THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

S.B.,
Grievant,

v. **Docket No. 2018-0632-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant, S.B.[1], was employed by Respondent, Department of Health and Human Resources within the Bureau for Child Support Enforcement. This is a consolidation of five related grievances. On September 12, 2017, Grievant filed a grievance, docket number 2018-0371-DHHR, protesting her "involuntary transfer." On October 26, 2017, Grievant filed a grievance, docket number 2018-0628-DHHR, protesting a written reprimand. On November 6, 2017, Grievant filed a grievance, docket number 2018-0660-DHHR, alleging "[r]etaliatory attendance improvement plan." On November 13, 2017, Grievant filed a grievance, docket number 2017-0714-DHHR, alleging "suspension with[out] good cause arising from Grievant's medically based refusal of functional demotion leading to possible further discipline and/or constructive discharge." Finally, on November 21, 2017, in docket number 2017-0758-DHHR, Grievant alleged, "Suspension and dismissal without good cause. Representation refused to Grievant."

Docket numbers 2018-0371-DHHR and 2018-0628-DHHR were filed and consolidated into the above-styled action at level one. Following the level one conference in the consolidated action, a level one decision was rendered on November 21, 2017,

[1] Grievant will be referred to by her initials due to the sensitive nature of the health information contained in the grievance.

denying the grievance. Meanwhile, docket numbers 2017-0714-DHHR and 2017-0758-DHHR were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). On November 22, 2017, Grievant appealed the level one decision in the consolidated action and requested it be consolidated with docket numbers 2017-0714-DHHR and 2017-0758-DHHR to be heard at level three. On December 1, 2017, level one waived docket number 2018-0660-DHHR to level three. By *Order of Consolidation* entered December 14, 2017, all five actions were consolidated into the above-styled action at level three of the grievance process. A level three hearing was held on April 12, 2018, before the undersigned[2] at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on June 6, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law, which date had been extended twice at the request and agreement of the parties.

Synopsis

Grievant was employed by Respondent as a Child Support Specialist 2 within the Kanawha County office of the Bureau for Child Support Enforcement. The Kanawha County office is divided into separate units, and Respondent moved Grievant from the enforcement unit to the customer service unit, both of which are staffed by Child Support

[2] At the beginning of the hearing, the undersigned disclosed to the parties that the undersigned had been employed by the two private companies that had previously been contracted to run the Kanawha County office, left that employment in 2012, and had worked with, but did not have a personal relationship with, Deborah Casto and Shannon Matheny, who were scheduled to testify in the grievance. Neither party objected to the undersigned hearing and deciding the grievance.

Specialists. Grievant continuously refused to be moved, stating that she could not answer telephones due to her generalized anxiety disorder. Grievant failed to present appropriate medical documentation that she could not answer telephones or that she was entitled to a reasonable accommodation. Respondent issued a verbal and then written reprimand, suspended Grievant for five days, and then terminated Grievant's employment, all for insubordination. Grievant filed five grievances that were consolidated into the instant grievance protesting the following: involuntary transfer, attendance improvement plan, written reprimand, suspension, and termination. Grievant alleged Respondent's actions were unreasonable and retaliatory. Respondent proved it was justified in suspending and then termination Grievant's employment for insubordination. Grievant made a *prima facie* case of retaliation, but Respondent rebutted the presumption and Grievant failed to prove Respondent's stated reasons for terminating Grievant were pretextual. Grievant failed to prove she was denied representation during the predetermination conference for her termination. The remaining issues presented are moot. 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:

Findings of Fact

1. Grievant was employed by Respondent as a Child Support Specialist 2 within the Kanawha County office of the Bureau for Child Support Enforcement.

2. Respondent previously contracted with a private company to manage the Kanawha County office and Grievant was originally employed by the private company. However, in April of 2016, the contract with the private agency ceased and Respondent

took control of the Kanawha County office. Grievant was then hired by Respondent as State employee.

3. The Kanawha County office, both under the private company and as a state office, is specialized into specific units because of its large volume of cases. The office has an intake unit, an enforcement unit ("ENU") and a customer service unit ("CSU"). All units are staffed by Child Support Specialists ("CSS").

4. All CSS positions in the Kanawha County office share some job duties, but CSS positions in the ENU are primarily responsible for managing a caseload and CSS positions in the CSU are primarily responsible for answering the telephones. Regardless, all CSS positions require daily phone contact with customers. In the ENU specifically, CSSs are responsible for completing a certain number of telephone contacts per month.

5. Grievant was specifically hired by the private company for a position within the ENU. As a temporary employee of the private company, Grievant had refused to apply for a position in the CSU.

6. Grievant suffers from generalized anxiety disorder and experiences panic attacks.

7. In September 2017, the Kanawha County office management team met to discuss the staffing needs of the office due to the loss of several employees and inefficient use of existing staff in some positions. At the time, there were nine vacant positions in the office. The management team decided to move several employees to different units, including Grievant. Grievant would be moved from the ENU to the CSU, initially for three hours each day, and then permanently. Keeping the telephones staffed was of paramount importance because insufficient staffing on the telephones created a snowball

effect of extra work for all employees. Placing an inexperienced employee on the telephones, would not be effective because they would not be able to answer customer questions, again causing more work for other employees. Grievant was chosen to be moved because she was an experienced CSS.

8. On September 11, 2017, Regional Manager Deborah Casto, Grievant's immediate supervisor, Lisa Webb, and supervisors, Ralona Skanes, Gwendolyn McGee, and Shannon Matheny, met with Grievant. Grievant was informed of the management team's decision to move her from the ENU to the CSU. Grievant was upset by the decision and stated that she would not answer the telephone full time and would resign first. After the meeting, Grievant had a panic attack.

9. On the same day, Grievant confirmed the discussion in the meeting that she refused to work in the CSU and that she would resign before working the phone permanently.

10. The next day, September 12, 2017, Grievant asked to meet with Ms. Webb and stated that she could not answer the phones permanently due to her anxiety. Ms. Webb explained to Grievant that she could provide a doctor's statement that she was not able to answer the phones. Grievant stated she had a doctor's appointment on September 22, 2017, and would provide an excuse thereafter.

11. It is unclear from the record, but it appears Grievant left work that day to see her doctor as she provided a *Return to Work/School* form that stated she was seen on September 12, 2017 and could return to work on September 12, 2017. The form contains no further information.

12. On September 18, 2017, the Grievant emailed Ms. Webb stating that her anxiety levels were "getting worse" and that she would bring a doctor's note after her appointment on Friday stating that her anxiety level was too high to be a "customer service representative." Grievant further stated, "At this time I would like to express that due to my stress level, I will not be able to answer the phones from 1-4 this week."

13. In response, Regional Director Casto, Ms. Webb, and Ms. Matheny met with Grievant and explained that work in the CSU fell within her job duties as a CSS2, that Grievant would be expected to work in the CSU as instructed, that refusal to do so would be considered insubordination absent a doctor's excuse, and that the doctor's excuse from September 12, 2017 was not sufficient. They also discussed with Grievant that other employees had expressed concern with Grievant's "disruptive behavior." When leaving the meeting, Grievant slammed the door.

14. Ms. Webb followed up the meeting with an email reiterating what had occurred in the meeting, and further noted that Grievant had again verbally refused to answer the phones as instructed.

15. On the same day, Grievant responded by email stating, "my anxiety level is too high to be on the phones at this time" and that her family doctor had referred her to a specialist with which she had an appointment that Friday. Grievant denied being disruptive or insubordinate stating, "I cannot risk my health by being on the phones and increasing my anxiety levels at this time."

16. Grievant did not work in the CSU on the 18th as instructed. Regional Director Casto and Ms. Webb met with Grievant to give her a verbal reprimand for her failure to answer the phones. Grievant refused to accept the verbal reprimand stating

she was disabled and had a doctor's excuse and again left the meeting slamming the door.

17. Grievant provided a second *Return to Work/School* form dated September 21, 2017, stating Grievant had been seen on September 12th and 22nd and could return to work on September 22nd. For limitations, it merely stated Grievant was "experiencing symptoms of anxiety due to conditions at work."

18. Grievant also provided a *Medical Excuse Form* from MedExpress stating Grievant was seen on September 23, 2017, and could return to work on September 25, 2017, with no restrictions.

19. Grievant provided a final *Return to Work/School* form dated September 25, 2017, stating Grievant had been seen on the 19th, 20th, and 21st and could return to work on the 22nd. Under "work limitations" it stated, "experiencing symptoms of anxiety due to constant receiving/making calls via the customer service line and constant face to face interaction at her place of employment."

20. On October 12, 2017, Grievant's primary care physician faxed a completed *Physician's/Practitioner's Statement,* pages two through four of the *Medical Leave of Absence Without Pay and/or Federal Family and Medical Leave Act (FMLA) Supplemental Certification of Health Care Provider for Employee's Serious Health Condition* ("Certification"), and *Department of Health and Human Resources Medical Inquiry Form in Response to an Accommodation Request* ("Inquiry Form"), all dated October 10, 2017.[3]

[3] Level one record, BCSE Exhibit # 3. The document itself is not marked but is identified within the transcript as the third exhibit.

21. The *Physician's/Practitioner's Statement* states that Grievant's limitations/restrictions would last from September 21, 2017, through January 1, 2018, and would consist of: "needs time to attend therapy and primary care appointments."

22. Under the "Medical Facts" section of the Certification form, Grievant's doctor answered "yes" to the question, "Is the employee unable to perform any of his/her job functions due to the condition" stating, "patient reports answering phones is a significant stressor for her and gives her panic attacks." However, under the "Amount of Leave Needed" section, Grievant's doctor only stated that Grievant "needs time off from work to attend therapy and primary care appt. for generalized anxiety disorder." Specifically, the Grievant was estimated to require "biweekly 60 minute or 30 minute psychotherapy session and 3 month follow ups."

23. The Inquiry Form is used during a reasonable accommodation review under the Americans with Disabilities Act ("ADA"). Grievant's doctor stated that Grievant does have an impairment, but that it is not permanent, and it does not limit a major life activity. Grievant's doctor stated that "generalized anxiety disorder is impairing job performance. Also needs time for therapy + MD appts." Grievant's doctor stated that, per Grievant's report, answering phones and high stress situations were increasing Grievant's anxiety and that her "mental status is diminished." Grievant's doctor last suggests that Grievant's job performance could be improved by giving Grievant job duties that do not give her anxiety.

24. By letter dated October 19, 2017, the Grievant was granted intermittent FMLA leave to attend bi-weekly appointments. The letter acknowledges the Office of

Human Resources Management's receipt of the *Physician's/Practitioner's Statement* and the Certification form, but not the Inquiry form.

25. On October 23, 2017, Regional Director Casto and Ms. Webb met with Grievant regarding Grievant's FMLA and request for ADA accommodation. Grievant was informed that, after review of the medical documentation, Grievant did not have a limitation that prevented her from performing her duties as a CSS2, which included answering the telephone. Grievant asserted that the approval of her FMLA meant that she did not have to answer the telephones, that she would not answer the telephones, and left the meeting.

26. By letter dated October 26, 2017, Grievant was issued a written reprimand for her refusal to answer the telephones.

27. By memorandum dated November 6, 2017, Grievant was placed on an Attendance Improvement Plan ("AIP").

28. On October 26, 2017, Larry LeFevre, Director of Field Operations, Regional Manager Casto and Ms. Webb met with Grievant to present her with the written reprimand for her continued refusal to answer the telephones. Grievant again asserted that because her FMLA was approved she was not required to answer the telephones. Grievant was again told that her FMLA was approved only for her to attend medical appointments and did not excuse her from answering the telephones. Grievant stated she would not answer the telephones.

29. Following the meeting, Grievant sent an email to Ms. Webb stating, "I am leaving at 1pm today." Ms. Webb replied that, if Grievant left, it would be unapproved leave.

30. A predetermination meeting was held on November 1, 2017, between Director LeFevre, Ms. Webb, Grievant and her representative. Grievant was informed that continued refusal to answer the telephones would be considered insubordination for which Grievant would be disciplined. Grievant continued to assert that she could not answer the telephones due to her health and that she had answered the telephones in the afternoons from September 11th through the 15th.

31. By letter dated November 8, 2017, BCSE Commissioner, Garrett Jacobs, suspended Grievant for five days for her "history of misconduct and insubordination." The letter stated that Grievant's "repeted declaration that you are leaving, rather than asking permission" was contrary to policy and procedure, that Grievant had refused on multiple occasions to follow the directive of supervisors, Grievant's "indication that she will *never* perform those duties" and that Grievant's "use of foul language is unprofessional and unnecessary." The letter specifically acknowledged the ADA paperwork and stated that Grievant was able to perform her job duties with no restrictions. The suspension letter notified Grievant that, upon her return to work, she "will be expected to answer phones from 1:00 pm to 4:00 pm" and that "should you continue to refuse to answer phones, absent clear instructions from your doctor which specifically states that your condition permanently renders you unable to perform this essential function of your position, I must conclude that refusal represents an unwillingness rather than inability to perform the duties." The letter further stated, "[s]hould you refuse to answer phones on November 21, 2017, a predetermination meeting will be held that day to give you an opportunity to be heard. The meeting will not be postponed."

32. Grievant returned to work on November 21, 2017, and, again, refused telephone duties.

33. A predetermination conference was immediately held, as per the suspension letter attended by Director LeFevre, Ms. Webb and Grievant. During the predetermination conference, Grievant again refused telephone duty.

34. By letter dated November 21, 2017, Commissioner Jacobs terminated Grievant from her position for "misconduct and insubordination" citing Grievant's disciplinary history, "repeated declarations that you are leaving, rather than asking permission," and refusal to perform telephone duties upon return from her suspension.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Although there are five consolidated grievances in this action, the determinative issue is whether Respondent was justified in suspending and then terminating Grievant. On that issue, Respondent asserts it was justified as Grievant's behavior was clearly and

repeatedly insubordinate for her refusal to answer the telephone.[4] Grievant asserts Respondent's "transfer" of Grievant to the CSU was improper and that the transfer and subsequent disciplinary action was in retaliation for Grievant's participation in an Equal Employment Opportunity Commission investigation. Grievant further asserts her Due Process rights were violated when Respondent refused to allow her representative to be present for the predetermination meeting on her termination.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent asserts it had good cause to terminate Grievant's employment for insubordination. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). "'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-*

[4] The suspension and termination letters included as additional grounds Grievant's alleged leaving without permission, and the suspension letter included Grievant's alleged use of foul language. However, as Respondent made no argument regarding those grounds in its Proposed Findings of Fact and Conclusions of Law, those grounds will not be further discussed.

Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't,* Docket No. 07-CHD-121 (Dec. 14, 2007)." *Graham v. Wetzel County Bd. of Educ*., Docket No. 2013-0014-WetED (Feb. 15, 2013), ***aff'd***, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

Grievant does not deny that she repeatedly refused to be moved to the CSU to answer the telephones. She instead argues that she was not insubordinate because the directive was unreasonable on its face and given her medical condition and in retaliation for her participation in a previous EEOC investigation.

"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); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), ***aff'd***, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

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, 474 S.E.2d 534 (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), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant characterizes the CSU unit position as a "telephone operator" and a functional demotion and argues that transferring Grievant, who had been productive and satisfactory within the ENU, to the CSU was unnecessary. Contrary to Grievant's assertion, the CSU position is not just a "telephone operator" as that position is the same

classification as the ENU position. It is undisputed that the Kanawha County office was experiencing an extreme staff shortage at the time of this management decision. Regional Manager Casto testified in the level one hearing that keeping the telephones staffed was of paramount importance because insufficient staffing on the telephones created a snowball effect of extra work for all employees. She further testified that it would do no good to place an inexperienced employee on the telephones because they would not be able to answer customer questions, again causing more work for other employees. Therefore, the initial decision to move Grievant from the ENU to the CSU was not unreasonable.

Grievant next argues it was unreasonable for Respondent to insist she move to the CSU given her medical condition, which she asserts prevents her from answering telephones on a daily basis. However, Respondent allowed Grievant the opportunity to provide medical evidence to support her claim and to request an accommodation due to her medical condition. Although it is undisputed Grievant has anxiety, Grievant's medical documentation does not support that she is unable to answer telephones as a job duty or that she is entitled to reasonable accommodation. While the various documents from Grievant's doctor discuss her reports of symptoms due to answering the telephone, none of the documents state that Grievant cannot perform that job duty. Grievant was granted intermittent FMLA leave due to her condition to attend appointments, and repeatedly asserted to management that excused her from telephone duties. This was clearly incorrect assertion. In enacting the FMLA, Congress found that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). The purpose of the FMLA was

"to entitle employees to take reasonable leave for medical reasons. . ." 29 U.S.C. § 2601(b)(2). It is through her ADA request that Grievant could claim entitlement to a reasonable accommodation.[5]

However, the ADA Inquiry form clearly shows Grievant was not entitled to a reasonable accommodation.

> [The ADA] prohibits employers from discriminating against individuals with disabilities in all employment practices and all employment related activities. Disability is defined as a physical or mental impairment that substantially limits one or more major life activities. The U.S. Equal Employment Opportunity Commission (EEO) considers the following as major life activities: walking, seeing, speaking, hearing, breathing, learning, performing manual tasks, caring for oneself, working, sitting, standing, lifting, reaching, thinking, concentrating, interacting with others, and sleeping. Reasonable accommodation is defined by the ADA as any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

Martin v. W. Va. Dep't of Health & Human Res./Jackie Withrow Hosp., Docket No. 2011-1590-DHHR (May 18, 2012), ***aff'd***, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012). The Inquiry form clearly states Grievant's impairment does not limit a major life activity or limit her ability to perform the essential functions of her job, therefore, Grievant was not entitled to a reasonable accommodation. While Respondent could have made a different management decision when Grievant insisted she could not answer telephones, it was not arbitrary and capricious for Respondent to refuse to change

[5] An employee may also seek reasonable accommodation under the West Virginia Human Rights Act, W.VA. CODE § 5-11-1 *et. seq*., but Grievant did not seek accommodation under that Act.

its decision given Grievant's unprofessional reactions to the decision by leaving meetings and slamming the door, and her subsequent failure to present medical documentation to support that she could not answer the telephones. Frankly, allowing an employee to refuse directives in such a manner would act to undermine management authority.

Respondent proved it was justified in suspending then dismissing Grievant for insubordination. Respondent follows a policy of progressive discipline and Respondent complied with its policy in disciplining Grievant. Grievant received a verbal warning, a written warning, a suspension, and then dismissal for refusing to answer phones. Grievant was given an opportunity to provide medical documentation, as discussed above, which did not show that Grievant could not answer the telephones or was entitled to a reasonable accommodation. After each successive level of discipline, Grievant continued to refuse the directions of management to answer the telephones. Respondent was justified in suspending and then dismissing Grievant from employment.

Grievant last argues her discipline was retaliatory for her participation in an EEOC investigation. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was

> subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Participation in an EEOC investigation is a protected activity. Respondent was aware of Grievant's participation in the EEOC investigation. Respondent offered no direct evidence of retaliatory motivation, but she participated in the EEOC investigation in March of 2017, and the adverse actions against her began in September 2017, which is sufficiently close in time to infer a retaliatory motivation. However, Respondent has offered sufficient credible evidence to rebut the presumption of retaliatory action as discussed above. Respondent offered a reasonable explanation for why Grievant was

chosen to be moved to the CSU and proved that the discipline against Grievant was justified for her refusal to perform her job duties. Grievant failed to prove that Respondent's reasons for disciplining Grievant were pretextual.

Although Grievant alleged in her grievance filing that she had been denied representation in the predetermination meeting on her termination, she did not testify at the level three hearing that she had been denied representation. Grievant's assertion that her due process rights were violated is in the nature of an affirmative defense. "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). As Grievant presented no evidence of this allegation, she has failed to prove this defense.

As Respondent has proven it was justified in suspending and then dismissing Grievant from employment, the other grievances consolidated into this grievance are moot and will not be further addressed. "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]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)). "Relief 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). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Services,* Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (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*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*).

4. "'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-*

Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't,* Docket No. 07-CHD-121 (Dec. 14, 2007)." *Graham v. Wetzel County Bd. of Educ*., Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

5. "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); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff'd*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

6. 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, 474 S.E.2d 534 (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), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

7. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

8. Respondent proved it was justified in suspending and then termination Grievant's employment for insubordination.

9. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie*

case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

10. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

11. Grievant made a *prima facie* case of retaliation, but Respondent rebutted the presumption, and Grievant failed to prove Respondent's stated reasons for terminating Grievant were pretextual.

12. Grievant failed to prove she was denied representation during the predetermination conference for her termination.

13. “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].” *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)). "Relief 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). *De minimus* relief is also unavailable. *Carney v. W. Va. Div. of Rehab. Services,* Docket No. VR-88-055 (Mar. 28, 1989)." *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

14. The remaining issues presented are moot.

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: July 20, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge