

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BILLIE JEAN ALLEN,  
Grievant,**

**v.**

**Docket No. 2019-0347-CONS**

**WOOD COUNTY BOARD OF EDUCATION,  
Respondent.**

## **DECISION**

Billie Jean Allen, Grievant, filed this consolidated grievance against her employer the Wood County Board of Education ("WCBE"), Respondent. Grievant protests Respondent's disciplinary actions. As authorized by W. VA. CODE § 6C-2-4(a)(4), Grievant filed an expedited level three grievance form dated July 17, 2018 alleging:<sup>1</sup>

I was just informed I am suspended from my job. I have not yet settled my first grievance related to my job. I am still in a default grievance with Wood County School. I was not offered representation, or asked to bring representation to this meeting on July 13. I also have not heard about Kanawha elementary, the 20- year aide that worked in the nurse office, and the right to be treated with dignity and fairness in my job. This is causing me even more stress due to the constant continuations by the BOE.

For relief, Grievant provided:

Now I am seeking not to be suspended without pay. I also would like to receive pay for no lunch breaks the medical bills due to the undue stress caused by the BOE not helping in a timely manner with the issue of my original grievance of unfair and unjust treatment by my boss, Mrs. Julie Bertram. I have continued to be treated unfairly. The stress of working in a hostile environment has now caused medical issues that I am under care of my primary physician related to the stress. I still seek the same help I asked for when I started grievance

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<sup>1</sup> W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

at the start of 2018. The elementary school, kids and staff deserve to have the four-hour position that had always been in the nurse office for the past twenty plus years. I seek pay for doing my job and the four -hour person's job for the past two years. I also seek pay for no lunches or bathroom breaks these past two years because nobody could cover for me. I also deserve to work in a non-hostile environment with fair and just treatment. Finally, to have an answer about the Kanawha nurse position, which I requested on 1/25/2018, the same day Mrs. Bertram e-mailed the eight- hour school nurses the change and new need of an eight-hour nurse instead of a four-hour nurse in the position.

Grievant also filed an expedited level three grievance form dated August 16, 2018, alleging:

Respondent suspended Grievant and terminated her contract on or about August 15, 2018. Grievant contends that these disciplinary in violation of W. Va. Code 18A-2-8 and 18A-2-12a. Grievant also asserts that the action was arbitrary and capricious and reprisal for filing a grievance.

For relief, Grievant sought:

(a) reinstatement into her position; (b) compensation for all lost wages with interest; (c) all benefits, pecuniary and nonpecuniary, including but not limited to seniority; and (d) any other relief necessary to render Grievant "whole".

On September 14, 2018, an Order of Consolidation was entered consolidating these grievances. A level three hearing was held before the undersigned Administrative Law Judge on January 30, 2019, at the Grievance Board's Charleston office. Grievant appeared in person and represented by legal counsel John Everett Roush, Esq., American Federation of Teachers-WV, AFL-CIO. Respondent was represented by its Superintendent William Hosaflook and counsel Richard S. Boothby, Esquire., Bowles Rice LLP. At the conclusion of the level three hearing, the parties were invited to submit

written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about March 4, 2019, on receipt of the last of these fact/law proposals.

### **Synopsis**

To work as a school nurse in West Virginia, it is necessary for a registered nurse to take additional college courses. In order to maintain certification/licensure as a school nurse, an individual must take a certain number of approved courses. Grievant is a registered nurse. Grievant was employed as a school nurse at Jefferson Elementary Center prior to the instant disciplinary action(s). Grievant's certification/licensure as a school nurse was due for renewal for the 2018-2019 school year. Grievant took a number of online courses, which she believed would serve to renew her certification/licensure, the online courses that Grievant had taken did not qualify for renewal of certification/licensure as a school nurse. Grievant requested a one-time one-year waiver that would grant her certification/licensure as a school nurse for the 2018-2019 school year. Respondent is not required to grant this extension. Grievant had three years to acquire the necessary accreditation. Respondent suspended Grievant without pay and subsequently recommended the termination of her contract of employment.

Grievant contends a number of manipulating factors influenced Respondent's actions in the context of this matter. Grievant alleges Respondent's actions can be viewed in several unacceptable manners, be it retaliatory or arbitrarily and capriciously. Grievant failed to persuasively establish Respondent's actions were not proper exercise of discretion. Respondent establish by a preponderance of the evidence justification for

disciplinary action against Grievant. Grievant failed to renew her school nurse certificate in a timely manner and she was not qualified to work for Respondent. 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. Grievant was employed as a school nurse at Jefferson Elementary Center prior to the disciplinary action which is the subject of the current grievance. Grievant worked for Respondent for eight years, four years as a substitute school nurse and four years as a regular employed school nurse.<sup>2</sup> Until August 14, 2018, Grievant was employed by Respondent as a school nurse.

2. Rebecca King is employed by the West Virginia Department of Education as its State School Nurse Consultant. She is a licensed Registered Nurse (R.N.). Ms. King provides assistance to school nursing programs throughout the state. Her assistance includes providing advice on renewal of school nursing certificates and making school nurses aware of opportunities to earn the necessary college credit hours to renew their school nurse certificates.

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<sup>2</sup> Separate from the instant matter, Grievant filed an employment grievance on or about January 29, 2018. In that grievance, Grievant alleged, essentially, that her supervisor had engaged in various forms of harassment as well as unfair and discriminatory treatment toward Grievant including but not limited to unfair criticism of Grievant's job performance and failure to permit Grievant to move to a more desirable job location. Grievant sought cessation of the harassment and unfair and discriminatory treatment. When a decision at level one was not forthcoming in a timely manner, Grievant filed for a default on March 13, 2018. A default hearing was conducted on August 17, 2018. A Public Employees Grievance Board decision granted the remedy sought through the default. See G Ex 8, *Allen v. Wood County Board of Education*, Docket No. 2018-0919-WooED (Oct. 5, 2018).

3. William Hosaflook is currently the Superintendent of Wood County Board of Education. He has been employed as such since July 1, 2018. Respondent's former Superintendent, John Flint left employment with Respondent on or around June 30, 2018. Prior to taking the position with Respondent, Superintendent Hosaflook worked as a principal and assistant principal in Jackson County. Superintendent Hosaflook met Grievant for the first time, on or about July 13, 2018.

4. Teresa Morehead is a licensed R.N. and school nurse. She currently works as a Coordinator in Respondent's Human Resources Department. Previously she served as the Respondent's Health Services Coordinator, the person who oversees the work of Respondent's school nurses, among other things.

5. Julie Bertram is a licensed R.N. and a school nurse. She is Respondent's current Health Services Coordinator.

6. State Board Policy 5202 contains the requirements for school nurses in West Virginia. Apart from holding a nursing license from the West Virginia Board of Nursing, school nurses must also possess a school nurse certificate from the West Virginia Department of Education (WVDE) to work in public schools.

7. Grievant is a licensed R.N. and is qualified to work as an R.N. This grievance concerns only the school nurse license from the WVDE.

8. School nurse is a professional position. To be a school nurse in West Virginia, at a minimum, a licensed registered nurse must have earned a Bachelor's of Science degree in nursing and successfully completed an accredited School Nurse program. See Policy 5202 at §10.3.b. A nurse must obtain six semester hours of

college coursework from an accredited institution of higher learning to complete an accredited School Nurse program. See Policy 5202 at §10.3.b.2.

9. Prior to working for Respondent, Grievant worked as an R.N. in a hospital setting for over twenty years. Grievant completed an accredited School Nurse program by earning six college credit hours at Fairmont State University before working as a school nurse for Respondent. Grievant L-3 testimony.

10. Upon completing those six credit hours, Grievant was granted a three-year initial school nurse license.

11. At the conclusion of the initial three-year school nurse license, school nurses are required to complete another six college credit hours of course work to renew their school nursing license from the WVDE. Upon doing so, a five-year school nursing license is issued to the school nurse. See Policy 5202, *also* see L-3 King Testimony.

12. Many options are available to school nurses who are seeking to obtain the college credit hours needed to renew their school nursing certificate. Among those options are traditional college coursework, 7-week courses through a program known as West Virginia Learns, a five-day free program for earning three credit hours through Blue Ridge College, and other programs available through the WVDE. King L-3 testimony

13. Grievant had a full three years to obtain the necessary six college credit hours.

14. Each fall, Respondent's Health Services Coordinator sends an email to all its school nurses to remind them about completing the college credit hours needed to renew their school nurse certificate with the WVDE. R Exs 1 & 3

15. On January 17, 2018, Julie Bertram (Respondent's current Health Services Coordinator) sent an email to Grievant reminding her that her school nurse certificate would expire on June 30, 2018, that she could not work in her position without that certificate, and that she must timely obtain the necessary college credit hours and pay the necessary fees to the WVDE in order to renew her school nurse certificate. R Ex 2

16. On March 19, 2018, Teresa Morehead (Respondent's Human Resources Department) sent an email to Grievant reminding her again that her school nurse certificate would expire on June 30, 2018. Ms. Morehead also reminded Grievant of the requirements of the renewal process. R Ex 4

17. On April 9, 2018, Coordinator Bertram emailed all school nurses including Grievant. In this email, she explained the following:

Be sure to keep up with your school nurse certification renewal dates. Your certification is your responsibility. Usually, recert [sic] requires 6 hours of graduate level college credit that is applicable to your practice, so it also takes preplanning. Also, don't forget that the Board will reimburse you up to \$800/year for tuition expenses. Your certification is viewable online at <https://wveis.k12.wv.us/certcheck/>

R Ex 5

18. Grievant took a number of online courses, which she believed would serve to renew her certification/licensure through the Spring of 2018. In addition, Grievant took a number of training courses simply to improve her ability to serve her students.

19. Grievant found out in early late May/early June 2018 that the online courses that she had taken did not qualify for renewal of certification/licensure as a school nurse. Grievant began taking steps to try and take courses which would serve for renewal of her school nurse certification/licensure.

20. On May 18, 2018, Coordinator Morehead emailed Grievant to ask about the transcript showing that she had completed the necessary college credit hours to renew her school nurse certificate. Grievant responded on May 21, 2018. Within 90 minutes, Ms. Morehead emailed Grievant and explained what documentation she needed. See R Ex 7 at page 2

21. When, due to extenuating circumstances, a school nurse is unable to complete the required six college credit hours for renewing her school nurse certificate from the WVDE, the school nurse must fill out a special form from the WVDE to request that the requirements of Policy 5202 be waived. That form must be signed by the superintendent of the school board which employs the school nurse and the superintendent must submit a letter requesting that the waiver be granted. See Policy 5202 §14.3 & 14.4. See also R Ex 14 (Waiver of WVBE Policy 5202 Request Form for Professional and Career and Technical Certificates)(“Waiver Form”).

22. The Waiver Form lists six reasons for which the waiver is being requested.

23. Superintendent Hosaflook, who had just become Superintendent of Wood County on July 1, 2018, did not sign a Waiver Form or write a letter requesting a waiver on behalf of Grievant.

24. Superintendent Hosaflook was not convinced that extenuating circumstances found in Policy 5202 caused Grievant not to be able to complete the six college credit hours she needed to renew her school nurse certificate. Hosaflook L-3 testimony.



25. WVDE is not involved in a superintendent's determination of whether extenuating circumstances exist and whether the superintendent will submit a letter seeking a waiver. Coordinator King L-3 testimony

26. Grievant's school nurse certificate expired on June 30, 2018. Respondent and WVDE gave Grievant further opportunities to renew that certificate after June 30, 2018. R Exs 7, 8, & 9

27. On July 10, 2018 Brad Fittro of the WVDE Office of Certification and Professional Preparation, emailed Grievant and provided her with an additional 30 days to submit the information needed to renew her school nurse certification. R Ex 9

28. On July 13, 2018, Superintendent Hosaflook met with Grievant, and after giving her the opportunity to explain her failure to obtain a current and valid school nurse license, he presented her with a letter suspending her without pay and informing her that he would recommend to the school board that her contract be terminated at a school board meeting on July 24, 2018. R Ex 12

29. In light of the additional time that the WVDE extended to Grievant to produce evidence of her completion of the necessary course work to renew her school nurse certificate, Grievant's hearing before the school board was rescheduled for August 14, 2018. R Ex 9 & 13

30. Grievant was notified of the opportunity for a hearing before the School Board. Grievant, by counsel, advised Respondent's counsel that she would forego a hearing before the board of education but intended to challenge the action through the grievance procedure. Relying upon the advice of another individual, Grievant

nevertheless attended the School Board meeting and addressed the Respondent during the delegation's portion of the meeting.

31. Grievant appeared during the delegations portion of Respondent's August 14, 2018 meeting.

32. Respondent approved Grievant's suspension without pay and the termination of her contract on August 14, 2019. G Ex 7; R Ex 13

33. As of the date of the Level Three hearing, Grievant still had not obtained the necessary requisites to renew her school nurse certificate. L-3 Testimony of King and Grievant.

34. Grievant testified that she has not worked for any employer since her contract with Respondent ended. Grievant is a registered nurse. She is and at all times pertinent to the present grievance has maintained her certification/licensure as a registered nurse both in West Virginia and Ohio.

### **Discussion**

As this grievance involves a disciplinary matter, Respondent bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified.

Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also

*Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

*W. Va. Dep’t of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent under the provisions of W. VA. CODE §§ 18A-2-7 and 18A-2-8 suspended Grievant from her duties as the school nurse at Jefferson Elementary Center, without pay, for failure to renew certification in School Nursing as defined in W. Va Department of Education Policy 5202, 10.1.d.2.A. and subsequently at a meeting of the Wood County Board of Education on August 14, 2018, terminated Grievant’s employment contract for the same reason. R Exs 12 and 13. Grievant protests these disciplinary actions.

Grievant’s certification/licensure as a school nurse was due for renewal for the 2018-2019 school year. Grievant admittedly understood she needed to take accredited class credits to renew her school nurse certificate with the West Virginia Department of Education (WVDE), the regulating agency which issues the mandated certification. Grievant took a number of online courses, which she believed would serve to renew her certification/licensure, however the online courses that Grievant had taken did not qualify for renewal of certification/licensure as a school nurse. Very few if any of the facts are in dispute, Grievant for one reason or another did not have the requisite number of

approved credit courses.<sup>3</sup> Grievant is of the opinion that the powers that be could be a be more flexible. After the determination that her submitted course work were not suitable was convincingly communicated to Grievant, she began taking steps to try and take courses which would serve for renewal her school nurse certification/licensure. Eg; Grievant attended the Kid Strong Conference on June 21 -22, 2018, but learned at the conference that she would not receive any credit for renewal of her school nurse certification/ licensure until late November or early December 2018.<sup>4</sup> (Grievant would also be required to give a presentation to her coworkers at her school in the Fall of 2018.) Grievant's school nurse certification/licensure was due to expire on June 30, 2018.

With regard to the renewal of professional certificates, and the school nurse certificate in particular, West Virginia State Board of Education Policy 5202 requires professional employees to complete a specific number of college credit hours, see 10.1.d *et seq.* The certificate renewal requirements of Policy 5202 may be waived temporarily under extenuating circumstances:

14.3. Extension of Professional Certificates for Extenuating Circumstances. -- A county superintendent may request, in writing to the State Superintendent, an extension of the Professional Certificate for an employee, including the county superintendent, who meets one of the three circumstances identified in §126-136-14.4.b.

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<sup>3</sup> Effort and time were spent at the level three hearing, describing the training courses and online credits Respondent took. See G Exs 1, 2, and 4. These courses and online credits did not qualify as college credit courses applicable for school nurse certification. Whether Grievant demonstrated due diligence in choosing the courses she chose is a debatable issue. Grievant needed college credit courses recognized by the West Virginia State Board of Education for accreditation.

<sup>4</sup> It may or may not be of interest to note the three credit hours obtainable at the Kid Strong Conference would not completely satisfy Grievant's six-hour renewal requirements but could be viewed to certify Grievant for one year.

14.4. Issuance and Extension of the Full-Time Permit/Out-of-Field Authorization of Extenuating Circumstances.

14.4.a. A county superintendent may request, in writing to the State Superintendent, an extension of the First-Class/Full-Time Permit/Out-of-Field Authorization for an employee, including the county superintendent, who meets one of the three circumstances identified below. The State Superintendent shall render a decision; however, the permit may not be extended beyond one school year or more than once.

14.4.b. Extenuating Circumstances for which First-Class/Full-Time Permit/Out-of-Field Authorization Can Be Extended or issued.

14.4.b.1. Unavailability of Coursework. -- The county superintendent shall submit verification from the designated official at the college or university through which the applicant is completing the state approved program that no required coursework was available during the school year; OR

14.4.b.2. Illness/Death. -- The county superintendent shall submit the applicant's description of how a major illness of the applicant or illness/death of an immediate family member prevented the educator from completing the required coursework; OR

14.4.b.3. Hardship. -- The county superintendent shall submit the applicant's description of how a major hardship other than illness prevented the applicant from completing the required coursework.

Policy 5202.

Grievant had been reminded of the pending June 30, 2018 deadline by more than one spokesperson. Grievant had three years to complete the coursework needed to renew her school nurse certificate. Nevertheless, it became readily apparent that Grievant was not going to meet the deadline date. Grievant requested of Superintendent

Hosaflook a, one-time, one-year waiver that would grant her certification/licensure as a school nurse for the 2018-2019 school year.

Superintendent Hosaflook considered Grievant's situation and in his opinion Grievant's predicament did not exemplify the conditions found in Section 14.4 of Policy 5202. He did not request a waiver under Policy 5202 for Grievant. Superintendent Hosaflook in determining whether to request a waiver for Grievant reviewed relevant material regarding school nurse certification and spoke to Teresa Morehead and Julie Bertram.<sup>5</sup> See L-3 testimony. Grievant highlights that Respondent had more to gain with her dismissal than with showing her leniency. Grievant contents that Respondent's refusal to request a waiver in her case constitutes reprisal, or arbitrary and capricious conduct.<sup>6</sup>

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal 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." To

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<sup>5</sup> Teresa Morehead is a licensed R.N. and school nurse. She currently works as a Coordinator in Respondent's Human Resources Department. Previously she served as the Respondent's Health Services Coordinator, the person who oversees the work of the Respondent's school nurses, among other things. Julie Bertram is a licensed R.N. and a school nurse. She is Respondent's current Health Services Coordinator.

<sup>6</sup> Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)) See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

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

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he 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.

*Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). The instant grievance tends to have all the primary elements of a *prima facie* case of reprisal.

It is not disputed that Grievant has identified and participated in what is recognized as protective activity. Grievant and Respondent do have history, earlier in 2018, Grievant filed a grievance alleging essentially, that her supervisor had engaged in various forms of harassment, as well as unfair and discriminatory treatment toward Grievant including but not limited to unfair criticism of Grievant's job performance. See *Allen v. Wood County Board of Education*, Docket No. 2018-0919-WooED (Oct. 5, 2018). Respondent was aware of Grievant's grievance, refused to request a waiver for Grievant, suspended her without pay and ultimately recommended the termination of the Grievant's contract of employment, all within a relatively short period of time (months). It is

recognized that within the fact pattern of this grievance are the elements of a *prima facie* case of reprisal.

The instant Grievant highlighted for analysis, the benefits Respondent receives with her dismissal. Grievant infers Respondent harbors ill-will toward her.<sup>7</sup> Grievant highlights motivation(s) Respondent has, intentional or not, to deny her a waiver. Grievant skillfully accepts and deflects responsibility for her failure to amass the required college credits necessary for recertification. The undersigned is aware of the default judgement *Allen v. Wood County Board of Education*, Docket No. 2018-0919-WooED (Oct. 5, 2018). A critical question is whether Grievant has established that her 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 County Board of Education*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm’n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989).

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<sup>7</sup> Grievant testifies that on or about July 25, 2018, after her suspension and shortly before her termination, Grievant was notified of the opening of a “West Virginia Learns” account for her. This account permits an employee to take approved online courses to renew certification/licensure as a school nurse free of charge. It is provided that many other school nurses in the employ of Respondent renew their school nurse certification/licensure through the “West Virginia Learns” program. Grievant alleges she was not advised of its existence or the possibility of completing the school nurse certification/licensure renewal process through the online courses offered and infers this lack of communication was intentional on the part of Respondent. See L-3 Grievant testimony.



“Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.” *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

While it should be said, not helping someone is vastly different than actively causing harm. Grievant created her predicament. Nonetheless, Respondent in the fact pattern of this matter has offered legitimate nondiscriminatory reasons for its actions. The reasons do not have the appearance of pretext. Grievant would like to postulate that Respondent’s refusal to grant her a discretionary waiver is proof of ill-will or discrimination<sup>8</sup>. This is not established. For some, the circumstances of Grievant’s situation might be viewed as a compelling case for requesting a waiver. And yet not so by others. It is within the discretion of Respondent as to whether to request a one-time waiver for certification/licensure as a school nurse, nevertheless Respondent is not required to grant the waiver. Superintendent Hosaflook considered Grievant’s situation and determined that none of the conditions found in Section 14.4 of Policy 5202 applied, this is not clearly wrong. Discretion is optional not mandatory. Grievant is not empowered to demand a waiver. Further, it is not established that Respondent has routinely requested waivers for similarly situated employees.

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<sup>8</sup> For purposes of the grievance procedure, discrimination is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

Respondent is of the belief that Grievant had ample time to obtain the course work needed to qualify for renewal of her certification/licensure. Grievant failed to prove that Superintendent Hosaflook acted arbitrarily and capriciously in deciding not to seek a waiver on behalf of Grievant. Further, after considering the facts, circumstances and relevant testimony, the undersigned does not find that Respondent's decision to not grant Grievant her request for a discretionary waiver constitutes retaliation. After June 30, 2018, or there about, Grievant lacked valid school nurse certification from the WVDE and therefore was not qualified to work as a school nurse in a West Virginia public school. See Policy 5202. This is reasonable and proper grounds for Respondent to commence disciplinary action against Grievant. Respondent has established by a preponderance of the evidence proper grounds for the termination of Grievant's employment contract.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. 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. W. VA. CODE § 18A-2-8 provides for the suspension and dismissal of school employees for incompetence, which term includes an employee's lack of a necessary certification to work in the public schools.

3. With regard to the renewal of professional certificates, and the school nurse certificate in particular, West Virginia State Board of Education Policy 5202 requires professional employees to complete a specific number of college credit hours for renewal and/or continued certification.

4. Grievant failed to amass the required amount of college credit hours specified to renew her school nurse certificate in a timely manner. See West Virginia State Board of Education Policy 5202.

5. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)) See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

6. After June 30, 2018, or there about, Grievant lacked valid school nurse certification. The certificate renewal requirements of Policy 5202 may be waived temporarily under extenuating circumstances. See West Virginia State Board of Education Policy 5202.

7. Grievant failed to prove that Respondent's execution of discretion regarding the Policy 5202 waiver was an impermissible arbitrary and capricious determination.

8. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal 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."

9. It is not established by a preponderance of the evidence that Respondent's conduct of not granting Grievant a waiver constitutes reprisal.

10. Respondent offered legitimate, non-retaliatory reasons for its actions. It was not established that Respondent's disciplinary actions constitutes retaliation.

11. Grievant lacked valid school nurse certification and therefore was not authorized to work as a school nurse in a West Virginia public school. See Policy 5202. This is reasonable and proper grounds for Respondent to implement disciplinary action against Grievant.

12. Respondent has established by a preponderance of the evidence proper grounds for the termination of Grievant's employment contract.

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 (2018).

**Date: April 10, 2019**

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**Landon R. Brown**  
**Deputy Chief Administrative Law Judge**