

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**CHESTER A. SPRANKLE,
Grievant,**

v.

Docket No. 2021-2173-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.**

DECISION

Grievant, Chester Sprankle, filed three grievances against Respondent on February 4, 2021. The first alleges, "Non posting and non-selection of CPS Supervisor Position." The second grievance alleges, "Willful violation of Due Process Clause of the West Virginia State Constitution." The third grievance alleges, "Retaliation for engaging in a protected activity under the WV Public Employees Grievance Procedure."

Grievant seeks in the first action, "To be made whole in every way to include requiring CPS Supervisor vacancy interviews to be held, rescinding of the temporary upgrade of Judy Darlington, for Grievant to be placed in this temporary upgrade pending interviews for posted CPS Supervisor vacancies; back pay to the date of Judy Darlington's temporary upgrade; and the 5% COLA that Martinsburg workers received on 11 22 2019." Grievant seeks in the second action, "To be made whole in every way to include being afforded the same equal opportunity options that all other employees are afforded requiring management to follow Temporary Classification Upgrade Policy, DHHR Policy Memorandum 2106 Employee Selection, and requiring management to

conduct interviews before employees are upgraded on a temporary basis.” Grievant seeks in the third action, “To otherwise be made whole, including future retaliatory actions be ceased by supervisor and be afforded all opportunities that other co-workers are afforded.” ¹

This consolidated grievance was waived to level three of the grievance procedure by agreement of the parties on February 10, 2021, by Respondent’s Level One Grievance Evaluator. A level three hearing originating from the Grievance Board’s Westover office was held via Zoom videoconference on May 4, 2021, before the undersigned. Grievant appeared *pro se*. Respondent appeared by its counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for consideration upon receipt of the parties’ fact/law proposals on June 18, 2021.

Synopsis

Grievant is employed by Respondent as a Child Protective Services Worker. Respondent was given approval by the Division of Personnel to award another Child Protective Service Worker in Grievant’s office a temporary upgrade to a supervisor’s position. Grievant filed this action challenging Respondent’s action in awarding another employee this temporary upgrade. Grievant failed to prove by a preponderance of the evidence that Respondent violated any law, rule, policy or regulation in providing this temporary upgrade. Grievant failed to establish that Respondent violated the Due Process clause of the West Virginia Constitution. Grievant failed to prove an adverse

¹ Grievant failed to present any evidence concerning his request for a 5% pay raise and did not address the issue in his proposals. Accordingly, this claim in his grievance is deemed abandoned and will not be discussed.

employment action was taken against him. Therefore, Grievant failed to establish a *prima facie* case of retaliation. This grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant has been employed with the Department of Health and Human Resources for almost ten years. Grievant's current job classification is Child Protective Services Worker for the Bureau for Children and Families' Crisis Team North.

2. On or about January 31, 2021, CPS Worker Judy Darlington was given a temporary upgrade to the position of CPS Supervisor in the Jefferson County office.

3. Grievant acknowledged that Ms. Darlington meets the minimum qualifications to be eligible for the temporary upgrade to CPS Supervisor.

4. Ms. Darlington remained in this upgraded position until a permanent selection was made for the CPS Supervisor position. At that time, Ms. Darlington returned to her CPS Worker classification.

5. Respondent's Policy Memorandum 2106 applies to the permanent selection of an employee to a posted position and does not apply to temporary upgrades.

6. Respondent's document titled "West Virginia Department of Health and Human Resources Performance Standards & Expectations" states that the CPS Senior Workers may serve as a backup for CPS Supervisor. Grievant's Exhibit No. 1.

7. Respondent's form dated February 25, 2020, indicates that a CPS Senior Worker serves as a lead worker and backup for CPS Supervisor. Grievant's Exhibit No. 2.

8. Grievant did not produce evidence of the loss of a property interest that would trigger his due process rights.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that he should have been temporarily upgraded to the position of CPS Supervisor instead of another employee. Grievant alleges that the failure to award him this position violated the Due Process clause of the West Virginia Constitution, Respondent's Policy Memorandum 2106, and it was in retaliation for his engaging in a protected activity under the West Virginia Public Employees Board Grievance procedure.

The record of this case does not contain any evidence as to how Grievant's due process rights may have been violated. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action

which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm’n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep’t of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). “A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” *Id.* at Syl. Pt. 4. “‘The constitutional guarantee of procedural due process requires “some kind of hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.’ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985).” Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). The record does demonstrate that Grievant’s right to address any concerns related to his employment have been protected by his ability to file this grievance. Grievant has failed to meet his burden of proof concerning this allegation in his grievance.

The record of this case demonstrates that Respondent’s Policy Memorandum 2106 is only applicable to the permanent selection of a person for a posted position.

Temporary upgrades are governed by § 143-1-4.8. This rule provides:

4.8. Temporary Classification Upgrade. -- With the approval of the Director, an appointing authority may temporarily upgrade the classification of an employee temporarily performing the duties of a position in a higher compensation range due to a separation or an extended leave of absence, for a short-term project, or in an emergency situation.

4.8.a. A temporary classification upgrade, except for classes allocated to the approved hourly pay schedule, shall be for a continuous period of no less than thirty (30) days and no more than six (6) months.

4.8.b. Classified-exempt employees may only be upgraded within the classified exempt service. A classified employee may serve in an acting capacity on a temporary basis in an exempt and/or appointive position without loss of his or her classified status.

4.8.c. The Director, at his or her discretion, may extend the period of a temporary classification upgrade upon written request from the appointing authority justifying the need for the extension.

4.8.d. Employees in the classified service approved for temporary upgrade to a classified position shall have attained permanent status and meet the minimum requirements for the position to which they will be temporarily upgraded.

On or about January 31, 2021, CPS Worker Judy Darlington was given a temporary upgrade to the position of CPS Supervisor in the Jefferson County office. Grievant complains that this action was unnecessary when Respondent had three CPS Senior Workers assigned to the Jefferson County District office. Grievant appears to rely on a document that provides that the CPS Senior Worker may serve as a backup supervisor. A similar form was admitted which provides that a CPS Senior Worker serves as a lead worker and backup for a CPS Supervisor. The undersigned recognizes that these documents have some relevance to Grievant's complaint; however, they are not dispositive on the issue of the temporary upgrade.

Respondent's reasonable interpretation of these documents is that CPS Senior Workers are used as a backup when the supervisor is still in the position but is unavailable for a short duration of time due to holiday vacation, illness or other reasons. A temporary upgrade is to place an employee in a position "due to a separation or an extended leave of absence, for a short-term project, or in emergency situation." Unlike a temporary upgrade, CPS Senior Workers who are serving as a backup would remain in the same classification and receive the same rate of pay. Grievant acknowledged that Ms. Darlington met the minimum qualification for the position. No legal requirement exists that Respondent conduct interviews prior to upgrading an employee on a temporary

basis. Ms. Darlington's temporary upgrade to the CPS Supervisor did not violate any law, rule, policy or regulation. The record demonstrated that Respondent complied with the Temporary Classification Upgrade Rule and that the Division of Personnel approved the upgrade of Ms. Darlington.

In addressing the allegation of retaliation, 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 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.

See *Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). See generally *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley, supra*. See *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievant established that he had engaged in an activity protected by the statute. Grievant also established that his supervisor and other agents of Respondent had actual knowledge of the fact that he previously filed a grievance. The record does not support a finding that the employment action taken by Respondent was the result of a retaliatory motivation or a retaliatory motive can be inferred. The temporary upgrade of Ms. Darlington complied with the Temporary Classification Upgrade Rule and the Division of Personnel approved the upgrade of Ms. Darlington. Grievant acknowledged that Ms. Darlington met the minimum qualification for the position. The record also lacks any evidence that any action taken in temporarily upgrading Ms. Darlington to the CPS Supervisor was in retaliation for Grievant engaging in a protected activity. Grievant failed to establish a *prima facie* case of retaliation.

The Following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact

is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant failed to prove by a preponderance of the evidence that Respondent violated any law, rule, policy or regulation in providing a temporary upgrade to one of its employees.

3. Grievant failed to establish that Respondent violated the Due Process clause of the West Virginia Constitution.

4. 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 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.

See *Coddington v. W. Va. Dep’t of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). See generally *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer

has shown legitimate, non-retaliatory reasons for its actions. *Graley, supra*. See *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

5. Grievant failed to establish a *prima facie* case of retaliation because the record does not contain any evidence that the temporary upgrade decision by Respondent was an adverse action against him.

Accordingly, this grievance is **DENIED**.

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

Date: July 20, 2021



Ronald L. Reece
Administrative Law Judge