

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DAVID DEYERLE, et al.,
Grievants,**

v.

Docket No. 2017-1128-CONS

**DIVISION OF REHABILITATION SERVICES,
Respondent.**

DECISION

This is a consolidated grievance involving four (4) employees of the Division of Rehabilitation Services, Disability Determination Section (“DDS”), Charleston Office. Grievants¹ filed their respective grievances against their employer the West Virginia Division of Rehabilitation Services, Respondent, on or about September 21, 2016, signed by their mutual representative. The individual statements of grievance were identical, identifying the grievance to be “Respondent’s failed to remove mold from the work environment.” The relief sought was then identified as “[t]o be made whole in every way including removal of mold, repair to HVAC and restoration of any lost leave used resulting.”

Respondent motioned to consolidate the grievances, Grievants did not object. The issue(s) in dispute are based upon a rather shared set of facts and a common request of relief. The four grievances were consolidated, and this matter was issued a consolidated docket number on or about October 28, 2016. A level one hearing was held on December 12, 2016. At the consolidated level one hearing, it was clarified that

¹ See David Deyerle, Docket No. 2017-1003-DEA; Elizabeth Elberink, Docket No. 2017-1004-DEA; Victoria Smallridge, Docket No. 2017-1005-DEA; and Sarah Wishon, Docket No. 2017-1006-DEA.

Grievants were seeking: restoration of sick and annual leave used as a result of the 2016 Labor Day incident; a comprehensive Air Quality Study of the building; and establishment of a procedure to have an alternate work site outside of 500 Quarrier Street, Charleston, if there should be a future similar incident. The clarification of the relief sought was deemed to be within the context of the original relief requested. Nevertheless, the grievance was denied at level one on or about January 19, 2017. Grievants appealed to level two on January 21, 2017. A mediation session was held on April 25, 2017. This matter was placed in abeyance for a period of time, giving the parties additional time to attempt a mutually acceptable resolution. Grievant appealed to level three on or about June 7, 2017. A level three hearing was held before the undersigned Administrative Law Judge on December 12, 2017, at the Grievance Board's Charleston office. Grievants David Deyerle and Sarah Wishon appeared in person. Grievants Elizabeth Elberink and Victoria Smallridge did not personally appear at the level three hearing. All four Grievants were represented by their representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent's legal counsel was Katherine A. Campbell, Assistant Attorney General. The parties were presented with the opportunity to submit written proposed findings of fact and conclusions of law. A request was received requesting an extension for submission of fact/law proposals. The request was timely granted. This grievance matter became mature for decision on or about January 29, 2018, on receipt of the last of the parties' written proposals. Both parties submitted fact/law proposals.

Synopsis

Grievants assert that the environment in which their employer required them to work affected their individual health. Grievants contend that they suffered undue risk and physical harm because of Respondent's handling of a workplace disorder. Grievants seek restoration of sick and annual leave used; a comprehensive Air Quality Study of the building; and establishment of a procedure to have an alternate work site if there should be a future similar incident. Respondent maintains it acted in a responsible and reasonable manner.

Grievants individual allegations of misfeasance by Respondent varies, to some limited degree; nevertheless, none establish failure on the part of Respondent to provide a reasonably safe work environment to the degree warranting the requested sanctions. Grievants failed to establish by a preponderance of the evidence legal liability of Respondent for any alleged health issues Grievants may have suffered relevant to the time period in discussion. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The Charleston Office of the Division of Rehabilitation Services, Disability Determination Services is located in the Colliers International Building at 500 Quarrier Street in Charleston West Virginia (the old federal Courthouse building) on the 4th floor. All Grievants work at this location.

2. Over the Labor Day weekend in September 2016, there was a water leak at the 500 Quarrier Street location. The water line to the ice maker in the DDS office kitchen area had developed a leak. The DDS 4th floor kitchen area and some of the employee work area were directly impacted by “flooding”.

3. Kathleen Jordan, Assistant Director of DRS, was the area administrator at the time of the events in discussion. Director Jordan testified on behalf of WVDRS at the level three hearing.

4. Assistant DDS Director, David Moss, confirmed in an email at 12:08 pm, on September 6, 2016, that the water leak in the 4th floor break room had occurred over the Labor Day holiday. G Ex 2 At 12:16 p.m., Assistant Director Moss emailed Grievant Deyerle,² and stated, “the plan right now is to treat the remaining wall all back along the wall close (to) Sarah Wishon and behind the kitchen counter. And the wall in the hallway. But we’ll likely know more once they start taking out the existing wall.” Id At 3:13 p.m., on September 6, 2016, Assistant Director Moss emailed Grievant Deyerle, and stated, “I’ve been informed that there was mold in our wall. We are attempting to get someone here to check our air quality as well as getting some ‘air scrubbers’ here. ...The area is being ‘sealed’ as well as possible but we are seeking additional advice on what additional procedures we should take.” G Ex 2

5. On September 6, 2016, Assistant Director Moss sent an email to supervisors — including Grievant Wishon — labeled as “high” importance, acknowledging that there had been a “water leak over the weekend,” and that “it was discovered that we

² Grievant David Deyerle appeared in person and testified at the level three hearing.

had some mold in the wall behind the ice maker and refrigerator.” G Ex 3 This email also informed supervisors that the 4th floor break room and “that section of the hallway” was closed “for the time being.” G Ex 3

6. Director Jordan issued an office-wide e-mail to the approximately 100 employees of the DDS Charleston Office on September 7, 2016, advising them of the issue and offering to relocate any employee to an alternate work area within the building.

The wording of the September 7, 2016 e-mail specifically provided:

As everyone is aware, we had a water leak in the 4th floor kitchen over the weekend. Building management has responded quickly to the problem and has ServePro working on all of the affected areas of our space. We also had GSA in this morning to inspect the affected areas. GSA is pleased with the responsiveness of building management and the work of ServePro on the clean-up.

I know this is inconvenient and distracting. If you are in the area where work is being done and wish to be moved to another location in the office, we will do our best to accommodate your request. Please talk to David Moss about this. If you wish to take leave, go through your supervisor, as usual.

We have requested air quality testing for the immediate area to be done now (today, if possible-GSA is in the process of requesting approval for this) and also again once the area has been cleaned and all construction is complete (building management will do this through a private contractor). ServePro is using “air scrubbers” in the clean-up process, and the returns on the HVAC in the area have been closed off, so we are taking all steps that we can to minimize stirring up dust, etc.

Please feel free to use the 5th floor kitchens while the 4th is out of commission.

G Ex 2

7. A subsequent e-mail from Director Jordan dated Sept 9, 2016, subject matter, “Update on water leak/clean-up” provided:

I want to thank staff for your patience and understanding as we continue the clean-up on the fourth floor. The drying process continues. It is not something that can be rushed. There was a lot of water in the area of the

leak and it takes time to ensure that everything is properly dried before we reconstruct and reassemble everything. I am in touch with all parties (General Services Administration, Colliers International, our Regional Office and ServePro) and have been repeatedly assured that the issue is being addressed timely and appropriately.

Most importantly, I am being assured by ServePro (they *are* the experts in this type of clean-up) that **no health risks** are posed by the leak or clean-up process.

I do understand that some individuals are sensitive to dampness and odors and noise. That is why I offered, and offer again, the option for temporary moves to anyone in the area who wishes to be moved.

ServePro will be back onsite this morning to check the cubicles where we have dismantled the furniture in order to gain full access.

In this process, nothing is more important than the health of our employees. I remain focused on this as my priority.

G Ex 2

8. After building management became aware of the water leak, they contained and repaired the leak itself, and commenced the process of cleaning the damaged areas. The building management (Colliers Management) representatives had ServPro Clean-up & Restoration Services conduct the removal, clean-up and restoration work.

9. Grievant Sarah Wishon is employed by Respondent as a Rehabilitation Office Supervisor. Grievant Wishon has been a DDS supervisor since March 2011. Grievant Wishon testified at the level three hearing.

10. Grievant Wishon's office was immediately adjacent to the 4th floor break room. Grievant Wishon's workspace was directly impacted by the water leak.

11. ServPro was contracted to dry out the impacted areas and assess the damage. ServPro commenced clean-up one day prior to Tuesday, September 6, 2016, the day Respondent's employees returned to work after the Labor Day weekend. They had vacuumed and had set up dehumidifiers and fans to continue the drying process on

Tuesday morning when Respondent's employees arrived. ServPro set up air scrubbers through-out the impacted area.

12. During the remediation process, including when drywall was being ripped out and replaced, a temporary barrier of a plastic tarp was erected, attempting to shield the floor from the construction zone. The efficiency of the plastic tarp barriers is debatable.

13. Construction work was done during the evening hours to lessen the impact upon the working environment for the employees.

14. During the removal process, something caused the damp drywall to be discolored. Grievants in good-faith believe the decolorization to be mold.

15. The Colliers Management representatives had an onsite inspection conducted by Healthy Buildings International, Inc. The onsite inspection was conducted on September 12, 2016. The report, *Colliers International, Proactive Indoor Air and Water Quality Report: Initial Inspection* was issued on September 23, 2016.

R Ex 1

16. Director Jordan issued a complete copy of the 80-page report to all 100 of the DDS Charleston Office employees.

17. Among other information the *Colliers International, Proactive Indoor Air and Water Quality Report: Initial Inspection* report (R Ex 1), found that "no significant source of mold proliferation indoors" was detected during the inspection. Specifically, on page 60 of the report it is concluded:

Airborne samples for mold spores and other general airborne particulates that may be indoor allergens were taken in those areas identified [Areas reflected include the DDS office spaces of: 4F North Perimeter Breakroom and 4F SW Interior Cubicle Area] The results of this sampling were:

The counts of airborne mold and other particulates throughout the building were substantially lower than those found outdoors, and types found in the indoor air were similar to those found in the outside air. These results suggest that there is no significant source of mold proliferation indoors. In our professional opinion these results are unlikely to trigger any adverse reactions to the majority of the building occupants.

R Ex 1

18. Information provided by the Summary of Findings on page 71 of the *Indoor Air and Water Quality Inspection Report* includes:

- 5.2 An inspection of the grounds and conditions around the building found no significant pollutant sources likely to impact the indoor air quality.
...
- 5.20 Spore trap device samples were collected to identify and count airborne microbial spores, fungal fragments, pollens or other allergenic particles in the air. The results were considered to be acceptably low and were therefore judged to be satisfactory.

19. In conclusion, at page 73 under Recommendations at 6.2 of Respondent's Exhibit 1, the *Report* determined that "[a]t this inspection, we were asked to inspect areas on the 4th Floor as a result of a recent flood incident. . . . A thorough inspection of the walls, carpeting and ceiling of these areas showed all surfaces to be dry and clean. . . . Moisture meter readings were taken of relevant wall surfaces in and around the areas that had been dampened by the flooding. All materials tested were judged to be dry having a moisture content below a level known to support mold growth ([less than] 1.0%).

Also, no odors or visible mold were noted at the time of our inspection. Finally, the airborne mold and allergen levels in the areas were very low and considered to be background levels (See Section 4.2). This indicates that the remediation of the flooded areas was successful, and the areas are now dry and clean.”

20. On September 26, 2016, Dr. Kelli J. Dumm of Mountain State Medical Associates wrote a physician’s note for Grievant Wishon that stated, “Below accommodation from this date through 10/21/16. Please allow patient to work from home due to work environment causing worsening medical condition. She may work full time with above modification.” Grievant Wishon L-3 Testimony and G Ex 4

21. In an e-mail to Assistant Director Moss dated September 27, 2016, Grievant Wishon stated, “I have been having health problems since...9/6/16. I went to my doctor again after work yesterday. My doctor is concerned about the long-term effects of me being in this building. She was also surprised that information regarding the mold etc. has not been forthcoming. She is asking for the accommodation of allowing me to work from home, since my symptoms clear up (slowly) when I am home.” G Ex 3

22. Assistant Director Moss sent a September 27, 2016 response email to Grievant Wishon which stated that Director Jordan “is contacting (agency director) Donna Ashworth in regards to your request to work from home. ...In the meantime, I again encourage you to use an office upstairs.” G Ex 3

23. Pursuant to an September 27, 2016 letter signed by Respondent’s Human Resources Senior Manager, Charlotte Stiltner, the September 26, 2016, request that Grievant Wishon be allowed to work from home was denied. The letter specifically

stated that Grievant's "job duties as Rehabilitation Office Supervisor would not allow [Grievant Wishon] to work from home." G Ex 4

24. The September 27, 2016 letter also reiterates an alternative solution. "There is office space available on the fifth floor. . . . The fifth floor is on a different HVAC system than the fourth floor; therefore, any dust, etc., that is circulating on the fourth floor would not be on the fifth." G Ex 4

25. On November 3, 2016, Grievant Wishon's attending physician renewed a request for accommodation for her to work from home full time based on "exacerbation of asthma/allergy due to mold in building. Having congestion/cough/wheeze/conjunctivitis while in building at work." G Ex 4

26. Pursuant to the allergy testing performed on Grievant Wishon, on November 16, 2016, Grievant Wishon was found to have positive allergic responses to dust mites, Aspergillus mold, Pullularia mold and Fusarium mold. G Ex 4

27. Grievant Wishon is of the opinion that the black substance found in or on the walls of the 4th floor area was mold and was the cause of her respiratory issues that she began suffering on the first day back from Labor Day weekend.

28. Grievant, David Deyerle, is employed by Respondent as a Disability Evaluation Specialist and works on the 4th floor in a cubicle. Grievant Deyerle appeared and testified at level three hearing.

29. Grievant Deyerle contends to some unspecified degree that the mold issues correlate with his tongue cancer episode. Grievant's testimony tended to be less than direct, inferring the mold worsened his condition and/or that mold in the building was the

cause of his cancer. Grievant testified that his tongue cancer was diagnosed within a few months of the water leak. Testimony was not very time specific. Grievant Deyerle offered no proof the two events were actually related, but strongly interjects his alleged belief of a casual connect given the relatively short time period between the events.

30. Grievant Deyerle did not provide any evidence to the record establishing the amount of sick or annual leave used for his illness allegedly resulting from the water leak, complications.

31. Elizabeth Elberink is employed by Respondent as Rehabilitation Office Supervisor. Grievant Elerink did not appear in person at the level three hearing. No specific evidence was put into the record regarding any illness suffered by Grievant Elberink. At the level three hearing, no specific amount of annual or sick leave was identified as being used by Grievant Elberink during the time period in discussion.

32. Victoria Smallridge is employed by Respondent as a Disability Evaluation Specialist. Grievant Smallridge did not appear to testify at the level three hearing.

33. No evidence was present on behalf of Grievant Smallridge nor Grievant Elberink in support of alleged health issues or any causal connection between any sickness, or uses of sick time, they may have used during the time period relevant to this grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

There is a recognized obligation for an employer to provide a reasonably safe work environment for employees.³ Grievants propose that they suffered health complications after the water leak that occurred over Labor Day weekend 2016, and Respondent should be held responsible. To prevail in this matter, Grievants should (needs to) establish several independent factors. Generically speaking, Grievants need to establish; duty,

³ West Virginia Code § 21-3-1, provides, in part: "Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render employment and the place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees: Provided, That as used in this section, the terms "safe" or "safety" as applied to any employment, place of employment, place of public assembly or public building, shall include, without being restricted hereby, conditions and methods of sanitation and hygiene reasonably necessary for the protection of the life, health, safety, or welfare of employees or the public."

breach of duty, damages and causal connection harm. In other words, Grievants must establish that Respondent breached a duty owed and that breach facilitated a credibly identified harm to Grievants that is responsibly connected to Respondent. Speculation and unsubstantiated fear is not proof.⁴

Whether certain conditions of Grievants' work space were, in fact, having a practical negative effect on Grievants' health given their particular circumstances is a fundamental question of this grievance. Further, it is also relevant to analysis whether Respondent took appropriate steps to provide its employees with a reasonably safe working environment. The parties disagree. Grievant Wishon is of the opinion that the black substance found was mold and was the cause of her respiratory issues that she allegedly began suffering on the first day back from Labor Day weekend. Grievant Deyerle's testimony fluctuates, in that he is of the belief that the mold caused him to develop tongue cancer or the mold issues severely aggravated the condition.⁵ No evidence was presented on behalf of Grievant Smallridge nor Grievant Elberink in support of alleged health issues or any causal connection between any sickness, or uses of sick time, they may have used during the time period relevant to this grievance.

This case involves several intertwined factors (facts). Grievants respective belief is real, however the fact that the Colliers International Building at 500 Quarrier Street in

⁴"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-DOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. Of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). It is prudent to note that mere allegations alone without reliable substantiating facts is not proof.

⁵ Respondent requested that this ALJ note that Grievants fail to proffer any reliable evidence that the black substance found on parts of the dry wall was caustic mold.

Charleston was a contaminated building is not fact certain.⁶ Grievant Wishon testified that her breathing difficulties were so severe on September 6, 2016, she believed her throat was closing up; however, she did not seek any medical attention until much later in the month. Grievant Wishon admits that Respondent informed her that she could move her office. Respondent offered not only a different location on the 4th floor, as well as a work space on the 5th floor which had not been impacted by the water leak and operated on different air filters than the 4th floor. This can be considered reasonable alternative work space.

Grievant Wishon wanted to work from home, she specifically requested to work from home, but her request was denied. Respondent's duty is limited to providing a reasonably safe workplace, not necessarily the working option desired by Grievants. Director Jordan testified that due to the highly confidential information that DDS employees deal with daily for the U.S. Social Security Administration and federal government privacy and security protocols that must be adhered to by all WVDRS/DDS employees that working from home was not an option.

Grievant Wishon was the sole Grievant to produce anything remotely resembling medical justification. She established her sensibility to dust mites, Aspergillus mold,

⁶ An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Pullularia mold and Fusarium mold. G Ex 4 Grievant took steps to secure a request for alternative working arrangements. This is commendable. Nevertheless, a request does not obligate Respondent to provide the explicit relief requested. Respondent's duty is limited to providing a reasonably safe workplace. Grievant Wishon eventually opted to move to an office on the 5th floor; however, maintains the move worsened her symptoms due to a dusty office. Whether some of Grievant's reactions was more psychosomatic than physical is speculation. Grievant Wishon acknowledges she had received Respondent's Exhibit 1, but did not trust the Air Quality Study's findings and believed that Collier International Management was just trying to cover up their mistakes. Ultimately, Grievant did in deed take a measurable amount of time off during November 2016, however it is not persuasively determined that Grievant Wishon's respiratory issues are based solely upon the physical condition of the workplace provided by Respondent. Grievant Wishon did not establish Respondent failed to provide her a reasonably safe work environment.⁷

Grievant Deyerle testified that the water leak caused a black substance that was found behind the wallpaper on the dry wall. The black substance was found during the remediation process. Grievant, in good faith, believes this substance to be mold. It was Grievant Deyerle's testimony that these alleged mold issues caused his tongue cancer. Moreover, he testified that his tongue cancer was diagnosed within a few months of this

⁷ Grievant has not proven by a preponderance of the evidence that Respondent failed to provide her with readily available accommodations for reasonable health concerns or engaged in actions which constituted a substantial detriment to, or interference with, her ability to attend work on a regular basis.

water leak. Grievant Deyerle offered no proof that the two events are connected other than a reported short time span between the events. Grievant Deyerle provided no evidence regarding any amount of annual or sick leave that he may have used in response to the water leak and its alleged health impact upon him. Grievant provides no medical evidence, dates of treatment, Doctor's opinion or reports of weight stipulating a causal connection of his illness and the working conditions of the fourth floor in the Colliers International Building at 500 Quarrier Street in Charleston West Virginia. Further, it is debatable that Grievant Deyerle's testimony at the level one hearing acknowledges diagnosis and treatment for tongue cancer prior to the established date of the water leak. Grievant's testimony is vague with regard to time frame and over reaching with unsupported conclusions. Grievant Deyerle would do well to establish facts certain, dates of events and limit his allegations to the probability that an elevated mold count is not likely to have been a good thing for an individual receiving radiation treatment. Grievant Deyerle did not establish to any degree of certainty that his work place was the proximate cause of his health issues.

An Air Quality Study was conducted to test the air quality post water leak. R Ex 1 Respondent highlights that The Air Quality conducted by Collier's Management reveals that there were no harmful impacts caused by the water leak and that the remediation was successful. Among other information the *Colliers International, Proactive Indoor Air and Water Quality Report* provided that airborne samples for mold spores and other general airborne particulates that may be indoor allergens were taken in the identified areas. *"The counts of airborne mold and other particulates*

throughout the building were substantially lower than those found outdoors, and types found in the indoor air were similar to those found in the outside air. These results suggest that there is no significant source of mold proliferation indoors. In our professional opinion these results are unlikely to trigger any adverse reactions to the majority of the building occupants.” Id

Respondent maintains that Grievants were not exposed to abnormal amounts of mold at work, air quality studies showed that the mold inside was similar to the air quality of mold outside. Spore trap device samples were collected to identify and count airborne microbial spores, fungal fragments, pollens or other allergenic particles in the air. The results were considered acceptably low. See Bullet point 5.20 Summary of Findings on page 71 of R Ex 1 “No significant source of mold proliferation indoors” was detected during the inspection. *Id* pg. 60. Director Jordan testified when she questioned Colliers Management and ServPro personnel about the safety of the area, she was assured that there were no risks to anyone working in the building, including the fourth floor. The efficiency level of the plastic tarp barriers is debatable, but steps were taken to minimize air flow from the construction area.

To the degree that Grievants Deyerle and Wishon have established health issues it is not persuasively established that the health issues, in and of themselves validate liability for Respondent. It is found that Respondent rationally complied with its responsibility to provide its employees with a reasonably safe working environment. A comprehensive Air Quality Study was performed, employees were provided the opportunity to work away from the construction area and reportedly responsible

professional services were employed to rectify established problems. Grievants have failed to establish by a preponderance of the evidence that the air quality of their work place environment was in fact responsible or casually connected to the reported health issues experienced by Grievant Deyerle. Further, it is not persuasively established that Grievant Wishon was not provided a reasonably safe alternative working space.

Grievants failed to prove by a preponderance of the evidence that the Division of Rehabilitation Services, Disability Determination Services, failed to reasonably respond, or failed to exercise due diligence in response, to the 2016 Labor Day Weekend incident at the worksite. Grievants failed to establish any violation of law, administrative policy or procedure.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept

as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & 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. There is a recognized obligation for an employer to provide a reasonably safe work environment for employees. See West Virginia Code § 21-3-1

4. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Davis v. Dep't of Health & Human Resources*, Docket No. 2016-1597-CONS citing *Lanehart v. Logan County Bd. Of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider the following: 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. *Davis v. Dep't of Health & Human Resources*, Docket No. 2016-1597-CONS citing Harold J. Asher & William C. Jackson, Representing the Agency Before the United States Merit Systems Protection Board 152-153 (1984); *Burchell v. Bd. Of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

5. Grievants failed to offer evidence sufficient to meet their burden of proof as they failed to prove by a preponderance of the evidence that Respondent failed to

reasonably respond, or failed to exercise due diligence in response, to the workplace condition.

6. Grievants failed to prove by a preponderance of the evidence that Respondent failed to provide a reasonably safe work environment.

7. Grievants failed to prove by a preponderance of the evidence that Respondent violated an identifiable law, administrative policy or procedure.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: April 4, 2018

Landon R. Brown
Administrative Law Judge