THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES NAMSUPAK, et al,

Grievants,

v. **Docket No. 2018-0242-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JOHN MANCHIN SR. HEALTH CARE CENTER,

Respondent.

DECISION

Grievants[1], employees in various classifications at the John Manchin Sr. Health Care Center (Manchin Clinic), are employed by Respondent, the Department of Health and Human Resources (DHHR). On August 14, 2017, Grievants filed this grievance against Respondent stating:

> On 08 August 2017, Dr. James Namsupak and Ms. Christina Flohr (RN) were informed by their supervisors that they were only permitted 08 hours of sick leave for a 09-hour shift. One hour of accrued annual leave was deducted to make up the difference. This change in policy also included any member of the Outpatient Staff working a 09-hour shift.
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> Ms. Flohr was informed of this change of policy by her supervisor Ms. Betty King. Ms. King stated that the change in policy resulted from a conversation with Ms. Melissa Williams during Kronos training.

[1]Grievants include Dr. James Namsupak, Christina Flohr, Sue Drummond, Jessica Pauley, and Tami Ranallo.

> Ms. Tami Ranallo (LPN) was informed by Ms. Michele Crandall (CEO) that Dr. Namsupak also lost one hour of accrued annual leave due to the sick leave policy change. Ms. Crandall informed Ms. Ranallo that this action was taken due to Administrative Rule.
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> Dr. Namsupak emailed Ms. Ginny Fitzwater (MHRM) for clarification, while Ms. Flohr contacted Ms. Ginny Fitzwater, Ms. Melissa Williams (Personnel Operations Specialist), and Angela Ferris (Payroll Manager) for clarification.
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> During the morning staff meeting on 10 August 2017, Ms. Flohr asked Ms. Crandall to explain the new rule regarding the use of sick leave. Ms. Crandall stated that this change was not a new rule, but enforcement of the existing Administrative Rule policy, and that the Long-Term Care nurses were currently following this policy. Ms. Crandall could not identify the section of the Administrative Rule that she was following for the change in existing policy.
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> On 11 August 2017, Ms. Ginny Fitzwater (MHRM) confirmed via email that employees who work a 09-hour shift, and call-off sick, are permitted to use 09 hours of sick leave if they have that amount of time amassed. Ms. Fitzwater stated that she would advise Ms. Crandall of the actual policy.
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> The staff of the Outpatient Clinic believe that this action by the clinic administration is part of an on-going pattern of retribution following a complaint against another staff member for misconduct. Ms. Crandall is the supervisor of that employee. Both Ms. Crandall and Ms. King were negligent in their review of existing policy. The appearance of retaliation is causing undo stress and disruption in the routine operation of the clinic.

For relief, Grievants seek "[i]mmediate return of annual leave time. Administration should verify policies/procedures before trying to enforce policies that don't exist.

Administration may benefit from classes in both conflict resolution and staff communication."

On November 16, 2017, prior to the level one hearing, Respondent moved to dismiss the grievance as moot because all leave had been corrected and Grievants did not lose time or salary. At the December 11, 2017, level one hearing, Grievants agreed that their claim for reinstatement of leave was moot, but objected to a dismissal so they could pursue their claim of retaliation. They also orally amended their grievance by including a claim for "retaliatory hostile work environment". The level one grievance evaluator agreed to hear Grievants' retaliation and hostile work environment claims and dismissed as moot the portion of the grievance requesting reinstatement of annual leave[2]. The issue of reinstatement of annual leave is moot and will therefore not be addressed. A level one decision was rendered on January 3, 2018, denying the grievance. The decision memorialized Grievants' oral amendment of their grievance, stating that "Mr. Simmons indicates, 'There were threats made to staff and Grievants maintain that a retaliatory hostile work environment was created by the administrator which persists and Grievants wish to pursue the grievance in order to relieve that situation.'"[3]

Grievants appealed to level two and a mediation session was held on April 25, 2018. Grievants appealed to level three of the grievance process on May 8, 2018. A level three hearing was held on October 1, 2018, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievants appeared in person and were

[2]Level One Hearing Transcript, p. 5.
[3]Level One Decision, p. 3.

represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on November 13, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants were employed in various classifications in the outpatient facility at the Manchin Clinic. Grievants allege that Respondent retaliated and created a hostile work environment when CEO Michele Crandall announced but never implemented a change to the Outpatient Clinic hours of operation; forced Grievants to use annual leave for any sick time taken beyond the first eight hours of a shift; announced but never implemented a discontinuation of vendor hosted luncheons; rearranged the Outpatient Staff workspace; locked up medical records, the copier, the fax machine, and x-ray supplies; worked Grievant Pauley out of classification; discussed confidential employee information so loudly that coworkers could hear details; and favored employee Kathy Tennant through inaction on Grievants complaints alleging that Tennant had threatened them and had violated the Health Insurance Portability and Accountability Act (HIPPA). Grievants proved that Respondent retaliated against Grievants when CEO Crandall announced a change in Outpatient Clinic hours of operation, locked up the copier, fax machine, and x-ray supplies for over six months, and announced a discontinuation of vendor hosted luncheons . Grievants also proved that Respondent created a hostile work environment when CEO Crandall locked up the copier, fax machine, and x-ray supplies for over six months. Accordingly, the grievance is GRANTED.

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

Findings of Fact

1. Grievants are employed by Respondent in various classifications at the John Manchin Sr. Health Care Center (Manchin Clinic).

2. Grievant Dr. James Namsupak is the Medical Director of the Outpatient Clinic at the Machin Clinic.

3. Grievant Christina Flohr is the Nursing Supervisor of the Outpatient Clinic.

4. Grievant Sue Drummond is a Laboratory Assistant 1 at the Outpatient Clinic.

5. Grievant Jessica Pauley is a Radiological Technologist 2 at the Outpatient Clinic.

6. Grievant Tami Ranallo is a Licensed Practical Nurse at the Outpatient Clinic.

7. Debra Quinn was the Human Resource Director at the Manchin Clinic between February 2017, and the end of July 2017 and is no longer employed there.

8. Michele Crandall is the CEO at the Manchin Clinic.

9. Betty King is the Supervising Nurse at the Manchin Clinic.

10. Kathy Tennant was, until recently, the Records Clerk and HIPPA Officer at the Manchin Clinic and is still employed there in a different capacity.

11. Ginny Fitzwater is the Human Resource Director for the entire DHHR.

12. The incident that resulted in the alleged retaliation by Respondent entailed Grievants complaining to CEO Crandall on July 3, 2017, regarding possible HIPPA

violations and threats towards Grievants by Kathy Tennant. (Grievants' Exhibit 2 and HR Director Quinn's testimony)

13. CEO Crandall was Tennant's direct supervisor and the two are friends.

14. On or about June 21, 2017, following another employee bumping her to work a holiday, Tennant told Outpatient Staff coworkers, Tami Ranallo, Jessica Pauley, and Pam Duckworth, "Don't any of you fucking bitches ask me to do anything for you again." (Testimony of Tami Ranallo and Level One Transcript, p. 46)

15. On June 27, 2017, Outpatient Staff Ranallo, Pauley, and Duckworth complained to Nursing Supervisor Flohr that Tennant had been rude to them and had told them, "Don't any of you fucking bitches ask me to do anything for you again." (Grievants' Exhibit 2 and Ms. Quinn's testimony)

16. On June 27, 2017, Nursing Supervisor Flohr informed the Manchin Clinic HR Director Quinn verbally and via letter of the June 21, 2017[4], incident between Tennant and Grievant Ranallo, Grievant Pauley, and Duckworth, and about a repeated pattern of negative behavior by Tennant, writing in part:

> Ms. Tennant routinely displays behavior that undermines the confidence and cohesiveness of the staff. Her anger and use of profanity are incompatible with the standards of any professional work environment. The staff of the Outpatient Clinic are reluctant to address Ms. Tennant's conduct due to their fear of retaliation. Ms. Tennent's unprofessional conduct makes conditions within the clinic uncomfortable and unpleasant. Her inability to manage her anger is negatively affecting the overall morale of the staff.

[4]The letter references a June 22, 2017, incident, which the undersigned has determined actually occurred on June 21, 2017.

> My past concerns over Ms. Tennant's negative actions resulted in multiple informal conversations with her immediate supervisor, Ms. Michele Crandall, including this latest incident. However, Ms. Tennant's pattern of negative engagement with our staff continues unabated. My repeated conversations with management concerning Ms. Tennant's conduct are not generating the required change in Ms. Tennant's behavior. She apparently ignores official counseling. Her conduct is creating a hostile work environment that is unproductive and dangerous.
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> (Grievants' Exhibit 3)

17. The Outpatient Clinic at Manchin Clinic has operated from 8:00 a.m. to 5:00 p.m. from Monday through Thursday and 8:00 a.m. to 4:00 p.m. on Friday. Outpatient staff work half a day on Fridays. (Grievants' Exhibit 2)

18. On July 3, 2017, Grievant Flohr informed CEO Crandall of possible HIPPA violations by Tennant, but left out any mention of the June 21, 2017, complaints by outpatient staff towards Tennant. (Grievants' Exhibit 2 and Flohr's testimony)

19. On July 3, 2017, Grievant Flohr informed Supervising Nurse Betty King of the June 21, 2017, complaints by outpatient staff towards Tennant. Supervising Nurse King discouraged Flohr from pursuing the complaints, telling her that it could result in vendor luncheons being discontinued and the Outpatient Clinic being closed. (Grievants' Exhibit 2 and Flohr's testimony)

20. On July 3, 2017, Grievant Flohr sent a follow-up email to Supervising Nurse King regarding their conversation that same day about the June 21, 2017, complaints by outpatient staff towards Tennant. (Grievants' Exhibit 2)

21. On July 11, 2017, Supervising Nurse King emailed Grievant Flohr, directing her to talk to CEO Crandall about the June 21, 2017, complaints by outpatient staff towards Tennant. (Grievants' Exhibit 2)

22. On July 12, 2017, Supervising Nurse King angrily confronted Grievant Flohr in response to the follow up email Flohr had sent her on July 3, 2017, and told her to give her June 27, 2017, letter to Judy Labdik, the Temporary Equal Employment Opportunity (EEO) officer for the Manchin Clinic. (Grievant's Exhibit 2 and Flohr's testimony)

23. Because the Manchin Clinic HR Director Quinn had been on vacation, she received Flohr's June 27, 2017, letter on July 13, 2017. (Quinn's testimony)

24. On July 13, 2017, Quinn went to CEO Crandall and related the totality of Tennant's behavior to her, including her behavior towards some of Grievants on June 21, 2017. Crandall was dismissive and upset that the outpatient staff had filed a complaint against Tennant and turned their complaint around to accuse staff of retaliating against Tennant. Crandall threatened to move staff. This reaction was a continuation of Crandall's previous manner of response to complaints against Tennant, which always entailed siding with Tennant and blaming the complaining employees. (Grievant's Exhibit 2 and Quinn's testimony)

25. CEO Crandall told Mark Lanham, CFO at the Manchin Clinic, that if outpatient staff filed a complaint on Tennant, Crandall would change Outpatient Clinic hours, cut an Outpatient Clinic nurse position, or move some of the outpatient staff to other parts of the facility. CFO Mark Lanham relayed this conversation to the Manchin Clinic HR Director Quinn. (Grievants' Exhibit 2 and Quinn's testimony)

26. Sometime between July 3, 2017, and July 13, 2017, outpatient staff, the Manchin Clinic HR Director Quinn, and Outpatient Nursing Supervisor Flohr, questioned CEO Crandall multiple times, asking her how Tennant's alleged HIPPA violation was an EEO matter rather than misconduct. CEO Crandall told HR Director Quinn that at the Manchin Clinic the EEO officer handles these issues, not Human Resources. (Grievants' Exhibit 2 and Quinn's testimony)

27. On July 13, 2017, HR Director Quinn overheard CEO Crandall say that outpatient staff were harassing Tennant. (Grievants' Exhibit 2 and Quinn's testimony)

28. Before the investigation against Tennant was complete, CEO Crandall informed Tennant of the HIPPA violation accusations against her. HR Director Quinn informed Crandall that this was improper. (Grievants' Exhibit 2 and Quinn's testimony)

29. On July 13, 2017, the Manchin Clinic HR Director Quinn informed DHHR HR Director Fitzwater by email that she overheard Temp EEO Officer Judy Labdik tell CEO Crandall and Tennant that she would keep them updated on the investigation and that "we do not take our dirty laundry outside this building nor do we bring it in." (Grievants' Exhibit 5)

30. Between July 13, 2017, and July 17, 2017, the Manchin Clinic HR Director Quinn sent a series of emails to DHHR's Office of Human Resource Management regarding CEO Crandall's favoritism towards Tennant and her reprisals against the outpatient staff. (Grievants' Exhibits 4-7)

31. On July 14, 2017, CEO Crandall approached her DHHR Supervisor Shevona Lusk with a request to change Outpatient Clinic hours because not many patients were being seen after 4:00 p.m. and another doctor would need to be retained

to see patients thereafter. Lusk approved the proposed change. (Grievants' Exhibit 2 and Crandall's testimony)

32. On July 14, 2017, CEO Crandall met with Dr. Namsupak and Flohr and presented them with a memo changing Outpatient Clinic hours of operation and stating that she has noticed a lot of down time in the clinic especially in the afternoons and that her supervisor, Shevona Lusk advised her to change the clinic hours and stop granting half days off on Fridays, starting immediately. (Dr. Namsupak and CEO Crandall's testimony)

33. On July 14, 2017, the Manchin Clinic HR Director Quinn informed DHHR HR Director Fitzwater by email that CEO Crandall had retaliated against staff by changing Outpatient Clinic hours after staff told Crandall about Tennant's behavior towards them. (Grievants' Exhibit 6)

34. Thereafter, Quinn informed Fitzwater that Crandall was angry and had blamed Quinn for contacting her superiors in Charleston instead of keeping the matter in house. (Grievants' Exhibit 7)

35. On July 17, 2017, Quinn and Flohr met with Crandall. Quinn asked Crandall why she had informed Tennant about the allegations against her before the investigation was complete. (Quinn's testimony)

36. Near the end of July, 2017, the Manchin Clinic HR Director Quinn quit her job at the Manchin Clinic. (Quinn's testimony)

37. On July 20, 2017, CEO Crandall told all outpatient staff of the change in Outpatient Clinic hours and that it was effective immediately. She further informed them that she was simply following instructions emailed to her by her DHHR superior, Shevona

Lusk. (Grievants' Exhibit 2, Grievants' Exhibit 11, Dr. Namsupak's testimony, and CEO Crandall's testimony)

38. On July 20, 2017, after prompting from Dr. Namsupak, CEO Crandall met with outpatient staff and agreed to construct a patient survey as a means for collecting data on Outpatient Clinic hours and agreed to meet again with staff in 30 days to further discuss Outpatient Clinic hours. Neither the patient survey nor the subsequent meeting ever occurred. (Grievants' Exhibit 11)

39. Crandall never implemented the announced change to Outpatient Clinic hours of operation. (Crandall's testimony)

40. On August 8, 2017, after CEO Crandall returned from a training on Kronos[5], she informed Grievants Flohr and Ranallo that employees were only allowed to use eight hours of sick leave for shifts greater than eight hours and that the remainder would necessitate annual leave, under the Administrative Rule. (Crandall's testimony)

41. On August 11, 2017, DHHR HR Director Fitzwater informed outpatient staff that the limitation of sick leave to eight hours per shift was a misinterpretation and management returned to Grievants all annual leave they had been forced to use in the place of sick leave. In spite of the correction to their annual leave, Grievants view the misrepresentation of sick leave policy by CEO Crandall as part of a concerted effort of retribution against them. (Dr. Namsupak's testimony)

42. Vendors, such as pharmaceutical or medical equipment companies, occasionally bring lunch for staff at the Manchin Clinic. During these luncheons, vendors

[5]Electronic time keeping system used by state employees.

provide free product samples and information on new products. Neither the Manchin Clinic nor staff provide these vendors anything in return. The Manchin Clinic utilizes the free medicine samples for their indigent patients. (Dr. Namsupak's testimony)

43. On October 17, 2017, CEO Crandall issued a memo to the Manchin Clinic staff stating that vendor luncheons were being discontinued immediately due to the noise they generated. CEO Crandall also informed Grievants that the luncheons were illegal and unethical. (Grievants' Exhibit 10 and Ms. Flohr's testimony)

44. Grievant Namsupak asked CEO Crandall if staff could bring lunch to attend vendor presentations as an alternative to vendor hosted luncheons. Crandall replied that they could if they brought lunch for everyone at the Machin Clinic. (Dr. Namsupak's testimony)

45. The discontinuation of vendor hosted luncheons has never been implemented. (Dr. Namsupak's testimony)

46. On March 6, 2018, CEO Crandall announced that all components of the Outpatient Clinic, apart from Kathy Tennant and the medical records she monitored, would be relocated away from the L-shaped room they were in, because outpatient staff was congregating too much. (Testimony of Dr. Namsupak and Flohr)

47. On March 16, 2018, outpatient staff submitted to CEO Crandall a list of recommendations regarding any proposed reorganization of the Outpatient Clinic workspace. (Grievants' Exhibit 2)

48. CEO Crandall never acknowledged the outpatient staff's workspace recommendations but summarily moved all outpatient staff, except Kathy Tennant, out of the L-shaped space into smaller, separate offices away from the medical records, copier,

fax machine, and x-ray supplies, which were all locked up, making it difficult for employees, including Dr. Namsupak, to access these as needed. This has resulted in Grievants being unable to do x-rays, make copies, and fax patient refills in a timely manner. (Dr. Namsupak's testimony)

49. CEO Crandall told outpatient staff that she had reorganized the Outpatient Clinic workspace because of staff's complaints that Kathy Tennant had potentially violated HIPPA by allowing her adult son access to patient records. (CEO Crandall's testimony)

50. The wrangling between outpatient staff and CEO Crandall resulted in the departure of an inordinate number of staff. (Dr. Namsupak's testimony)

51. Former employee Anderson overheard CEO Crandall on the phone firing an employee who Anderson later learned was Anderson's daughter. (Anderson's testimony)

52. On May 15, 2018, management reassigned Grievant Pauley to full-time Front-Desk Receptionist duty and obligated her to continue her duties as the full-time Radiological Technologist. (Grievants' Exhibit's 14 & 15)

53. Respondent recently removed the copier and fax machine from the locked records room, making them more easily accessible by outpatient staff. (CEO Crandall's testimony)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.

Grievants contend that Respondent retaliated against them for reporting HIPPA violations and threats towards them by coworker Kathy Tennant. They contend that CEO Crandall was motivated by her friendship with Tennant, as seen in her backing Tennant on numerous other complaints. Grievants contend that Respondent's actions against them also created a hostile work environment. Grievants allege that CEO Crandall retaliated against them and created a hostile work environment by announcing a change to the Outpatient Clinic hours of operation, by improperly forcing Grievants to use annual leave for any sick time used for shifts longer than eight hours, by announcing a discontinuation of vendor hosted luncheons, by rearranging Grievants' workspace, by working Grievant Pauley out of classification, and by discussing confidential employee information so loudly that coworkers could hear details, as well as through her inaction on Grievants' complaints that Kathy Tennant had threatened coworkers and violated HIPPA.

Respondent contends that Grievants' complaints regarding retaliation and hostile work environment are moot and unripe since Grievants were reinstated any annual leave they were forced to use for sick time, that CEO Crandall never implemented her

announced changes to the hours of operation and discontinuation of vendor hosted luncheons, and that Grievants presented no evidence showing Respondent failed to investigate or discipline Tennant for her alleged infractions.

Before assessing whether each of Grievants' allegations meets the definition of retaliation or hostile work environment, the undersigned must determine whether any elements of the grievance are moot, premature, or non-grievable. The Grievance Board has repeatedly refused to decide matters that are "speculative or premature, or otherwise legally insufficient." *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994). A grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavey v. Kanawha County Bd. of Educ*., Docket No. 20-87-102-1 (June 30, 1987).

Respondent initially required Grievants to use annual leave for sick time taken beyond eight hours per shift. Respondent subsequently reinstated the annual leave and now argues that the issue is moot. "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)). While Grievants concede that

reinstatement of annual leave is a moot issue, they allege that this conduct is retaliation and part of a hostile work environment and that their grievance of the conduct is therefore not moot. Respondent further contends that threats and announced changes to hours of operation and discontinuation of vendor hosted luncheons are moot and are not grievable because they were never implemented. The Grievance Board has held that a grievance over the misapplication of leave which was subsequently corrected is not moot where the motive for the initial denial of leave is still at issue. *See Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017). The same thereby holds true for the retaliatory threats against Grievants which have not been carried out. Grievants have a right to make the case that Respondent's threats and non-implemented announcements are retaliation and part of a hostile work environment.

Respondent argues that Grievants cannot grieve incidents where CEO Crandall discussed confidential information loudly enough for staff to hear details because Grievants presented no evidence that the confidential information pertained to Grievants or that Grievants overheard Crandall. "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . ." W. VA. CODE § 6C-2-2(i)(1). The only incident Grievants specified was when a non-grievant employee overheard Crandall rudely talking to and firing another employee over the phone, only to find out later that the fired employee was her daughter. This is not "an injury-in-fact, economic or otherwise"

to any of the Grievants. Grievants therefore lack standing to grieve it. The same holds true for any grievance premised on other employees quitting. The undersigned finds that both the loud discussion by Crandall of confidential employee information and employees quitting are not actionable by Grievants and will not address these further.

In deciding whether the alleged incidents rise to the level of retaliation and hostile work environment, facts in dispute must first be addressed. Certain facts or rationale surrounding some incidents were the subject of conflicting testimony. It is necessary to assess the credibility of various Grievants and witnesses who testified regarding events at issue. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness;

and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

Respondent does not contest many of Grievants' allegations concerning CEO Crandall's conduct, such as informing Grievants of an immediate change to Outpatient Clinic hours and the discontinuation of vendor hosted luncheons, forcing Grievants to take annual leave for their sick time during shifts longer than eight hours, rearranging outpatient staff workspace, and locking up the medical records, fax machine, copier, and x-ray supplies. The primary allegation that requires a credibility determination is CEO Crandall's motive in taking these actions.

Grievants testified about the tension that has surrounded the Manchin Clinic since CEO Crandall assumed her position a few years prior. Grievants testified that it was their belief that Crandall's conduct and threats towards the outpatient staff were in retaliation for their complaints against Tennant. Grievants displayed a sense of entitlement in implying that CEO Crandall was obligated to abide by their recommendations on such issues as Outpatient Clinic hours and the ethics of vendor hosted luncheons on grounds that they were well versed in these areas and she was a novice. It may well be that CEO Crandall lacked the requisite experience to make informed decisions on these issues. This does not excuse any insubordination that Grievants may have displayed towards her. This dynamic between CEO Crandall and the outpatient staff escalated out of control. While Grievants have displayed an attitude of pretentiousness towards CEO

Crandall, the undersigned did not detect that it had any measurable effect on their honesty. Because there were multiple Grievants who testified to each incident, Grievants had opportunity for variation and inconsistency in their version of events. There was however no inconsistency in Grievants' version of events.

While CEO Crandall seemed nervous and flustered, this appeared indicative of the enormous pressure she must have been under in testifying in front of employees who had questioned her decision making, rather than a sign of deceit on her part. There were, however, multiple instances testified to by Grievants where CEO Crandall had provided Grievants with cover stories for her actions which appeared to be fabricated. One such story entailed CEO Crandall telling staff that her DHHR Supervisor Lusk had instructed her to change Outpatient Clinic hours, when she later testified that she had approached Lusk for approval. Another was when Crandall told Grievants that vendor hosted luncheons would be discontinued because they were too noisy, when they had been operating for years without issue, only to later change her rationale to their questionable legality and ethics. Even though CEO Crandall did not in the stated instances owe staff any legal obligation to be forthright, and did not repeat those fabrications under oath, the undersigned was struck by the ease in which she was able to provide these facades to staff. It is not wholly relevant to a credibility determination that Crandall did not repeat her fabrications under oath, as the relevant factor under *Asher* is "reputation for honesty". It is the undersigned's opinion that Crandall was truthful in testifying that she approached

her DHHR Supervisor Shevonna Lusk and received permission to change the Outpatient Clinic hours. The fact that she did not implement the change shows that she, rather than Lusk, was the one moving for a change in hours and later succumbed to pressure from staff. Crandall reasoned that the change was motivated by a dearth of patients after 4:00 p.m. and the need to retain another doctor to serve patients after 4:00 p.m. Dr. Namsupak countered that this was not the case. Respondent did not present evidence that another doctor was ever hired. Crandall's explanation is less believable than that provided by Grievant Namsupak. The fact that Crandall announced the change on July 14, 2017, a day after the Manchin Clinic HR Director Quinn told Crandall about the totality of Tennant's bad behavior, and in light of her threats in close proximity thereto, the undersigned is struck by Crandall's overwhelming motivation to get back at Grievants. While no evidence was presented concerning any reputation for dishonesty on the part of any of Grievants, that was not the case for Crandall. When it comes to motive, Crandall's credibility is clearly compromised.

The most important testimony in determining motive came in the form of hearsay when Quinn testified that CFO Lanham told her that he heard Crandall say that if outpatient staff filed a complaint against Tennant, Crandall would change Outpatient Clinic hours, cut an Outpatient Clinic nurse position, or move some of the outpatient staff to other parts of the facility. If true, this testimony would assist Grievants in making their case for retaliation because the evidence shows that Crandall announced she was

changing Outpatient Clinic hours and moved outpatient staff to other parts of the facility. Hearsay necessitates an additional hurdle of analysis for a credibility determination. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

CFO Lanham did not appear at the level three hearing. However, Grievants included CFO Lanham on their witness list and obtained a subpoena from the Grievance Board to compel his attendance. Grievants gave no indication whether they had served

Lanham his subpoena but displayed no surprise that he did not appear. Grievants presented no written corroboration of the hearsay statement testified to by Quinn. Conversely, even though CEO Crandall did testify, neither party questioned her as to whether she told Lanham there would be repercussions to Grievants if they filed a complaint against Tennant. Lanham was not a disinterested witness to the event he related to Quinn; however, if he had bias, it was likely in favor of the Respondent since he was a member of management and Crandall trusted him enough to tell him that she would take retaliatory action. Lanham's statement to Quinn is consistent with the general tone of the testimony given by other witness and appears credible. It is apparent from Flohr's testimony that Crandall discussed similar repercussions for outpatient staff with King. Quinn also testified that Crandall threatened to move outpatient staff when Quinn informed Crandall of Tennant's behavior towards staff. These instances are consistent with Lanham's statement to Quinn and Respondent did not present evidence that contradicted this statement. Quinn's overall testimony was consistent and lacked contradiction. She seemed pained at the appearance of impropriety for actions by management, when she was part of management as HR Director, and her conduct throughout this ordeal seemed to be motivated primarily by a desire to do right. Quinn has nothing to gain in the outcome of this action. No testimony revealed an ulterior motive. Quinn was a credible witness. Grievants have proven that Crandall told Lanham

that she would change Outpatient Clinic hours and move outpatient staff to other parts of the facility if they filed a complaint against Tennant.

Grievants contend that CEO Crandall retaliated against them for filing a complaint against Tennant which alleged that Tennant had violated HIPPA and threatened coworkers. Grievants contend that Tennant violated HIPPA in allowing her non-employee, adult son to assist her in making copies of prescription records for patients at the Manchin Clinic. Respondent counters that Grievants assumed that CEO Crandall took no action against Tennant for the alleged HIPPA violation and threats towards coworkers, because they were not privy to any possible discipline due to the confidential nature of employee discipline. Respondent contends that Grievants failed to prove that CEO Crandall did not investigate or discipline Tennant. Grievants presented no evidence that Respondent failed to investigate or discipline Tennant for violating HIPPA or threatening coworkers. Ultimately, the question of whether the complaint against Tennant had merit is not relevant to the merits of the remaining allegations in this grievance. It is, however, relevant to Grievants' allegation that Respondent's failure to discipline Tennant was either retaliatory or part of a hostile work environment. Because Grievants did not present evidence on Respondent's failure to investigate or discipline Tennant, they failed to prove that Respondent gave preferential treatment to Tennant at all, let alone in retaliation for Grievants' complaint against Tennant or as part of a hostile work environment. The undersigned will not deal any further with this allegation. Grievants'

remaining factual allegations are not premised on Respondent's alleged failure to discipline Tennant, because, even if Respondent had disciplined Tennant, Respondent could have still retaliated against Grievants and subjected them to a hostile work environment. Also, a grievance premised on a claim of retaliation does not necessitate that the undersigned determine the accuracy of the complaint which triggered the retaliatory action from the employer.

"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). 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 for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case[6], must establish by a preponderance of the evidence:

(1) that he was engaged in activity protected by the statute (e.g., filing a grievance);

[6]"The establishment of a legally required rebuttable presumption." BLACK'S LAW DICTIONARY 1228 (8th ed. 2004).

(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.

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013). *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).

In assessing whether Grievants have made a *prima facie* case for retaliation, the undersigned must first assess whether Grievants established by a preponderance of the evidence that they engaged in a protected activity. Grievants contend that their complaint against coworker Tennant was a protected activity. This Board has held that a "grievance proceeding" is not limited to grievance actions before this Board or other tribunals. See *Riddle v. DHHR/BCF*, Docket No. 2018-2029-DHHR (Oct. 24, 2018), appeal docketed,

Civil Action No. 18-AA-256 (Kanawha County Circuit Court Nov. 20. 2018). In the context of retaliation, this Board has interpreted "grievance proceeding" to mean a range of "protected activities" beyond a "grievance proceeding", including cooperating with an investigation. *See Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (September 22, 2016). Grievants Pauley and Ranallo were recipients of alleged threats by Tennant and related these to HR Director Quinn. Grievants Namsupak and Flohr then attempted to rectify the situation by complaining up the chain of command. While Grievant Drummond was not involved in the complaint, Respondent does not dispute that all Grievants engaged in a protected activity. The undersigned finds that Grievants engaged in a protected activity.

Grievants also proved that Respondent had knowledge that Grievants engaged in a protected activity. The evidence shows that that CEO Crandall was upset that Grievants had filed a complaint against Tennant, that outpatient staff questioned Crandall multiple times about the way she was handling their complaint against Tennant, and that the Manchin Clinic HR Director Quinn informed DHHR HR Director Fitzwater by email that Grievants had complained to CEO Crandall about Tennant's behavior towards them and that Crandall had retaliated by changing their hours. Respondent does not dispute that Respondent had knowledge that all Grievants engaged in a protected activity. The undersigned finds that Respondent had knowledge that Grievants engaged in a protected activity.

While Grievants argue that Respondent took adverse employment action against them, Respondent disputes that it treated Grievants adversely. Respondent contends that it never carried out the threats it made towards Grievants and that it reversed any adverse action by reinstating to Grievants their annual leave. As previously discussed, the fact that a threatened action was either never implemented or simply rescinded by Respondent does not necessarily reverse the retaliatory harm suffered by Grievants. Because the harm analysis in a retaliation case simply entails Grievants proving by a preponderance that the employer took "an adverse employment action" against them, Grievants only need to prove that "an adverse employment action" was taken against them by Respondent in order to satisfy this factor in the establishment of a *prima facie* case for retaliation. The severity of the harm inherent in "an adverse employment action" is low. All that is required is that the employment action by Respondent be against Grievants' interests. "Adverse" simply means "opposed to one's interests" or "unfavorable". MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 14 (2007). Threats by management or announced changes to work conditions that are never implemented or rescinded, or changes which are implemented and rescinded after a short period, but which adversely affect the conditions of employment for either a short or an indefinite period, could be "adverse employment actions". Grievants proved that Respondent treated them adversely when CEO Crandall announced a change to hours of operation; forced them to use annual leave for sick time that exceeded the first eight hours of their

nine-hour shift (which annual leave was later reinstated); announced a discontinuation of vendor hosted luncheons; rearranged their Outpatient Clinic workspace, locking up medical records, the fax machine, the copier, and the x-ray supplies; and worked Grievant Pauley out of classification.

All that remains in assessing Grievants' *prima facie* case for retaliation is determining the existence of at least an inference of retaliatory motive, or a causal connection between the protected activity and the adverse treatment. This inference of motive can be gleaned from the proximity between Grievants' protected activity and CEO Crandall's adverse treatment. An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013). The evidence shows that on July 3, 2017, Grievant Flohr told CEO Crandall and Supervising Nurse King of possible HIPPA violations by Tennant. On July 13, 2017, HR Director Quinn told CEO Crandall about Grievants' complaints of mistreatment by Tennant. The next day, July 14, 2017, Crandall met with Grievants Dr. Namsupak and Flohr and informed them she was changing the Outpatient Clinic hours. Three weeks later, on August 8, 2017, Crandall and King informed Grievants Flohr and Ranallo that staff had to use annual leave for sick time taken for any portion of a shift over eight hours. Three months later, on October 17, 2017, Crandall issued a

memo to staff discontinuing vendor luncheons. Eight months later, on March 6, 2018, Crandall began relocating outpatient staff and locked up the medical records, copier, fax machine, and x-ray supplies. Ten months later, Respondent reassigned Grievant to full-time duty at the front desk while obligating her to fulfill her duties as full-time Radiological Technologist 2. Regardless of any out-of-classification assignment infraction (which will not be addressed herein since it was only first alleged in Grievants' proposed findings of fact and conclusion of law), the undersigned cannot make a retaliatory connection between Grievant Pauley's reassignment on May 15, 2018, and the July 13, 2017, complaint against Tennant. Even though Respondent has indefinitely required Pauley to work out of classification, it did so ten months after the Grievants' protected action. Respondent also had a legitimate reason for the reassignment in that the Outpatient Clinic had been short of staff and management was attempting to fulfill its staffing needs.

Given the proximity of the remaining adverse employment action to Grievants' complaints against Tennant, a causal connection may be inferred between the remaining incidents and Grievants' protected activity. In addition to proximity, Crandall's own statements point to a causal connection. Crandall told CFO Lanham that if Grievants pursued their complaint against Tennant, she would change hours of operation and relocate outpatient staff. By her own admission, Crandall told outpatient staff that she had reorganized Outpatient Clinic workspace because of staff complaints regarding a possible HIPPA violation by Tennant. Crandall also told Quinn that she was going to

move outpatient staff after being told of Grievants' complaint against Tennant. Supervising Nurse King discouraged Grievant Flohr from pursuing Grievants' complaints against Tennant, telling her it could result in a discontinuation of vendor luncheons and the closing of the Outpatient Clinic. CEO Crandall followed through on these threats by announcing a change in hours of operation, announcing a discontinuation of vendor hosted luncheons, and relocating outpatient staff, which relocation included locking up the Outpatient Clinic medical records, fax machine, copier, and x-ray supplies. Grievants meet all four elements of retaliation and have made a *prima facie* case of retaliation on the remaining allegations.

Respondent has offered nondiscriminatory reasons for its actions. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc*., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ*., 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

CEO Crandall testified that she changed Outpatient Clinic hours because few patients were coming after 4:00 p.m. and she would need to retain another doctor to cover after 4:00 p.m. These sound like legitimate reasons for changing the hours. Dr. Namsupak credibly testified that these reasons were inaccurate. Respondent did not present any evidence to support the reasons given for the change. On July 20, 2017, outpatient staff confronted Crandall and got her to agree to conduct a patient survey to collect data so she could make an informed decision and that she would reconvene with staff in 30 days to reassess hours of operation. It is noteworthy that neither the survey nor the follow up staff meeting ever occurred, nor was the announced change in hours of operation ever implemented. CEO Crandall's stated concerns were never rectified. Grievants have proven that the reasons given for the threatened change to hours of operation were pretext for retaliation.

As for requiring Grievants to use annual leave on August 8, 2017, Crandall testified that only after she returned from a training on Kronos did she inform Grievants, based on her understanding of the training, that they had to use annual leave for any sick time taken beyond eight hours per shift. On its face, this reason is legitimate, as it is plausible that not all training participants fully grasp the information provided to them right away. Grievants did not refute Crandall's rationale or cross exam her as to feasibility. Grievants have not proven that forcing them to use annual leave was pretext for retaliation.

As for the discontinuation of vendor hosted luncheons, Crandall testified that they caused too much noise and that she was also concerned about their legality. Grievants presented credible evidence that vendor hosted luncheons have been going on for years without challenge to their legality. Respondent could have easily checked on their legality before threatening to discontinue and announcing that they were being discontinued. Respondent did not present any evidence that it ever had reason to believe that vendor hosted luncheons were illegal or that they were in fact illegal. However, Respondent's other given reason, that the luncheons were too loud, is a legitimate reason to end vendor luncheons. However, Grievants showed that Crandall gave permission for the luncheons to continue if Grievants brought lunch and provided it for everyone at the facility, thus revealing that the noise rationale was a façade. Grievant's proved that there was no noise problem and that noise was a pretext for retaliatory motive.

As for relocating Grievants from their workspace and locking up medical records, the fax machine, the copier, and x-ray supplies, Crandall testified that she did so to secure patient records in order to deal with alleged HIPPA violations. Respondent rebutted the presumption of retaliatory motive in its relocation of Grievants workspace and in its locking up of patient records. Respondent's rationale for relocating Grievants was that, due to the common areas of their workspace, Grievants were congregating too often and that this was distracting them from their work. Grievants did not successfully prove that the relocating of their workspace was pretext for retaliation. Grievants presented evidence

that the only alleged HIPPA violations were against Kathy Tennant and another employee a few months prior to the allegations against Tennant. In moving staff away from the patient files, copier, fax maching and x-ray supplies, Tennant was the only remaining employee with the same access to patient files as before the relocation. While this may seem akin to leaving the fox in charge of the henhouse, the bottom line was that Tennant's job title remained that of record clerk. She was the first employee that should have been given access to the files as long as she retained her job as records clerk. Whether she should have been allowed to keep the job is not at issue, although she has since traded in her job as records clerk for another. It is undisputed that Respondent had at least the perceived problem of its employees violating HIPPA. The understandable consequence of increasing security was that employees who needed access to medical records were no longer able to gain easy access. What seems less justifiable is that these same employees were denied reasonable access to the copier, fax machine, and x-ray supplies. While Respondent provided a legitimate basis for locking up patient records, it did not provide justification for locking up the copier, fax machine, and x-ray supplies. An apparent justification might be proximity to patient records and lack of other space, but Respondent did not provide this as justification. While Respondent rebutted the presumption of retaliation concerning the patient records, it did not rebut the presumption of retaliation in relation to locking up the copier, fax machine, and x-ray supplies. The fact that the Respondent recently removed the copier and fax machine from the locked

room in order to provide staff with easier access reveals that Respondent in fact had other options and did not have to keep the copier and fax machine locked up with the medical records. The recent removal of the copier and fax machine from the locked medical records room does not change the fact that they were locked up for over six months. Grievants have proven that locking the copier, fax machine, and x-ray supplies was retaliation.

Grievants have proven by a preponderance of the evidence that Respondent retaliated against Grievants by announcing a change in Outpatient Clinic hours of operation, announcing a discontinuation of vendor hosted luncheons, and locking up the copier, fax machine, and x-ray supplies, and that any rationale provided by Respondent for these actions was pretext for retaliation.

Regarding Grievants charge that Respondent created a hostile work environment, the undersigned must assess whether each incident which survived the prior legal and factual analysis meets the definition of a hostile work environment, separate and apart from the retaliation analysis. This leaves the following incidents for consideration as a hostile work environment: that Respondent announced a change to Outpatient Clinic hours of operation; that Respondent forced Grievants to use annual leave for sick time taken beyond the first eight hours of a shift; that Respondent announced a discontinuation of the vendor hosted luncheons; that Respondent worked Grievant Pauley out of

classification; and that Respondent rearranged the Outpatient Clinic workspace, including locking up the medical records, copier, fax machine, and x-ray supplies.

Respondent counters that Grievants failed to provide examples of how CEO Crandall created a hostile work environment for any of them specifically. Respondent contends that the grievance was based on Grievants' general feeling of a hostile work environment rather than credible evidence that Crandall's actions were sufficiently severe or pervasive to alter the conditions of their employment. Respondent argues that much of the tension at the Manchin Clinic was caused by the inability of Grievants to adjust to Crandall's management style. Respondent contends that it has much leeway in management decisions and that Grievants cannot second guess these decisions. In assessing a hostile work environment, Respondent's inappropriate conduct must be frequent and severe enough to alter conditions of employment for Grievants. The undersigned must discount the retaliation analysis he performed for each of the incidents and grant Respondent much more leeway in the perceived unfairness of its actions and in any lack of frequency in the actions. "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000)(*citing Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997))." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002). It is apparent that there were personality conflicts between Grievants and CEO

Crandall, and Grievants have clearly been unable to adjust to Crandall's management style in some instances. Respondent is permitted to change its management style without succumbing to findings of unfairness due to a shift towards a more disciplinary approach.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, 'considering all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75 (1998) (citing Harris, 510 U.S. at 23). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" but "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of

an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).” *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). “As a general rule ‘more than a few isolated incidents are required’ to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc.,* 107 F.3d 568, 573 (8th Cir. 1997).” F*airmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

The first assessment in analyzing hostile work environment must be a determination of whether each incident qualifies as inappropriate conduct. Grievants are charged with articulating how each incident is inappropriate. As quoted earlier, *Oncale* uses “harassment” interchangeably with “inappropriate conduct”. West Virginia Code § 6C-2-2(l) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.” Grievants implied that Respondent’s actions against them were intended to harass them but failed to show how many of the incidents were contrary to the behavior expected by law, policy and profession. Grievants could not show how changing hours of operation, discontinuing vendor hosted luncheons, working Grievant Pauley out of classification, reassigning Grievants’ workspace, and locking up the medical records was against any policy, law or expected behavior of any of their professions. Grievants showed that Kathy Tennant was the only employee given the key for the medical records room. However, this has the appearance of legitimacy as she was the records clerk and

Grievants could not cite any law or policy that required someone in Dr. Namsupak or any other employee's position to also have direct access to the medical records. While the Grievants detailed the benefits that their patients received through the current hours of operation and the free medicine samples received through vendor hosted luncheons, Grievants did not quantify how changing or discontinuing either was inappropriate conduct. Respondent had a staffing shortage at the Outpatient Clinic front desk and dealt with the shortage by assigning those duties to Grievant Pauley while also leaving her with existing obligations as a Radiologist Technician 2. Grievants attempted to argue in their proposed findings of fact and conclusion of law that assigning Grievant Pauley additional duties at the front desk was improper work out-of-classification but could not quantify how it was part of a hostile work environment. Grievants did show, however, that it was against policy and therefore inappropriate to force Grievants to use annual leave for sick time taken beyond the first eight hours of a shift. Grievants also showed that it was contrary to behavior expected of their profession and at least a continual annoyance to not have easy access to the fax machine, copier, and x-ray supplies.

Respondent is given deference in its management decisions. "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); *Mickles v. Dep't of Envtl.*

Prot., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff'd*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth*., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005). A review of whether management decisions are arbitrary and capricious and "constitute a substantial detriment" to job performance must take into account the frequency and severity of inappropriate conduct. CEO's Crandall's mandate that Grievants use annual leave for sick time taken beyond eight hours of a shift was a one-time occurrence implemented on August 8, 2017, and rescinded on August 11, 2017. Grievants were restored all annual leave they had been forced to use for sick time. Given the three-day span between the taking and restoration of annual leave, this incident does not pass the frequency and severity test. As for locking up the fax machine, copier, and x-ray supplies, Grievants were able to not only show that this affected services they rendered to patients but also their work performance. Grievants were unable to do x-rays for patients, fax patient refills, and copy needed documents in a timely manner. Until a recent release of the copier and fax machine from the locked records room, the inaccessibility of these items caused Grievants great stress and personal inconvenience as well as hindered their ability to serve patient needs efficiently. The confinement of the copier, fax machine, and x-ray supplies under lock and key is severe and pervasive in its

frequency and effect in that it altered the conditions of employment from the perspective of a reasonable person and affected Grievants on a daily basis.

Grievants have proven by a preponderance of the evidence that Respondent engaged in retaliation and created a hostile work environment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The Grievance Board will not decide matters that are "speculative or premature, or otherwise legally insufficient." *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994).

3. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents,* 166 W. Va. 702, 279 S.E.2d 169 (1981).

In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEM PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

4. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id*.; *Sinsel v.*

Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

5. "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). W. Va. 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 for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a prima facie case, 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.

Matney v. Dep't of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013). *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).

6. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

7. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may

include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc*.,107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin*., Docket No. 02-ADMN-165 (Mar. 31, 2006).

8. "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); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff'd*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth*., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

9. Grievants have proven by a preponderance of the evidence that Respondent retaliated against Grievants by announcing a change in the Outpatient Clinic hours of operation, by locking up the copier, fax machine, and x-ray supplies for over six months, and by announcing a discontinuation of vendor hosted luncheons, and that any rationale provided by Respondent for these actions was pretext for retaliation.

10. Grievants have proven by a preponderance of the evidence that Respondent created a hostile work environment when it locked up the copier, fax machine, and x-ray supplies for over six months.

Accordingly, the grievance is GRANTED**.** Respondent is ORDERED to immediately stop any retaliatory action against Grievants or any conduct which contributes to a hostile work environment for them.

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: January 3, 2019

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Joshua S. Fraenkel
Administrative Law Judge