THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTINA FLOHR,
Grievant,

v. **Docket No. 2018-0755-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JOHN MANCHIN SR. HEALTH CARE CENTER,
and DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Christina Flohr, a Nurse 1 at John Manchin Sr. Health Care Center (Manchin Clinic), is employed by Respondent Department of Health and Human Resources (DHHR). Respondent Division of Personnel (DOP) ensures that all of DHHR's positions are properly classified. On November 20, 2017, Grievant filed this grievance against Respondent, stating, "Facility has failed to process Grievant's request for reallocation or to provide information on same. Retaliation and discrimination". Relief sought states, "To be made whole in every way including expedited request with back pay plus interest."

A level one hearing was conducted on April 24, 2018, and a decision denying the grievance was issued on May 15, 2018. Grievant appealed to level two on May 16, 2018. On May 23, 2018, Respondent filed a motion to join the Division of Personnel as a party. On May 25, 2018, the Grievance Board entered an order joining the Division of Personnel as a party Respondent. After being continued a number of times, including on February 4, 2019, for Grievant's failure to submit a Position Description Form (PDF), a mediation session was held on April 30, 2019. Grievant appealed to level three of the grievance process on June 8, 2019. A level three hearing was held on November 15, 2019, before

the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by her representative, Gary DeLuke, UE Local 170, West Virginia Public Workers Union. Respondent DHHR appeared by Ginny Fitzwater and counsel, Brandolyn Felton-Ernest, Assistant Attorney General. Respondent DOP appeared by Wendy Campbell and counsel, Karen O'Sullivan Thornton, Assistant Attorney General. Grievant and Respondents submitted Proposed Findings of Fact and Conclusions of Law (PFFCL). This matter became mature for decision on January 3, 2020.

Synopsis

Grievant was employed by DHHR as a Nurse 1 in the outpatient unit of Manchin Clinic. She applied for a Nurse 2 position in the long-term care unit. When she did not hear back on her application, she filed this grievance. DHHR determined that Grievant did not want the position applied for but only the reallocation of her current position to a Nurse 2. DHHR therefore directed Grievant to complete a PDF for processing with DOP. Grievant refused, reasoning that coworkers had been upgraded to Nurse 2 without a PDF. DHHR explained that an employee could become a Nurse 2 by either applying for a promotion to Nurse 2 under a different position number than the one held or submitting a PDF so the position held could be reallocated. After 16 months of quibbling, Grievant was not swayed. So DHHR submitted a PDF to DOP without Grievant's assistance. Whereupon, DOP reallocated Grievant's position to a Nurse 2. Grievant alleges that her supervisor retaliated and discriminated against her by not timely processing her reallocation and by requiring her, but not coworkers, to complete a PDF to become a Nurse 2. Grievant requests two years of backpay as a Nurse 2. Grievant failed to prove that any delay in her reallocation was due to retaliation or discrimination. Accordingly,

this 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 by DHHR as a Nurse 2 in the outpatient unit of Manchin Clinic since June 2019.

2. Grievant had been employed in the same position under a Nurse 1 classification between 2013 and June 2019, and was so employed when she initiated this action in July 2017.

3. The Nurse 1 classification is for beginning nurses. Nurse 2 is for experienced nurses and entails greater pay than Nurse 1. (DOP's Exhibits 5 & 6)

4. In July 2017, Grievant learned she was eligible to request a Nurse 2 classification. Grievant asked Debbie Quinn[1] how she could become a Nurse 2. Ms. Quinn told Grievant she could apply for one of two vacant Nurse 2 positions[2] in the long-term care unit at Manchin Clinic. Ms. Quinn had used job vacancies to upgrade Carol Rush and others to Nurse 2. Ms. Quinn believed all employees at Manchin Clinic under a Nurse 1 classification would be upgraded this way. (Ms. Quinn & Grievant's testimony)

5. There are only two ways an employee can move from a Nurse 1 to a Nurse 2: these are promotion or reallocation. (Ms. Fitzwater's[3] testimony)

[1]Human Resource Director for Manchin Clinic between February 2017, and the end of July 2017.
[2]All were posted as both Nurse 1 or 2.
[3]HR Director for DHHR's health facilities.

6. A promotion occurs when an employee applies for a vacant position under a position number different from the number for the position currently held by the employee. (Ms. Fitzwater's testimony)

7. A reallocation occurs when an employee remains in a position and retains their position number but changes their duties. (Ms. Fitzwater's testimony)

8. A promotion requires an application. A reallocation requires the completion of a Position Description Form (PDF) for submission to DOP. (Ms. Fitzwater's testimony)

9. A Position Description (aka PDF) is "an official record of the duties and responsibilities assigned to a position and shall be used by the Division of Personnel to allocate the position to its proper class." (DOP's Exhibit 1 - DOP's Administrative Rule[4])

10. Reallocation entails the reassignment by DOP of a position to its proper class whenever there is a significant change in the duties and responsibilities permanently assigned to a position or to address a misalignment of title and duties. (DOP's Exhibits 1 & 4)

11. DHHR usually relies on the employee requesting a reallocation to complete the PDF interactively with their agency. DHHR only completes a PDF on its own if the position is vacant or if the incumbent refuses to complete it. (Ms. Fitzwater's testimony)

12. When a PDF is completed, it is forwarded to DOP for a classification determination. DOP has sole authority to determine whether to reallocate a position. (*See* Ms. Fitzwater & Ms. Wendy Campbell's[5] testimony)

[4]W. VA. CODE ST. R. § 143-1-1 et. seq (2016).
[5]Assistant Director for the Classification and Compensation Section of the Division of Personnel.

13. The Classification and Compensation Section of the Division of Personnel is responsible for ensuring that all positions under the purview of DOP are classified appropriately, are paid within the appropriate range, and are in compliance with regulations. (Ms. Campbell's testimony)

14. Grievant wanted to change her classification from a Nurse 1 to a Nurse 2 without changing her position or location in the facility, and did not want to move to the long-term care unit. (Grievant's testimony)

15. Grievant was essentially requesting a change in the duties and responsibilities assigned to her current position.

16. Conversely, Ms. Rush moved into a vacant position with a different position number when she went from a Nurse 1 position to a Nurse 2 position. (*See* Ms. Quinn's testimony)

17. There was no evidence that Ms. Rush's old position as a Nurse 1 was reallocated to a Nurse 2 while she was holding that position. Had Ms. Rush been misclassified as a Nurse 1 in her old position, she would have also been required to complete a PDF so DOP could reallocate her position to a Nurse 2. (Ms. Campbell's testimony)

18. Nevertheless, Ms. Quinn did not know when to implement a reallocation rather than a promotion. She instructed Grievant to update her original employment application with details regarding her work at Machin Clinic before submitting it for processing to CEO Michelle Crandall[6]. (Ms. Quinn's testimony)

[6]CEO of Manchin Clinic.

19. In July 2017, Grievant submitted paperwork to CEO Crandall as instructed by Ms. Quinn. (Grievant's testimony)

20. On October 16, 2017, Grievant emailed CEO Crandall an inquiry into the status of her Nurse 2 application, stating that her "understanding is that the state is moving their Nurse Is (new nurse) to Nurse IIs (experienced nurse) and this is not a move from current positions. Any assistance would be appreciated. (Grievant's Exhibit 5)

21. On October 26, 2017, Grievant again emailed CEO Crandall, stating, "Wanted to touch base again regarding my application for reclassification of Nurse I to Nurse II. Not sure if you received my email last week. It's been since July and I'd like a status update." (Grievant's Exhibit 6)

22. On October 26, 2017, CEO Crandall responded by email, stating, "sent your last email to Ginny Fitzwater for clarification. I don't know what Debbie Quinn was referring to. The Nurse 1/2 positions posted were on the second floor … . I haven't received any clarification at this time. I am sending this request to Ginny as well." (Grievant's Exhibit 6)

23. CEO Crandall was apparently confused by Grievant's application for a Nurse 2 position in the long-term care unit because Grievant stated she did not want to move to a different position, but only to upgrade her current position in the outpatient unit from a Nurse 1 to a Nurse 2.

24. On November 8, 2017, Grievant emailed CEO Crandall for a status update. (Grievant's Exhibit 7)

25. On November 16, 2017, Grievant emailed CEO Crandall to check on the status of her "application for reclassification." The email stated that "Debbie Quinn told

me, before she left, that everything was in order and I was the only one to apply. There was an application ahead of mine and once that one was approved, mine would go in next. She said the process would take a while but if I had not heard anything in a month to check with you on the status. She said you knew all about this because she had discussed it with you several times. It's been four months. I think I have been more then [sic] patient regarding this issue." (Grievant's Exhibit 8)

26. On November 21, 2017, Grievant filed the instant action.

27. Shortly after this filing, Ms. Fitzwater, HR Director for DHHR's health facilities, spoke with Grievant and her representative, Jamie Beaton. Ms. Fitzwater was told that Grievant did not want the duties listed on the Nurse 2 long-term care unit posting for which she applied but simply wanted her current position in the outpatient unit changed to a Nurse 2. Ms. Fitzwater advised Grievant that she would need to complete a PDF to reallocate her current position from a Nurse 1 to a Nurse 2, if she was not going to move to a different position. (Ms. Fitzwater's testimony)

28. Ms. Fitzwater recognized that Grievant wanted to change her classification without changing her actual position and location. As such, Ms. Fitzwater deemed Grievant's application to be a request for reallocation of the duties and responsibilities of her position. She therefore asked Grievant to complete a PDF to trigger a position review by DOP. (See Ms. Fitzwater's testimony)

29. On December 18, 2017, Ms. Fitzwater emailed Grievant as follows:

> When you, Mr. Beaton, and I spoke via phone recently regarding your wish to be upgraded to a Nurse 2, you advised that you had applied for a Nurse 2 position when Ms. Quinn was the HR Director at Manchin, but that you wanted to keep your same duties, not the duties listed on the posting for which you had applied. I advised you during our telephone

> discussion that if you wanted to stay in your same position and keep the same duties, then a PD [Position Description] would need to be completed by you, your supervisor, and the CEO, Michele Crandall, and sent to me for processing to DOP for a classification review. By state code, the Division of Personnel is the only authority that can assign title and pay grade to state positions, and in order to review your duties and responsibilities for a classification determination, they require the PD form be completed and submitted.
>
> Mr. Beaton indicated on our phone call that he was emailing you the PD form. If you need the form, or have questions or concerns regarding the form or the process, please let me know.

(Respondent DHHR's level one Exhibit 1)[7]

30. On January 8, 2018, Ms. Fitzwater again emailed Grievant and her representative and advised Grievant to complete a PDF so DOP could review her classification. (Grievant's level one testimony, level one transcript)

31. Grievant refused multiple times to complete a PDF, which would have enabled DOP to reassign her position to a Nurse 2. She refused because she felt she was being required to jump through an extra hurdle not required of nurses in the long-term care unit, such as Ms. Rush. (Grievant's testimony)

32. Over the next year and a half, Grievant refused to comply with repeated requests that she submit a PDF to enable DOP to reallocate her position from a Nurse 1 to a Nurse 2. (Grievant's Exhibit 4 and Ms. Fitzwater's testimony)

33. Grievant was never disciplined for her refusal to follow DHHR's directives to complete a PDF.

34. An agency such as DHHR has a legal obligation to not work an employee

[7]Neither party presented evidence at level three regarding the date Grievant was first asked to complete a PDF.

out of classification. In the event an employee is improperly classified, it is the agency's responsibility to correct it. (Ms. Campbell's testimony)

35. Because all positions belong to the agency and must be properly classified, DHHR eventually completed a PDF for Grievant's position without her cooperation and forwarded it to DOP for processing. (Grievant's Exhibits 1, 2, 3, & 4 and Ms. Fitzwater testimony)

36. On April 12, 2019, Ms. Fitzwater emailed Grievant a PDF determination showing that DOP had reallocated Grievant's position to a Nurse 2. (Grievant's Exhibit 3)

37. However, DOP's Administrative Rule mandates that "[w]hen a position is reallocated to a different class, the incumbent shall not be considered eligible to continue in the position unless he or she meets the minimum qualifications for the classification." (DOP's Exhibit 1)

38. Upon reallocation of a position, DOP requires the incumbent to submit an application to determine their qualification for the new classification. DOP has an application form for this purpose. (Ms. Campbell's testimony & Grievant's Exhibit 4)

39. On April 18, 2019, James Whetsel, HR Director[8] of Manchin Clinic, requested Grievant to complete an application so she could be processed to the reallocated position. Grievant did not comply. (Grievant's Exhibit 4)

40. On April 25 & 26, 2019, Ms. Fitzwater emailed Grievant a link to DOP's application form, as well as directions for its completion. (Grievant's Exhibit 4)

41. On or after May 2, 2019, Grievant completed and submitted her application for her reallocated position. (Grievant's Exhibit 4)

[8]Effective following Ms. Quinn's departure in July 2017.

42. After Grievant submitted her application for her reallocated position, she was determined to be qualified for her reallocated Nurse 2 position. The reallocation and its accompanying seven percent salary increase, took effect on June 8, 2019. (Grievant's Exhibits 1 & 2)

Discussion

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

Grievant contends that DHHR retaliated against her when it required her to complete a PDF, resulting in a two-year delay in her reallocation to a Nurse 2. Grievant premises her claim of retaliation on the undersigned's previous determination[9] that Grievant engaged in a protected activity and that DHHR knew of the protected activity. Grievant asserts that DHHR also discriminated against her by requiring her to complete a PDF in order to be upgraded to Nurse 2 when it had not required the same of coworkers such as Ms. Rush.

DHHR contends that Grievant's reallocation took two years because Grievant refused to complete a PDF. DHHR contends that it gave Grievant two options for

[9]*Namsupak v. DHHR/John Manchin Sr. Health Care Center*, Docket No. 2018-0241-CONS (Jan. 3, 2019).

becoming a Nurse 2: promotion or reallocation. It asserts that Grievant chose reallocation, which necessitates a PDF, while Rush chose promotion, which only requires an application. DHHR implies that because Grievant and Ms. Rush chose different routes to a Nurse 2 classification, they are not similarly situated for purposes of discrimination. Grievant implies that because DHHR had an obligation to not work her out of classification, it violated DOP regulations by working her out of classification long after discovering it was doing so, which it could have rectified regardless of Grievant's refusal to cooperate. DHHR contends that Grievant was obligated to follow its directives that she complete a PDF. DHHR moves to dismiss this action as moot now that Grievant has been reallocated to a Nurse 2.

Before dealing with the merits, the undersigned must address DHHR's mootness argument. "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)). Grievant did not have an opportunity to address mootness because it was first raised in Respondent's PFFCL. Nevertheless, even though Grievant's position has been reallocated to a Nurse 2 as she requested, Grievant also requested, but was not provided, backpay. As Grievant can potentially make a case for backpay, Respondent's motion to dismiss is denied.

As for the merits, Grievant claims she is entitled to two years of Nurse 2 backpay because DHHR would have reallocated her to Nurse 2 sooner, without requiring her to complete a PDF, if not for retaliation and discrimination. "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*[10] 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).

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

"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).

In assessing whether Grievant made a *prima facie* case for retaliation, the undersigned looks to his determination in *Namsupak v. DHHR/John Manchin Sr. Health Care Center*, Docket No. 2018-0241-CONS (Jan. 3, 2019), that Grievant engaged in a protected activity in July 2017, and that Respondent had knowledge that Grievant engaged in the protected activity. Grievant thus satisfies the first two elements for retaliation. Grievant also easily meets the fourth element in that any adverse action followed the employee's protected activity within a period of time that retaliatory motive can be inferred. Because Grievant's application for the long-term care Nurse 2 position was submitted in July 2017, it was in the same period of time as the protected activity detailed in *Namsupak*.

The third element of a *prima facie* case, an adverse employment action by DHHR, is more problematic for Grievant. In the current action, Grievant claims that DHHR took adverse employment action against her in not processing her Nurse 2 application, waiting

four months before requiring her to complete a PDF, and waiting two years before completing a PDF for her position. Grievant contends this resulted in the loss of two-years in increased wages as a Nurse 2. Grievant submitted her application in July 2017. DHHR first told Grievant to complete a PDF around the end of November 2017. Thus, four months lapsed between the time Grievant submitted her application and the time DHHR told Grievant to complete a PDF. Grievant then refused to complete a PDF for the next year and a half. The fruition of an adverse employment action was negated by Grievant's inaction. Had Grievant timely complied with DHHR's directive to complete a PDF, Grievant could have then argued that she would have been reallocated to a Nurse 2 four months sooner, if not for DHHR's inaction, and could have requested the difference in pay for those four months.

DHHR informed Grievant multiple times in the ensuing months that she needed to complete a PDF to be reallocated to a Nurse 2. Ms. Fitzwater even offered to send Grievant a PDF for completion in December 2017. Ms. Fitzwater again told Grievant on January 8, 2018, that she needed to complete a PDF. Ms. Fitzwater outlined for Grievant her only two options for becoming a Nurse 2: promotion or reallocation. Grievant was told that to be promoted she needed to apply for a Nurse 2 position that was different from the position she held. She was told that to be reallocated she need to submit a PDF so DOP could consider reallocating her current position to a Nurse 2. Grievant informed DHHR that she did not want to move from her current position in the outpatient unit to a Nurse 2 position in the long-term care unit. Thus, Ms. Fitzwater acted reasonably in telling Grievant that her application for the Nurse 2 position in the long-term care unit was not being processed and that she had to complete a PDF so her position could be reallocated

to a Nurse 2. Grievant admits that for the next year and a half she refused to complete a PDF. DHHR then completed and processed a PDF without Grievant's assistance.

Even if the four-month hiatus by DHHR is an adverse employment action, DHHR rebutted any presumption of retaliatory action by offering credible evidence of legitimate nondiscriminatory reasons for its actions. DHHR showed that there were only two ways for Grievant to become a Nurse 2. As previously outlined, Grievant could either be promoted by applying for a Nurse 2 position different from the position she held or be reallocated by completing a PDF. Grievant chose reallocation but refused to complete a PDF.

Grievant asserts that DHHR could have reallocated her position without submitting a PDF to DOP. However, DOP has sole authority for reallocating a position to a different classification. Wendy Campbell, Assistant Director for the Classification and Compensation Section of the Division of Personnel, testified that the Classification and Compensation Section of the Division of Personnel is responsible for ensuring that all positions under the purview of DOP are classified appropriately, are paid within the appropriate range, and are in compliance with regulations. The fact that DHHR processed a PDF with DOP after Grievant refused to cooperate demonstrates that DHHR believed that this was the only way to reallocate Grievant's position in compliance with DOP policy. Grievant did not prove that DHHR's insistence on completing a PDF was pretext for retaliation.

Which brings us to Grievant's claim of discrimination. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are

related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant claims DHHR treated her differently than Ms. Rush by requiring Grievant, but not Ms. Rush, to complete a PDF for reallocation to Nurse 2. However, Grievant did not prove that she and Ms. Rush were similarly situated. As previously stated, DHHR showed that there are two ways to upgrade from Nurse 1 to Nurse 2. One way is by applying for a promotion to a Nurse 2 position that has a different position number than the position currently held by the applicant. The other is to seek reallocation of a position by submitting a PDF to DOP. Respondent showed that Ms. Rush chose the first category and that Grievant chose the second.

Grievant argues, through Ms. Quinn's testimony, that Ms. Rush did not move into another position when she became a Nurse 2 but continued with the same duties she had previously performed as a Nurse 1. This argument is based on the erroneous premise

that reallocation does not entail a change of duties. The evidence clearly shows that any change from Nurse 1 to Nurse 2 entails a change in duties, regardless of whether the change in position is effectuated by promotion or reallocation. Further, in spite of Ms. Quinn's testimony that Ms. Rush kept her duties, Ms. Quinn agreed that Ms. Rush applied for and assumed a position with a different position number from the one she previously held. Ms. Rush applied for a Nurse 2 position in the long-term care unit and was stationed there. Grievant clearly did not want to assume the Nurse 2 position which she applied for in the long-term care unit. She unambiguously stated that she wanted to remain in the outpatient unit if she became a Nurse 2. As such, her only choice was option two: seeking reallocation by submitting a PDF. DHHR therefore acted reasonably when it placed Ms. Rush in the first category and Grievant in the second category. Grievant had the burden of proving otherwise but failed to do so.

Grievant claims that, even after DHHR became aware, it continued working her out of classification. The parties agree that DHHR is obligated to properly classify its positions. DHHR's submission of a PDF without Grievant's participation could be an indication that it recognized Grievant was working out of classification. Or it could be an indication that DHHR was doing all it could to accommodate Grievant to avoid discord. Grievant implies that it was retaliatory for DHHR to continue working her out of classification. However, Grievant did not prove that DHHR's failure to reclassify Grievant sooner was retaliatory. In order to prove the third element for a *prima facie* case of retaliation, Grievant needed to prove that DHHR took an adverse employment action against her. Grievant did not show just when it was that DHHR first found out it was working Grievant out of classification. Neither did Grievant show how long DHHR was

working her out of classification. Because Grievant did not show that DHHR had a duty to reallocate her sooner than it did, she was unable to show that DHHR took adverse employment action against her.

Regardless, the bottom line is that the PDF would have been processed sooner had Grievant complied with DHHR's directives. DHHR had a right to expect Grievant to cooperate in the reallocation of her position. DHHR's protocol in processing PDFs is to have the occupant of a position complete a PDF. As such, it was justified in expecting Grievant to follow its directive to complete a PDF. Further, DHHR's decision to deviate from this protocol in processing the PDF without Grievant's cooperation is an indication that DHHR knew a PDF was the only way to reallocate Grievant's position in compliance with DOP's guidelines.

Grievant did not prove by a preponderance of evidence that any delay in the processing of her reallocation was a result of retaliation or discrimination. The following Conclusions of Law support the decision reached.

Conclusions of Law

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

2. "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).

3. "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).

4. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant did not prove by a preponderance of evidence that any delay in the processing of her reallocation to Nurse 2 was a result of retaliation or discrimination.

6. More specifically, Grievant did not prove by a preponderance of evidence that DHHR took an adverse employment action against her or that she and Ms. Rush were similarly situated.

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: February 5, 2019

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Joshua S. Fraenkel
Administrative Law Judge