

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PHIL MYERS,

Grievant,

v.

Docket No. 2019-0256-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,**

Respondent.

DECISION

Grievant, Phil Myers, is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital. On August 9, 2018, Grievant filed this grievance against Respondent stating, “[i]ndefinite suspension without good cause or predetermination/ due process & charge to employee of \$32 for WV Cares background check[.]” For relief, Grievant seeks “[t]o be made whole in every way including back pay with interest and benefits restored and refund of \$32 with interest[.]” On August 19, 2018, Grievant filed a second grievance against Respondent stating, “Grievant requested a copy of the ‘background check’ that was the supposed basis of his unpaid suspension and was made to spend \$32 to obtain the exculpatory documents in Respondent’s possession.” For relief, Grievant seeks “[t]o be made whole in every way including Removal of the baseless suspension and reimbursement of any and all costs to Grievant to obtain from Respondent exculpatory and relevant evidence. Please amend Grievant’s previous grievance to include or consolidate this issue[.]”

Grievant filed directly to level three of the grievance process.¹ A level three hearing was held on December 19, 2018, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant was represented by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on February 5, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Sometime after the legislature created WV CARES in 2015, to facilitate the processing and analysis of the criminal history and background of applicants for direct access employment with covered providers, WV CARES notified Sharpe Hospital and Grievant, a nineteen-year employee of Sharpe, that Grievant was ineligible for direct access employment based on his criminal history report. WV CARES informed Grievant he could apply for a variance. Sharpe suspended Grievant without pay pending investigation. Grievant applied for a variance and expended time and resources to obtain his criminal history report and correct its inaccuracies. WV CARES granted Grievant a variance and Sharpe reinstated Grievant's employment and annual leave. Grievant contends that Respondent denied him due process in not providing him a predetermination meeting or the reason for his suspension, and requests to be made whole, including reimbursement of his expenses in obtaining a variance and the removal of his suspension from his record. Grievant did not prove that Respondent denied him

¹West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievant has been suspended without pay.

due process or that it was obligated to remove the suspension from his record, that it owed him backpay, or that it had any obligation to reimburse him the cost of his criminal history report or his expenditures in obtaining a variance. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed as a health service assistant (HSA) for over 19 years at William R. Sharpe, Jr., Hospital, (Sharpe) a psychiatric facility operated by the West Virginia Department of Health and Human Resources (DHHR), hereinafter “Respondent.”

2. West Virginia Clearance for Access: Registry and Employment Screening (WV CARES) is a background check program created by the legislature in 2015, to facilitate the processing and analysis of the criminal history and background of “applicants”² to “covered providers”³ and covered contractors with “direct access”⁴. (Respondent’s Exhibit 6)

²“Applicant’ means an individual who is being considered for employment or engagement with a covered provider or covered contractor.” W. VA. CODE § 16-49-1(1).

³“Covered provider” means a skilled nursing facility; a nursing facility; a home health agency; a provider of hospice care; a long-term care hospital; a provider of personal care services; a provider of adult day care; a residential care provider that arranges for, or directly provides, long-term care services, including an assisted living facility; an intermediate care facility for individuals with intellectual disabilities; and any other facility or provider required to participate in the West Virginia Clearance for Access: Registry and Employment Screening Program as determined by the DHHR secretary by legislative rule. W. VA. CODE § 16-49-1(6).

⁴“Direct access’ means physical contact with a resident, member, beneficiary or client of a covered provider, or access to their property, personally identifiable information, protected health information or financial information.” W. VA. CODE § 16-49-1(6).

3. Michelle Markovich is the assistant CEO at Sharpe.
4. At the initiation of his employment with Sharpe over 19 years ago, Grievant was subjected to a criminal background check by Sharpe. (Grievant's testimony)
5. WV CARES processes and analyzes the criminal history and background of both applicants and existing employees. (Ms. Markovich's testimony)
6. WV CARES includes an integrated Rap Back⁵ Program with the State Police to allow retention of fingerprints and updates of state and federal criminal information on all direct access personnel until such time as the individual is no longer employed or engaged by the covered provider or covered contractor. (Respondent's Exhibit 6)
7. The purpose of WV CARES is to protect West Virginia's vulnerable populations by requiring registry and criminal background checks for all direct access personnel of covered providers and covered contractors. (Respondent's Exhibit 6)
8. Meghan Shears is the director of WV CARES. (Ms. Shears' testimony)
9. WV CARES operates within the Office of the Inspector General of DHHR. (Ms. Shears' testimony)
10. All employees at Sharpe are finger printed and their criminal background checked with law enforcement. (Ms. Markovich's testimony)
11. The criminal background is sent to WV CARES so that it can issue a fitness determination. (Ms. Shears' testimony)

⁵“Rap back’ means the notification to the department when an individual who has undergone a fingerprint-based, state or federal criminal history record information check has a subsequent state or federal criminal history event.” W. VA. CODE § 16-49-1(12).

12. WV CARES can inform the applicant and covered provider that a fitness determination was made, but is prohibited by the WV CARES Act from providing them the criminal history report or any of the information therein. (Ms. Shears' testimony & Respondent's Exhibit 6)

13. By letter dated August 7, 2018, WV CARES notified Grievant that he received a "fitness determination of INELIGIBLE for direct access employment." It stated that this ineligibility determination was based on the fitness determination process in W.Va. Code § 16-49-1 *et seq.* and W.Va. Code St. R. § 69-10-5. It stated that information related to Grievant's criminal history would not be released to Sharpe or Grievant. It informed Grievant where he could obtain his criminal history report and that he would be responsible for the cost. (Respondent's Exhibit 1)

14. The August 7, 2018, letter also stated that Grievant could request a variance from WV CARES, during which the employee **"may be provisionally employed for no more than 60 days and shall receive direct onsite supervision while the variance decision is pending. Provisional employment during the variance process is solely at the discretion of the employing agency and/or facility."**(emphasis in the original) (Respondent's Exhibit 1)

15. On August 8, 2018, Sharpe orally informed Grievant he was being suspended pending investigation and presented Grievant with the WV CARES notification letter that was sent to him. (Respondent's Exhibit 2)

16. By letter dated August 10, 2018, Sharpe suspended Grievant without pay from his employment pending investigation and informed him that he could opt to use annual leave during his suspension. (Respondent's Exhibit 2)

17. Grievant used annual leave during his suspension. (Grievant's testimony)
18. Sharpe did not conduct a predetermination meeting in conjunction with its suspension of Grievant.
19. Respondent never informed Grievant of the specific allegations on which his suspension was based. (Grievant's testimony)
20. Grievant traveled to Clarksburg to be finger printed in order to obtain a copy of the criminal history report relied on by WV CARES. (Grievant's testimony)
21. Grievant paid Thirty-two Dollars to a third party to obtain a copy of the criminal history report relied on by WV CARES. (Grievant's testimony)
22. Grievant's criminal history report contained a number of inaccuracies. (Grievant's testimony)
23. Grievant obtained numerous references and testimonials in preparation of his variance request. (Grievant's testimony)
24. Grievant paid Fifteen Dollars in order to obtain documents and court records disproving allegations in his criminal history report. (Grievant's testimony)
25. Grievant did not receive any assistance from Sharpe in clearing his criminal history report or in obtaining a variance. (Grievant's testimony)
26. Grievant filed a variance request with WV CARES. (Grievant's testimony & Respondent's Exhibit 3)
27. By letter dated August 23, 2018, Grievant was notified by WV CARES that his variance request was granted and that he was permitted to work at Sharpe. (Respondent's Exhibit 3)

28. Upon reinstating Grievant, Sharpe reinstated the annual leave he had used during his suspension. (Respondent's Exhibit 4)

29. Respondent does not pay or reimburse any employee for the cost of their criminal history report. (Ms. Markovich's testimony)

30. DHHR is immune from liability incurred for good faith conduct in determining eligibility or granting variances under the WV CARES Act. (Respondent's Exhibit 6)

31. The legislation governing WV CARES does not mention the manner of handling existing employees deemed ineligible, only applicants in waiting or provisionally employed. (Respondent's Exhibit 6)

32. The West Virginia Division of Personnel's Administrative Rule, 143 C.S.R. 1, provides for non-disciplinary suspensions to conduct an investigation:

12.3.b. Non-disciplinary Suspension. -- An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 contends that he was a tenured employee with a property interest in his job and that Respondent deprived him of due process by suspending his employment without pay based solely on a determination by WV CARES that he was ineligible for direct access employment after 19 years of being so employed. Grievant contends that Respondent further denied him due process by not notifying him of the allegations leading to his suspension or providing him with a predetermination meeting, whereupon Grievant found himself in the Kafkaesque situation of being required to prove his innocence without being informed of his infraction. Respondent counters that Grievant should have filed a grievance against WV CARES if he had an issue with their determination that he was ineligible, and that, in suspending Grievant, Respondent was only abiding by legislation mandating Grievant’s ineligibility for employment. Respondent further contends that it could not provide Grievant with any specifics because WV CARES did not and could not provide it with Grievant’s criminal history report. In spite of no mention being made in the WV CARES Act about the handling of tenured employees deemed ineligible, Grievant does not contend that the WV CARES Act is inapplicable to him as a tenured employee. He does argue that, because it operates under DHHR, WV CARES is already a party to this action. Grievant seeks to remove the suspension from his record and receive backpay and reimbursement of his expenditures, with interest. He contends that he

expended time and money in successfully seeking a variance from WV CARES, including \$32 for a background check and \$15 for records disproving the allegations therein.

“The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm’n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep’t of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). “A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” *Id.* at Syl. Pt. 4. Grievant contends that this Board has held that “West Virginia’s Due Process Clause requires presentation of charges and some opportunity for the employee to respond to them before the imposition of a discipline which deprives the employee of wages or salary. *Hammer v. Greenbrier County Bd. of Educ.*, Docket No. 2008-0302-GreED (May 21, 2008) (*citing*: Syl. Pt. 7, *Waite v. Civil Service Commission*,⁶ 161 W. Va. 154, 241 S.E.2d 164 (1977); *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981) and *Knauff v. Kanawha County Bd. of Educ.*, Docket No. 20-88-095 (Jan. 10, 1989)).” *Beaton, et. al. v. Dep’t of Health & Human Res.*, Docket No. 2013-0496-CONS (Dec. 20, 2013). The scope of the due process rights to be afforded an employee hinges on the disciplinary nature of an employer’s action against the employee.

Grievant contends that the instant case is analogous to *Beaton* and that Respondent was obligated to provide him the documents upon which it based its unpaid suspension. Sharpe, however, did not have access to Grievant’s criminal history report and WV CARES could not provide the report to either Grievant or Sharpe. The WV

⁶Overruled in part on other grounds by *W. Va. Dep’t of Educ. v. McGraw*.

CARES Act directs DHHR to maintain the confidentiality of criminal background information obtained thereunder. W. VA. CODE § 16-49-9(c). In maintaining the confidentiality of criminal history reports, WV CARES' interpretation and practice is to not provide even the subject of the check with any information from the background check. Although not clearly delineated in the code, this interpretation is not unreasonable. In withholding from Grievant all information from his criminal history report that was considered in determining his ineligibility for employment, WV CARES was reasonably abiding by its interpretation of the mandate in the WV CARES Act. Further, the Department of Personnel's Administrative Rule (the DOP Rule) does not require Respondent to provide Grievant with the documents upon which the suspension is based or with a predetermination meeting when the suspension is made pending investigation. W. VA. CODE ST. R. § 143-1-12.3.b. (2016).

While some suspensions are disciplinary, unpaid suspensions pending investigation are non-disciplinary and are permitted to last indefinitely under the DOP Rule. *Id.* In spite of the permissiveness of unpaid suspensions pending investigation, Respondent is still obligated under the DOP Rule to "give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension." *Id.* On August 8, 2018, Sharpe informed Grievant in person that he was being suspended pending investigation, gave him the ineligibility notification letter from WV CARES, and specified that the suspension was based on an ineligibility fitness determination pursuant to the WV CARES Act. On August 10, Respondent sent a letter to Grievant informing him of the same. Under the DOP Rule, a predetermination conference is not required for non-disciplinary suspensions pending

investigation. *Id.* Further, Grievant was provided his due process appeal rights under the WV CARES Act, which he availed himself of by successfully obtaining a variance. Thus, Respondent complied with due process requirements under the DOP Rule and the WV CARES Act.

Respondent contends that this action is moot because Grievant was granted a variance that resulted in the reinstatement of his employment and of all the annual leave he expended during his suspension. This Board has held that “[m]oot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). Grievant counters that “[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.” Syl. Pt. 1, *State ex rel. M.C.H. v. Kinder*, 317 S.E.2d 150, 173 W.Va. 387 (W. Va., 1984). “Will” is a word of certainty, synonymous with “shall”.⁷ Grievant’s due process arguments are premised not only on his suspension, but also the now moot possibility that his suspension could have been converted to a dismissal. Grievant avoided dismissal and his suspension was revoked upon his being reinstated after obtaining a variance from WV CARES. Grievant was also restored the annual leave he had used during his suspension. If Grievant again finds himself in the

⁷“Will” is “[a]n auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must.’ It is a word of certainty, while the word ‘may’ is one of speculation and uncertainty.” BLACK’S LAW Dictionary 1598 (6th ed. 1990).

situation that led to this grievance, there is no certainty that the claims arising therefrom will evade review. The relief affected by Respondent's mootness argument includes Grievant's request for reinstatement of employment and backpay, as well as any relief emanating from a declaration that the WV CARES Act is unconstitutional. Even if a determination on the constitutionality of the WV CARES Act is ripe, this Board is not, as an agency of the executive branch limited by the separation of powers, empowered to determine the constitutionality of a statute. *Akers v. West Virginia Dep't of Highways*, Docket No. 89-DOH-605 (May 22, 1990) *overruled on other grounds*, W.Va. Sup. Ct. App, 425 S.E.2d 840, 188 W.Va. 698 (Dec. 18, 1992). The undersigned will therefore not address any implied request by Grievant for a determination on the constitutionality of the WV CARES Act, reinstatement of backpay, or reinstatement of his employment.

Grievant did not present any evidence or testimony regarding damages, other than Thirty-two Dollars for his criminal history report and Fifteen Dollars for reports to disprove allegations therein. Even if he had, "tort-like" damages, such as monetary relief and reimbursement, are unavailable in the grievance process. The Grievance Board is an administrative agency and not a court. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (*citing* Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). The Grievance Board is not authorized by statute to hear tort claims or award damages

for emotional distress. "Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as 'tort-like' damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997)." *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995). Further, even though Respondent did not argue that it had immunity, DHHR is in fact immune from any liability that might otherwise be incurred or imposed for good faith conduct in determining eligibility or granting of variances. W. VA. CODE § 16-49-9. Even though Respondent failed to argue a lack of jurisdiction, the undersigned cannot act outside of his jurisdiction. DHHR's immunity, and the unavailability of "tort-like" damages, render as beyond the undersigned's jurisdiction any consideration of the requested money damages.

Respondent argues that Grievant failed to prove that its actions were arbitrary and capricious. "[T]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322

(June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Sharpe had a rational basis for suspending Grievant. The WV CARES Act requires that a covered provider not engage applicants with a disqualifying offense as direct access personnel and that it terminate any provisionally employed applicant. W. VA. CODE § 16-49-9. The WV CARES Act does not cover the manner in which employers should treat tenured employees with a disqualifying offense or provide any direct authority for suspending them. Nevertheless, Sharpe received notice from WV CARES that Grievant was ineligible for direct access employment. Sharpe's best option was to suspend Grievant, not only out of concern that it would be violating the WV CARES Act if it did not do so, but also out of concern for the civil and criminal liability it could face if Grievant harms a patient. Respondent could not directly provide Grievant with the specific reason he was suspended because WV CARES only provided Respondent the same information it provided Grievant. In requesting the removal of his suspension from Sharpe's records, Grievant did not provide any legal authority requiring removal. Further, Grievant presented no evidence that there were any errors in Sharpe's records. The undersigned can only surmise that Sharpe's records show Grievant was suspended after WV CARES determined Grievant was ineligible and that Grievant was reinstated after WV CARES granted him a variance.

While there is no evidence that all provisions of the WV CARES Act are applicable to tenured employees, Grievant did not argue otherwise and instead relied on his argument that Respondent failed to provide him due process. Grievant did not prove that

Respondent violated his due process rights, that Respondent failed to provide Grievant the reason for his investigatory suspension, or that Grievant had a right to a predetermination meeting prior to an investigatory suspension. Neither did Grievant prove that Respondent had an obligation to remove the suspension from his record or to reimburse him his costs in obtaining his criminal history report. Further, Grievant failed to prove that Respondent was responsible for any errors on his report or that Respondent had any obligation to reimburse him for the documents he obtained and efforts he expended thereafter to correct his criminal history report and obtain a variance.

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 his 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. “The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm’n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep’t of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). “A State civil service classified employee

has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” *Id.* at Syl. Pt. 4.

3. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015).

4. “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

5. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as 'tort-like' damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

6. Respondent has proven that Grievant was subject to a non-disciplinary suspension pending investigation.

7. Grievant did not prove by a preponderance of the evidence that Respondent failed to provide him with due process or the reason for his suspension.

8. Grievant did not prove by a preponderance of the evidence that Respondent was obligated to provide him with a predetermination meeting, remove the suspension from his permanent record, restore any benefits, or reimburse him the funds he expended in obtaining and correcting his criminal history report and in obtaining a variance.

Accordingly, the grievance is **DENIED**.

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

DATE: March 21, 2019

Joshua S. Fraenkel
Administrative Law Judge