THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATTY SHIRK,

Grievant,

v. **Docket No. 2018-0938-CONS**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Patty Shirk, filed a level one grievance against her employer, Respondent, Division of Highways ("DOH"), on December 20, 2017, stating as follows: "[o]n December 15, 2017, Grievant denied opportunity to interview for administrative secretary posting. Retaliation." As relief sought, Grievant asked "[t]o be made whole in every way including allowing Grievant to interview and be fairly considered." This grievance was assigned the Docket No. 2018-0805-DOT. On January 12, 2018, Grievant filed a second grievance, an expedited level three grievance, stating as follows: "[d]isciplinary demotion without good cause. Retaliation." As relief, Grievant asked "[t]o be made whole in every way including reversal of demotion with back pay and interest." This grievance was assigned the Docket No. 2018-0876-DOT. These grievances were consolidated for hearing and decision at level three by Order entered February 13, 2018.

A level three hearing was held on June 27, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Keith A. Cox, Esquire, DOH Legal Division. This matter became mature for decision on

September 4, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Supervisor 1. Respondent approved Grievant for intermittent leave pursuant to Family Medical Leave Act (FMLA). Thereafter, Grievant's immediate supervisor took issue with her absences and imposed disciplinary action and Grievant grieved the same. While that grievance was pending, Grievant was denied an interview for a posted position, and she again grieved. Soon thereafter, Grievant's supervisor recommended to Human Resources that Grievant received a disciplinary demotion which would demote her to an Office Assistant III position. Grievant filed a grievance regarding that action as well. Human Resources did not approve the disciplinary demotion, but approved a "temporary reassignment of duties" for Grievant that resulted in her duties being those of an office assistant/receptionist. Grievant's pay and classification title were not changed. Grievant asserts claims of reprisal and functional demotion. Respondent denies all of Grievant's claims. Grievant proved by a preponderance of the evidence that Respondent engaged in acts of reprisal against her for her participation in the grievance process and for utilizing FMLA leave, and that Respondent functionally demoted her. Therefore, this grievance is GRANTED.

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 is employed by Respondent as a Supervisor 1 in the Materials Control, Soils and Testing (MCST) Division located in Kanawha County. Grievant's

working title is General Services Supervisor. Grievant has been so employed since on or about November 3, 2015. It is noted that Grievant was originally classified as a Supervisor 2 upon hire; however, the Division of Personnel (DOP) changed her classification title to Supervisor 1 within recent years. Grievant began working in the MCST Division as a Secretary 2 in 2013.

2. Ron Stanevich has been the administrative director of the MCST since April 2015. Director Stanevich hired Grievant for the supervisor position and was Grievant's immediate supervisor from that time until September 1, 2017. Director Stanevich did not directly supervise Grievant when she worked as a Secretary 2.

3. As a General Services Supervisor 2 in the MCST Division, Grievant was assigned to oversee and direct the operations of six labs in the district. Grievant was also assigned to supervise a storekeeper, a maintenance crew comprised of one supervisor and one subordinate, facility contracted janitors, and facility contracted security staff. Grievant's job duties also included, but were not limited to, purchasing, paying bills, record-keeping, negotiating and writing contracts, scheduling, and conducting employee performance appraisals. One of Grievant's main duties was the purchasing of fuel.

4. In April and June 2017, Grievant filed two grievances, separate and apart from the instant grievance matter, against Respondent challenging a written reprimand and a suspension that had been imposed upon her by Director Stanevich. These two grievances were consolidated. At level three, the consolidated grievance was granted, in part, and denied, in part. *See Shirk v. Div. of Highways,* Docket No. 2017-2494-CONS (Feb. 20, 2018). Therein, the ALJ concluded that the written reprimand was reasonable, but that Respondent's denial of FMLA leave and the imposition of the suspension

improperly restrained Grievant's exercise of her FMLA rights pursuant to 29 U.S.C. § 2612(a)(1). Therefore, the suspension was overturned by the Grievance Board's decision. *See Id.*

5. Because of a health condition, Grievant has been taking intermittent FMLA leave, which has been approved by Respondent, since, at least, spring 2017. As of the date of the level three hearing in this matter, June 27, 2018, Grievant had not been able to work forty hours per week. She estimated that she worked approximately thirty-five hours per week.[1]

6. On or about September 1, 2017, Director Stanevich removed himself from being Grievant's supervisor, and Charlotte Byrd, administrative services associate III, became Grievant's direct supervisor. It is unknown why this change was made. Respondent has offered no reason for the same.

7. In December 2017, there was a posting for an administrative secretary position at MCST, and Grievant applied for the same. This position was to be the Administrative Secretary to Director Stanevich. Grievant testified that she did not think that she would get the position, but that she wanted to apply.

8. By letter dated December 15, 2017, Director Stanevich informed Grievant that, "[w]e have reviewed the applications of all who applied and selected for interview those who possess the best qualifications and experience for the position. Unfortunately, you were not selected for interview."[2]

[1] *See*, testimony of Grievant; testimony of Ron Stanevich.
[2] *See*, Grievant's Exhibit 1, December 15, 2017, letter.

9. On December 20, 2017, Grievant filed a grievance challenging Director Stanevich's decision to deny her an opportunity to interview for the administrative secretary position.

10. Twelve people applied for the administrative secretary position, including Grievant. Of those twelve, five applicants were interviewed. Two of the five interviewed were external applicants; the other three were internal applicants. It is unknown who was selected for the position or whether that person was an internal or external applicant.

11. Director Stanevich made the decision as to who would be interviewed and selected for the administrative secretary position. Director Stanevich chose to interview only five of the candidates based upon guidance he received from Matt Ball, DOH Employee Benefits Manager. Mr. Ball had informed Director Stanevich that he was allowed to interview only the top five candidates if he wished. It is unknown if any other DOH employees participated in the interviews with Director Stanevich.

12. Director Stanevich decided not to interview Grievant for the administrative secretary position based, at least in part, because of her job performance as a supervisor. Director Stanevich also considered the representations of Sajid Barlas, Grievant's former supervisor when she was a secretary 2. Director Stanevich indicated that he was told that she had work performance issues in that position, as well. Director Stanevich had no first-hand knowledge of Grievant's work performance during that time, and Mr. Barlas was not called as a witness in this matter. Further, Director Stanevich did not review Grievant's evaluations to see how her work performance as a secretary 2 was rated.

13. Director Stanevich suggested that Grievant's work performance declined because of her absences, even though such absences were approved pursuant to the

FMLA. He testified something to the effect of, [Grievant's] "attendance causes a lot of her issues with getting things done and staying on top of her work."

14. On December 27, 2017, Maria Catalano, Assistant Director of Finance Division within DOH, informed Grievant by email that she and Paul Anderson, Purchasing Card Coordinator, had decided to close Grievant's purchasing card effective February 3, 2018, because of problems Grievant was having with getting bills, or invoices, paid properly. Grievant had been having problems keeping her purchasing card statement balanced and bills paid for some time. Both Assistant Director Catalano and Coordinator Anderson had discussed the same with Grievant in the past and had worked with her on performance of these duties.

15. On or about January 12, 2018, fewer than thirty days after she filed the grievance challenging Director Stanevich's decision to deny her an interview for the administrative secretary position, Director Stanevich informed Grievant that her supervisory duties were being removed and that he would be recommending that she be demoted to an office assistant position.

16. It is undisputed that as of January 12, 2018, Grievant's supervisory duties were taken from her and disbursed among other employees. Grievant was then assigned only receptionist-type duties at the office.

17. As of the day of the level three hearing on June 27, 2018, Grievant had not been "officially" demoted from her classification of Supervisor 1, and her pay had not been changed. However, Grievant has been performing receptionist-type duties since January 12, 2018.[3]

[3] *See*, testimony of Ron Stanevich.

18. Neither party introduced any of Grievant's Employee Performance Appraisals (EPA) into evidence at the level three hearing. However, Grievant testified without rebuttal that during the time she was a secretary 2, she received no disciplinary actions and that she was evaluated as meeting expectations.

19. None of the applications for the five people selected for interviews were presented as evidence at the level three hearing. Grievant's application for the position was not presented as evidence. Further, no documentation ranking the applicants, rating their qualifications, or the selection of the successful applicant was presented at level three.

20. No written documents pertaining to the changes to Grievant's duties were introduced into evidence. It is unknown whether any such documentation exists.

21. It is unclear whether DOH's Human Resources was involved in making the changes to Grievant's duties. Director Stanevich testified that he changed Grievant's duties after Human Resources did not approve his recommendation for demotion. Human Resources role, if any, in making the "temporary reassignment" of Grievant's duties is unknown.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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*.

Grievant argues that she has been functionally demoted, and that such was in retaliation for her participation in the grievance process. Grievant also asserts that Director Stanevich's decision to deny her the opportunity to interview for the administrative secretary position was also retaliatory. Respondent denies these allegations, and argues that Grievant's duties were only temporarily changed and that pursuant to its policy, Director Stanevich had the authority to interview only the top five applicants. Therefore, Grievant was not entitled to an interview.

It is undisputed that Grievant was not granted an interview for the administrative secretary position. Therefore, the first issue to be addressed is whether Grievant has been functionally demoted. "Demotion is governed by the Division of Personnel's administrative rules. '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. *See Id.* 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. Dep't of*

Corrections, [Docket No.] 89-CORR-105 (Aug. 29, 1989))." *Morris v. Workforce West Virginia*, Docket No. 2012-0943-CONS (Aug. 20, 2013). "A 'functional demotion' is not a disciplinary matter." *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Kanawha Cnty. Cir. Ct., Docket No. 12-AA-131 (July 24, 2013). Functional demotion is a wrongful act, and it is not one of the types of demotions addressed by DOP Administrative Rule 11.4.

"Of the few cases in which this Board has reviewed allegations of functional demotion, the only three that have been granted show a very clear change in duties. *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)." *Morris v. Workforce West Virginia*, Docket No. 2012-0943-CONS (Aug. 20, 2013). "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." *Lamp v. Div. of Juvenile Serv*., Docket No. 2015-0076-MAPS (Mar. 30, 2017).

It is undisputed that Grievant was not formally demoted. Director Stanevich had made a recommendation to DOH Human Resources that Grievant receive a disciplinary

demotion from Supervisor 1 to an OA III position, and informed Grievant of his recommendation on or about January 12, 2018. Director Stanevich gave Grievant an RL-544 form to that effect.[4] At that time, Mr. Stanevich removed all of Grievant's supervisory duties, as well as those assigned to her as General Services Manager, which were then distributed to other employees, and relegated Grievant to only office assistant/receptionist-type duties. However, according to Mr. Stanevich, Human Resources did not approve his recommendation for demotion. Therefore, Grievant did not receive the disciplinary demotion and the RL-544 was to be pulled from her DOH files. Nevertheless, Grievant's duties did not revert to those of Supervisor 1. Grievant has continued to be assigned office assistant/receptionist-type duties since January 12, 2018. However, Grievant's classification title and pay have not changed. She remains classified as a Supervisor 1, and receives pay commensurate therewith. These matters are also undisputed.

Grievant alleges that such is a functional demotion. Respondent, however, claims that Grievant's supervisory duties have been temporarily removed because she has been unable to perform them. In its proposed Findings of Fact and Conclusions of Law, Respondent states that, "[t]here have been some temporary changes and these accommodations may be health/attendance related to whatever degree Grievant's health and attendance may have affected her performance."[5] Therefore, it sounds as if Respondent is asserting that the changes in Grievant's duties were made to accommodate her medical condition. However, the evidence does not support that claim.

[4] Such was not introduced into evidence in this matter.
[5] *See*, Respondent's proposed FOFCOL, pg. 8, numbered paragraph 5.

Director Stanevich had recommended a disciplinary demotion, and when he informed Grievant of such, he removed her Supervisor 1 duties and responsibilities and distributed them to other employees. He was disciplining Grievant, not accommodating her illness. Further, Director Stanevich testified that Grievant had a "litany" of work performance issues, and that such was why he recommended demotion. He also testified that Grievant's absences from work, those covered by her approved FMLA leave, have caused many of her issues with getting her work done, and that she now has no duties that have to be completed by the next day as he could not know when she would be at work. He testified that "you can't be a supervisor if you can't come to work." According to Mr. Stanevich, DOH Human Resources did not "necessarily" agree with his recommendation for a disciplinary demotion, and they went with a "temporary reassignment of duties" for Grievant.[6] However, Director Stanevich did not know how long this temporary assignment was supposed to last. No documentation regarding this temporary reassignment of duties was presented as evidence in this matter. It is unknown whether any documentation of the temporary reassignment of duties even exists.

The changes in Grievant's duties that Director Stanevich put in place in January 2018 pursuant to his recommended disciplinary demotion have all remained in place. Respondent has only renamed this action a "temporary reassignment of duties," rather than a disciplinary demotion. Respondent has not changed Grievant's classification title or pay. As in the cases of *Koblinsky, Watson, and Lily* discussed above, Grievant is assigned to perform work clearly below the skill level of their classification. As of the day of the level three hearing, Grievant was only responsible for answering the phones.

[6] *See*, testimony of Ron Stanevich.

Clearly, Grievant is a Supervisor 1 in name only. Based upon the evidence presented, Grievant has been functionally demoted.

Grievant also asserts that the functional demotion she received and Director Stanevich's decision to deny her an interview for the administrative secretary position was retaliation, or reprisal, for her participation in the grievance process and her use of intermittent FMLA leave. Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o). "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).

To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour Cnty. Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health*

and Human Resources/Bureau for Children and Families, Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour Cnty. Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013).

"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 Cnty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

The evidence presented in this matter demonstrates that Grievant filed two grievances in early 2017, one on April 7, 2017, and one on June 6, 2017, which were later

consolidated, challenging a reprimand and a suspension without pay imposed by Director Stanevich. Later, in December 2017 and January 2018, Grievant filed the two grievances that were consolidated into the instant matter. At the time Grievant was denied an interview for the administrative secretary position, she had a consolidated grievance pending. At the time Director Stanevich informed Grievant that he was recommending her demotion to an Office Assistant III position and removed her supervisory duties, Grievant had the earlier consolidated grievance pending, as well as the one she filed in December 2017 regarding the interview. Additionally, Grievant had been taking approved intermittent FMLA leave in 2017 and in January 2018. The level three decision in the Grievant's earlier consolidated grievance was issued on February 20, 2018.[7] Therein, the Grievance Board found that the reprimand was appropriate, but that the suspension Director Stanevich imposed on Grievant was improper as it constituted interference with the use of her approved FMLA leave.

The Grievant participated in the grievance process, and thereafter, Director Stanevich denied her an interview for a posted position. Grievant then grieved that adverse action on December 20, 2017. Later in December 2017, Maria Catalano and Paul Anderson revoked Grievant's P-Card. Soon thereafter, on January 12, 2018, Director Stanevich informed Grievant of his intent to demote her, removing her supervisor duties, and informed her of his intent to reduce her pay. Further, from at least April 2017 through the date of this level three hearing, Grievant had been taking approved intermittent FMLA leave. It is noted that Director Stanevich took adverse actions against Grievant because of her leave usage prior to the filing of the instant grievances.

[7] *See Shirk v. Div. of Highways,* Docket No. 2017-2494-CONS (Feb. 20, 2018).

Respondent and Director Stanevich had actual knowledge of all the grievances filed, and Director Stanevich and other DOH management and employees participated in them. Given the evidence presented, an inference can be made that there was a causal connection between the adverse actions taken against Grievant and her participation in the grievance process, as well as taking intermittent FMLA leave, because these events were so close in time. Additionally, despite the characterization that the removal of Grievant's supervisory duties was an accommodation for her health condition, or a temporary reassignment of duties, it was a functional demotion.[8] Accordingly, based upon the evidence presented, Grievant has established a *prima facie* case of reprisal.

To rebut the presumption of reprisal, Director Stanevich testified that he did not grant Grievant an interview because she was not as qualified as the five applicants he interviewed. However, he was not able to explain how they were better qualified, and there was no evidence presented about their actual qualifications. He explained that Matt Ball told him that he only had to interview five applicants. He could have interviewed more, but he chose not to do so. Such seems to comply with DOH guidelines.[9] Director Stanevich testified that he did not grant Grievant an interview because of her performance problems in her current position, and that many of these performance issues were caused by her FMLA absences. He further testified that Grievant's prior performance as a Secretary 2 was another of his considerations. However, Director Stanevich admitted that he did not supervise Grievant as a Secretary 2, he did not review her EPAs from that

[8] *See*, Respondent's proposed FOFCOL, pg. 8, numbered paragraph 5.
[9] *See*, Respondent's Exhibit 8, "Best Practices Guidelines" Memorandum.

time period, and that he was only told by others that she had performance issues in that position.

With respect to Grievant's functional demotion, Director Stanevich testified that he had recommended that Grievant be demoted to an OA III position. Director Stanevich informed Grievant of this recommended disciplinary action on or about January 12, 2018, via an RL-544 Form. Director Stanevich told Grievant at that time that he could not pay her as a supervisor when she was not coming to work.[10] As Director Stanevich explained during his testimony at the level three hearing, DOH's Human Resources did not agree with his recommendation, and the demotion was not approved. Director Stanevich explained that instead, Grievant's duties were temporarily changed in that all of her supervisory duties and assignments as General Services Manager were taken from her and she was given only office assistant/receptionist duties. However, her classification title and pay had not been changed.

During his testimony, Director Stanevich appeared annoyed by this grievance and the whole situation with Grievant. He seemed frustrated that his recommended disciplinary demotion had not been approved by Human Resources, and that Grievant was not working full work weeks due to her FMLA leave. Director Stanevich appeared to express some hostility toward Human Resources, the legal division, and the FMLA process during his testimony. He stated that the FMLA was how all of Grievant's absences were "covered," meaning, permitted. He stated that he did not "even understand FMLA" or the process. He expressed some frustration during his direct examination stating something to the effect of "it seems like it [FMLA and the process]

[10] *See*, testimony of Grievant.

changes every time I talked to someone in the DOH legal division." Director Stanevich also testified that Grievant's absences, those covered by FMLA, were the cause of Grievant's work performance issues.

Director Stanevich had clearly wanted to demote Grievant to an office assistant position, and wanted someone else doing her job duties. Director Stanevich got what he wanted, but did not get to cut her pay. Director Stanevich did not refer to this "temporary reassignment of duties" as any kind of accommodation for Grievant's health condition. The ALJ could find no reference to such a designation during the level three hearing. This appears to be suggested only in the Respondent's proposed Findings of Fact and Conclusions of Law. Further, the "temporary reassignment of duties" would appear to have the same effect as the intended disciplinary demotion because Grievant is now assigned only office assistant/receptionist-type duties. The only difference is that her pay was not reduced. The bulk of the evidence Respondent presented seemed to focus on what it perceived as Grievant's poor work performance mainly caused by absences at work, and that such justified changing her duties. It is noted that Maria Catalano and Paul Anderson revoked Grievant's purchasing card because of Grievant's failure to keep the records up to date and the bills paid on time. Grievant cannot do purchasing without it, and such had been one of her main responsibilities. However, that was only one of Grievant's Supervisor 1 duties. The evidence presented establishes that Respondent has failed to rebut the presumption of retaliatory action.

Therefore, Grievant has proved by a preponderance of the evidence that Respondent functionally demoted her in January 2018. Further, Grievant has proved by a preponderance of the evidence that this functional demotion and Director Stanevich's

decision to deny Grievant an interview in December 2017 were acts of reprisal for Grievant's participation in the grievance process and/or for taking approved FMLA leave. Accordingly, this grievance is GRANTED.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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*.

2. "Demotion is governed by the Division of Personnel's administrative rules. '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).

3. "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. Dep't of Corrections,* [Docket No.] 89-CORR-105 (Aug. 29, 1989))." *Morris v. Workforce West Virginia*, Docket No. 2012-0943-CONS (Aug. 20, 2013). "A 'functional demotion' is not a disciplinary matter." *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Kanawha Cnty. Cir. Ct., Docket No. 12-AA-131 (July 24, 2013). Functional demotion is a wrongful act, and it is not one of the types of demotions addressed by DOP Administrative Rule 11.4.

4. Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

5. To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour Cnty. Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families,* Docket No. 2010-0448-DHHR (Feb. 11, 2011).

6. “[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour Cnty. Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). An inference can be drawn that Respondent’s actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep’t of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013).

7. “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 Cnty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

8. Grievant has proved by a preponderance of the evidence that Respondent functionally demoted her in January 2018.

9. Grievant established a *prima facie* case of reprisal by a preponderance of the evidence. Respondent failed to rebut the presumption of retaliatory action.

10. Grievant has proved by a preponderance of the evidence that the functional demotion imposed in January 2018 and the decision to deny her an interview for the administrative secretary position in December 2017 were acts of reprisal for Grievant's participation in the grievance process and/or for taking approved FMLA leave.

Accordingly, this grievance is **GRANTED**.

Respondent is hereby **ORDERED** to return Grievant to the duties and responsibilities of a Supervisor 1, General Services Manager, as she held before her January 2018 functional demotion, with all of the benefits afforded to such position. Respondent is hereby **ORDERED** to take whatever steps that are appropriate and necessary to stop the retaliation and/or retaliatory actions against Grievant.

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 (2018).

DATE: November 14, 2018.

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Carrie H. LeFevre
Administrative Law Judge