THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBBIE L. PARSONS,
Grievant,

v. **Docket No. 2021-2543-CONS**

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

DECISION

Grievant, Debbie L. Parsons, is employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On May 4, 2021, Grievant filed a lengthy statement of grievance, which is incorporated in full by refererence, that essentially alleged bullying, harrassment, and intimidation by her supervisor and a failure to follow Respondent's attendance and sick leave policy. For relief, Grievant sought the removal of a performance improvement plan and evaluation, the establishment of a system to equitably distribute work flow, and for Grievant's supervisor to cease her retaliatory and harassing actions. This grievance was assigned docket number 2021-2386-DHHR.

Following the June 24, 2021 level one hearing, a level one decision was rendered on July 15, 2021, denying the grievance. Grievant appealed to level two on July 21, 2021. On November 28, 2021, Grievant filed a second grievance directly to level three of the grievance process, assigned docket number 2022-0420-DHHR, protesting her suspension from employment. Following unsuccessful mediation in docket number 2021-2386-DHHR, Grievant appealed to level three of the grievance process on December 21, 2021. The two actions were consolidated by order entered February 1, 2022.

A level three hearing was held on March 3, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office. At the beginning of the hearing, Grievant agreed that the matters grieved in docket number 2021-2386-DHHR were resolved so the hearing proceded only on the grieved suspension. Grievant appeared in person and was represented by Dave Parsons. Respondent appeared by Michael Hale and was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on April 1, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Economic Service Worker. Grievant protests her three-day suspension from employment. Respondent proved Grievant failed to comply with her supervisor's directive to complete training and that it was justified in suspending her for three days for this failure pursuant to its policy. Grievant failed to prove that Respondent's action was discriminatory, retaliatory, or untimely. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant was employed by Respondent as an Economic Services Worker.

2. As a result of a lawsuit against Respondent, Respondent entered into an agreement with the federal Office of Civil Rights to conduct civil rights training for its approximately 1,000 employees who interacted with the public. The order required the training to be conducted by a live trainer.

3. To fulfill its obligation, Respondent's Division of Training created a three-hour training that would be taught by a live trainer to employees through video conferencing. Twenty-eight sessions of the training were scheduled over a three-week period in July and August 2021.

4. Information regarding this training was provided in an undated memo that was distributed by Respondent's Division of Training. The memo explained in bold that the training was created because of the agreement with the Office of Civil Rights, that it was mandatory, and that it was live. The memo listed all the dates and times for the sessions and provided instructions to sign up for the training using a website called "GoSignMeUp."

5. On July 23, 2021, Rodney A. Wright, Respondent's ADA Coordinator, distributed the memo to management by email. The email stated in bold and all caps that the training was mandatory and that classes would start on July 28, 2021.

6. Grievant's supervisor, Economic Service Supervisor Kathy Brumfield, received the email on July 26, 2021. On the same day, Ms. Brumfield forwarded the email to her staff, including Grievant, stating, "Please take and send me your certificate."

7. At the time, Grievant had been under a performance improvement plan, which included a directive that Grievant "complete all work assigned within the designated timeframes" and specifically instructed that Grievant "will be responsible for checking her dashboard and email for notification of new assignments throughout the day."

8. Grievant did not sign up for any of the sessions for training.

9. On August 3, 2021, Ms. Brumfield sent a second email to Grievant and other staff who had not registered for the training stating, "Please make sure to get enrolled and block your calendar for that 3 hour period of time so no apts. will be scheduled on you. Also make sure I get a copy of your certificate. I will be doing mine 8-5-21 at 9am to 12 noon. So I will not be available during that time."

10. At the conclusion of the scheduled training sessions, Grievant and approximately twenty-five other employees had failed to take the training.

11. Respondent did not notify the employees of their failure to attend the training or inform them of any possible consequences for failure to complete the training.

12. The Division of Training's Program Manager for Family Assistance, Joshua Woodard, arranged for a make-up class to be taught on September 13, 2021. As the class required a live trainer, the make-up class had to be scheduled around the trainer's other responsibilities.

13. Rather than notifying employees to sign up for the make-up class on their own, Mr. Woodard, himself, signed each employee up on the GoSignMeUp website for the make-up session.

14. Grievant was notified of the make-up session through an automated email from the GoSignMeUp website. The subject of the email was "Enrollment Confirmation" and the email stated that the course was confirmed and provided the date, time, and a link to the videoconference.

15. When employees, including Grievant, failed to attend the make-up session Mr. Woodard scheduled another make up session September 14, 2021, in the same way, and then again on September 23, 2021.

16. Grievant was not available to attend the September 23, 2021 session because she was on sick leave from September 20, 2021, through September 24, 2021, so.

17. On October 4, 2021, Mr. Woodard sent an email to Grievant and the eight other employees who had failed to attend one of the three makeup sessions. He stated, "If you are receiving this email, it is because you have not attended any of the sessions of Mandatory Civil Rights training. You have now been scheduled for the next training session on **Oct 15, 2021 at 9:00 am. This is the final scheduled session of this mandatory training**."

18. On October 5, 2021, Grievant emailed her supervisor, Ms. Brumfield, saying she had mediation scheduled for the day of the scheduled training.

19. On October 6, 2021, Ms. Brumfield replied stating that she was on vacation and that Grievant needed to discuss the issue with "Mary and Lynette." Grievant replied that she would email them.

20. There is no evidence that Grievant emailed "Mary and Lynette."

21. Grievant failed attend the October 15, 2021 final training.

22. Following the October 15, 2021 final training, Grievant was the only employee in the entire organization who had not taken the training.

23. On October 19, 2021, Grievant's second-level supervisor, the interim Family Assistance Coordinator, Lynette Stewart, met with Grievant, Ms. Brumfield, and

Economic Service Supervisor Michael Barber regarding Grievant's performance and her failure to attend the training. When Ms. Stewart asked why Grievant had failed to attend the training, Grievant laughed and said she had been too busy. Grievant offered to take the training that day and Ms. Steward explained Grievant would have to take it when it was next offered in the new worker training course. During the meeting, Ms. Brumfield issued a special employee performance evaluation form EPA-2 regarding Grievant's failure to attend the training and continued Grievant's previous performance improvement plan. At the conclusion of the meeting, Ms. Stewart moved Grievant to Mr. Barber's supervision.

24. The EPA-2 stated that Grievant had failed to complete the mandatory training despite thirty opportunities to do so. Ms. Brumfield noted that one of the dates was the same date of Grievant's grievance proceeding but did not acknowledge that Grievant had been absent due to illness on one of the other make-up days. However, the EPA-2 correctly reflects the total number of actual opportunities Grievant had to attend the training, as there were thirty-two total trainings.

25. Following the meeting, Mr. Woodard arranged for Grievant to take the training by sitting in with a new worker training class on October 28, 2021. Grievant finally completed the training by attending that session.

26. In initial discussions between Community Services Manager Michael Hale, Regional Director Lance Whaley, and Deputy Commissioner Tina Mitchell, Mr. Hale opined that Grievant should be issued a written reprimand for her failure to attend training.

27. On November 10, 2021, Mr. Hale conducted a predetermination conference with Grievant, her representative, and Family Assistance Coordinator Mary Harris. Although Grievant's representative questioned how Grievant had received notice of the trainings and asserted the matter was moot because Grievant had by then taken the training, he did not provide any explanation why Grievant had failed to complete the training when directed.

28. On November 30, 2021, Regional Director Whaley issued Grievant a three-day suspension for violation of Respondent's employee conduct policy. Regional Director Whaley determined Grievant had violated the policy by failing to follow the directives of management and failing to comply with applicable state and federal rules and regulations.

29. Respondent's Policy Memorandum 2108, Employee Conduct, requires employees to "[comply with all relevant federal, state, and local laws" and to "[f]ollow directives of their management personnel...."

30. Respondent's Policy Memorandum 2104, Progressive Correction and Disciplinary Action provides for "progressively correcting performance or behavior when appropriate." The policy recommends the initial implementation of non-disciplinary corrective actions and increasingly severe disciplinary actions but recognizes "instances where more severe levels of discipline are initially imposed...." When determining the level of discipline "management should consider the totality of the circumstances, which includes but is not limited to: the employee's EPA 1, 2, and/or 3, prior disciplinary history, length of tenure, the nature of the employees position..., aggravating or mitigating circumstances, as well as the level of discipline imposed in similar

situations...." The policy outlines a progression of discipline from verbal reprimand to written reprimand to suspension. "A suspension may be issued when minor infraction/deficiencies continue despite the imposition of a written reprimand or when a more serious singular incident occurs." The levels of suspension are three, five, and ten days.

31. At the time of her suspension, Grievant had not been previously been disciplined but had received non-disciplinary coaching in the form of a performance improvement plan.

32. At the time of her suspension, Grievant had met expectations in her most recent annual evaluation covering the period of September 2020 through August 2021.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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 employer has not met its burden. *Id.*

Grievant asserts Respondent's decision to suspend her employment was not justified as Respondent failed to properly communicate with Grievant, inconsistently applied its disciplinary policy, failed to timely impose discipline, and imposed the discipline in an arbitrary and capricious manner. Grievant denies wrongdoing and does

not argue that the punishment should be mitigated. Respondent asserts the action taken was justified due to Grievant's repeated failure to attend training.

Regarding the notice of training and Grievant's behavior during the meeting with Ms. Stewart, Grievant did not provide any specific evidence to contradict Respondent's evidence on this issue, as Grievant chose not to testify, as is her statutory right.[1] However, Grievant does appear to question the credibility of Respondent's evidence. 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).

Joshua Woodard's demeanor was calm and professional. He answered questions readily and appeared to have a good memory of events. There was no

[1] "An employee may not be compelled to testify against himself or herself in a disciplinary grievance hearing." W.VA. CODE § 6C-2-3(g)(2).

indication Mr. Woodard had bias or interest in this matter. His testimony was supported by the documentation of the emails he sent to Grievant. Mr. Woodard is credible.

Kathy Brumfield's demeanor was calm and appropriately serious. Her answers to questions were matter-of-fact. Although Grievant appears to argue that Ms. Brumfield may have been biased against her, this appears to be more of a disagreement with Ms. Brumfield's management style. There was no actual indication of bias or untruthfulness in Ms. Brumfield's testimony. Ms. Brumfield's testimony is supported by the emails submitted into evidence and Ms. Stewart's testimony. Ms. Brumfield was credible.

Lynette Stewart's demeanor was serious and forthright. Although she appeared nervous, this was most likely because it was Ms. Stewart's first time testifying in a grievance hearing. She did not hesitate in her answers and appeared to have a good memory of events. There appears to be no bias against Grievant or interest in this matter. Ms. Stewart's testimony was supported by Ms. Brumfield's testimony. Ms. Stewart was credible.

Without any evidence to the contrary and considering the credible testimony of Respondent's witnesses, it is more likely than not that Grievant received all the emails notifying her of the trainings. Although the automated emails from the GoSignMeUp website do not clearly reflect when the emails were sent, in the absence of any evidence to the contrary, it is more likely than not that Grievant received the emails. The credible testimony of Ms. Stewart and Ms. Brumfield proves that Grievant reacted inappropriately to the serious discussion of Grievant's failure to complete the training by laughing and saying she was too busy. Therefore, Respondent proved that Grievant

refused management's directives by failing to take the training and that she acted inappropriately when questioned about her failure.

Respondent's policy requires its employees to follow the directives of management. In this case, Grievant was directed by email to complete this special mandatory training. Grievant, particularly, was required to read and respond to her email daily under the conditions of her performance improvement plan. While Grievant's supervisor, Ms. Brumfield's, portion of the email did not indicate the urgency and deadline of the training, the forwarded email from ADA Coordinator Wright and the attached memo clearly explained that the training was special, mandatory, and had a deadline. Ms. Brumfield then followed up with a second email reminding Grievant and other staff who had not yet completed the training to block off time on their calendar to enroll and attend. When Grievant failed to attend the training by the deadline, Mr. Woodard enrolled Grievant for the makeup dates and she was notified of the same by email. Grievant still failed to attend the training.

Although it is true that Grievant was unavailable for the last two makeup sessions due to illness and a previously-scheduled grievance proceeding, it was Grievant's responsibility to ensure that she completed the training. At no time did Grievant take any affirmative action to ensure she completed the training she was directed to take. Grievant did not offer any explanation for her failure to take the training or request another training opportunity. The first time Grievant took any steps was when she informed Ms. Brumfield that she was unavailable on the final make-up date. There is no indication why Grievant would contact Ms. Brumfield for this when it was Mr. Woodard who had emailed her about the training. Nonetheless, Ms. Brumfield responded and

clearly directed Grievant to contact "Mary and Lynette" regarding this issue as Ms. Brumfield was on vacation. Although Grievant stated she would email the same, there is no evidence that she did. When Grievant was questioned why she failed to take the training she laughed and said she was too busy. At no time did Grievant state that she had not received notice, accept any responsibility for her failure, or acknowledge the inconvenience her failure to complete the regularly-scheduled training caused the agency.

Grievant's behavior clearly violated Respondent's policy and demonstrated that the previous corrective action of the performance plan had failed, warranting discipline. Respondent's Policy Memorandum 2104, Progressive Correction and Disciplinary Action provides for "progressively correcting performance or behavior when appropriate" but recognizes "instances where more severe levels of discipline are initially imposed...." In this case, Respondent had already attempted correction of Grievant's behavior through a performance improvement plan, which specifically included a requirement to "complete all work assigned within the designated timeframes" and specifically instructed that Grievant "will be responsible for checking her dashboard and email for notification of new assignments throughout the day."

When determining the level of discipline the policy directs that "management should consider the totality of the circumstances, which includes but is not limited to: the employee's EPA 1, 2, and/or 3, prior disciplinary history, length of tenure, the nature of the employees position..., aggravating or mitigating circumstances, as well as the level of discipline imposed in similar situations...." The decision to suspend Grievant was made after discussion among CSM Hale, Regional Director Whaley, and Deputy

Commissioner Mitchell. They considered that Grievant was on a performance improvement plan but had not received discipline. They considered that the aggravating circumstances were the numerous opportunities to receive the training and Grievant's lack of explanation and acknowledged Grievant was unavailable for two of the thirty-two opportunities for training. There was no similar situation to compare in that Grievant was the only employee who had failed to take the training after the fourth make-up opportunity.

The policy outlines a progression of discipline from verbal reprimand to written reprimand to suspension. "A suspension may be issued when minor infraction/deficiencies continue despite the imposition of a written reprimand or when a more serious singular incident occurs." The levels of suspension are three, five, and ten days. In this case, Respondent viewed this as a serious singular incident because of what they viewed as Grievant's unwillingness to comply despite clear direction and previous corrective action, and her failure to provide explanation for her behavior. Respondent's decision to skip a written reprimand an impose the first level of suspension is not unreasonable under the circumstances or in violation of its policy.

Grievant has asserted several defenses to the suspension. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). In asserting "uneven and inconsistent application of discipline," Grievant is essentially asserting discrimination. "'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). Grievant points to the approximately twenty-five other employees who failed to complete training during the regularly-scheduled sessions and the eight employees who had failed to attend one of the three make-up sessions. However, Grievant is the only employee who failed to attend the final make-up training that had been clearly identified as the last opportunity to take the training. As such, those employees are not similarly-situated to Grievant. In addition, Grievant was already on a performance improvement plan and failed to provide any reason for why she did not complete the training other than that she was too busy. Grievant provided no evidence that this was so for any of the other employees who failed to timely take the training.

Grievant also asserts Respondent's decision to discipline her was in retaliation for her previously-filed grievance. 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 any lawful attempt to redress it." To demonstrate a prima facie case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v.*

Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). 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 adverse action. *Warner v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21. 2013); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant did engage in a protected activity by filing a grievance, Respondent was aware of the grievance, and the grievance was still pending when Grievant was suspended. Therefore, Grievant has made a *prima facie* case of retaliation. However, Respondent clearly had legitimate nondiscriminatory reasons for its actions. Respondent's previous attempt to correct Grievant's behavior through the performance

improvement plan had failed. Grievant provided no explanation for her failure to attend the training and showed no willingness to accept responsibility. Discipline in that circumstance is reasonable. Grievant failed to demonstrate that this reason was a mere pretext.

Grievant asserts that the suspension was untimely as the suspension was issued thirty days after Grievant had already completed the training. Grievant cites nothing in the policy that requires Respondent to act within a certain number of days. Grievant failed to attend the final make-up training on October 15, 2021. Respondent is required by law to meet with Grievant prior to imposing discipline. Respondent's management discussed the issue on October 18, 2021, and determined a predetermination meeting should be held to allow Grievant an opportunity to explain. Grievant finally attended the training on October 28, 2021. The predetermination conference was held on November 10, 2021. Respondent's management subsequently held additional discussion regarding the appropriate level of discipline and the letter was issued on November 30, 2021. The timeframe was reasonable and Grievant was not prejudiced in any way by this small passage of time.

Grievant finally argues, in essence, that Grievant's failure to attend the training was somehow Ms. Brumfield's fault. Grievant cites Ms. Brumfield's alleged failure to communicate, monitor employee activity, and prove follow-up guidance. While there may have been some issue with Grievant's unrelated EPA-3, Ms. Brumfield's expectations and directives regarding the training were clear. Grievant was required to read her email per her performance improvement plan and she was directed to complete and submit proof of her training. Grievant either did not read her email or she

read it and ignored it. Ms. Brumfield was not required to micro-manage Grievant's activities.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018).

2. "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 employer has not met its burden. *Id.*

3. Respondent proved Grievant failed to comply with her supervisor's directive to complete training and that it was justified in suspending her for three days for this failure pursuant to its policy.

4. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

5. "'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).

6. 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 any lawful attempt to redress it."

7. To demonstrate a prima facie case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

8. "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 adverse action. *Warner v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21. 2013); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

9. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory

reasons for its action. *Id. See Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

10. Grievant failed to prove that Respondent's action was discriminatory, retaliatory, or untimely.

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: May 16, 2022

Billie Thacker Catlett
Chief Administrative Law Judge