THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVE JOYCE,
Grievant,

v. **Docket No. 2018-0963-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Steve Joyce, is employed by Respondent, Division of Highways ("DOH), as a Transportation Worker 3, Heavy Equipment Operator ("TR 3"). Mr. Joyce filed a level one grievance form dated, February 12, 2018 alleging: "Removed from excavator operation and regular assignment after return from worker's comp. Pay reduced." As relief, Grievant seeks to be returned to his prior equipment and assignment, compensation, and interest for loss of pay.

A level one conference was held on March 5, 2018, and an order denying the grievance was entered March 26, 2018. Grievant appealed to level two on March 30, 2018, and a mediation was conducted on June 7, 2018. Grievant filed a level three appeal dated the same day.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on March 4, 2019. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170, WVPWU.[1] Respondent appeared through Steve Young, District 1, Maintenance Engineer, and was represented by Xueyan

[1] West Virginia Public Workers Union.

Palmer, Esquire, DOH Legal Division. The matter became mature for decision on April 22, 2019, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleges that Respondent discriminated against him pursuant to grievance procedure definition, and the definition found in W. VA. CODE §§ 23-5A-1, and 3(b), by failing to fully reinstate him to a soil nailing assignment upon his return from workers' compensation. Grievant presented no evidence comparing his treatment to the treatment of similarly-situated employees, which is required to prove discrimination under the grievance procedure statutes. Additionally, while Grievant proved that Respondent may have precipitously removed Grievant from the soil nailing assignment, it was not proved that Respondent failed to return Grievant to the Transportation Worker 3 position he held prior to his work-related injury.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Steve Joyce, Grievant, is employed by Respondent, Division of Highways, in District 1 and assigned to the heavy equipment "Disforce" unit.

2. Grievant was initially employed by Respondent on December 15, 2004 and is in the Transportation Worker 3, Equipment Operator classification. Grievant has been routinely assigned to operate an excavator.

3. Grievant received five annual Employee Performance Appraisals ("EPA"), between January 1, 2005, and December 31, 2012. He was rated as meeting or exceeding expectations for all the indicators on each EPA. For the indicators in the areas

of “Quantity of Work” and “Quality of Work,” Grievant was routinely rated as “Exceeds Expectations.” (Grievant Exhibits 1 – 5).

4. Grievant suffered a serious work-related injury and was off work for the period of February 2014 through April 2015. Upon returning to work, Grievant sustained a separate work-related injury which caused him to be off work for surgery and recovery from July 2015 through December 11, 2017. Grievant applied for and received workers’ compensation benefits during the periods he was unable to work. .

5. Prior to his injury, Grievant had been assigned to operate an excavator on “soil nailing” projects.[2] The crews he worked with generally worked twelve-hour shifts for five days per week, amounting to a sixty-hour work week. Twenty of those hours were overtime.

6. Grievant was released by his medical professional to return to work without restrictions on December 17, 2017. He reported to work and was sent for a drug test which he passed. Grievant then reported to a soil nailing project in Clay County.

7. The Clay County soil nailing project had been contracted by the State to GeoStabalization International (“GSI”). DOH employees were assigned to provide assistance in performing certain parts of the project. There were no details given regarding the contract, but it was clear that GSI had overall control of the project, but State employees answered to their normal DOH supervisors.

[2] “Soil nailing” is a construction remedial measure to treat unstable natural soil slopes or as a construction technique that allows the safe over-steepening of new or existing soil slopes. The technique involves the insertion of relatively slender reinforcing elements into the slope – often general purpose reinforcing bars (rebar) although proprietary solid or hollow-system bars are also available. "Soil nailing." Wikipedia*, Soil Nailing*, http://en.wikipedia.org/wiki/Soil_Nailing (last visited, April 30, 2019).

8. Grievant operated the excavator for the soil nailing project for approximately one and a half hours before he was sent to load bails of straw. The next day, when Grievant returned to the Clay County site, DOH Supervisor Kevin Given was operating the excavator and Grievant was assigned to run an excavator on other projects which did not involve soli nailing.

9. The assignments Grievant was performing after the soil nailing projects did not generally have the same schedules as Grievant had been working. The new assignments were scheduled to work four ten-hour days with up to twelve hours of overtime available on Friday. The maximum number of hours Grievant could work on this shift was 52 hours per week; eight hours less overtime hours than the soil-nail assignments.

10. Steve Young is the District 1 Maintenance Engineer and he also heads the Disforce Unit. Timothy Wood is a Project Supervisor for GSI. He was supervising the soil nailing project in Clay County as well as other “geohazard mitigation projects” for DOH District 1.

11. When Grievant returned to work on the soil nailing project, Superintendent Woods observed his work. He called Engineer Young and said he observed Grievant making several sudden moves with the excavator boom. He told Mr. Young that Grievant’s operation of the boom was unsafe for crew and equipment in the area and asked Mr. Young for an alternate operator. Engineer Young complied with the request.

12. This request was made via the telephone and was not immediately documented. While the grievance was pending, Mr. Young requested that Superintendent Woods provide him with a letter documenting their conversation. Mr. Woods sent a letter

to Mr. Young as an email attachment. The unsigned letter is dated May 30, 2018.[3] (Respondent Exhibit 1). No mention of this letter, or the conversation reflected therein, was made at level one of the grievance process.[4]

13. DOH Supervisor Kevin Given, was running the DOH soil nailing crew and was Grievant's supervisor on December 17, 2017. Both he and Mr. Wood observed Grievant's performance that morning. Mr. Wood told Supervisor Given that he was concerned that Grievant was not operating the excavator as well as he should, and it created safety concerns for him. Supervisor Given observed Grievant made visual errors and wondered if he could see properly. When testifying, Mr. Given could not remember seeing Grievant operate the machine unsafely and could not specially describe the nature of the visual errors.

14. DOH Construction Superintendent Ronald Lawrence, TW 3 Crew Chief Carry Payne and TW 3 Crew Chief Joe Knapp all supervised Grievant at different times during his tenure while he was operating an excavator. They all testified that he was a capable operator and they did not observe and problems with his work. None of these supervisors were present for when Grievant was operating the excavator on December 17, 2017.

[3] Both Mr. Young and Mr. Woods testified regarding the authenticity of the letter, its contents and method of delivery, and that it accurately reflects the conversation they held in December 2017.

[4] Mediations are confidential, so we cannot know if the letter or the conversation were discussed at level two. However, Grievant's representative sent a specific discovery request for the letter dated June 12, 2018, five days following the level two mediation. A copy of the discovery request was sent to the West Virginia Public Employees Grievance Board and made a part of the case file.

15. The Division of Personnel Classifications Specifications sets out the following as a description of the "Nature of Work" for the Transportation Worker 3 position:

> Under limited supervision, at the journey level performs skilled work in the construction and maintenance of highways, related buildings and structures, and erecting and operating a drilling rig. May serve as a working shop leader in a County Garage. Operates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, backhoe, and semi-trailer. Transports equipment across state to construction or maintenance sites; makes major repairs to roads and bridges. Performs major overhaul of gasoline and diesel powered automotive and highway maintenance equipment. Performs full-performance experienced work maintaining and repairing a variety of equipment used in heating, ventilation, cooling and general operation of public buildings. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.[5]

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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 party bearing the burden has not met its burden. *Id.*

Grievant alleges that he was subjected to "discrimination" as that term is defined in W. VA. CODE §§ 6C-2-2(d) and 23-5A-1 by failing to place him in the same assignment

[5] In the absence of specific DOH classification specification for TW 3 position approved by the State Personnel Board, the DOP classification specification continues to be controlling. *See* W. VA. CODE § 29-6-4 (b) regarding the creation of new positions in the classified service.

he was working when he went on workers' compensation for a work-related injury. Grievant also alleges that Respondent discriminated against him in violation of W. VA. CODE § 23-5A-3(b) for filing worker compensation claims by placing him in a less financially favorable assignment when he was medically released to return to work.

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). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The grievance statute definition does not fit with the facts of this case. To prove "discrimination" a grievant must compare the way he or she was treated with the treatment of similarly-situated employees. Grievant did not provide evidence regarding how other employees were treated when returning from worker's compensation and therefore did not meet the first element necessary for proving "discrimination" under W. VA. CODE § 6C-2-2 (d). Grievant did not prove by a preponderance of the evidence that Respondent was guilty of "discrimination" as that term is defined in the grievance procedure. However,

all Grievant's evidence relates to his placement after return from Workers' Compensation so his main claim apparently was not aimed toward the grievance statutes.

W. VA. CODE §23-5A-1 states the following related to discrimination against employees for seeing Workers' Compensation benefits:

> No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

W. VA. CODE §23-5A-3(b) defines discrimination regarding workers compensations as follows:

> (b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties.

Grievant alleges that Respondent discriminated against him pursuant to W. VA. CODE §§ 23-5A-1, and 3(b) by failing to fully reinstate him to the soil nailing assignment upon his return from workers' compensation.[6] "'In order to make a *prima facie* case of

[6] Grievant does not seek to adjudicate his claim for the Worker's Compensation benefits over which the Grievance Board lacks jurisdiction, but, rather, seeks to block his employer's alleged wrongful employment action taken against him in retaliation for his claim. This is a grievance claim which is cognizable under the statutory grievance

discrimination under W. VA. CODE § 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE § 23-1-1, *et seq*.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.' Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W. Va. 700, 403 S.E.2d 717 (1991). *Addair v. Dep't of Health and Human Resources/Welch Community Hosp*., Docket No. 03-HHR-147 (Feb. 2, 2004)." *Rollyson v. Kanawha County Bd. of Educ*., Docket No. 2018-0296-KanED 2018 (Apr. 4, 2018).[7]

The first two factor are not in dispute. Grievant sustained two discrete and serious work-related injuries and he applied for and received workers' compensation benefits in both cases. Additionally, in discussing discrimination under W. VA. CODE § 23-5A-3(b) the West Virginia Supreme Court of Appeals wrote:

> [The statute] does not *require* competent medical evidence. It simply states, as quoted above, that it is a discriminatory practice to fail to reinstate an employee to his former position if the position is available and the employee is "not disabled from performing the duties of such position." W. Va. Code § 23-5A-3(b). The statute does indicate that a "written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties." *Id*

procedure for state employees. *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lew. Co. Cir. Ct. Docket No. 94-C-00036 (Jan. 25, 1995); *Rollyson v. Kanawha County Bd. of Educ*., Docket No. 2018-0296-KanED 2018 (Apr. 4, 2018).

[7] It is unlikely the Grievance Board has jurisdiction to decide a claim of "discrimination" under W. VA. CODE §§ 23-5A-1 & 3(b) in as much as W. VA. CODE § 23-5A-2 sets out a different specific remedy by stating; "This section provides a private remedy for the employee which shall be enforceable in an action by the employee in a circuit court having jurisdiction over the employer." Because this statutory definition has been analyzed in prior Grievance Board decisions an analysis is done here as well.

JWCF, LP v. Farruggia, 232 W. Va. 417, 424-425, 752 S.E.2d 571, 578-579, (2013)

The parties do not dispute that Grievant provided a medical release freeing him to return to work with no restrictions. Additionally, there were TW 3 positions available when Grievant was released. The only questions remaining are whether Respondent discriminated against Grievant by failing to reinstate Grievant to his prior position and whether the filing of a Workers' Compensation claim was a significant factor in that decision.

Grievant avers that his prior position was a TW 3 on the soil nailing crew. He argues that his subsequent assignment was not "comparable as to wages" because he could not earn as much overtime per week in that assignment. The problem with that argument is that Grievant's position, at all times relevant to this grievance, has been a Transportation Worker 3, Equipment Operator,[8] not a Transportation Worker 3, Soil Nailer. Respondent returned Grievant to his prior position of TW 3 at the same pay grade he was receiving prior to his injuries. Grievant does not deny that he has been operating an excavator most of the time since his return and his assignments fall under the duties set out in The Division of Personnel Classification Specification for the TW 3 position.

W. VA. CODE § 23-5A-3(b) only requires the employer "to reinstate an employee to his former *position* if the position is available and the employee is 'not disabled from performing the duties of such position.' W. Va. Code § 23-5A-3(b)." (Emphasis Added) *Farruggia,* 232 W. Va. 417, *supra.* In fact, employees in the Transportation Worker

[8] *See* W. VA. CODE § 29-6-2 (m) which defines a position as: "'Position' means a particular job which has been classified based on specifications." "Transportation Worker 3 is classifications but soil nailer is not."

Classification are not guaranteed a specific assignment and their assignments are often changed to meet the specific needs of the organization. *See generally, Cobb v. Div. of Highways,* Docket No. 2013-0866-CONS (Nov. 7, 2013). The fact that the soil nailing assignment provided an opportunity for eight hours more overtime per week does not make it a separate position. It remains a duty assignment within the TR 3 position classification.

Grievant did not prove by a preponderance of the evidence that Respondent violated W. VA. CODE §§ 23-5A-1, and 3(b) by failing to return Grievant to the position he held prior to sustaining a work-related injury for which he received workers compensation.

Finally, Grievant did not specifically allege reprisal or retaliation under the grievance statutes, he does argue that he has been retaliated against for making workers' compensation claims. While it is unlikely the Grievance Board has jurisdiction to make a determination of "discrimination" or "retaliation" under the workers compensation statute, Grievant's allegations of retaliation are appropriate to be analyzed by the Grievance Board under the grievance procedure statutes. *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lew. Co. Cir. Ct. Docket No. 94-C-00036 (Jan. 25, 1995) and *Lamp v. Div. of Juvenile Ser*., Docket No 2015-0076-MAPS (Mar. 30, 2017). As noted herein, the Worker's Compensation Act is a statute applicable to Grievant that he has alleged Respondent violated when it retaliated against him. Grievant does not seek to adjudicate his claim for the Worker's Compensation benefits over which the Grievance Board does not have jurisdiction, but, rather, seeks to block his employer's alleged wrongful employment action taken against him in retaliation for his claim. This is a grievance claim which is cognizable under the

statutory grievance procedure for state employees as retaliation or reprisal. *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lew. Co. Cir. Ct. Docket No. 94-C-00036 (Jan. 25, 1995). The West Virginia Public Employees Grievance Procedure statute specifically prohibits retaliation for participation in the grievance procedure stating, "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h).

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

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

> actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013)." *Lamp v. Div. of Juvenile Ser*., Docket No 2015-0076-MAPS (Mar. 30, 2017).

Grievant engaged in the protected activity of filing a Workers' Compensation claim. Such actions are protected under the worker's compensation statutes cited above. Respondent does not dispute that its agents had actual notice of Grievant's workers' compensation claims. The dispute arises over whether an adverse action was taken by Grievant's employer.

Grievant's argument is that an adverse action was taken when he was reassigned from the soil nailing assignment shortly after returning from workers' compensation. However, Grievant was assigned to the same position in the same paygrade he held prior to going on workers compensation. The only difference once he returned was placement in an assignment where he would likely receive less overtime.[9]

The assignment of particular duties is a management decision. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997). *Lamp v. Div of Juvenile Ser.* Docket No. 2015-0076-MAPS (Mar. 30, 2017).

Grievant continues to operate an excavator. There is no evidence that the assignment of Grievant to these duties violated any rule, regulation, or statute, or

[9] It is important to note that Grievant may earn significant overtime in his present assignments.

constituted a substantial detriment to or interference with the Grievant's effective job performance or health and safety. Grievant did not suffer adverse treatment upon return from workers' compensation rehabilitation. Grievant did not prove by a preponderance of the evidence that he was subject to retaliation or reprisal as those terms are defined in W. VA. CODE § 6C-2-3(h).

Accordingly, the grievance is **DENIED.**

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3 (2018), *Burden of Proof.*

2. 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).

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant did not prove by a preponderance of the evidence that Respondent was guilty of "discrimination" as that term is defined in W. VA. CODE § 6C-2-2 (d).

5. W. VA. CODE §23-5A-1 states the following related to discrimination against employees for seeing Workers compensation benefits:

> No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

6. W. VA. CODE §23-5A-3(b) defines discrimination regarding workers compensations as follows:

> (b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties.

7. "'In order to make a *prima facie* case of discrimination under W. VA. CODE § 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE § 23-1-1, *et seq*.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.' Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W. Va. 700, 403 S.E.2d 717 (1991).

Addair v. Dep't of Health and Human Resources/Welch Community Hosp., Docket No. 03-HHR-147 (Feb. 2, 2004)." *Rollyson v. Kanawha County Bd. of Educ*., Docket No. 2018-0296-KanED 2018 (Apr. 4, 2018).

8. Grievant did not prove by a preponderance of the evidence that Respondent violated W. VA. CODE §§ 23-5A-1, and 3(b) by failing to return Grievant to the position he held prior to sustaining a work-related injury for which he received workers compensation.

9. "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).

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

> (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
>
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.
>
> *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Graley v. *W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365

> S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013)." *Lamp v. Div. of Juvenile Ser*., Docket No 2015-0076-MAPS (Mar. 30, 2017).

11. Grievant did not suffer adverse treatment upon return from workers' compensation rehabilitation. Grievant did not prove by a preponderance of the evidence that he was subject to retaliation or reprisal as those terms are defined in W. VA. CODE § 6C-2-3(h).

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2018).

DATE: May 17, 2019

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE