THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES DICKENS, et al.,

Grievants,

v. **Docket No. 2016-0100-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,

Respondent.

DECISION

Grievants[1] filed level one grievances against their employer, Respondent, Department of Health and Human Resources/Jackie Withrow Hospital, dated August 4, 2015, and September 29, 2015, stating as follows "[r]etaliatory deduction in differential pay without good cause." As relief sought, Grievants seek "[t]o be made whole in every way including backpay (sic) with interest and restoration of pay going forward."

The individual grievances were consolidated at level one on or about August 6, 2015, based upon Grievants' Motion to Consolidate. A level one hearing was conducted on November 13, 2015. The grievance was denied by decision dated December 8, 2015. Grievants appealed to level two of the grievance procedure on December 13, 2015. A level two mediation was conducted on March 11, 2016. On March 17, 2016, Grievants perfected their appeal to level three. The level three hearing in this matter was scheduled to be held on September 21, 2016, in Beckley, West Virginia. However, in lieu of an

[1] The Grievants are James Dickens, Jerry Hardy, Matthew Hodge, Donna Leftwich, Nola Lilly, Travis Puffenbarger, Gail Robertson, Cameron Shrewsbury, Johnny Taylor, Edward Toler, Kevin White, James Williams, and Ronald Graef.

evidentiary hearing, the parties agreed to submit this matter for a decision at level three based upon the record developed below. This matter became mature for consideration on October 28, 2016, upon the receipt of the parties' proposed Findings of Fact and Conclusions of Law. It is noted that as its proposed Findings of Fact and Conclusions of Law, Respondent submitted a copy of the level one decision in this matter. Grievants appeared by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Steven R. Compton, Esq., Senior Assistant Attorney General.

Synopsis

Grievants are employed by Respondent in various positions at Jackie Withrow Hospital. Some of the Grievants were parties to a previous grievance action regarding a shift differential policy. Those Grievants prevailed as the Grievance Board found that under the policy as it was then written, they were eligible for the shift differential pay. A few months later, Respondent revised the policy, and under the same, many employees, including the Grievants in this matter, were no longer eligible for the shift differential pay. Grievants claim that the Respondent's revision of the policy was an act of reprisal. Grievants also claim violation of the Administrative Rule and substantive due process. Respondent denies Grievants' claims, and asserts that its revision of the policy was proper. Grievants established a *prima facie* case of reprisal by a preponderance of the evidence. Respondent successfully rebutted the presumption of retaliation. Grievants failed to prove their remaining claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review

of the record created in this grievance, including the level one hearing transcript and level one exhibits[2]:

Findings of Fact

1. Grievants are employed by Respondent in various positions at Jackie Withrow Hospital ("JWH"), a long-term nursing facility operated by the Bureau of Behavioral Health and Health Facilities ("BHHF") which is part of the West Virginia Department of Health and Human Resources ("DHHR").

2. On October 17, 2002, the State Personnel Board approved the establishment of "a shift differential for all Department of Health and Human Resources hospitals," to be effective November 1, 2002.[3]

3. Respondent implemented its Shift Differential Policy on December 10, 2002.[4]

4. On October 29, 2009, a grievance was filed challenging Respondent's December 10, 2002, Shift Differential Policy, in that under this policy, Respondent did not pay the shift differential to employees for hours they worked immediately prior to their scheduled day shift. In that grievance, the Grievance Board found the shift differential policy "was clearly wrong, in that it made a distinction between mandated time after a shift and time in which an employee is requested to report before a scheduled shift." *See Goff*

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[2] It is noted that the level one transcript is of poor quality. It is unknown if it were transcribed by a professional court reporter. Nonetheless, it contains a number of typographical errors, including repeatedly referencing the case of *Mickey, et al., v. West Virginia Department of Health and Human Resources/Jackie Withrow Hospital*, Docket No. 2014-0244-CONS (March 10, 2015), as "*Nikki*." Further, the transcript indicates that a great deal of the testimony was "inaudible." To say that reviewing and understanding all of the testimony at level one is difficult is an understatement.

[3] *See*, Grievants' Exhibit 2, level one.

[4] *See*, Grievants' Exhibit 3, level one.

v. Dep't of Health & Human Res./Sharpe Hosp., Docket No. 2010-0524-DHHR (Feb. 14, 2012).

5. Respondent amended its December 2002 Shift Differential Policy on April 8, 2011, before the *Goff* decision was issued.

6. On September 1, 2013, dietary department employees filed a grievance challenging Respondent's application of the April 8, 2011, Shift Differential Policy, in that they were not paid the shift differential for certain hours they worked. The Grievance Board granted this grievance by decision issued March 10, 2015, finding that the Respondent had not applied the shift differential as written, and that the grievants were entitled to receive the shift differential during the hours they worked that fell within the facility's evening shift. *See Mickey, et al., v. Dep't of Health & Human Res./Jackie Withrow Hospital*, Docket No. 2014-0244-CONS (Mar. 10, 2015).

7. Respondent again revised its Shift Differential Policy, and this revised policy became effective July 16, 2015. Employees at JWH were informed of the revised policy when it was distributed to them by Aimee Bragg, Administrator, with a cover sheet dated June 18, 2015.[5]

8. Respondent has revised its Shift Differential Policy at least twice since it was implemented in 2002. Both times, the revisions followed the filing of a grievance regarding the application of the policy and hearings on the same. However, the first revision came after the level three grievance hearing, but before the issuance of the decision. The second revision came after both a level three grievance hearing, and the issuance of the decision.

[5] *See*, Grievants' Exhibit 5, level one.

9. Respondent's April 2011 Shift Differential Policy stated, in part, as follows:

I. Shift Differential

A. A one dollar per hour shift differential will be paid to non-exempt staff that work at least two hours between the beginning of the facility evening shift and the end of the facility night shift.

B. Full-time, part-time and temporary non-exempt workers assigned to what are normally considered 24 hour departments for that facility are eligible for shift differential. Staff working 3-11 or 11-7 will also receive shift differential.

C. Staff working under the Baylor Plan will not be eligible for shift differential.

10. Respondent's current shift differential policy, which went into effect on July 16, 2015, states, in part, as follows:

I. Shift Differential

A. Shift differential is supplemental compensation paid primarily to compensate for less convenient hours of work and to attract sufficient numbers of qualified candidates to these schedules.

B. A shift beginning at 3:00 p.m. or later is eligible for shift differential.

C. A shift that begins prior to 3:00 p.m., in which 4 or more hours falls after 3:00 p.m., is eligible for shift differential for those hours scheduled after 3:00 p.m. However, a shift from 11 am to 7 pm or 12 pm to 8 pm is considered day shift for which no shift differential will be paid unless the employee is providing direct care to patients/residents.

D. Non-exempt employees who are required to work at least four hours past the end of their scheduled day shift will receive shift differential for those hours worked past 3:00 p.m.

E. The amount of shift differential paid is one dollar per hour ($1.00 per hour).

F. Exempt employees are not eligible for shift differential.[6]

11. The July 2015 version of the Shift Differential Policy is significantly different from prior versions, and is much more detailed.

12. As a result of the July 2015 Shift Differential Policy, those people who were grievants in the *Mickey* grievance, and the other grievants herein, are no longer eligible to receive the shift differential pay.

13. The following Grievants in this matter were also grievants in the *Mickey* grievance: Jerry Hardy and Donna Leftwich.

14. Grievants Gail Robertson, Cameron Shrewsbury, James Williams, and Nola Lilly have filed grievances against Respondent in the past.

15. Grievants James Dickens, Matthew Hodge, Edward Toler and Keven White have filed grievances against Respondent since the filing of the instant grievance.

16. Aimee Bragg, Administrator at JWH, had at least some input into revising the Shift Differential Policy in 2015. However, others in DHHR management, who were never named in the record in this matter, also participated in revising the policy.

17. Grievants' regular pay was not reduced as a result of the 2015 Shift Differential Policy. Grievants are no longer eligible for the $1.00 per hour shift differential pay based upon the language of the 2015 version of the policy.

[6] *See*, Grievants' Exhibit 5, level one.

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).

Grievants argue that Respondent's decision to change its Shift Differential Policy following the issuance of the decision in the *Mickey* grievance was an act of reprisal in that under the new version of the policy, they would no longer be entitled to receive the shift differential pay granted in the grievance. Respondent denies that its decision to revise the Shift Differential Policy was in reprisal for the *Mickey* grievance. Respondent argues that it revised the policy in an effort to clarify the policy, and that it was following the "recommendation" of the undersigned administrative law judge in the *Mickey* decision.

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;
>
> (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.

See 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).

The evidence presented establishes that all of the Grievants, at various times, participated in the grievance process. However, only two of the Grievants were parties to the *Mickey* grievance. Nonetheless, all of the Grievants had engaged in said protected

activity at various times in the past, and such was recognized at level one. Soon after the issuance of the decision in the *Mickey* grievance, Respondent revised its Shift Differential Policy in a manner that resulted in the Grievants being no longer eligible to receive the shift differential pay for certain hours worked during their shifts. It is undisputed that Respondent was well aware of the Grievants' participation in the grievance process, including that two of the Grievants had been parties to the *Mickey* grievance. Further, given that Respondent revised its Shift Differential Policy a few months after the Grievance Board granted the *Mickey* grievance, an inference can be drawn that there was a retaliatory motive for the policy revision. 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 denies that it revised the policy in order to retaliate against Grievants. Respondent, however, has asserted a number of reasons as to why it revised the Shift Differential Policy after the issuance of the *Mickey* decision. At level one, Ms. Bragg testified that the policy was revised because the undersigned "recommended" and/or suggested such in the *Mickey* decision. Ms. Booker appeared to assert at level one that

the policy was revised because the undersigned told Respondent to do so. Ms. Bragg further testified at level one that the policy was revised to clarify the policy, and to make it reflect what the Respondent had originally intended the policy to mean. While it is not entirely clear who was involved in drafting the revised policy, it appears that Ms. Bragg had some input, but many of the revisions came from upper management and staff in DHHR's Charleston, West Virginia, headquarters.[7] The undersigned must first examine the reasons Respondent has provided for revising the policy.

First, to be very clear, the undersigned in no way recommended, directed, or suggested that Respondent revise its policy, or to engage in any acts of reprisal against its employees.[8] Further, the undersigned in no way suggested that the Respondent

[7] *See*, testimony of Aimee Bragg, level one.

[8] *See,* the following excerpt from *Mickey, et al.*: "[i]n this matter, the plain language of the shift differential policy is clear and unambiguous; therefore, it is not subject to interpretation. Nothing in the policy indicates that paragraphs A and B are to be read together. There are no words that tie the two paragraphs together, or signal that they are to be read together. The three paragraphs, as written, stand independent of one another. There has been no claim that paragraph C is to be read in conjunction with any other paragraph or section, and it is written in the same format as paragraphs A and B. It may be true that the drafters of the policy wanted paragraphs A and B to be read together, but that is not what they wrote in the policy. Respondent's interpretation of the policy requiring paragraphs A and B to be read together is contrary to the plain meaning of the language in the policy. . . There is no question that Respondent is allowed to pay a shift differential. Respondent's shift differential policy allows for the payment of a shift differential for specified work periods, just as contemplated in the Rule 5.4.f.4 above. However, nothing in Rule 5.4.f.4 prohibits the Grievants from receiving the shift differential. The level one grievance evaluator took notice of the original purpose of the Respondent's shift differential, which was to get people to work difficult-to-fill shifts, as discussed in *Streets, et al. v. Dep't of Health & Human Res./Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003), and noted that Grievants did not prove that they were worked difficult-to-fill shifts or that there was a retention issue in the Dietary Department. **However, none of that matters. The only thing that matters is what the policy actually says. The current version of the policy does not say anything about the purpose of the shift differential, and the policy simply does not say what Respondent says it does. The policy is clear and does not warrant any interpretation. The evidence presented certainly suggests that the Respondent wants the policy to say something other**

should "clarify" its policy. In fact, in the *Mickey* decision, the undersigned found that the 2011 version of the policy was clear and unambiguous; therefore, Respondent was improperly using interpretation to apply the policy in a manner inconsistent with the way it was written. Respondent had been interpreting the policy to include words that were not there, which resulted in the policy being applied improperly. Simply put, Respondent was not following its policy as written. Instead, Respondent argued that it was applying the policy as it had been intended, but not as it was written. After a discussion of the established law regarding interpretation, the undersigned concluded that Respondent had to apply the policy as written, meaning Respondent could not add words to the policy, thereby changing its meaning, when applying the policy. The undersigned then noted that had Respondent wanted the policy to include other words, it should have written them in. This one sentence, which was entirely *dicta*, is what Respondent claims to be a directive from the undersigned to revise its policy. That is simply not so, and suggests that Respondent did not understand the meaning of the *Mickey* decision. The undersigned did not speculate or suggest what the policy should have said. The point was that the policy had to be applied as it was actually written. The decision was about the application of a policy and the rules of interpretation. The undersigned was merely pointing out that as Respondent wrote the policy, which was clear and unambiguous, and that Respondent had the responsibility of applying it as written, but it failed to do so. Accordingly, the undersigned wholly rejects Respondent's argument that it revised the

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than it does, but that does not allow Respondent to 'interpret' its policy in a manner contrary to the plain meaning of its language. If Respondent wanted additional words in the policy, it should have written them in." *Id.* (Emphasis added).

policy because the undersigned directed, suggested, or recommended such in the *Mickey* decision. Further, the revisions made to the policy in 2015 were extensive.[9] It was an entire re-write of the policy. This was no mere clarification of the wording of the policy, or a simple change in the wording. The 2015 version of the policy is more detailed than the 2011 version, and actually raises the threshold for eligibility to receive the shift differential pay. Therefore, the undersigned also rejects Respondent's argument that the 2015 was designed to "clarify" the policy.

However, Respondent also argued that it revised the policy to reflect the actual intent of the policy. It is undisputed that Respondent has revised this policy several times, and that these revisions, and/or the application thereof, resulted in grievances being filed, and that at least two of those grievances were granted.[10] Further, there has been no evidence presented to suggest that agencies are not permitted to revise, or re-write, their policies. No evidence was presented as to whether there are any rules, requirements, or procedures to be followed when a policy is changed or revised. Ms. Booker and Ms. Bragg mentioned at level one that the revised policy had to be approved by the Personnel Board, and that it was so approved.[11] Grievants appear to dispute this by referencing a letter from then Director of the Division of Personnel, Sara P. Walker, which stated that DOP's records contained no correspondence between Respondent DHHR and DOP "relevant to differential policy pay and practices" other than a letter with a proposal review summary and minutes of the State Personnel Board held on October 17, 2002, but no

[9] *See*, Grievants' Exhibit 3, lower level.
[10] *See Goff v. Dep't of Health & Human Res./Sharpe Hosp.*, Docket No. 2010-0524-DHHR (Feb. 14, 2012); *Mickey, et al., v. Dep't of Health & Human Res./Jackie Withrow Hospital*, Docket No. 2014-0244-CONS (Mar. 10, 2015).
[11] *See*, testimony of Aimee Bragg, lower level.

other evidence about the 2015 revision was presented.[12] No one from DOP was called to testify as a witness at level one. No evidence was presented to establish that the revised policy was enacted improperly.

Respondent contends that the original intent of the Shift Differential Policy was to address recruitment and retention problems for shifts occurring during less convenient work hours, such as the evening and night shifts at the facility. Respondent's 2015 version of the policy reduces the number of employees eligible to receive the shift differential from those who would be eligible under the 2011 version. It is undisputed that Grievants are no longer eligible to receive the shift differential pay under this new policy. From the evidence presented, it appears that Respondent revised the policy to limit the shift differential pay to those working the evening and night shifts, and those providing direct care to patients/residents during two day shifts. These revisions appear to be consistent with the stated purpose of pay the shift differential, and the undersigned cannot find that such was improper. Respondent's argument was that the shift differential pay was created as an incentive to get staff to work less convenient hours. Respondent has demonstrated by a preponderance of the evidence that its new policy was implemented for legitimate, non-retaliatory reasons, even though it reduces the number of employees who are eligible for the shift differential. Grievants have failed to demonstrate by a preponderance of the evidence that Respondent's stated reasons for the policy change were merely a pretext for a retaliatory motive.

Grievants further argue that Respondent's actions in eliminating their eligibility for

[12] *See*, Grievant's Exhibit 1, letter from Sara Walker to Mr. Simmons; Grievant's Exhibit 2, Minutes of the State Personnel Board dated October 17, 2002. It is noted that no cover letter or proposal review summary were included in this exhibit.

the shift differential pay amounts to a permanent reduction in pay which is prohibited by the Administrative Rule. Grievants assert that the only circumstances in which a reduction in pay for a classified public employee is permitted by the Administrative Rule is a demotion. Grievants then quote the demotion portions of the Administrative Rule in their proposed Findings of Fact and Conclusions of Law. Grievants' regular pay was not reduced. The only thing that changed under the 2015 Shift Differential Policy was that the Grievants would no longer be eligible for the extra $1.00 per hour for certain hours during their shifts. Grievants have provided no authority to support their argument that ineligibility for the shift differential pay is a prohibited permanent reduction in pay. The shift differential is an incentive paid for working shifts that are more difficult to fill because of the inconvenient hours. It is not the same as regular pay. Nothing in the Administrative Rule prohibits employees being removed from eligibility for shift differential pay. Similarly, Grievants argue that the 2011 version of the Shift Differential Policy gave them a property right in the shift differential pay, that the 2015 revision of the policy adversely affected this property right, and that the same is a violation of substantive due process. Based upon the evidence presented, Grievants' argument also fails. There was no property interest created by the 2011 shift differential policy.

Lastly, Grievants appear to assert that Respondent's revision of the policy in 2015 was arbitrary and capricious. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). An action is recognized as arbitrary and capricious

when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996)* (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).

"While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001). Further, "[t]he Grievance Board has no authority to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of the agency. *Streets, et al., v. Dep't of Health and Human Resources/Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003); *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Sarver v. W. Va. Dep't of Health & Human Res./Office of Human Res. Management and Education Reimbursement Leave Program*, Docket No. 2016-1466-DHHR (Dec. 12, 2016). The evidence presented established that Respondent revised the 2011 version of its Shift Differential Policy to correspond with the intent behind the policy, which was to

improve recruitment and retention for shifts with less convenient work hours. The undersigned cannot find that the 2015 revision was arbitrary and capricious. The 2015 revisions, as set forth above, were specific and appear to correspond with the intent of the policy. While the undersigned is sympathetic to the Grievants who are now ineligible for the shift differential, there has been no evidence presented to establish that the revisions were unreasonable, or without consideration of the facts. Further, the undersigned cannot substitute her judgment for that of the employer. Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievants bear the burden of proving their 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. 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;
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> (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.

See 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).

3. "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).

4. "[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).

5. Grievants have established a *prima facie* case of reprisal by a preponderance of the evidence.

6. 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).

7. Respondent has rebutted the *prima facie* showing of reprisal as it presented evidence that it revised the Shift Differential Policy to make the written policy conform with the intent behind it.

8. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996)* (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).

9. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

10. Further, "[t]he Grievance Board has no authority to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of the agency. *Streets, et al., v. Dep't of Health and Human Resources/Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003); *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Sarver v. W. Va. Dep't of Health & Human Res./Office of Human Res. Management and Education Reimbursement Leave Program*, Docket No. 2016-1466-DHHR (Dec. 12, 2016).

11. Grievants have failed to prove by a preponderance of the evidence that Respondent's 2015 revision of the Shift Differential Policy was arbitrary and capricious.

Accordingly, this Grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: March 8, 2017.

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Carrie H. LeFevre
Administrative Law Judge