THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL L. FROST,

Grievant,

v. **Docket No. 2017-0472-BSC**

BLUEFIELD STATE COLLEGE,

Respondent.

DECISION

Grievant filed level a one grievance against his employer, Respondent, Bluefield State College, dated September 14, 2016, stating as follows:

> I again have experienced retaliation and discrimination by this administration by refusing to allow me the time off in order to help my son with some personal issues and even though I explained this situation to the VP of Student Affairs and Enrollment Management, the VP of Financial and Administrative Affairs, and the President, all of them refused to grant my request (the President actually told me to go on to the VA Hospital to see what they had to say). It is my contention that this is an ongoing attempt to 1. Disenchant me to the point of resignation (Which isn't going to happen) 2. Create such a stress factor that I either become insubordinate (That's NOT going to happen either!!!!) or 3. I end up having a stroke/heart attack due to the stress, anxiety, high blood pressure levels or all of the above caused by the lack (The VA in Salem VA actually took me out of service due to the previous health issues previously listed). This and the former administration have continued to create a hostile work environment due to all of the previous grievances I have filed, when in fact if the institution would not create such discrepancies, there would be no reason to file said grievances. Both administrations have continually stated that "Family comes First!" well we now know that is a LIE!!!!!!!!."

As relief sought, Grievant seeks, "[t]he Administrators involved in this lack of

sensitivity and/or understanding 'family first' be formally reprimanded[1] and instructed as to how EARNED annual days may be used by employees more especially when it is evident the employee NEEDS to take care of their family's needs."

A level one hearing was conducted on September 30, 2016. The grievance was denied by a letter dated November 7, 2016, which advised Grievant the Respondent was adopting the recommended decision issued by the level one hearing examiner. Grievant appealed to level two of the grievance procedure on December 1, 2016. A level two mediation was conducted on February 1, 2017. On February 14, 2017, Grievant perfected his appeal to level three. Respondent filed a Motion to Dismiss on March 17, 2017. Grievant filed a response thereto which was received on April 3, 2017. A telephonic hearing was conducted on the Motion to Dismiss on April 27, 2017, at which counsel for Respondent, Grievant's representative, and Grievant all appeared. Following the hearing, the parties were given until May 4, 2017, to submit file supplemental briefs. After consideration of the parties' arguments and submissions, on May 17, 2017, the undersigned ALJ informed the parties that the Motion to Dismiss was denied. A brief discussion regarding the same will be included herein.

The level three hearing in this matter was scheduled to be held on October 4, 2017, in Beckley, West Virginia. However, in lieu of an evidentiary hearing, the parties agreed

[1]It is a well-settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.,* Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (Jul. 8, 1996). Any decision concerning discipline action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP (Mar. 20, 2009); *Cassella v. Div. Highways*, Docket No. 2012-0496-DOT (Dec.11, 2012).

to submit this matter for a decision at level three based upon the record developed below. This matter became mature for consideration on October 23, 2017, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law. Grievant appeared by his representative, Ben Barkey, West Virginia Education Association. Respondent appeared by counsel, Candace Kraus, Esq., Deputy General Counsel, West Virginia Higher Education Policy Commission & West Virginia Community and Technical College System.

Synopsis

During the 2016 Fall semester, Grievant was scheduled to teach a college skills class to incoming freshmen. During the first three weeks of classes, Grievant missed three days of teaching his class because he took approved annual leave. Thereafter, Grievant requested annual leave for two more days in early September, one of which was a teaching day. Grievant's supervisor denied his request for annual leave on the teaching day, but not the other. Grievant alleged reprisal for participating in the grievance process. Respondent denied Grievant's claim, and argued that the request for annual leave was properly denied. Grievant proved by a preponderance of the evidence a *prima facie* case of reprisal. Respondent rebutted the presumption of retaliation by offering legitimate, nonretaliatory reasons for the denial of annual leave. Grievant failed to demonstrate that Respondent's stated reason for the denial was a pretext for a retaliatory motive. 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:

Findings of Fact

1. Grievant is employed by Respondent as a Counselor II. One of Grievant's job responsibilities in the Fall semester of 2016 was to teach the Building Successful College Skills ("BSCS 100") class.

2. The BSCS 100 class is for first-year college students, and is designed to "enable students to understand the role of higher education and the academic fundamentals needed to support a successful transition to college." In the course description, it further states that "the course content will also enhance the development of skills necessary to understand the learning process and how it is associated with college success. Students will be motivated to persist and encouraged to achieve their educational, personal, and career goals." Students' attendance and participation are factors considered in their grades.[2]

3. Dr. Jo-Ann Robinson is the Vice President for Student Affairs and Enrollment Management. Dr. Robinson is Grievant's direct supervisor.

4. On August 31, 2016, Dr. Robinson received a leave request from Grievant through the Kronos personnel system in which he requested annual leave on September 6, 2016, and September 7, 2016.[3]

5. Grievant had taken approved leave in August 2016 on the following dates: August 1; August 2; August 3; August 15; August 16; August 17; August 18; and, August 30. It appears that the absences from August 1-3, 2016, were the result of a death in Grievant's family. The absence on August 18, 2016, was the result of a doctor's

[2] *See*, BSCS Syllabus, Exhibit B, Respondent's "Memorandum in Support of Motion to Dismiss."
[3] *See*, Respondent's Exhibit 2, level one hearing.

appointment. The absence on August 30, 2016, was the result of Grievant attending an unrelated grievance proceeding.

6. As a result of his absences in August 2016, Grievant missed teaching class on three days, those being August 16, 2016, the first day of classes at Bluefield State College, August 18, 2016, and August 30, 2016. Nonetheless, those absences were approved.

7. By email dated August 31, 2016, Dr. Robinson informed Grievant that she was denying Grievant's request for leave on September 6, 2016, because such was a day on which he was supposed to be teaching the BSCS 100 class, and he had already missed three days of classes (incorrectly referenced as being September 2016 dates). Dr. Robinson offered to meet with Grievant to discuss his leave request for September 7, 2016.[4]

8. On September 1, 2016, at 10:30 a.m., Grievant sent the following email to Dr. Robinson in response to her August 31, 2016 email denying his leave request:

> I have NO choice but to be on leave those dates as I will be in Houston helping my son. I don't need any more STRESS in dealing with everything going on right now with my family and my health! If I have to have the doctors take me out of service, I WILL!!!! Should you wish to discuss this further I will be more than happy to do so. As far as my class goes, I am teaching adults; furthermore, the dates you referenced have not occurred yet. I believe you are talking about August. Which on August 16, (my birthday) the bookstore didn't even have the books (Not my responsibility). August 18 I had a VA Doctor's Appointment which are hard to get. August 30 was a grievance hearing (Which if the institution had of done the right thing in the first place, we would not be having THAT discussion). Please advise as to how we shall proceed. Thank you for your attention to this matter. Sincerely, Daniel "Frosty" Frost.

[4] *See*, Respondent's Exhibit 2, level one hearing.

9. Grievant sent a second email to Dr. Robinson on September 1, 2016, at 11:21 a.m., stating as follows:

> Dr. Robinson,
>
> I have had two constituents offer to cover my class on Tuesday 06 September 2016 in order for me to help my son. Additionally, I have been in touch with the VA hospital's mental health department and spoken with their lead Psychologist who is currently working on my referrals. Please be advised that this is a direct result of dealing with continual harassment, retaliation, bullying thereby creating a hostile work environment by this and the previous administrations which can also be documented by previous allegations that were erroneous and detrimental. Sincerely, Daniel "Frosty" Frost.[5]

10. After receiving Grievant's two emails sent the morning of September 1, 2016, at 12:35 p.m. on that same day, Dr. Robinson replied to Grievant as follows:

> Mr. Frost,
>
> I am not approving leave for Tuesday, September 6, 2016. As I previously stated, it is important that you attend class on a regular basis and set an example of the expectations you have for your students regarding attendance and class participation. I am still available to discuss September 7, 2016. I apologize that I incorrectly stated September 16, September 18 and September 30 instead of August in my earlier email. Best, Jo-Ann Robinson, Ph.D.[6]

11. At 4:16 p.m. on September 1, 2016, Grievant responded to Dr. Robinson's last email as follows:

> Dr. Robinson,
> I will not be at work tomorrow as I will be at the VA Hospital due to your denial of my request to go to Houston to help my son when he needs me the most. Furthermore, if I had wanted to, I could have requested the leave via FMLA due to

[5] *See*, Respondent's Exhibit 2, level one hearing.
[6] *See*, Respondent's Exhibit 2, level one hearing.

> all of the stress he has been and still is under due to the loss of his job thus having to sell his house. I will be following up with Dr. Krotseng tomorrow morning prior to leaving for the VA.[7]

12. Dr. Robinson forwarded the email thread consisting of the above-referenced emails exchanged between Grievant and her to Dr. Marsha Krotseng. In her email to Dr. Krotseng, Dr. Robinson stated that, "I have denied his leave request for Tuesday, September 6, 2017 because he is responsible for teaching the BSCS 100 course on Tuesdays and Thursdays."[8]

13. Bluefield State College Board of Governors Policy No. 18, Section 4, subsection 4.2 states as follows:

> The work requirements of the institution shall take priority over the scheduling of annual leave or other leave for an employee. When operationally possible, the supervisor shall grant earned annual leave at the convenience of the employee. However, departmental needs must be met, and annual leave may not be taken without prior request and approval of the employee's supervisor.[9]

14. Grievant's physician placed Grievant off work on the following dates: September 5, 2016; September 6, 2016; September 7, 2016; September 8, 2016; and, September 9, 2016. Grievant requested sick leave for these dates, and Respondent approved this request.

15. Grievant took leave on September 6, 2016, and was not at work anytime that day. However, Grievant took sick leave on this date, not annual leave as he had originally requested.

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[7] *See*, Respondent's Exhibit 2, level one hearing.
[8] *See*, Respondent's Exhibit 2, level one hearing.
[9] *See*, Respondent's Exhibit 1, lower level hearing.

16. Grievant has filed grievances against Respondent in the past, and Respondent is well-aware of the same.

17. In a prior grievance matter, this Grievance Board found that a previous Vice President for Student Affairs and Enrollment Management retaliated against Grievant for engaging in grievance activity. The Grievance Board granted this grievance. *See Frost v. Bluefield State College*, Docket No. 2013-2074-BSC (Mar. 19, 2015).

Discussion

Motion to Dismiss

Respondent filed a Motion to Dismiss in this matter arguing that the grievance is moot, and that the requested relief is not available through the grievance procedure. Grievant's representative filed a response to the Motion to Dismiss. This ALJ ruled on Respondent's Motion to Dismiss, and the parties were informed of the same. The ALJ had initially intended to issue a short order reflecting the ruling, but as the motion would need addressed in the level three decision, no order was required. It is noted that even though counsel for Respondent was informed that her Motion to Dismiss was denied, in her proposed Findings of Fact and Conclusions of Law, she again argues mootness and that Grievant has requested relief that is unavailable through the grievance process.

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." W. VA. CODE ST. R. § 156-1-6.2 (2008). The burden of proof is on the Respondent to demonstrate that its motion to dismiss should be granted by a preponderance of the evidence. "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).

Respondent makes the following argument in its Motion to Dismiss, and again in its proposed Findings of Fact and Conclusions of Law: "Respondent states that this grievance is moot. Grievant requested to use annual leave to cover his absence on September 6, 2016, which was denied. Thereafter, Grievant's submission of sick leave to cover his absence on September 6, 2016, was approved by Bluefield State. (Exh. A) Inasmuch as the use of annual leave is no longer at issue in this matter, the issue is now moot." The Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Respondent is mistaken. The issue in this matter, as stated in Grievant's statement of grievance, is whether Respondent denied Grievant's request for annual leave on September 6, 2016, in retaliation for his participation in the grievance process. The fact that Grievant was ultimately approved for a different type of leave on that day is irrelevant. The motive for the initial denial is still at issue. Therefore, this grievance is not moot.

Respondent also argues that the relief requested is unavailable through the grievance process. In his statement of grievance, Grievant requested that the administrators involved in the denial of his annual leave request be formally reprimanded

and given instruction on annual leave issues. In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Further, "'[t]he Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Goff v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-048 (Apr. 7, 2003); *Coster v. W. Va. Div. of Corrections,* Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors,* Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.,* Docket No. 91-54-497 (May 14, 1992).' *Emrick v. Wood County Bd. of Educ.,* Docket No. 03-54-300 (March 9, 2004)." *Shaffer v. Kanawha County Bd. of Educ. & Pauley*, Docket No. 2013-0161-KanED (Sept. 19, 2013). The Grievance Board generally lacks the authority to order adverse personnel action be taken against another employee. *See Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).

During the telephonic hearing on Respondent's Motion to Dismiss, Grievant's representative acknowledged that the Grievance Board had no authority to order that disciplinary action be taken against an employee, and that such is not being pursued. While not specifically stated in his statement of grievance, Grievant's representative

asserted that through this grievance, Grievant is asking that Respondent be ordered to stop retaliating against him. Respondent objects to this as it is not written in the statement of grievance.

This Board has ordered a Respondent to "take whatever steps that are appropriate and necessary, utilizing the corrective and disciplinary measures available" to stop harassment when the Respondent was aware of a situation in which an employee was harassing co-workers and took "no meaningful action to correct the situation." *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 31, 1994). In another matter, the Board considered a case in which a grievant was subjected to harassment by a coworker, and his crew leader and immediate supervisor did not take appropriate action to correct the situation, but the executive director took appropriate action, separating the grievant and the coworker, once he was notified of the situation. In that case, the Board noted that it was unclear whether it could order the continued separation of grievant and the coworker. Therefore, it ordered Respondent to continue its intervention to prevent further harassment of the grievant by the coworker by "whatever means Respondent deems appropriate." *See Shaffer v. Kanawha County Bd. of Educ. & Pauley*, Docket No. 2013-0161-KanED (Sept. 19, 2013). In a more recent case, the Board ordered a Respondent "to take whatever steps that are appropriate and necessary to stop [an employee] from harassing the Grievants, and to eliminate the hostile work environment that such harassment has caused." *Hinkle, et al., v. W. Va. Div. of Highways*, Docket No. 2015-0807-CONS (Mar. 22, 2016). In that same grievance, the ALJ noted that while not specifically stated in their grievance as relief sought, the grievants made an implied request for the harassment to stop. *See Id*.

A review of the statement of grievance in this matter shows that Grievant is asking the Grievance Board for relief from the retaliation he alleges. Grievant does not come out and stay, "make it stop," but such is exactly why grievances like these are filed. Clearly, the Board has the authority to issue an order directing a respondent to take actions to stop improper behavior. As such, some of the relief Grievant seeks in this matter is not unavailable through the grievance process. For these reasons, the Respondent's Motion to Dismiss is DENIED.

Merits

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). In this grievance, Grievant has made claims of discrimination, reprisal, and hostile work environment against Respondent. However, at level three, the only issue Grievant addresses in his proposed Findings of Fact and Conclusions of Law is reprisal. As such, the other claims raised in the statement of grievance shall be deemed abandoned, and will not otherwise be discussed herein. Grievant argues that Respondent's decision to deny his annual leave request for September 6, 2016, was an act of reprisal for his participation in the grievance process.

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;
>
> (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). "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).

Grievant has participated in the grievance process for a number of years. At the time Grievant's leave request at issue was denied, he had a separate grievance then pending. The evidence presented establishes that Respondent was well-aware of the

Grievant's participation in the grievance process. Further, given that Respondent denied Grievant's leave request a day after he had been absent from work to attend a level two mediation, an inference can be drawn that there was a retaliatory motive for the denial. 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); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). "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 Dr. Robinson denied Grievant's annual leave request for September 6, 2016, because she was "prioritizing the needs of the College and department," as required by BSC Policy 18. Policy 18, Section 4.2 states as follows:

> The work requirements of the institution shall take priority over the scheduling of annual leave or other leave for an employee. When operationally possible, the supervisor shall grant earned annual leave at the convenience of the employee. However, departmental needs must be met, and annual leave may not be taken without prior request and approval of the employee's supervisor.

Dr. Robinson testified at level one, and stated in her August 31, 2016, email to Grievant that she denied his September 6, 2016, leave request because he had missed teaching

his class three times since classes started on August 16, 2016. Dr. Robinson explained that it was important for Grievant "to attend class on a regular basis and set an example of the expectation he had for his students regarding attendance."[10] Such would be a need of the department. Dr. Robinson did not deny Grievant's request for annual leave on September 7, 2016. However, she did not grant it in her email either. Dr. Robinson told him to come and speak with her about that request. Grievant was not scheduled to teach a class on September 7, 2016. It does not appear that Grievant went to speak with Dr. Robinson about that date. Also, Grievant did not tell Dr. Robinson that he had two people who would agree to cover his class until the morning of September 1, 2016, after she had denied his leave request.

Grievant appears to assert that by considering his absence on August 30, 2016, a day on which he attended a level two grievance mediation, as a justification for denying his leave request, Dr. Robinson engaged in an act of reprisal. The undersigned ALJ disagrees. Dr. Robinson considered that Grievant had missed teaching three classes, only one of them occurring on August 30, 2016. Policy 18 clearly indicates that annual leave is not automatically granted and that work requirements come first. Grievant was assigned to teach the BSCS class on Tuesdays and Thursdays each week starting August 16, 2016. Grievant had missed teaching his class three times between August 16, 2016, and August 31, 2016, and he would be missing another class on September 6, 2016, if his leave request were granted. It appears undisputed that student attendance is required for the BSCS class, and such is even a factor in the students' grades. The students are expected to attend each class. It is not unreasonable for Dr. Robinson to

[10] *See*, Level One Transcript, pg. 12, lines 11-13.

expect an instructor to set a good example for his or her students, or to view Grievant's three absences in such a short period of time as running contrary to the same. Additionally, Dr. Robinson did not deny Grievant's request for annual leave on September 7, 2016, a day on which Grievant was not scheduled to teach. This further suggests that teaching the class was her concern. Dr. Robinson has provided legitimate, non-retaliatory reasons for denying Grievant's September 6, 2016, annual leave request. Therefore, Respondent has successfully rebutted the *prima facie* case of reprisal.

To prevail on his claim, Grievant must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive. Grievant has failed to do this. It is noted that Grievant presented little evidence at level one and chose not to testify.[11] The evidence demonstrates that Dr. Robinson did not deny Grievant's leave request for September 6, 2016, in retaliation for his attendance at the grievance mediation on August 30, 2016. Annual leave requests are not automatically granted, and work requirements are the priority. The fact Dr. Robinson considered Grievant's absence on August 30, 2016, when he was at a mediation, in making her decision does not automatically make her denial of Grievant's leave request an act of reprisal. Grievant's participation in the mediation was not a motivating factor in Dr. Robinson's decision. Dr. Robinson looked at how many classes Grievant had missed teaching and the message such would be sending to the students, and based her decision

[11] At level one, Grievant indicated that he was not going to testify at that level. However, Grievant wound up interjecting during Dr. Robinson's testimony, and answering a few questions during the course of the hearing. Grievant called no witnesses and presented little evidence at level one. Respondent introduced most of the evidence presented which included Dr. Robinson's testimony, the email thread between Grievant and Dr. Robinson, and the policy.

on the same. Even if Grievant's absence for the mediation were not considered, Dr. Robinson still had the authority to deny the request.

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, 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. 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;
>
> (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. Grievant has 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);

Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994). "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 rebutted the presumption of retaliation by offering legitimate, non-retaliatory reasons for denying Grievant's September 6, 2016, leave request. Grievant has failed to prove by a preponderance of the evidence that the reason offered by Respondent was a pretext for a retaliatory motive.

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: December 7, 2017.

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Carrie H. LeFevre
Administrative Law Judge