**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOHN WILLIAM LAMP,**
**Grievant,**

**v.** **Docket No. 2015-0076-MAPS**

**DIVISION OF JUVENILE SERVICES/**
**LORRIE YEAGER JR. JUVENILE CENTER,**
**Respondent.**

## DECISION

Grievant, John William Lamp, is employed by Respondent, Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center. On July 23, 2014, the Grievance Board received an unsigned, undated grievance form filed directly to level three. Grievant attached a lengthy statement to the grievance form which appears to protest the removal of his duties as Field Training Officer and Hearing Officer alleging retaliation after an on-the-job injury. For relief, Grievant seeks for the duties to be reinstated and for no retaliation.

A grievance may be filed directly to level three only upon the parties' agreement or when an employee has been disciplined or demoted resulting in a loss of pay or benefits. W. VA. CODE § 6C-2-4(a)(4). Grievant alleged he had been demoted, but did not allege a loss of pay or benefits, so the matter was dismissed from level three and transferred to level one. Following the September 3, 2014 level one hearing, a level one decision was rendered on September 23, 2014, denying the grievance. On December 9, 2014, by undated statement, Grievant moved for default judgment. Default judgment was denied by *Order Denying Default* dated May 20, 2015, which remanded the grievance to level two for mediation. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on on November 19, 2015. Respondent filed a *Motion to*

*Dismiss* by email at 4:16 pm on December 19, 2016, the day before the level three hearing.[1] A level three hearing was held on December 20, 2016, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*.[2] Respondent was represented by counsel, Celeste Webb-Barber, Assistant Attorney General and Brooks Crislip, Assistant Attorney General. This matter became mature for decision on January 20, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

**Synopsis**

Grievant is employed by Respondent as a Correctional Officer II. Grievant served as a Field Training Officer at the Lorrie Yeager Jr. Juvenile Detention Center. The Facility Director removed Grievant's duties as Field Training Officer and assigned Grievant to the regular shift rotation for Correctional Officer IIs. Grievant was not demoted and he suffered no change in pay or job class. Grievant did not prove he was functionally demoted. Grievant did not prove the decision to remove his duties as a Field Training Officer was arbitrary and capricious. Grievant established a *prima facie* case of retaliation but Respondent showed legitimate, non-retaliatory reasons for its actions. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

[1] Respondent made no argument respecting the motion in its Proposed Findings of Fact and Conclusions of Law, so the motion is deemed abandoned and will not be addressed herein.

[2] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

## Findings of Fact

1. Grievant is employed by Respondent as a Correctional Officer II at the Lorrie Yeager Jr. Juvenile Detention Center ("LYJJDC").

2. Grievant held the title of Field Training Officer and was responsible for preparing, scheduling, conducting, and tracking training at the facility and conducting resident discipline hearings.[3] Training was to be scheduled and tracked on LYJJDC's intranet computer system.

3. Robert Browning was the Training Director for the Division of Juvenile Services.

4. In February 2014, a riot occurred at LYJJDC.

5. In March, Mr. Browning and members of his staff went to LYJJDC to conduct Disturbance Control Training. Through that training it became apparent that there were training deficiencies in other training areas. As an example, there was a tenured officer who had no idea how to properly apply mechanical restraints. Multiple officers had no ability to perform the basic tasks of the defensive tactic program. These were critical safety deficiencies.

6. During this time, Mr. Browning met with Grievant and ordered Grievant to get training scheduled immediately to address the deficiencies with the staff.

7. Mr. Browning assigned members of his staff to make follow up visits to LYJJDC that showed that files were not being updated and training was not being completed.

[3] Although the field training and hearing duties were split later, at the time of the grievance events, there was only one title, Field Training Officer, and the Field Training Officer performed both the training and hearing duties.

8. Mr. Browning and his staff found that for the year 2014 there was nothing on the intranet. There was nothing on the calendar and the staff training records were empty. The calendar for 2014 should have been completed in 2013.

9. When Mr. Browning returned to the facility in May, Grievant had made no effort to address the training deficiencies.

10. Following the riot the Facility Director at the time of the riot departed and Drew Goddard was named the acting Facility Director and served from February to June.

11. In June 2014, Travis White became the Facility Director for LYJJDC.

12. Upon assuming charge of LYJJDC, Grievant was informed by the training division and Mr. Goddard that training at LYJJDC had been "almost non-existent." Staff members told Mr. White that the riot was caused because they were never trained.

13. Because of this information, Mr. White met with Grievant to go over expectations for training at the facility. Mr. White viewed Grievant's attitude during the meeting as very nonchalant. Mr. White asked Grievant for training schedules and never received the schedules. Mr. White instructed Grievant to get training started over a two-day period during which Mr. White was away for a meeting. When he returned, Mr. White discovered that Grievant had not completed the training, but had merely set out forms for staff to sign that training had been completed. The required information in the intranet system was not up to date.

14. Grievant was injured by a resident on June 11, 2014, while conducting a disciplinary hearing.

15. On June 16, 2014, Grievant presented a document from his doctor excusing him from work until June 22, 2014.

16. Mr. White expected Grievant to arrange for coverage of his duties while he was out on leave.

17. By memorandum dated June 25, 2014, Mr. White removed Grievant's title and duties as Field Training Officer. Mr. White stated:

> I am writing to inform you of the removal of your appointed title of Field Training Officer at the Lorrie Yeager Jr. Juvenile Detention Center. Based on reports from Mr. Goddard's audit of the facility staff training and resident hearings, as well as from what I have observed in the past several weeks, it appears obvious to me that you have not put forth the required effort to ensure the staff of LYJC is properly trained in all aspects to ensure they are fully capable of completing their duties. After spending time with the new Correctional Officers, it is apparent to me that they have not received the proper training and/or orientation in order to make sound confident decisions when dealing with our residents. Furthermore, as a trainer for the OIS system that is now a requirement for all of DJS, it was your responsibility to ensure that staff in this facility were trained in the use of the OIS system to fully understand and complete their job duties. This has not happened.
>
> On 16 June 2014 you brought in a Dr. Slip taking you off of work until 22 June 2014. At no time did you make any effort to arrange that the Hearings you are responsible for are taken care of. This placed the facility and your co-workers in a dire position. In conclusion, I have decided that you will no longer be handling the duties of the Field Training Officer and you are to resume the normal Correctional Officer II duties as a of 01 July 2014, when you will be placed back into regular shift rotation for officers.

18. The removal of the Field Training Officer duties did not change Grievant's classification or result in a loss of pay.

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has 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 & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "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).

Grievant asserts he was wrongly demoted without merit due to being injured on the job. Respondent asserts Grievant was not satisfactorily performing the duties of Field Training Officer and that Grievant has failed to establish he was improperly removed as the Field Training Officer.

"There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or a change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity." W. VA. CODE ST. R. § 143-1-11.4 (2012). There are strict requirements for how an employer may demote an employee under the rule. *Id.*

Grievant did not lose pay or suffer a change in job class, so the removal of the Field Training Officer duties was not a demotion. However, "[i]t has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement."

*Dudley v. Bureau of Senior Serv*., Docket No. 01-BSS-092, (July 16, 2001) (citing *Gillispie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989)). "A 'functional demotion' is not a disciplinary matter." *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (Oct. 23, 2012). Grievant presented no evidence how the removal of the Field Training Officer duties may impact his ability to obtain future job advancement. Further, Grievant's situation certainly does not rise to the level of other cases in which the Grievance Board has found a functional demotion occurred. See *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (Oct. 23, 2012) (Registered Sanitarian, who previously performed inspections in the field, confined to desk to perform only clerical tasks not ordinarily done by Registered Sanitarians); *Watson v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hospital*, Docket No. 2009-0558-DHHR (Dec. 31, 2009) (Security Guard reassigned to perform the duties of a Food Service Worker); *Lilly v. Dep't of Transportation/Division of Highways*, Docket No. 07-DOH-387 (June 30, 2008) (As part of a written reprimand all managerial duties of Highway Administrator removed). In these cases, while the grievants' classifications did not technically change, the grievants were assigned to perform work clearly below the skill level of their classification. Essentially, the grievants' were working in their classification in name only. Such is not the case here. Grievant does not assert he will no longer be performing duties encompassed in the COII classification, and Director White's memorandum shows Grievant was to resume "normal Correctional Officer II duties" in a "regular shift rotation for officers." Grievant did not prove he was functionally demoted.

The assignment of particular duties is a management decision. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these

decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

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).

Grievant claims removing him as the Field Training Officer was without merit because he had never been disciplined or received a negative evaluation and had never

been told that he was not doing his job satisfactorily. Also, Grievant testified at level three that he did good training and that he was current in his training. It is undisputed that Grievant had not been disciplined for his poor performance or received a negative evaluation; however, Respondent disputes that Grievant's work was satisfactory and that he had not been told his work was unsatisfactory.

Neither party presented documentary evidence of Grievant's job performance prior to the decision to removed his duties.[4] Therefore, evidence of Grievant's performance was presented by testimony. Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. White's demeanor was appropriate. He was calm, professional, and responsive to questions. There was no evidence of bias against Grievant. His testimony was supported by the credible testimony of Mr. Browning and Clarissa Hill.

[4] Respondent presented a memorandum, email and report all dated in July 2014, after the decision had already been made. These documents were not available to Director White when he made his decision, so are not relevant to the determination of the reasonableness of the decision, but are relevant to impeach Grievant's testimony that he provided good training and was current in his training.

Mr. Browning's demeanor was appropriate. He was respectful, forthright, and maintained good eye contact. Although Grievant asserts he was "railroaded" because Mr. Browning wanted him out of the Field Training Officer position, there was no evidence that Mr. Browning had any actual bias against Grievant or took any inappropriate action. Mr. Browning credibly testified that he supported Grievant's removal from the position because of the serious safety deficiencies caused by Grievant's failure to train staff. Mr. Browning's testimony was supported by the credible testimony of Mr. White and Clarissa Hill.

Clarissa Hill assumed the duties of Field Training Officer for approximately six months after those duties were removed from Grievant. Ms. Hill then voluntarily separated from employment with Respondent to take another job. Ms. Hill's demeanor was appropriate. She was calm, direct, and forthcoming in her answers to questions. She was very certain in her assertion of the training deficiencies and provided detailed examples. There is no evidence Ms. Hill has any bias against Grievant and has no interest in the action as she is no longer employed by Respondent. Ms. Hill was credible. Ms. Hill testified that the paper files were not up-to-date, there was no training on the calendar, that no information had been scanned into the intranet as required, and that training that should have been scheduled at the beginning of the year had not been scheduled.

Grievant's credibility was questionable. Grievant's attitude towards the action was poor. Grievant was unprepared for his hearing and failed to follow the undersigned's instructions during the hearing. Grievant's testimony that he provided good training and was current on the training were mere assertions that were not supported by necessary

detail in his testimony or other corroborating evidence. The assertion that he was current on the training was contradicted by his own testimony that he could not complete training because trainings were repeatedly cancelled due to employees being pulled from the training and that he had not scheduled any training from January through June of 2014. Further, both assertions were contradicted by the credible testimony of Ms. Hill, Mr. Browning, and Mr. White.

The evidence shows that Grievant had failed to perform his training duties satisfactorily, which was a serious safety concern that had a significant impact on Respondent's operations. Grievant had failed to correct those deficiencies and had failed to follow the instructions of both Mr. Browning and Mr. White. As for the hearing duties, there was no evidence presented that it was Grievant's responsibility to arrange for coverage of his hearing duties. The assignment of duties is the responsibility of the supervisor. Even if it was somehow Grievant's responsibility to arrange for coverage under a policy or procedure that was not named or presented to the undersigned, Grievant was off on leave and Respondent clearly cannot expect Grievant to perform work activities, such as arranging for coverage of duties, while on leave. Mr. White's expectation for Grievant to arrange coverage was not reasonable. However, it is clear that the major concern was Grievant's failure to perform his training duties. At the time, the Field Training Officer's duties included both training and hearing duties. Therefore, Mr. White's decision to remove the duties of the Field Training Officer and assign Grievant to the regular shift rotation for officers was not unreasonable or without consideration as a whole.

In his Proposed Findings of Fact and Conclusions of Law, Grievant alleged Respondent had retaliated against him due to his on-the-job injury.[5] The West Virginia Public Employees Grievance Procedure statute specifically prohibits retaliation for participation in the grievance procedure stating, "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h). Grievant does not allege retaliation due to his participation in the grievance procedure, but, rather, because of his on-the-job injury, for which he had a Workers' Compensation claim. Pursuant to the Worker's Compensation Act, "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." W. VA. CODE § 23-5A-1.

In pertinent part, a grievance is defined as "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination. . ." W. VA. CODE § 6C-2-2(i)(1). The Worker's Compensation Act is a statute applicable to Grievant that he has alleged Respondent violated when it retaliated against him. Grievant does not seek to adjudicate his claim for

[5] Grievant's claim is dubious as, in his level three testimony, Grievant stated that he was set up to be removed before July because Field Training Officers were given a 5% raise and made corporals In July and he believes he was removed so he wouldn't get the raise and that he was "railroaded" because Mr. Browning wanted him removed from the position.

the Worker's Compensation benefits over which the Grievance Board does not have jurisdiction, but, rather, seeks to block his employer's alleged wrongful employment action taken against him in retaliation for his claim. This is a grievance claim which is cognizable under the statutory grievance procedure for state employees. *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lew. Co. Cir. Ct. Docket No. 94-C-00036 (Jan. 25, 1995).

In order to establish a *prima facie* case of retaliation, a grievant must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
> (3) that, thereafter, an adverse employment action was taken by the employer; and
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.
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> *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Graley v. *W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

*Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013).

Grievant had engaged in a protected activity in that he had an on-the-job injury that resulted in a workers' compensation claim. Director White was aware of Grievant's workers' compensation injury. Grievant was injured on June 11, 2014, and Grievant's

duties were removed on June 25, 2014. Retaliatory motive can be inferred due to the short passage of time between the injury and the adverse action. However, as discussed above, Respondent had reasonable concerns about Grievant's failures as the Field Training Officer. Further, these concerns pre-dated Grievant's injury. Respondent had legitimate, non-retaliatory reasons for removing Grievant's duties.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has 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 & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "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).

2. "There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or a change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity." W. VA. CODE ST. R. § 143-

1-11.4 (2012). There are strict requirements for how an employer may demote an employee under the rule. *Id.*

3. Grievant was not demoted and he suffered no change in pay or job class.

4. "It has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement." *Dudley v. Bureau of Senior Serv*., Docket No. 01-BSS-092, (July 16, 2001) (citing *Gillispie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989)).

5. "A 'functional demotion' is not a disciplinary matter." *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (Oct. 23, 2012).

6. Grievant did not prove he was functionally demoted.

7. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997).

8. "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

9. 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).

10. Grievant did not prove the decision to remove his duties as a Field Training Officer was arbitrary and capricious.

11. In order to establish a *prima facie* case of retaliation, a grievant must establish by a preponderance of the evidence:

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

> *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Graley v. *W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

*Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013).

12. Grievant established a *prima facie* case of retaliation but Respondent showed legitimate, non-retaliatory reasons for its actions.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: March 30, 2017**

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**Billie Thacker Catlett**
**Chief Administrative Law Judge**