WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHELIA HALLMAN-WARNER,
Grievant,

v. **DOCKET NO. 2017-1007-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

D E C I S I O N

Grievant, Shelia Hallman-Warner, filed a level one grievance dated September 21, 2016, against the Respondent, Bluefield State College stating:

> Hostile work environment; WV §6C-2-2(i)(1) Grievance (ii) Discriminatory application of policy (v) interference with job performance (o) Retaliation/Reprisal; Bluefield State Employee Policies. Professor teaching a class on criminology given a letter of warning and reported to campus police for demonstrating a hand held taser (in air) and for tongue in cheek comment about mace.

As relief sought, Grievant seeks, "Removal of warning letter dated September 1, 2016 and mailed approximately one week later."

A Level One hearing was conducted on October 4, 2016, and the grievance was denied by decision dated January 17, 2017. Grievant appealed to level two on January 26, 2017. A level two mediation was conducted on April 24, 2017. Grievant appealed to level three on May 5, 2017. On September 7, 2017, Respondent filed a Motion to Dismiss asserting that no relief can be granted in the grievance, the grievance issues are moot and that a hearing on the merits of the claim would result in an improper advisory opinion. Parties were provided opportunity to fortify their position regarding the motion and their respective opinions regarding the proper disposition of this grievance.

Respondent and Grievant had the opportunity to address the motion and theory of the grievance. Respondent's motion had merit but ultimately the undersigned determined Grievant would be allowed to pursue her grievance and be given the opportunity to demonstrate any justification for her conduct or alleged malfeasance by Respondent.

A level three hearing was held before the undersigned Administrative Law Judge on September 29, 2017, at the Grievance Board's Beckley facilities. Grievant appeared in person and with representative Ben Barkey, West Virginia Education Association Member Advocacy Specialist. Respondent was represented by Kristi A. McWhirter Assistant Attorney General. Angela Lambert, Provost and Vice President of Academic Affairs (hereinafter "Dr. Lambert") also appeared on behalf of Respondent. At the September 29, 2017 Level III hearing, it was made clear and stated repeatedly that Grievant needed to identify a form of relief not moot and/or available as a remedy properly ordered by this Grievance Board and that this grievance was subject to Respondent's renewed motion to dismiss. At the conclusion of the hearing, the parties were informed of the opportunity to present written proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals and this matter became mature for decision upon receipt of the last of these proposals on or about October 27, 2017, the assigned date for the submission of the parties' fact/law proposals.

Synopsis

Grievant filed a grievance contesting the actions of Respondent with regard to a written warning pertaining to the performance of her duties as a Professor at Bluefield State College. It was highlighted prior to the Level III three hearing that the requested

relief of removing the disciplinary letter from Grievant's personnel files was a moot issue. Grievant alleged discriminatory application of policy, interference with job performance and retaliation/reprisal action by Respondent. Grievant was not deprived of the opportunity to establish unlawful actions by Respondent. Other than the removal of a disciplinary letter from Grievant's personnel files the relief requested and inferred was akin to an advisory opinion. Arguably, discretion was present in the facts of this matter; nevertheless, Respondent established appropriate grounds for the disciplinary action of issuing a written warning letter. This grievance is DENIED.

Findings of Fact

1. Respondent employs Grievant as a tenured faculty member.

2. On August 16, 2016, Grievant was in front of her classroom preparing to teach her Victimology class of the Fall Semester. Before class began, Grievant, for no apparent reason, pulled her hand-held taser out of her purse and discharged it multiple times. She also pulled a container out of her purse and verbally indicated she was in possession of pepper spray. These events were recorded on a video format with sound. See Respondent's Exhibit (R Ex) 1, video recording.

3. On September 1, 2016, Respondent issued Grievant a Letter of Warning for unprofessional conduct and for violating of Bluefield State College's prohibition against deadly weapons on campus for discharging a stun gun multiple times in front of students prior to the beginning of class, and after discharging the stun gun, for displaying pepper spray and advising students "not to piss her off because she had pepper spray too."

(Respondent Level One Exhibits 1 and 2) Grievant received this letter on or about September 9, 2016.

4. Bluefield State College (BSC) prohibits the concealed or open carry of a deadly weapon on its property, and all personnel and students are notified of this fact by email and signs posted on campus. Also see W. VA. CODE §61-7-14.[1]

5. The display of the stun gun and pepper spray was not established to be related to any lesson Grievant was teaching for the day.

6. Jason Brooks, Director of Public Safety at BSC, (hereinafter "Officer Brooks"), conducted a separate law enforcement investigation of the incident and issued Grievant a citation for disruption of a school function. Officer Brooks L-3 Testimony

7. Officer Brooks, rightly or wrongly considered Grievant's taser a deadly weapon. A complaint was filed in Magistrate Court of Mercer County. Grievant requested a jury trial; however, the charges were dismissed without trial.

8. The Letter of Warning clearly advised Grievant that "the disposition of a workplace issue is different from a law enforcement investigation and criminal prosecution." "The results of a law enforcement investigation or adjudication are not determination of whether an individual is responsible for violation of a College standard." Respondent maintains that the administrative action of issuing a Letter of Warning, was taken because Grievant violated BSC standards, and Grievant failed to follow the College's procedures, practices and workplace conduct expectations.

[1] W. Va. Code §61-7-14 states "any owner, lessee or other person charged with the care, custody and control of real property may prohibit the carry openly or concealed of any firearm or deadly weapon on property under his or her domain." This statute also prohibits the possession or carry of deadly weapons in primary and secondary educational facilities. Cited in Level One decision.

9. Grievant filed a formal employee grievance. Grievant asserts she has been subjected to discrimination, retaliation and hostile work environment. Grievant requested as relief removal of the September 1, 2016, letter from her faculty personnel file.

10. Pursuant to its past practice of removing employee disciplinary letters from personnel files after one year, Respondent removed the September 1, 2016 Letter of Warning from Grievant's faculty personnel file. *See* September 2, 2017 letter.

11. The removal of the September 1, 2016 Warning letter was the sole relief identified by Grievant on the grievance form as relief sought.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court,

June 5, 2013) (memorandum decision). Further, when an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

To the degree that Grievant alleges the sanction levied is improper, it is prudent to note mere allegations alone without substantiating facts is not proof. An employee asserting an affirmative defense to a disciplinary action must persuasively establish such a defense.[2] To the degree that Grievant alleges harassment, retaliation, and/or discrimination, she bears the burden of proving these claim(s) by a preponderance of the evidence. Mere allegations alone without substantiating facts are insufficient to prove a grievance. *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); See *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

Grievant discharged stun gun in front of students for no apparent reason and provided a halfhearted (seemly tongue-in-cheek) warning while displaying pepper spray.

[2] Generally, an employee asserting an affirmative defense to a disciplinary action must establish such a defense by a preponderance of the evidence. *Smith, supra; McFadden v. W. Va. Dep't of Health & Human Res.*, Docket No. 94-HHR-428 (Feb. 17, 1995); *Parham v. Raleigh County Bd. of Educ.,* Docket No. 91-41-131 (Nov. 7, 1991), *aff'd*, 192 W. Va. 540, 453 S.E.2d 374 (1994); *Morris v. W. Va. Dep't of Health*, Docket No. 91-DHS-112 (June 25, 1991). *See Schmidt v. Safeway, Inc*., 864 F. Supp. 991 (D. Or. 1994), *See also Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

Respondent found this conduct to be below their anticipated level of faculty performance. Respondent found that Grievant had acted unprofessionally an issued a Letter of Warning. The Letter of Warning noted that a student complained to the administration, believing Grievant's behavior was inappropriate. The two-page letter references the BSC Faculty Handbook and acceptable conduct expectations for faculty. In part the September 1, 2016, letter provided:

> You have been employed as a faculty member by Bluefield state College since August 1994 and are currently employed in the position of Assistant Professor of Criminal Justice with tenure. As a faculty member, you are expected to act professionally and refrain from using profane language in the classroom. . . . you are also expected to act professionally and refrain from using profanity whenever you are representing Bluefield State College in your official capacity as an employee of the College and/or when conducting Bluefield State College business. You acted unprofessionally by displaying, waving around and activating a stun gun multiple times in from of your students. You also acted unprofessionally by using profanity in the presence of students, conduct for which you have received a prior written warning from the former Provost. When you advised students not to "piss you off" because you had pepper spray in addition to a stun gun, you also exhibited behavior that had the potential of creating an intimidating and hostile educational environment. Unprofessional, intimidating behavior is not acceptable workplace conduct.
>
> The College prohibits the concealed and open carry of deadly weapons on its property. A stun gun is considered a deadly weapon for the purposes of the College's practice of prohibiting deadly weapons on its property. Carrying the stun gun in the satchel, displaying it and waving it around while you activated it, violates the College's practice of prohibiting deadly weapons on its property.

R Ex 2

Respondent has removed the Letter of Warning for unprofessional conduct dated September 1, 2016, from Grievant's personnel file. This document is represented to be the catalyst for the filing of the instant grievance. Respondent highlights that Grievant has received the relief she requested.

Grievant alleged discriminatory application of policy, interference with job performance and retaliation/reprisal action by Respondent. The undersigned is aware that for Grievant this grievance 'may' be more than the existence of a warning letter in Grievant's personnel file for one year. Grievant disagrees with Respondent's interpretation of events and the official reprimand. Grievant was not denied the opportunity to pursue her grievance and to demonstrate justification for her conduct and/or alleged malfeasance by Respondent.[3]

Grievant, Shelia Hallman-Warner has been a professor of Criminal Justice at Bluefield State College for over twenty years. She was cited for an incident that occurred in her classroom. The college reprimand indicates a student made a complaint about an incident in her classroom. The "student" in question was actually a college employee as well as student and not a student in the classroom at the time of the incident. The employee reported the situation to school Counselor Lisa Bennett after witnessing it on tape at the school where it is the employee's job to monitor the distance learning recording facility. Counselor Bennett, who is also a member of the school safety team reported the incident at or after a safety team meeting. The safety team never dealt with the issue but School Safety officer Jason Brooks started an investigation.

Pursuant to the Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy

[3] At the September 29, 2017 Level III hearing, it was made clear and stated repeatedly that Grievant needed to identify a form of relief not moot and/or available as a remedy properly ordered by this forum. Other than the removal of a disciplinary letter from Grievant's personnel files the relief requested and/or inferred was akin to an advisory opinion. This Grievance Board does not issue advisory opinions.

wholly unavailable to the grievant is requested."

> When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, 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. Dept. 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).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). 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). "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

Although Grievant appears to be challenging the "written warning" she received, Grievant has failed to request any relief that the Grievance Board has the authority to

grant. The removal of the September 1, 2016 Warning letter was the sole relief identified by Grievant on the grievance form as relief sought. Said letter is no longer in Grievant's personnel file. Further Grievant failed to persuasively establish a discrimination, retaliation and/or hostile work environment violation.

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998). Mere annoyance or disagreement with management's decision to discipline does not constitute harassment without more. *Whiting v. Fairmont State University*, Docket No. 02-HEPC-335 (Mar. 3, 2003).

Grievant also tends to allege hostile work environment. "[T]o create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d

463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR-130 (Jan. 29, 1999). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

The totality of the circumstances in this case do not amount to a hostile work environment. As stated before, although Grievant no doubt found the letter annoying, mere annoyance or disagreement with management's decision to discipline does not constitute harassment without more. Grievant failed to produce any other incidents that would lend one to believe that Respondent's letter was part of a pattern of harassment. A properly conducted separate law enforcement investigation of behavior that may violate criminal laws does not create a hostile work environment. Here, the letter was not unseemly, and creates no unreasonable expectations of performance for Grievant. Grievant was specifically informed, "This letter is a letter of warning." Grievant is expected to follow the College's rules, regulations, policies, procedures, practices and adhere to all workplace conduct expectations when representing or conducting Bluefield State College business. "Any further incidents of unprofessional conduct including but not limited to the use of profanity in the presence of students, and/or violations of the College's practice of prohibiting deadly weapons on its property and/or any other violations of any other College rule, regulation, policy, practice or workplace standards of

conduct" could result in additional disciplinary action.

For purposes of the Grievance Procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W.Va. Code § 6C-2-2(d). Favoritism is defined in W. Va. Code § 6C-2-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities or is agreed to in writing by the parties." In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

a. that he or she has been treated differently from one or more similarly-situated employee(s);
b. that the different treatment is not related to the actual job responsibilities of the employees; and
c. that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005). Grievant has not met this burden. Grievant has failed to prove she was treated differently than one or more similarly-situated employee(s). The record of this grievance does not establish that a written reprimand is a clearly disproportionate disciplinary action for the established conduct of Grievant.

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94- 01-394 (Jan. 31, 1995). See *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989). Grievant did not present persuasive, if any, evidence demonstrating she was engaged in a protected action, nor did she establish the Letter of Warning was the result of engaging in a protected activity. It is not established that Respondent's disciplinary action was an abuse of discretion[4] or an arbitrary and capricious action.[5]

Respondent is within its purview to establish and to expect Grievant to conduct her class room actions within duly prescribed parameters, e.g., Faculty Handbook (use of

[4] "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

[5] 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 is 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *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." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." 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 his judgment for that of the authoritarian agency. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

profanity in front of students). A written reprimand documenting relevant events and providing guidance regarding future conduct is not extreme.[6] A key component to a successful corrective action is that an employee realizes that his or her work performance or behavior is unsatisfactory, what is expected in terms of improvement and to implement behavioral or attitudinal alterations which facilitates, eliminates or accomplishes a recognizable goal. The need for a formal written reprimand in the circumstances is debatable but it is not, *per se*, an excessive disciplinary action. Respondent met its burden and established persuasive evidence of record to justify the issuance of a "Letter of Warning."

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are

[6] Respondent "wants Grievant to refrain from waving stun guns around in the classroom, to refrain from using profanity in the classroom and to refrain from making comments to the students that could be construed as intimidating and that could chill the reporting of student concerns." See Respondent's fact/law proposals.

to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

2. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

3. Respondent established sufficient evidence of record to meet its burden of proof for the issuance of a letter of warning for unprofessional conduct.

4. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008).

5. "A grievance may be dismissed in the discretion of the Administrative Law Judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 6.11.

6. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense

and the personnel action.'" *Connor v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. Grievant failed to persuasively establish the letter of warning was an inappropriate disciplinary action and/or excessive action

8. Grievant failed to establish a *prima facie* case of discrimination, retaliation or harassment. Grievant failed to prove she was treated differently from any other similarly situated employees. Further, even if Grievant had proven a *prima facie* case of discrimination, harassment or retaliation Respondent provided legitimate nonretaliatory, nondiscriminatory and non-harassing reasons for issuing the disciplinary letter that are not pretextual.

9. Respondent established sufficient evidence of record to meet its burden of establishing grounds for the issuance of a letter of warning for unprofessional conduct and violation of Respondent's policy.

Accordingly, grievance is **DENIED** on its merits and **dismissed** from the docket.

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 (2008).

Date: December 12, 2017

_____

Landon R. Brown
Administrative Law Judge