THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS BRENT MORGAN,

Grievant,

v. **Docket No. 2015-1327-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Grievant, Thomas Brent Morgan, filed a level one grievance against his employer, Respondent, Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("Bateman"), dated May 22, 2015, stating as follows:

> [a]t the beginning of May 2015 I noticed that my pay had decreased by 57.00 each pay period. I let my supervisor know and he directed me to HR Dept. After bringing it to there attention they informed me that I was being over paid since 2011. How can this be that this was noticed after I returned from work injury? Proceeded with chain of command and informed CEO Craig Richards of situation which he contacted Charleston and they referred it back to HR Dept. There resolution was as before. How can you be overpaid for almost 3 years? They have done W-2's and everything else and this is just now being noticed. What's even worse is that I was not contacted when this adjustment was made. They just started taking it. Also attached are check stubs to show the change. It is my understanding that each time I receive a pay check that is not the amount I used to make is a grievable event. I mean I've been off payroll on other occasions and no other adjust's were made until I came back from a workers comp. claim.

As relief sought, Grievant seeks "[r]ate of pay being brought back up to 833.00 per pay period and back pay from Jan, 2015 to present." Grievant amended his statement of grievance at level two stating the following:

> [a]lthough I agree part of the grievance board decision that I can only make wages that my job is salaried for is understandable, yet to be accountable for a mistake someone else has made is unfair and just wrong. What I've been receiving in wages since January has already been causing financial distress. I feel that the responsible person that made the mistake should be accountable for reimbursement. As stated by myself and HR Dept. This mistake was not my fault. Nor was any of us aware of it till I discovered it on the 1st of May, 2015. (See statement enclosed) Not only have they made this mistake once, they entered me in wrong again when I made them aware of this. I am deeply sorry that this has happened, but it was totally out of my control. How could this mistake happen when salaries are set up in classifications? Not only that, but as I stated before, how can this go on for almost 3 years before anyone noticed?

As relief sought, Grievant seeks, "[t]hat responsible person who made mistake be accountable for back pay. That safeguards be put into place so this won't happen again to someone else." At level three Grievant only amended the relief sought section of his statement of grievance, stating "[t]hat DHHR (Mildred Mitchell-Bateman Hospital) take responsibility for there (sic) payroll mistake."

A level one hearing was conducted on June 11, 2015. The grievance was denied by decision dated July 6, 2015. Grievant appealed to level two of the grievance procedure on July 10, 2015.[1] A level two mediation was conducted on August 19, 2015. On August 26, 2015, Grievant perfected his appeal to level three. A level three hearing was conducted by the undersigned on February 1, 2016[2], at the Grievance Board's

[1] It is noted that Grievant's level two appeal was dated July 9, 2015, but was post-marked July 10, 2015. It was clocked in at the Grievance Board on July 13, 2015. It is further noted that Grievant's Representative filed his "Appeal to Level II" on July 16, 2015. The "Appeal to Level II" only states that Grievant is appealing his grievance to level two, and does not go into the details set forth in Grievant's July 10, 2015, appeal.

[2] This was the earliest of the proposed dates submitted by the parties' representatives when this matter was being scheduled at the end of September 2015.

Charleston, West Virginia, office. This matter became mature for consideration on March 16, 2016, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Harry C. Bruner, Jr., Esquire, Assistant Attorney General.

Synopsis

Grievant is employed by Respondent as a housekeeper at Mildred Mitchell-Bateman Hospital. In May 2015, it was discovered that Grievant was being paid in excess of his correct salary, and Respondent adjusted his salary downward to correct the error. However, it was later learned that Grievant had been both overpaid and underpaid at varying times between February 2012 and May 2015 due to clerical errors resulting is his being over paid a total of $2,013.58 during that time. Initially, Grievant sought a return to the higher salary. However, Grievant acknowledged that a mistake had been made and withdrew his claim to the higher salary. During the level one proceeding, Respondent informed Grievant that it intended to seek repayment of the overpayment from him. Grievant continued with his grievance alleging discrimination, reprisal, and that Respondent's actions were arbitrary and capricious. Respondent denied all of Grievant's claims. Grievant failed to prove his claim of discrimination by preponderance of the evidence. Grievant established a *prima facie* case of reprisal, and Respondent successfully rebutted the presumption of retaliation. Grievant proved that Respondent's actions in seeking repayment of the overpayment was unreasonable, and otherwise arbitrary and capricious. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

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 housekeeper at Mildred Mitchell-Bateman Hospital. Grievant has been so employed for about six years.

2. In or about May 2015, Grievant noticed that his bimonthly gross pay had been reduced from $833.00 per pay to $797.00 per pay. A few months earlier, Grievant had been off work due to a work-related injury. During this time, Grievant was off payroll.

3. Grievant went to his supervisor to ask about the reduction in his pay, and was instructed to speak with someone in the Human Resources Department. Thereafter, Grievant went to see someone in the HR Department about the reduction in his pay. Within a few days, Grievant was informed by an HR employee that he had been overpaid since 2012, and such is why his pay had been reduced.[3]

4. Grievant received no written notification from Respondent or DHHR's Office

[3] This HR Department employee has been identified as Vicky Crager. However, she was not called as a witness, and the undersigned does not know if this is the correct spelling of her name. Based upon testimony provided at the level three hearing, Ms. Crager was unable to appear at the level three hearing because of a death in her family. It is further noted that near the beginning of the hearing, counsel for Respondent indicated that it would proceed in Ms. Crager's absence. However, at the end of the level three hearing, counsel for Respondent moved for a second day of hearing so that Ms. Crager could be called as a witness regarding the overpayment calculations. Counsel could articulate no reason why Ms. Crager's testimony regarding the calculations would be necessary in the case, and had even presented evidence that she had not prepared any of said calculations in the first place. The undersigned denied counsel for Respondent's request given the evidence presented. However, when Grievant's representative indicated that Grievant was not disputing the overpayment calculations that were presented, counsel for Respondent withdrew his request for the opportunity to call Ms. Crager as a witness.

of Human Resource Management (OHRM) of the overpayments, underpayments, or any changes to his pay. Further, Grievant received no written notification from Respondent or OHRM informing him of their intent to seek repayment from him for the overpayment.

5. OHRM is not a party to this grievance, and no one from that office was called as a witness at the level three hearing in this matter.

6. Between 2012 and January 2015, Grievant went off payroll more than once for valid medical reasons. Each time an employee goes off payroll and returns, a WV-11 form must be completed. It appears that all of the WV-11 forms completed for Grievant during this time were correct.[4] However, it appears that clerical errors were made when the information was entered into the system at OHRM which caused Grievant to be both overpaid and underpaid at varying times between February 15, 2012, and May 15, 2015.[5]

7. According to the payroll records obtained by Respondent, Grievant has been overpaid a total of $2,013.58.[6] OHRM calculated the amount of overpayment and sent the information to Respondent. Neither Ms. Worden nor Ms. Crager made these calculations. The person who ran these calculations is believed to have been David Curzey, who worked as the Director of Payroll in OHRM, but he is no longer employed there.[7]

8. Grievant first learned at the level one conference that Respondent was seeking repayment from him for the overpayment. At level three, Respondent proposed that Grievant repay the overpayment at the rate of $20.00 per pay check.

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[4] *See*, Respondent's Exhibit 2, WV-11 forms.
[5] *See*, testimony of Kieth Anne Worden; Respondent's Exhibit 4, payment spreadsheet.
[6] *See*, testimony of Kieth Anne Worden; Respondent's Exhibit 4; Respondent's Exhibit 2; Respondent's Exhibit 3.
[7] *See*, testimony of Kieth Anne Worden.

9. At no time was Grievant paid a salary that was outside the range for his pay grade.

10. Respondent has made errors in paying employees before which have resulted in the employees being overpaid. In at least two such cases, the employees have repaid the overpayments. However, when this occurred, OHRM was not involved with payroll and did not instruct Bateman to seek repayment of the overpayments. At that time, Bateman was in charge of doing its payroll in house.[8]

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Initially in this matter, Grievant was challenging Respondent's decision to reduce his pay to the correct amount when it was learned he was being overpaid, and sought his pay be increased to the prior amount. In his appeal to level two, Grievant acknowledged that a mistake had occurred resulting in his overpayment, but focused his argument on

[8] *See*, testimony of Kieth Anne Worden.

only that he should not be responsible for the repaying the overpayment because he had not made the mistake. Based upon the evidence presented, it appears that Grievant was only informed that Respondent wanted him to repay the overpayment during the level one proceeding. Grievant never uses the words "discrimination" or "reprisal" in his statements of grievance, but made these arguments at level three. However, given what Grievant has said in his statements of grievance, the evidence presented, and that Respondent addressed the issue of discrimination in its proposed Findings of Fact and Conclusions of Law, the undersigned will consider the claims of discrimination and reprisal. Respondent denies Grievant's claims and asserts that policy requires it to seek repayment of the overpayment from Grievant.

"'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). In order to establish a discrimination claim 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant appears to be arguing that Respondent has engaged in discrimination toward him as it has not sought repayment of overpayments from other employees. At the level three

hearing, neither party presented much evidence regarding whether other employees have been required to repay overpayments. Ms. Worden testified that two other employees had been overpaid within the last six and a half years, and Respondent sought and received repayment from both. However, it is unknown when this occurred, who the employees were, what their jobs were, the reason for the overpayment, or the amount of repayment sought. Grievant presented a March 27, 2006, report of the Legislative Auditor entitled, "West Virginia Department of Health and Human Resources Special Report on Overtime and Additional Compensation for the Period of July 1, 2003-June 30, 2005," in which, it is listed that Mildred Mitchell-Bateman Hospital overpaid some of its employees, and made other errors in the payment of employees, noting an error rate of 57.14% in the payments the auditor tested.[9] However, this report was for a time period many years before the incident leading to this grievance, and pertained mostly to the payment of overtime and additional compensation, which is not at issue in this matter. While the legislative auditor's report shows that DHHR and Bateman have made significant errors in payment of its staff in the past, such is largely irrelevant to the instant grievance. Given the evidence presented, the undersigned cannot find that Grievant proved his claim of discrimination by a preponderance of the evidence.

Reprisal is "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." W. Va. CODE § 6C-2-2(o). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

[9] *See*, Grievant's Exhibit 1, report of the legislative auditor.

> (1) That he engaged in protected activity (i.e., filing a grievance);
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> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
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> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families,* Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013); *Cobb v. Div. of Highways,* Docket No. 2013-0866-CONS (Nov. 7, 2013).

Grievant's claim of reprisal arises out of his allegation that Vicky Crager from

Bateman's HR Department initially told him that Respondent would not be seeking repayment of the overpayment from him. Following this, Grievant filed the instant grievance challenging the reduction of his pay to the correct amount. Ms. Worden did not address whether Ms. Crager told Grievant that Respondent would not seek repayment of the overpayment. Instead, she testified that OHRM made the decision to seek repayment of the overpayment and informed her of the same. Apparently, it is undisputed that Grievant was first informed that Respondent was seeking repayment from him at the level one grievance proceeding. Respondent was obviously aware that Grievant had filed this grievance when it informed him that it was seeking repayment. Further, based upon the timing between Grievant's filing of this grievance and being informed at the level one proceeding that repayment would be sought, an inference can be drawn that there was a retaliatory motive. Accordingly, based upon the evidence presented, Grievant has demonstrated a *prima facie* case of reprisal.

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Respondent asserts that it must seek reimbursement from Grievant pursuant to the Division of Personnel's Administrative Rule, citing W.VA. CODE ST. R. §§ 143-1-5.4(d)

and 3.77. Further, Respondent points to its past practice, that being it has sought repayment from two other employees who were similarly overpaid. The DOP Administrative Rule, Rule 5.4(d) states as follows:

> Additional Pay.—Except for authorized overtime, Board approved pay differentials and monetary incentives, or other statutorily required and/or authorized payments, appointing authorities shall make no pay in addition to the regular salary to any employee. Additional duties imposed or volunteered are not an exception to this rule.

W.VA. CODE ST. R. § 143-1-5.4(d) (2012). DOP Administrative Rule, Rule 3.77, which is part of the definitions section, states as follows:

> Salary Adjustment.—A salary change resulting from a revision of the pay plan, the reassignment of a class to a different pay grade, a Board approved pay differential, a temporary classification upgrade, a general wage increase mandated by the Legislature or the Governor, or the correction of payroll errors.

W.VA. CODE ST. R. § 143-1-3.77 (2012). These two rules do not state that an employer is required to seek repayment from employees who are mistakenly overpaid. Rule 5.4(d) simply states that employees cannot be paid more than their salaries except for overtime, incentives, and differentials. Rule 3.77 is no more than the definition of the term "salary adjustment," which includes a salary change resulting from the correction of payroll errors. Therefore, the adjustment to Grievant's salary to reduce the same where the error was found was a "salary adjustment" permitted by this rule to correct the payroll error that had been discovered. Given the evidence presented, it appears that Respondent based its decision to seek repayment of the overpayment on its past practices and the two rules mentioned above. Even though the timing was suspicious, it appears that the repayment was sought for non-retaliatory reasons. Therefore, the undersigned concludes that

Respondent has rebutted the presumption of retaliation.

The issue now is whether Respondent can require Grievant to repay the overpayment of $2,013.58. It is again noted that Respondent has not yet began to collect the overpayment from Grievant but intends to do so pending the decision in this grievance. Respondent contends that OHRM has directed it to seek the repayment from Grievant, and that it has authority to so collect under Administrative Rule 3.77. Grievant asserts that he should not have to repay the overpayment because it was not his mistake, he was never paid above his pay grade range, and that requiring him to repay the amount would be unreasonable. As stated above, there is nothing in Administrative Rule 3.77 that addresses the repayment of overpayments. It only addresses the definition of salary adjustments to correct payroll errors, which was done when Grievant's salary was adjusted downward when it was discovered that he was being overpaid in May 2015. The repayment of an overpayment to an employee is not addressed in any rule, regulation, statute, or policy introduced into evidence at the level three hearing.

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*,

769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Given the circumstances of this case and the evidence presented, the undersigned finds that it would be unreasonable to require Grievant to repay the $2,013.58 overpayment which accrued as a result of his being both overpaid and underpaid in error, without his knowledge and through no fault of his own, between February 15, 2012, and May 15, 2015.

Accordingly, this grievance is GRANTED IN PART, AND DENIED IN PART.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

2. "'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). In

order to establish a discrimination claim 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant failed to prove his claim of discrimination by a preponderance of the evidence.

4. Reprisal is "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." W. Va. CODE § 6C-2-2(o). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v.*

Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994).

5. "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families,* Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

6. An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013); *Cobb v. Div. of Highways,* Docket No. 2013-0866-CONS (Nov. 7, 2013).

7. Grievant established a *prima facie* case of reprisal against Respondent by a preponderance of the evidence.

8. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a

pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

9. Respondent successfully rebutted the resumption of retaliation by showing non-retaliatory reasons for its actions in seeking repayment of the overpayment from Grievant. Grievant failed to prove by a preponderance of the evidence that Respondent's reasons for seeking the repayment were a pretext for a retaliatory motive.

10. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

11. Grievant proved by a preponderance of the evidence that given the circumstances of this case and the evidence presented, it would be unreasonable, and otherwise arbitrary and capricious, to require Grievant to repay the $2,013.58 overpayment which accrued as a result of his being both overpaid and underpaid in error,

without his knowledge and through no fault of his own, between February 15, 2012, and May 15, 2015.

Accordingly, this Grievance is **GRANTED IN PART AND DENIED IN PART**.

Respondent is hereby ORDERED to cease any actions to collect from Grievant the $2,013.58 overpayment he received between February 2012 and May 2015. Further, if Respondent has collected from Grievant any sums toward the repayment of the $2,013.58 since the level three hearing in this matter, the same shall be returned in full to Grievant immediately.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: September 27, 2016.

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Carrie H. LeFevre
Administrative Law Judge