021, but that Mr. Ferrell reassigned them the van and, without any explanation, told them they had to use it. Mr. Hale testified that he did not see Mr. Ferrell drive the truck very often, which seems to be contrary to the testimony of Mr. Ferrell. However, when asked where he would normally see that truck in 2021, Mr. Hale testified that when it was not at the garage, he saw various other employees driving it. This, too, is consistent with Grievant’s testimony.

Mr. Hale’s testimony was mostly consistent with that of Grievant’s, Mr. Lawhon, Mr. Conrad, and Mr. Nance, and consistent with his own handwritten statement. Mr. Hale’s memory problems are concerning, especially regarding the exhaust leak. However, such may be explained by the passage of time. Mr. Hale denied that Mr. Ferrell and Mr. Midkiff told him anything about this grievance, but that he had “heard around” that Mr. Ferrell would not let Grievant “do something,” or “took her off” an assignment because she filed this grievance. However, Mr. Hale stated that he could not remember any more than that. Despite some inconsistencies in this testimony, and his memory problems, Mr. Hale was mostly credible.

Robert Newlon testified at the level three hearing. As of the date, Mr. Newlon had worked for DOH for about ten years and was set to retire later in 2022. The record is unclear as to Mr. Newlon’s job classification. Mr. Newlon works on Mr. Nance’s crew

and has for a couple of years. Mr. Newlon was quite candid and appeared at ease testifying about what he had witnessed during the times leading up to the filing of this grievance and after, perhaps because he was close to retirement. Mr. Newlon displayed the appropriate demeanor during his testimony and was not evasive. He has no known interest in this grievance. Mr. Newlon had some difficulty remembering exact dates or years, but could give estimates, and such had no impact on his credibility. Mr. Newlon had provided a written statement to Grievant at her request after she filed this grievance, and his testimony was consistent with the same. Mr. Newlon was direct and did not hesitate when responding to questions from counsel for Grievant or counsel for Respondent.

According to Mr. Newlon, he was present in Mr. Ferrell's office on June 25, 2021, along with a few others, whose identities he could not recall, when Mr. Ferrell called and ordered Grievant to bring the truck back to the garage. Mr. Newlon testified that he witnessed Mr. Ferrell say that the truck was assigned to him and that he was going to put his nephew, Noah, in it once Grievant returned it to the garage, and put Grievant in the van. It is noted that Mr. Newlon testified that Mr. Ferrell called Grievant; however, the evidence presented establishes that Mr. Ferrell called Mr. Hale, who he directed to tell Grievant to bring the truck back. This discrepancy is most likely the result of Mr. Ferrell indicating that he was going to have Grievant bring the truck back in, and Mr. Newlon being unable to hear the person to whom Mr. Ferrell was speaking.

Mr. Newlon testified that during the call, that Mr. Ferrell commented that the truck was assigned to him. After the call, Mr. Newlon testified that he witnessed Mr. Ferrell say he "liked messing with people," referring to Grievant, and that Mr. Ferrell did not

make this comment in a joking manner. Mr. Newlon further noted that Mr. Ferrell looked right at him when Mr. Ferrell made that comment. Mr. Newlon further explained that he was in Mr. Ferrell's office when Grievant returned with the truck and that she was upset. Consistent with other witnesses' testimony, Mr. Newlon testified that he was aware that Van 211-1001 had mechanical problems, and that he rode in the van in the summer of 2021. Mr. Newlon further testified that exhaust fumes leaked into van, the gear shift lever kept "popping out," and the air conditioning did not work. Mr. Newlon stated that he, too, had written the van up using a 28 Sheet, and the 28 Sheets pertaining to the van "mysteriously disappeared" after this grievance was filed. He also stated that he had gone looking for the missing 28 Sheets, but he did not find them. When asked about Mr. Ferrell's decision to call Grievant to return the van to the garage and give it to Noah, Mr. Newlon testified that he did not see any "sense in pulling one person out of a vehicle just to put someone else in it who was doing the same job," and Mr. Ferrell did not give any reason for his decision.

As to the process for submitting 28 Sheets, Mr. Newlon testified Mr. Ferrell had worked out a system, and that Mr. Newlon was to scan them into the system using the copier and, from there, email them to Mr. Ferrell, and that he still did this as of the date of the level three hearing. Additionally, it was Mr. Newlon's understanding that a copy of the 28 Sheets were to be given to the mechanic, and that was what he did with the 28 Sheet he wrote up on Van 211-1001 in 2021, which was before Mr. Lawhon had to go on medical leave.

Finally, consistent with Grievant's testimony, Mr. Newlon testified that he had observed that Mr. Ferrell and/or Mr. Midkiff took Grievant off mowing duty after she filed

this grievance. Mr. Newlon also testified that Mr. Lawhon told him that Mr. Midkiff and Mr. Ferrell approached [Mr. Lawhon] before the hearing and told him that he did not have to appear at the level three hearing, as had Mr. Hale. This is consistent with Mr. Lawhon's testimony, but inconsistent with Mr. Hale's. However, contrary to both Mr. Lawhon and Mr. Hale's testimony, Mr. Newlon testified that they told him that Mr. Midkiff and/or Mr. Ferrell had offered them positions if they did not testify. Mr. Newlon was a credible witness.

Jesse Ferrell testified at the level three hearing. When questioned by Respondent's counsel, Mr. Ferrell appeared somewhat calm and confident. However, during his testimony, Mr. Ferrell frequently touched his face and rested his fingers and hand around his chin and mouth, which could indicate nervousness. As he is accused of discriminating against Grievant and favoring other employees over her, and his actions on June 25, 2021, are central to this grievance, Mr. Ferrell can be seen as having an interest in this grievance and/or bias against Grievant, which could be a motive to be untruthful.

When Grievant's counsel questioned Mr. Ferrell, he immediately began to change his posture by sitting up straighter in his chair, but continued to rest his chin in his hand, at times, nearly covering his mouth, which, again, can indicate nervousness. Many of Mr. Ferrell's responses to Grievant's counsel's questions were curt, and he seemed annoyed that he was having to answer them. His demeanor changed while he was responding to Grievant's counsel's questions about his actions on June 25, 2021. Mr. Ferrell began moving his arms around and appeared to be using these movements to punctuate his statements, which evolved into an even more unusual behavior. Mr.

Ferrell began smacking his hands on the table in front of him, palms down and fingers outstretched. Each time he struck the table it made noise including clacking sound, caused by a ring on one of his fingers hitting the table. Again, Mr. Ferrell sounded like he was using these sounds and movements to punctuate his words and sentences. Even though this ALJ had never witnessed such behavior in prior grievance hearings, this ALJ does not allow disruptive behavior in hearings. However, Mr. Ferrell's behavior was so unusual, and he appeared to be using it intentionally to punctuate his statements, it seemed to be part of his testimony as much as his words. As this behavior was a characteristic of his demeanor, this ALJ allowed him to continue. Mr. Ferrell continued this unusual behavior throughout the remainder of his testimony.

When asked about the events of June 25, 2021, Mr. Ferrell, essentially, stated that he did nothing improper, he made a management decision that the truck needed to be closer to the garage, and that Grievant "blew up" at him for no reason after she returned the truck. In his version of events, Mr. Ferrell seemed to portray Grievant as having an irrational response to him telling her to return the truck, that she threw a temper tantrum, and that he was the victim of her anger, all because she did not want to drive the van because it had no air conditioning. However, Mr. Ferrell's account of the events on June 25, 2021, was entirely different from that of every other witness who testified about it.

When questioned about June 25, 2021, by Respondent's counsel, Mr. Ferrell first stated he was twenty minutes late getting to the garage that morning, and when he got there, he noticed that the "parts truck"⁸⁶ was gone. He explained that he found out that

⁸⁶ Mr. Ferrell referred to the vehicle as "the parts truck" throughout his testimony.

Grievant and Mr. Hale had taken it to mow, so he called Mr. Hale and merely told him to bring it back to the garage when they were done. Mr. Ferrell further stated that Mr. Hale and Mr. Walker were the two mowers that day and Mr. Walker's truck was down, so he needed to put Mr. Walker in the parts truck. He explained that he made this decision because "they" tried to keep the parts truck close to the garage in case Mr. Edmunds needed it. While he did not mention Noah in this explanation, Mr. Ferrell later admitted during questioning by Respondent's counsel that Noah was working with Mr. Walker mowing on WV 193 that day, and that Mr. Ferrell assigned Noah to drive the truck just as Grievant was using it to follow Mr. Hale. Mr. Ferrell further testified that he "intended" to send Grievant and Mr. Hale back out to mow using the van, but that he did not.

Mr. Ferrell stated that following his exchange with Grievant, she went home for the day because she was mad. However, Mr. Ferrell later added that before she left, Grievant said to him that she was not going home just because the air conditioning did not work in the van. After that, Mr. Ferrell testified that Grievant "blew up" on him, then left. Mr. Ferrell contended that at that same time, Truck 585 was available to Grievant and Mr. Hale. Apparently contradicting himself, Mr. Ferrell then testified that he told either Mr. Hale or Grievant to have Mr. Lawhon look at the van, and that Grievant and Mr. Hale went back out in Truck 585. Mr. Ferrell denied saying to anyone that he "like messing with people," as Mr. Newlon maintained. He also denied telling Mr. Nance which duties or vehicles to assign Grievant. Near the end of this questioning, Mr. Ferrell testified that the van "was safe as far as he knows."

However, when Grievant's counsel asked Mr. Ferrell about the events of June 25, 2021, Mr. Ferrell described the events of that day differently. He testified that he was late getting to the garage that morning because he stopped to talk to "that lady" with the complaint on his way to work in his own personal vehicle. Mr. Ferrell maintained that both Grievant and Mr. Hale brought the truck back to the garage after his one call to Mr. Hale that day. Therefore, he denied calling Mr. Hale twice that day and denied ordering Grievant to return to the garage once for the truck and a second time for the van. Mr. Ferrell testified that he had only one conversation with Grievant on June 25, 2021, which was at the garage after she and Mr. Hale had returned the truck. Mr. Ferrell stated that during this conversation is when Grievant "blew up" on him, and "screamed at the top of her lungs," "[y]ou just don't want me to drive your truck," and something else, but he could not make out all that she said. He also described Grievant as being "high-toned." Mr. Ferrell denied raising his voice at Grievant. When asked whether a male employee had ever done that, Mr. Ferrell testified that male employees had raised their voices to him, but never screamed and yelled like Grievant had. Contrary to his responses to counsel for Respondent's questions, Mr. Ferrell testified that Mr. Hale was the person who told him that Grievant had left for the day, and stated that he did not know whether Grievant went back out to mow.

Mr. Ferrell admitted that after Grievant returned the truck to the garage, he assigned Noah to drive it following Mr. Walker on WV 193, just as Grievant had been using it with Mr. Hale on WV 10. Mr. Ferrell explained that "they," presumably, he and Mr. Midkiff, tried to keep the truck close to the garage so that Mr. Edmunds could use it if needed, and that WV 10 was farther away from the garage than WV 193. Mr. Ferrell

added that [he] could not “always get [Grievant and Mr. Hale] on the phone,” and that cellular service was unreliable on WV 10. However, during Grievant’s counsel’s questioning, Mr. Ferrell testified that he had never had to call Mr. Hale and Grievant before, and that June 25, 2021, was the first time.

Mr. Ferrell further stated that the parts truck was only to be used for highway work on a “have-to” basis, and that it was not regularly used for mowing.⁸⁷ Despite this, no witness, except for Mr. Midkiff, offered consistent testimony. Mr. Ferrell’s testimony about how and when the truck was used was contradicted by other witness testimony, which established that people other than Mr. Ferrell and Mr. Edmunds used the truck at various times relevant to this grievance. Mr. Hale and Grievant used the truck for mowing at the beginning of their 2021 mowing assignment. Noah used it mowing on June 25, 2021.⁸⁸ There was also evidence presented that “core drillers” used the truck at times. Grievant was the only female employee who drove the truck during this time.

Mr. Ferrell testified that he frequently used the truck go out to look at jobsites, to investigate complaints made by the public, and to travel to the district headquarters in Huntington, and that if he was not in the garage, he was out doing his duties using the truck. No distances from the garage to any of these places were mentioned. He added that he did not worry about taking the parts truck for these purposes and that he asked Mr. Edmunds if he had to go get a part, but that sometimes Mr. Edmunds did not know in advance. This testimony implies that if Mr. Edmunds needed to go get a part when Mr. Ferrell was out in the parts truck, he had to wait until Mr. Ferrell returned. Mr.

⁸⁷ It was during this part of his testimony that Mr. Ferrell began smacking his hands on the table, clacking his ring.

⁸⁸ See, testimony of Lisa Spurlock; testimony of Philip Hale.

Ferrell's attempt to explain who was allowed to use the truck and for what purposes was confusing, demonstrated double standards, and ran afoul of his claim that he and Mr. Midkiff tried to keep the truck close to the garage for Mr. Edmunds.

Regarding the van, Mr. Ferrell testified that "he had no idea" that it did not have valid state inspection sticker on June 25, 2021. He testified that if the van had no state inspection sticker, the van should have been written up. Mr. Ferrell also denied receiving 28 Sheets as a regular part of his job. He testified he only received the Daily Checklists as Assistant Supervisor, and that the 28 Sheets went to the mechanic, which was later contradicted by Mr. Nance and Mr. Newlon. Mr. Ferrell contended that Grievant did not complete any 28 Sheets on the van, and he also denied knowing that the 28 Sheets completed on Van 211-1001 were missing. He testified that those 28 Sheets, "should be with Tony [Edmunds]." This testimony was also contradicted by the testimony of several other witnesses. Lastly, Mr. Ferrell denied any knowledge of who had access to Mr. Lawhon's office, or work area, while Mr. Lawhon was on leave.

As explained above, Mr. Ferrell's demeanor during his testimony ranged from calm to waving his arms around to slapping his hands on the table making noise. His behaviors alone cast doubt on his truthfulness. Mr. Ferrell's demeanor appeared to change from question to question and appeared to depend upon who asked them. He demonstrated a negative attitude toward this grievance, Grievant, and her counsel during the hearing. At times during his responses to Grievant's counsel's, he sounded curt and annoyed. He sounded nervous at times, and defiant at others. In contrast, when Mr. Ferrell answered Respondent's counsel's questions, he styled his testimony

to appear like he was polite to Grievant, just doing his job, and that Grievant “blew up” at him in a loud, emotional outburst.

Most significantly, much of Mr. Ferrell’s testimony conflicted with that of nearly every witness who testified, which further diminished his credibility. He contradicted himself as well. He gave any entirely different account of the events of June 25, 2021, than at least three eyewitnesses, Grievant, Mr. Hale, and Mr. Newlon, whose testimony was largely consistent. For example, Mr. Ferrell admitted calling Mr. Hale and telling him to have Grievant return the truck to the garage, but his testimony was that he asked them to bring it back when “they were done.” In his version of events, Mr. Ferrell did not include sending Grievant back out to WV 10 in the van after she returned the truck, or his calling Mr. Hale a second time demanding that Grievant back in to return the van to the garage. He also did not mention that he intended to send Grievant back out to mow in a second truck after that.

Further, Mr. Ferrell’s assertion that he made Grievant return the truck because they needed to keep the truck closer to the garage runs contrary to his own testimony that he frequently drove the truck all over District 2 and to Huntington. Even if Mr. Ferrell asked Mr. Edmunds if he needed the truck before Mr. Ferrell took it, the same situation Mr. Ferrell claimed he was trying to remedy on June 25, 2021, by making Grievant return the van to the garage and putting Noah in it, would still exist: if Mr. Edmunds needed the truck to go get a part, the truck was away from the garage. With Mr. Ferrell using it, there was no telling how far away he was at any given time, or how long he would be gone. If he were in Huntington at headquarters, it would not be possible to get it back to the garage in a few minutes. At least when Grievant was

driving it on June 25, 2021, they knew how many miles she was away from the garage because she had a specific assignment, and it did not take her very long to get to the garage, as demonstrated by the evidence. Mr. Ferrell did not mention whether anyone had ever called him to return the truck to the garage while he was using it so that Mr. Edmunds could go get a part. Mr. Ferrell was not a credible witness.

Alan Midkiff testified at the level three hearing. He is the top supervisor in Cabell and was so at the times relevant herein, and as such, he is Grievant's ultimate supervisor in the county. Given his positions, the decisions Mr. Midkiff makes affects everyone who works in the county. Mr. Midkiff is Mr. Ferrell's direct supervisor, and he was an eyewitness to the incident between Mr. Ferrell and Grievant. Mr. Midkiff took no action to intervene during the incident, and he has testified that he approved of Mr. Ferrell's actions. Moreover, Mr. Midkiff is Mr. Ferrell's only superior in Cabell County and they work closely together as the top two members of management. Accordingly, Mr. Midkiff can be seen as having an interest in this grievance and/or bias against Grievant, which could be a motive to be untruthful.

Mr. Midkiff answered the questions asked of him; however, his demeanor changed according to who was questioning him, and what he was being asked. While being questioned by Respondent's counsel, Mr. Midkiff was respectful, and his answers were straight forward. He was not evasive. At times, he was even softspoken and it was hard to hear his answers. When Grievant's counsel first began questioned him, Mr. Midkiff answered the questions asked of him and was respectful, referring to Grievant's counsel as "ma'am." However, Mr. Midkiff soon became defensive and appeared annoyed. At times, he was defiant. He folded his arms across his chest and smirked at

Grievant's counsel. At one point, this ALJ had to intervene because Mr. Midkiff kept talking over Grievant's counsel. In response to one question, Mr. Midkiff said something to the effect of, "if you'll remember from my previous testimony. . .," sounding smart-alecky, then slowed his speech some as if Grievant's counsel lacked the ability to understand the words he was saying. This behavior was both condescending and inappropriate. Mr. Midkiff was disrespectful to both Grievant's counsel and to the grievance process. Mr. Midkiff's shift in tone between questioners was indicative of his negative, if not hostile, attitude toward Grievant's counsel, Grievant, and/or this grievance. This was an overt display of bias against Grievant. Mr. Midkiff's attitude and demeanor diminished his credibility.

During his testimony, Mr. Midkiff confirmed Mr. Nance's testimony that he had personally "charged" the crew leaders with running their crews as efficiently as possible and that he witnessed the June 25, 2021, exchange between Mr. Ferrell and Grievant. He testified that it started with Grievant being upset about the vehicle she had been assigned that day because it did not have air conditioning, that she was "emotional" and got "very, very loud" with Mr. Ferrell. He further stated that Mr. Ferrell handled the situation well, he did not yell, and that he did not act inappropriately toward Grievant. Mr. Midkiff's description of the exchange between Mr. Ferrell and Grievant was similar to Mr. Ferrell's account, but different from that of other witnesses. Mr. Midkiff testified that he agreed with Mr. Ferrell's decision to call Grievant back to the garage to return the truck because they tried to keep it close to the garage. He also agreed with Mr. Ferrell's decision to give the truck to Noah after Grievant returned it to the garage,

noting that as Noah and Mr. Walker were working closer to the garage than Grievant and Mr. Hale, they could get it back to the garage quickly, if needed.

Mr. Midkiff denied that the van was unsafe, but admitted that it was in poor condition. Mr. Midkiff denied knowledge of the van having an expired inspection sticker when Grievant was assigned to use it and said the mechanic should have downed it if that were so. He also denied that the van had ever been downed, contrary to the testimony of Mr. Lawhon. Mr. Midkiff testified that if a vehicle or piece of equipment was unsafe, he would not use it, and that he never put anyone in a vehicle his mechanic said was unsafe. Mr. Midkiff explained that vehicles and equipment are either “useable” or “nonusable,” and that there was no area in between, and that the mechanic makes that determination. He stated that neither he nor Mr. Ferrell had the authority to down a vehicle or piece of equipment. Mr. Midkiff testified that he had heard there was an exhaust leak in the van, but the mechanics checked it and they found nothing.

Despite records to the contrary, those being Respondent’s exhibits, Mr. Midkiff testified that when Grievant began working at DOH, “they utilized her” in the storeroom for “several months.” The record establishes that Grievant was assigned to the storeroom for nearly two years before Mr. Edmunds was hired in the fall of 2020, at which time she was assigned to a crew. It is possible that Mr. Midkiff was simply mistaken in his testimony given the passage of time, but he never indicated he was having difficulty remembering anything. Like Mr. Nance and Mr. Ferrell, Mr. Midkiff testified that he had no problems with Grievant’s work or her work performance and that she had no history of discipline.

Overall, Mr. Midkiff was not credible. The record has firmly established that Mr. Midkiff and Mr. Ferrell knowingly required Grievant and other employees to operate a vehicle that was so unsafe it could not pass the state inspection. Exhaust leaked into the cab of the van and exposed Grievant and other employees to the toxic fumes. Mr. Lawhon had downed the van in the past, but Mr. Midkiff and Mr. Ferrell kept sending employees out to drive it. Mr. Midkiff and Mr. Ferrell knowingly and intentionally put Grievant in the van and required her to drive it despite all the 28 Sheets she completed on it. Further, Grievant had conversations with Mr. Midkiff and Mr. Ferrell about the van's condition, the exhaust leak, and it being unsafe. While Mr. Midkiff denied all knowledge of the van's numerous safety issues, the evidence demonstrates that he knew.

At the level three hearing, Kathleen Dempsey served as the DOH representative and remained in the room for the entire proceeding, and she was the last witness to testify. She appeared calm and professional. She answered the questions asked of her and she was not evasive. She displayed the appropriate demeanor at the hearing and appeared to have a fair recollection of her conversation with Grievant during their brief meeting on June 25, 2021. Ms. Dempsey confirmed that Grievant came to her office on that day before Grievant left work. Ms. Dempsey testified that "they talked about what had happened," and that Grievant first mentioned the "van not having air conditioning," then "exhaust issues." Ms. Dempsey testified that in response to this, she asked Grievant if she "did [her] pretrip" and had she "completed [her] pretrip checklist," meaning daily checklist. Ms. Dempsey focused on this despite the nature of their meeting. It seemed unusual for Ms. Dempsey to be so concerned about the checklist

because Ms. Dempsey was the District 2 Human Resources Director and she had nothing to do with the actual work being performed in the garage. Supervisors such as Mr. Midkiff and Mr. Ferrell have authority over that. It seemed like Ms. Dempsey was more interested in the checklists than what Grievant was telling her.

Ms. Dempsey confirmed that Grievant told her about being out in the truck flagging for Mr. Hale, being called to return the truck, going out in the van, and then being called back to the garage again, but Ms. Dempsey again raised the checklist in response. Ms. Dempsey stated that she was concerned about the checklists because they (DOH) had had problems with employees in Region 9 completing them. Again, this was unusual, especially since Grievant employee was reporting to her that she and others had been continually exposed to an exhaust leak. From Ms. Dempsey's testimony, it did not appear that she asked Grievant for the details about the "exhaust issues" and it did not appear that she was concerned about the issues Grievant reported to her.

Ms. Dempsey testified that Grievant did not mention anything about being treated differently because of her gender or that Mr. Ferrell was creating a hostile work environment for her, though she later admitted that Grievant may have said something about being "a little girl." Ms. Dempsey testified that Grievant mentioned nothing about any issues she had with Mr. Ferrell, or any history of problems with him. Ms. Dempsey stated that Grievant was concerned about the "a/c," and "there was something about an exhaust issue and violating the nepotism policy." Ms. Dempsey confirmed that Noah was Mr. Ferrell's nephew and that he was "just working last summer" and a "summer worker." By this statement, it is unknown whether Ms. Dempsey was saying that Noah

was regularly employed by DOH in District 2 at some point in the summer of 2021, or merely temporary “summer help.”

Ms. Dempsey admitted telling Grievant that she needed some time to “look into it” and would get back to Grievant, but failed to do so. Ms. Dempsey looked into it by talking to Mr. Midkiff and Mr. Ferrell. However, she spoke to no one else, such as Mr. Hale, a direct witness to the events of June 25, 2021, Mr. Lawhon, the mechanic, or anyone else who might have witnessed the exchange between Grievant and Mr. Ferrell, such as employees who were working in the garage that day.

Ms. Dempsey testified that she concluded that Mr. Ferrell had kept an even keel during his exchange with Grievant, and that he did not raise his voice. She further concluded that Mr. Ferrell assigned his nephew to drive the truck doing the same job as Grievant because Mr. Midkiff and Mr. Ferrell tried to keep the truck close to the garage in case Mr. Edmunds needed to use it to go get parts. She did not speak to Mr. Edmunds about keeping the truck close to the garage. Ms. Dempsey did not talk to Grievant again, not even to clarify her account of the events of June 25, 2021. She accepted Mr. Midkiff and Mr. Ferrell’s statements as the truth without looking into it any further. This demonstrates that Ms. Dempsey displayed some level of bias against Grievant and that she favored management. Ms. Dempsey purposefully made no effort to look into the exhaust leak Grievant reported and did not try to fully assess the events of June 25, 2021, as reported to her. Ms. Dempsey was not an entirely credible witness, but she confirmed some other witness testimony, acknowledged her failure to contact Grievant after speaking to Mr. Ferrell and Mr. Midkiff, and fully admitted that she spoke to no one else about Grievant’s claims after speaking with them.

The evidence presented establishes that at the beginning of the 2021 mowing season, Mr. Ferrell assigned Grievant to flag for Mr. Hale, who was to operate a mower. Grievant was not assigned to work on a crew at that time. During this mowing season, Mr. Ferrell acted as Grievant's supervisor and assigned her both the duties and the vehicles she was to use. Mr. Ferrell's nephew, Noah, worked at District 2 during this time. The record is silent as to Noah's hiring date and all the duties he was assigned that summer; however, the evidence establishes that he was assigned to flag for a mower on June 25, 2021. For a couple of weeks at the beginning of Grievant and Mr. Hale's mowing assignment, they were assigned to use the parts truck. However, sometime in May 2021, Mr. Ferrell started assigning the van to Grievant and Mr. Hale, and had informed them they had to use it for mowing. Mr. Ferrell continued to assign them the van each day through June 25, 2021. There was some testimony during the level three hearing suggesting that Mr. Ferrell had assigned Noah to use the van flagging for Thomas Walker, but after the van quit on him, Mr. Ferrell did not assign it to Noah again. No firsthand testimony or other evidence was offered to support this allegation. As such, that allegation is not being considered in this decision.

Mr. Ferrell's actions and conduct toward Grievant on June 25, 2021, were blatantly discriminatory, and showed that he overtly favored his nephew over Grievant. Despite his testimony to the contrary, Mr. Ferrell called Grievant back to the garage twice and forced her to drive the unsafe van because she was using the truck that he wanted his nephew to drive. After the first call to Grievant, Mr. Ferrell stated to those present in his office that he "liked messing with people," referring to Grievant. During the time Grievant was returning both the truck and the van to the garage and driving

back to the jobsite, Mr. Hale had to stop mowing until Grievant returned to flag for him. Despite Mr. Midkiff's edict about efficiency, Mr. Ferrell's decisions resulted in inefficiency at the highest level. Mr. Ferrell's demands wasted time and money and delayed the completion of the mowing on both WV 10 and WV 143. Mr. Ferrell's decisions were certainly not made for the benefit of DOH.

Mr. Ferrell and Mr. Midkiff's claim that Mr. Ferrell called for Grievant to return the truck because they tried to keep the truck closer to the garage in case Mr. Edmunds needed to use it is not supported by the evidence and makes no sense. Mr. Ferrell, Mr. Midkiff, and Ms. Dempsey were the only witnesses who mentioned the practice of keeping the truck close to the garage. Grievant and Mr. Hale may have been a few miles farther away than Noah and Mr. Walker, but they could not have been very far away, because Mr. Ferrell was quick to call Grievant back to the garage two times that day. Grievant and Mr. Hale were already out mowing when Mr. Ferrell called them. There was absolutely no evidence presented that Mr. Edmunds needed the truck that day. Even if Mr. Ferrell and Mr. Midkiff's claim about trying to keep the truck close to the garage were true, Mr. Ferrell could have simply waited until Mr. Edmunds needed the truck to call Grievant to bring it back. That would have undoubtedly been more efficient than what was done.

Except for two weeks at the beginning of mowing season, the van seemed to follow Grievant from assignment to assignment until it was finally taken out of service immediately after the events of June 25, 2021.⁸⁹ Mr. Ferrell specifically assigned Grievant to operate the van during mowing season 2021 even though he knew about its

⁸⁹ See, Respondent's Exhibit 3, Daily Checklists; testimony of Grievant; testimony of Joe Nance; testimony of Philip Hale; testimony of Terry Conrad.

condition, and he was aware Grievant had written it up for its numerous problems. During blacktop season, just prior to mowing season, Mr. Ferrell routinely assigned the van to Mr. Nance's crew while Grievant was a crew member. When Grievant was not working on Mr. Nance's crew, Mr. Ferrell did not appear to assign the van to them. When Grievant was on Mr. Nance's crew, he routinely assigned Grievant to operate the van to flag for other crew members. Mr. Nance explained that he assigned his crew members to the various jobs in a manner that would comply with Mr. Midkiff's charge to run his crew as efficiently as possible. To do so, Mr. Nance assigned the more experienced, male crew members to operate the equipment, even though Grievant was qualified to run much of the equipment. Mr. Nance further explained that he had to assign Grievant the van to use for flagging because it would be the only vehicle left after the other assignments were made. Mr. Nance did not assign Grievant to operate any of the equipment because she was not the best for those jobs. Undoubtedly, Grievant was not the best operator because she lacked the experience her coworkers had. However, this logic results in a *Catch 22* for Grievant. She could not gain the needed experience to be assigned to operate equipment because she was never allowed to operate the equipment due to her lack of experience.

Respondent appears to argue that Mr. Midkiff and Mr. Ferrell had nothing to do with Grievant being routinely assigned the van when she was on Mr. Nance's crew; therefore, it was impossible for them to have subjected her to discrimination or favoritism. Grievant has not asserted any discrimination or favoritism claims against Mr. Nance or anyone on his crew. Despite Respondent's argument, the evidence suggests that it is more likely that Mr. Midkiff and/or Mr. Ferrell influenced Mr. Nance's decisions,

or pressured him, by specifically charging him with running his crew as “efficiently as possible,” and by assigning the van to his crew only when Grievant was working with them. Mr. Nance appears to have been painted in a corner by Mr. Midkiff and/or Mr. Ferrell’s edict. It was clear that Mr. Nance felt like he had to make the assignments as he had. Mr. Nance testified that Mr. Midkiff and Mr. Ferrell were his bosses and they could tell him what to do, and Mr. Nance appeared reluctant to say anything that could be considered negative about them.

Mr. Nance displayed no trace of negativity or hostility toward Grievant during the hearing. He was not reluctant to talk about Grievant, her performance, or the assignments he had given her. In fact, his testimony revealed that he thought highly of Grievant and complimented her work and her work ethic. Further, Mr. Nance took action to help Grievant by setting up a system to prevent any more of her 28 Sheets from going missing. Mr. Nance’s testimony demonstrated that he had confidence in Grievant and that he supported her. Mr. Nance appeared proud of his crew and when asked if he had heard any talk about anyone treating Grievant differently than other employees, he was quick to respond, “not on my crew.” Given the evidence, Respondent’s argument that Mr. Ferrell and Mr. Midkiff could not have discriminated against Grievant or favored other employees over her regarding her daily crew assignments fails.

Respondent defends management’s decisions to select the more experienced male employees to operate equipment instead of Grievant, citing the need to get the work done efficiently, even though Mr. Ferrell’s decisions and actions on June 25, 2021, are the epitome of inefficiency. Throughout this grievance, Grievant has asserted that

she was treated differently than her male coworkers because she was not provided sufficient training on the equipment which prevented her from being assigned to operate the same. However, it appears that Grievant is using the words “training” and “experience” interchangeably, when DOH appears to consider them different terms. Grievant has received her required training and as much additional training as she has been allowed to sign-up for, but she has not been sent to one of the specialized DOH training programs. Grievant has been denied the opportunity to get on-the-job training on the equipment because management will not assign it to her. On-the-job training results in experience, and experience appears to be the key to being assigned to operate the equipment.

Given that Grievant had been employed by Respondent for nearly three years as of June 25, 2021, the question becomes why did Grievant lack the experience some of her coworkers, like Mr. Hale, somehow managed to attain. When Grievant was hired at DOH in November 2018, she was classified as a TW1CW Tier 1, and was initially assigned to flagging with a work crew. It is undisputed that Mr. Midkiff pulled Grievant off highway work soon thereafter and reassigned her to work in the storeroom located in the District 2 garage because the storekeeper position was vacant. Grievant did not grieve that assignment, and this ALJ will not allow Grievant to grieve it now. However, Mr. Midkiff’s decision to assign Grievant to perform the storekeeper duties for about two years, appears most likely related to Grievant’s lack of experience operating equipment and her subsequent crew and mowing assignments.

When Mr. Midkiff assigned Grievant to work in the storeroom in 2018, she was a new employee and the only employee assigned to work there. Mr. Midkiff never said

why he chose Grievant to work in the storeroom. Grievant's duties there were mostly clerical. She was required to use a computer, complete paperwork, and to do purchasing, inventory, and pick up parts, among other things. There was no evidence to suggest that Grievant had any of these skills, or experience with parts, when she was hired by DOH. Further, none of these storekeeper duties are listed in the job duties section of the Transportation Worker 1, TW1CW, job posting dated September 28, 2018, which was the position Grievant held at that time.⁹⁰

While Grievant was working in the storeroom, she was routinely sent out to flag for mowers during mowing season and to drive a snowplow during SRIC season. Otherwise, all of her daily duties were in the storeroom, and she functioned as the storekeeper. Grievant was even required to use a state purchasing card for this job, for which she had to be trained and certified.⁹¹ Grievant remained assigned to the storeroom until the fall of 2020, when Mr. Midkiff filled the storekeeper position by hiring Tony Edmunds. Once Mr. Edmunds was hired, Grievant was sent to work on Mr. Nance's crew having only some experience flagging and operating a snowplow, but absolutely no experience operating the equipment for which she was qualified. Grievant received no pay increase while performing the storekeeper duties, or a temporary upgrade. Grievant received her Class B CDL while she was working there, as well as some trainings on operating equipment. However, Grievant gained no experience in the TW1CW duties listed in the job posting, nor did she gain any experience operating the equipment she became qualified to operate, except for the snowplow.

⁹⁰ See, Grievant's Exhibit 6.

⁹¹ See, Grievant's Exhibit 7.

While Grievant was working in the storeroom, other TW1CWs hired around the same time she was hired and after, all of whom were men, were working on crews and/or operating equipment, such as mowers, and gaining experience in the actual TW1CW classification's job duties. Given the evidence, it appears likely that these TW1CWs also started gaining experience, such as operating equipment, during this time. Mr. Hale was one of these people. Mr. Hale was hired as a TW1CW sometime in 2019 while Grievant was working in the storeroom. Between his hiring in 2019, and his classification change to TW2EQOP, Mr. Hale had somehow gained enough experience to be regularly assigned to operate a mower during the 2021 mowing season. On June 25, 2021, Mr. Hale was receiving a temporary upgrade to a higher classification to both operate the mower and to supervise Grievant's work. Mr. Hale received an increase in his hourly pay each time he operated a mower, and as her site supervisor, he also signed-off on Grievant's daily timesheets. Grievant and Mr. Hale regularly worked together like this throughout the 2021 mowing season. It is unknown for whom Grievant flagged when she was assigned to work in the storeroom.

When Grievant was sent out to work on Mr. Nance's crew, she was qualified to operate equipment including, "but not limited to, motorized equipment such as a tractor with mower, front-end loader, skid steer, roller, passenger vehicle, single and tandem axle trucks, [and] a snow plow."⁹² Despite this, Grievant was assigned to flag almost exclusively, and was only once assigned to operate a piece of equipment. As of the date of the level three hearing, Mr. Nance testified that Grievant was still frequently being assigned to flag, and she was "blowing out holes" with a leaf blower, "putting

⁹²See, Grievant's Exhibit 8.

down tack” in them, and “raking the blacktop some;” however, it is unknown when Mr. Nance began assigning Grievant these jobs. For the most part, prior to the filing of this grievance, Grievant had largely only worked in the storeroom, flagged, and drove the van and the parts truck. Her daily duties from the 2021 blacktop season through June 25, 2021, consisted of only flagging for other transportation workers. Since the filing of her grievance, she has been assigned to drive dump trucks and a double axel truck to haul gravel and dirt. As of the date of this decision, Grievant has been qualified to operate numerous types of heavy equipment for over two years, but she has never been given the opportunity to operate any. Accordingly, she has not the ability to gain experience operating them. At the same time, her coworkers have been allowed to do so. Whatever the motivation, the evidence presented demonstrates that Respondent has discriminated against Grievant and subjected her to favoritism, and that such has impacted her work assignments and income, and has limited her skills and opportunities for advancement.

For the reasons explained herein, Grievant has proved her claims of discrimination and favoritism. The evidence demonstrates that Grievant has been treated differently from her coworkers in both the assignment of duties and vehicles, that these differences in treatment were not related to Grievant’s actual job responsibilities, that had she not agreed in writing to these differences in treatment. Therefore, this grievance is GRANTED.

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. W. VA. CODE ST. R. §

156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. Discrimination for purposes of the grievance process has a very specific definition. “‘Discrimination’ means 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 employee.” W. VA. CODE § 6C-2-2(d).

3. “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

4. To establish discrimination and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

(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 employee(s); and,

(c) that the difference in treatment was not agreed to in writing by the employee.

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

5. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility

determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

6. Grievant proved by a preponderance of the evidence that Respondent has discriminated against her and subjected her to favoritism in both work and vehicle assignments, which has limited her skills and her opportunities for advancement.

Accordingly, this Grievance is **GRANTED**. Respondent is hereby **ORDERED** to take all actions necessary to stop the discrimination and favoritism, as detailed herein, to which Grievant has been subjected during her employment in District 2.

Any party may appeal this decision to the Intermediate Court of Appeals.⁹³ Any

⁹³ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE

such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: October 14, 2022.

Carrie H. LeFevre
Administrative Law Judge

§ 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.