THE WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL L. FROST,

Grievant,

v. **Docket No. 2013-2074-BSC**

BLUEFIELD STATE COLLEGE,

Respondent.

DECISION

Daniel L. Frost ("Grievant") filed this grievance against his employer, Bluefield State College ("BSC" or "Respondent"), on June 6, 2013. His statement of grievance reads:

> Bluefield State has now brought to fruition the fact of downgrading a position in addition to making it a part time position, in order to deter me from applying, by now making it a full time position as was addressed in a previous grievance. This was notated in an E-mail addressing what their intentions were. Additionally, it would not surprise me to see the position upgraded to the original pay grade 17 later to which I will address again. It seems this administration as well as the past continues to operate in an arbitrary and inconsistent manner creating a hostile work environment.

As relief sought, Grievant requested:

> Bluefield State College to admit they never wanted me in the position during the bumping process and they later downgraded the position and made it part time to deter me for applying for the position once it was advertised. To which (*sic.*) I have previously submitted an E-mail documenting this situation in addition to prior testimony. Position to be re-instated at pay grade 17 with the title of Student Service Specialist and advertised according [to] BSC hiring policy # 42.

Following a Level One grievance hearing on October 4, 2013, BSC denied the grievance on November 20, 2013. Grievant appealed to Level Two of the grievance

procedure on December 3, 2013. After mediation was completed at Level Two on April 21, 2014, Grievant appealed to Level Three on April 28, 2014. A Level Three hearing on this grievance was initially scheduled for August 25, 2014. On July 2, 2014, Respondent filed a Motion to Dismiss. Following receipt of Grievant's Memorandum in Opposition of Motion to Dismiss dated July 23, 2014, the undersigned Administrative Law Judge issued an Order Denying Motion to Dismiss on July 29, 2014. Thereafter, the Level Three hearing was continued, for good cause shown, at Respondent's request, and rescheduled for November 14, 2014. On October 20, 2014, Respondent filed a Supplemental Motion to Dismiss. On October 28, 2014, the undersigned issued an Order Denying Supplemental Motion to Dismiss. It is not necessary to discuss the merits of these motions, as those pleadings are now part of the record in this matter in accordance with the West Virginia Administrative Procedures Act, W. Va. Code § 29A-1-1, *et seq*. Following another continuance for good cause shown, as requested by Respondent, this matter was rescheduled and a Level Three hearing held before the undersigned Administrative Law Judge on January 16, 2015, in Beckley, West Virginia. Grievant was represented at the hearing by Derrick W. Lefler, Esquire, with Gibson, Lefler and Associates. BSC was represented by Assistant Attorney General Brian L. Lutz. This matter became mature for decision on March 2, 2015, upon receipt of the parties' post-hearing briefs.

Synopsis

Grievant is employed as a Counselor II by Respondent BSC. He has been employed by BSC since September 1995, initially working in the Physical Plant as a

Painter, Trades Worker and Trades Worker Lead. Grievant has filed several grievances during his tenure at BSC. Grievant established by a preponderance of the evidence that BSC's Vice President for Student Affairs and Enrollment Management retaliated against Grievant for engaging in extensive grievance activity by intentionally and improperly manipulating the terms and conditions of employment of the Director of Intramurals and Wellness Programs which was posted in or about June 2011 for the express purpose of deterring Grievant from submitting an application for the position. BSC failed to establish that the legitimate reasons it posited for making these changes constituted anything more than a pretext for prohibited retaliation. Accordingly, Grievant is entitled to a make-whole remedy involving reinstatement of the *status quo* as it would have existed in 2011, absent any prohibited retaliation.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed from the hearings held at Level One and Level Three.

Findings of Fact

1. Grievant is currently employed by Bluefield State College ("BSC") as a Counselor II in the Counseling Center. Grievant has been employed at BSC since September 1995, when he began working in the Physical Plant as a Painter, and later as a Trades Worker and a Trades Worker Lead, the latter position obtained as a result of a grievance Grievant filed sometime around 1997.

2. Grievant became a Project Coordinator with the Veterans Upward Bound Program at BSC in 2000. He thereafter served as an Educational Opportunity Counselor before being promoted to Student Services Specialist, Pay Grade 17, with

the same program. After funding for Veterans Upward Bound dried up in 2007, BSC placed Grievant in a Counselor II position, which is also in Pay Grade 17. That position currently reports to the Vice President of Student Affairs and Enrollment Management.

3. Shelia Johnson is currently employed by BSC as Vice-President of Financial and Administrative Affairs, and has been in that position since 1997.

4. Joan Buchanan is currently employed by BSC as Director of Student Activities. Ms. Buchanan has worked in Student Life or Student Activities at BSC for approximately 15 years.

5. Ms. Buchanan currently reports to Dr. Joanne Robinson, BSC's Vice President of Student Affairs and Enrollment Management.

6. In 2011 through 2014, John Cardwell held the position of Vice President of Student Affairs and Enrollment Management, and served as Ms. Buchanan's immediate supervisor.

7. In early 2011, Carolyn Kirby held the position of Director of Intramurals & Wellness Programs ("Intramurals position") as a full-time Pay Grade 17. In 2007, this same position was titled "Student Services Specialist" at Pay Grade 17, and held by Roy Grimes.

8. While employed in Maintenance in 1997, Grievant applied for the Intramural position when it became vacant, but was not selected. Subsequently, when Grievant's Student Services Specialist position was eliminated in 2007, Grievant asked to be reassigned to the Intramural position. However, that request was denied, and he was instead reassigned as a Counselor II.

9. Following Ms. Kirby's departure for another position, the Intramurals position she previously occupied was posted in or about July 2011 as a 9-month position at Pay Grade 16. *See* G Ex 1.

10. The decision to reconfigure the Intramurals position as a 9-month position with a lower pay grade was made by Mr. Cardwell.

11. At the time these changes were made, Mr. Cardwell told Ms. Buchanan that he was making the change in the Intramurals position, making it a part-time position, and lowering the pay grade, to keep Grievant from applying, further stating that he believed Grievant needed to maintain full-time employment at his current pay rate.

12. Mr. Cardwell also told Ms. Buchanan; "You don't want to work with Mr. Frost." Ms. Buchanan stated that she was willing to work with anyone who was qualified for the position.

13. At the time this conversation took place, Ms. Buchanan was serving in an interim capacity as Director of Student Activities.

14. Shortly after this conversation regarding Mr. Frost, Ms. Buchanan asked Mr. Cardwell when her position would be changed from interim status, given that she had been serving in an interim capacity for approximately two years. Mr. Cardwell stated that he could no longer support her because she was not a "team player."

15. Ms. Buchanan subsequently took her concerns regarding the status of her position to Christina Brogdon, who was then BSC's Director of Human Resources. Ms. Brogdon told Ms. Buchanan that she could not take action on the Director of Student

Activities position until the Intramurals position was filled. Ms. Brogdon stated to Ms. Buchanan: "As you are aware, no one wants Mr. Frost in that position."

16. There were no changes regarding the duties assigned to the 9-month position at Pay Grade 16 and the duties assigned to the position when it was a 12-month position at Pay Grade 17, other than the swimming pool on campus was closed when the position was posted, and the new Director of Intramurals was not then required to oversee pool staffing.

17. The campus pool had been closed for a significant period of time while Ms. Kirby held the Intramurals position, as well as while her predecessor held the same position, without any documented effort to revise the position description to reflect the pool's closure over a three to four-year time frame. Re-opening the campus pool was an on-going goal at BSC, but could not be accomplished until sufficient funds were donated to make necessary repairs.

18. Shortly after taking the Intramurals position, Mr. Belt obtained certification as a life guard, as required in the Position Information Questionnaire ("PIQ") for the position, even though the swimming pool remained closed with no expectation of reopening in the immediate future.

19. Grievant did not apply for the Intramurals position when it was posted in 2011. Grievant was a full-time employee at Pay Grade 17 and would have been required to suffer a significant loss of pay had he voluntarily elected to accept a part-time (9 month) position at Pay Grade 16.

20. On a separate occasion, Ms. Buchanan and Mr. Cardwell had a telephone discussion regarding the Intramurals position at which time Mr. Cardwell reiterated his desire to keep "Frosty" (Grievant) out of that position. Ms. Buchanan was using a speaker phone on her end of the conversation and Grievant, who was coincidentally sitting in her office at the time, overheard this conversation.

21. Louis Belt was the successful applicant for the posted Intramurals position. The swimming pool on campus was still closed when he began working in that position. Prior to his selection, and continuing through the present, Mr. Belt was also under contract with BSC to coach the men's and women's tennis programs.

22. Mr. Belt had prior experience as the Director of Tennis for a private country club, as well as serving as a substitute teacher in Mercer County Schools, and coaching high school tennis teams. Mr. Belt has an engineering degree from Virginia Tech.

23. Effective March 1, 2013, the Intramurals position was upgraded to a 12-month position at Pay Grade 16. *See* G Ex 4.

24. Ms. Buchanan was not consulted on the decision to upgrade the Intramural position to a 12-month position.

25. Ms. Buchanan was informed by Mr. Cardwell that Sheila Johnson had found additional funds to pay Mr. Belt as a full-time employee.

26. Ms. Buchanan proposed that the PIQ for the position needed to be updated and the position posted. Ms. Brogdon in Human Resources approved the PIQ,

and Ms. Buchanan signed the revised PIQ for the Intramurals position as directed by Mr. Cardwell. The position was not reposted.

27. Mr. Belt recalled that the campus swimming pool reopened in May 2013. The pool closed again for repairs in 2014 and was not in service for approximately two months.

28. At the time Mr. Cardwell informed Mr. Belt that his position would be extended to a 12-month position, Mr. Belt was working in the fitness center because there were no student employees available to keep that facility open.

29. Ms. Johnson speculated that renting the swimming pool for private events would generate sufficient revenue to cover the cost of Mr. Belt's additional pay as a full-time employee.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met his burden. *Id.*

Respondent contends that this grievance was not initiated within the statutory time limits. As required by W. Va. Code § 6C-2-3(c)(1), BSC invoked this timeliness defense in advance of Level Two by raising it before the Level One Hearing Examiner. (HT Vol 1 at 5; HT Vol 2 at 10-11, 57-58.)[1] *See Alexander v. Kanawha County Bd. of Educ.*, Docket No. 01-20-377 (Sept. 12, 2001). BSC has the burden of proving any assertion that a grievance was not timely filed by a preponderance of the evidence. *Redd v. McDowell County Bd. of Educ.*, Docket No. 2012-0420-McDED (July 27, 2012); *Dunn v. Marshall Univ.*, Docket No. 2009-0983-CONS (Feb. 16, 2010); *Webb v. Shepherd Univ.*, Docket No. 06-HE-400 (Feb. 28, 2007); *Carroll v. Mingo County Bd. of Educ.*, Docket No. 98-29-396 (Feb. 3, 1999). Once an employer demonstrates that a grievance has not been timely filed, the employee then has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ.*, Docket No. 2012-0188-RalED (Mar. 28, 2012); *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar 31, 1997). *See Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997), *aff'd*, Cir. Ct. of Kanawha County No. 97-AA-1106 (June 21, 1999).

[1] The Level One record includes two hearing transcripts, one transcript from a hearing on August 20, 2013, at which neither Grievant nor his representative appeared, due to a communication error, and another transcript from a hearing on October 4, 2013, at which all parties appeared and were represented. These transcripts will be cited as "HT Vol 1" and "HT Vol 2," respectively.

W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator . . .

The West Virginia Supreme Court of Appeals has recognized that there is a discovery rule exception to the established time limits under which the time "to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). *Spahr* applied the grievance procedure time limits set forth in W. Va. Code § 18-29-4(a)(1), one of the predecessor statutes to the current grievance procedure. However, the critical phrase, "within fifteen days of the date on which the event became known to the grievant," applied in *Spahr* is indistinguishable from the current language which merely substitutes "employee" for "grievant."

BSC established by preponderant evidence that the position at issue, formerly a full-time Pay Grade 17 position, was posted and filled in 2011 as a "part-time," 9-month position in Pay Grade 16. In March of 2013, BSC changed the position to a "full-time," 12-month position, still classified at Pay Grade 16. BSC did not post this change as a position vacancy, and the incumbent employee, Louis Belt, was allowed to remain in the position. Grievant became aware of this change in the position from a .75 full-time equivalent ("FTE") position to a 1.0 FTE position on or about June 5, 2013, when the

change was confirmed in correspondence of that date from Jonette Aughenbaugh, BSC's Director of Human Resources. This grievance was filed on June 6, 2013. BSC contends that Grievant should have filed his grievance in 2011, because his grievance relates back to that event.

Grievant asserts that BSC's actions in changing the position from a 9-month position to a 12-month position in 2013 provides evidence of BSC's intent, going back to 2011, to manipulate the structure and benefits of this particular position to keep him from applying for the vacancy, as part of a continuing effort to retaliate against him for filing grievances challenging various employment actions. Grievant presented preponderant evidence that Respondent knowingly and intentionally made changes to the position posting in 2011 for the express purpose of deterring Grievant from making an application for the position. Further, while these changes may have been transparent at the time the position was posted and filled, Respondent's motive was not publicly revealed, an understandable omission because the employer was acting in a manner that was clearly contrary to law. This is the particular kind of conduct which the "discovery exception" to the grievance procedure filing deadline was intended to address.

Grievant also contends that this course of conduct involved a continuing violation, because the position posting had been artificially manipulated to deter him from submitting an application. Thus, it was only a matter of time before the employer would recognize that the position needed to be a full-time position, so that someone would be available to supervise the operation of the swimming pool when it reopened.

Ms. Johnson's testimony was essentially consistent with this theory, supporting Grievant's contention that the effort to keep him out of the Intramurals position involved a continuing violation of the prohibition against retaliation.

W. Va. Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g.*, filing a grievance);
>
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013). *See Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether

the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievant easily established a *prima facie* case of retaliation. Prior to the events which form the basis for this grievance, Grievant participated in the grievance procedure on multiple occasions. In addition to Grievant's uncontradicted testimony to this effect, administrative notice may be taken of prior decisions of this Grievance Board wherein Grievant filed grievances against BSC prior to the date of the actions which Grievant asserts as acts of retaliation, and of which the alleged retaliator, Mr. Cardwell, was necessarily aware. It is also clear that the Intramurals position was modified in 2011, after many years as a full-time Pay Grade 17 position, making it undesirable for someone in Grievant's situation, because he would then have to suffer a pay cut in order to take the position. It was also established the Grievant had previously expressed an interest in the position as an alternative to his Counselor II assignment.

It is noted that Ms. Buchanan's testimony describing Mr. Cardwell's statements responding to her questioning of his decision to post the Intramural position as a 9-month position in Pay Grade 16 constitutes hearsay evidence. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a grievance proceeding. *See Hamilton v. W. Va. Dep't of Health & Human Res.*, Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-

hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the proffering party's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *See Simpson v. W. Va. Univ.*, Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ.*, Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).

Ms. Buchanan appeared in person at the Level Three hearing and testified under oath. She was a credible witness who appeared understandably apprehensive about giving testimony that was detrimental to her employer. It was clear from her demeanor that she was not enthusiastic about supporting Grievant's position or providing information that would be detrimental to her employer. The conversation she described with her immediate supervisor, Mr. Cardwell, involved the Intramural position under her direct supervision, and represented an appropriate topic for two BSC managers to be discussing at the time. In addition to her testimony recollecting this conversation, there is a contemporaneous e-mail from Ms. Buchanan to Mr. Cardwell wherein a similar discussion is related. That e-mail, dated June 8, 2011, included the following statements:

> You also discussed your fear of Daniel Frost becoming involved in the bid for positions down here. We discussed how to prevent that by making one of the positions down here a [Pay Grade] 15 so he would not want to be transferred to Student Life. During the past two years I have heard so much about trying to keep Frosty out of Student Life and experience (*sic.*) many changes in Student Life restructuring to prevent this. My concern is for a continued successful program in Student Life, not just trying to keep another employee from wishing to transfer. . . .

G Ex 2.

BSC introduced Mr. Cardwell's e-mail response to Ms. Buchanan dated later that same day, and which stated as follows:

> Joan,
> As I indicated in my email to you the revised PIQ will be submitted to HR by Monday. HR determines pay grade not me as I have told you on numerous occasions. I cannot guarantee slotting. This reorganization is not an attempt to keep anyone from a position but a way to keep our programs viable and available for our students. As you recall we have a deficit of over $100,000 that we have to make up. Our increase this year was a way to keep us viable. Remember we have not had an increase in student fees in over 20 years and in fact we have lost revenue from HERF and grants. Our student surveys have grilled us for lack of intramurals and a variety of activities. It is my intent for you to review the PIQ before I submit it. Thank you for your feedback and your dedicated service to BSC.
> John Cardwell

R Ex A.

In evaluating these contradictory comments, it should be noted that Ms. Buchanan was cross-examined by Respondent's counsel without revealing any indication that any aspect of her narrative had been fabricated. There was no evidence of any animus by Ms. Buchanan toward Mr. Cardwell. Further, Mr. Cardwell's e-mail represents hearsay evidence, and BSC did not call Mr. Cardwell to testify in person, so that he could be similarly cross examined. Other than the fact that Mr. Cardwell is no

longer employed by BSC, there was no explanation indicating why Mr. Cardwell was not available as a witness for the employer. Further, Grievant's prior history of filing grievances, including grievances which challenged Mr. Cardwell's authority or discretion, makes it completely credible that he would have some desire to retaliate against Grievant, and prevent him from obtaining a desirable position in Student Life. BSC's intention was further evidenced by the phone conversation between Ms. Buchanan and Mr. Cardwell which Grievant happened to overhear.

Accordingly, the undersigned Administrative Law Judge finds that Grievant presented preponderant evidence that his employer, through Vice President John Cardwell, manipulated the terms and conditions of employment for the Intramurals position in an effort to discourage Grievant from making an application to fill the vacancy as posted in 2011, and that the reinstatement of the position in 2013 was an inevitable consequence of this activity, given that reopening the campus swimming pool was an ongoing goal of the administration, and its previous closure for repairs had not resulted in changing the terms and employment of other employees who had no record of any grievance activity. Further, the legitimate reasons articulated by BSC for these changes were nothing more than a pretext to permit retaliation and reprisal against Grievant.

As a consequence of a grievant demonstrating that his employer engaged in reprisal or retaliation prohibited by W. Va. Code § 6C-2-2(o), this Grievance Board has authority to issue a make-whole remedy which requires that the parties restore the conditions of employment which existed before the prohibited action occurred. *See Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12,

2013); *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar. 30, 1999); *Sanders v. Putnam County Bd. of Educ.*, Docket No. 97-40-459 (Dec. 3, 1997). *See also Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992). This is generally referred to as a *status quo ante* remedy. *See Jarman v. Dep't of the Navy*, 144 F.3d 794 (Fed. Cir. 1998); *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 856 F.2d 293 (D.C. Cir. 1988).

As of the operative time when the Intramural position was manipulated in an effort to discourage Grievant from applying for the vacancy, it involved a 12-month position at Pay Grade 17. In order to create a make-whole remedy, the position should be re-established as a full-time Pay Grade 17 solely for the purpose of allowing Grievant a reasonable opportunity to apply for the position. If Grievant does not apply for the position within a reasonable time, then no further action need be taken. The violation established was directed solely toward Grievant, and BSC is therefore not required to repost the position for other eligible employees to submit an application. Similarly, Mr. Belt, the incumbent employee who currently holds this position, was not a party to this grievance and may not benefit from a "windfall" resulting from the position being re-established at Pay Grade 17 to remedy actions that were directed specifically at Grievant for exercising his right to use the statutory grievance procedure. This decision does not address the issue of whether Grievant meets the minimal qualifications to be considered for the Intramural position, or whether, if he does meet the minimal qualifications, he is better qualified than Mr. Belt[2] to fill the position, and nothing in this

[2] In the event such a comparison takes place, it should be based upon the qualifications of the applicants as of July 2011, and not consider any subsequent experience, training or skills they may have obtained.

decision should be construed to suggest any such opinion. If Grievant is selected to fill the Intramurals position, he will be entitled to seniority in that position retroactive to the date in 2011 when Mr. Belt began serving in that position. Because Grievant, at all times pertinent to this grievance, was employed in a full-time position at Pay Grade 17, he will not be eligible to receive back pay or any other benefits, should he apply for, and be selected to fill, the Intramurals position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. *Redd v. McDowell County Bd. of Educ.*, Docket No. 2012-0420-McDED (July 27, 2012); *Dunn v. Marshall Univ.*, Docket No. 2009-0983-

CONS (Feb. 16, 2010); *Webb v. Shepherd Univ.*, Docket No. 06-HE-400 (Feb. 28, 2007); *Carroll v. Mingo County Bd. of Educ.*, Docket No. 98-29-396 (Feb. 3, 1999).

3. Once an employer demonstrates that a grievance has not been timely filed, the employee then has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ.*, Docket No. 2012-0188-RalED (Mar. 28, 2012); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar 31, 1997). *See Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989).

4. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator . . .

5. Under W. Va. Code § 6C-2-3(c)(1), "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." BSC timely asserted this defense, and demonstrated by a preponderance of the evidence that the grievance was not filed within fifteen days of the original posting of the Intramurals position, or the conversion of the Intramurals position from a .75 FTE position to a 1.0 FTE position.

6. Under the "discovery rule exception," the time in which "to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving

rise to the grievance." Syl. pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Grievant's discovery that BSC had reinstated the Intramurals position as a 12-month position without re-advertising the position to be filled competitively represents a factual discovery sufficient to satisfy the legal exception established in *Spahr*. Because the change in the Intramurals position was not posted or advertised, BSC did not demonstrate that Grievant was aware of the change before he received a response to an electronic mail inquiry. Accordingly, this grievance was timely filed within the established time limits following that event. *See Rose v. Raleigh County Bd. of Educ*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Redd*, *supra*; *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

7. The Public Employees Grievance Board is authorized by statute to provide relief to an employee for reprisal as that term is defined in W. Va. Code § 6C-2-2. *See Matney v. Dep't of Transp.*, Docket No. 2009-1413-CONS (Oct. 1, 2010).

8. W. Va. Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g.*, filing a grievance);

(2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013). *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Matney v. Dep't of Health & Human Res.*, *supra*; *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

9. Grievant established a *prima facie* case of retaliation by a preponderance of the evidence, demonstrating that a BSC Vice President responded to Grievant's extensive grievance activity by changing the terms and conditions of the Intramurals position for the express purpose of deterring Grievant from applying for the vacant position. BSC failed to establish by a preponderance of the evidence that any of the articulated *bona fide* reasons for making those same changes constituted anything more than a pretext to mask unlawful retaliation.

10. Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a “make-whole” remedy, intended to restore the grievant to his or her rightful place as an employee. *Matney v. Dep’t of Health & Human Res.*, *supra*; *Barker v. Lincoln County Bd. of Educ.*, Docket No. 98-22-496 (Mar 30, 1999). *See Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ.*, Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ.*, Docket No. 97-40-459 (Dec. 3, 1997).

Accordingly, this grievance is **GRANTED.** Respondent BSC is **ORDERED** to provide Grievant with a posting for the position of Director of Intramurals and Wellness Programs as a 1.0 full-time equivalent position at Pay Grade 17, and allow Grievant not less than ten (10) days to make application, as provided in BSC Policy No. 42, and to consider any such timely application as Grievant elects to submit, consistent with Policy No. 42 and all applicable laws.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be

prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: March 19, 2015

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LEWIS G. BREWER
Administrative Law Judge