THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STUART PETERS,
Grievant,

v. **Docket No. 2021-0270-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Stuart Peters, is employed by Respondent, Division of Natural Resources. On August 21, 2020, Grievant filed this grievance against Respondent stating, "Improper and retaliatory EPA3." For relief, Grievant seeks "[t]o be made whole in every way including removal and or correction of EPA3."

Following the September 8, 2020 level one conference, a level one decision was rendered on September 15, 2020, denying the grievance. Grievant appealed to level two on September 16, 2020. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on October 30, 2020. A level three hearing was held on January 19, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant appeared personally and was represented by Gordon Simmons and Steve Thompson. Respondent appeared by Andrea Fout-Tinsley and was represented by counsel, Jane Charnock, Assistant Attorney General. Following the first day of hearing, Respondent's counsel retired, which resulted in a delay in scheduling a second day of hearing. A second day of hearing was conducted in person at the Grievance Board's Charleston, West Virginia office on October 21, 2021. Grievant appeared in person and was represented by Gordon Simmons and Steve Thompson. Respondent appeared by Andrea Fout-Tinsley

and was represented by counsel, Katie Franklin, Assistant Attorney General. This matter became mature for decision on November 19, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant is employed by Respondent as the Park Superintendent of Cabwaylingo State Forest. Grievant protests his performance evaluation alleging it was improper due to procedural failures and retaliation. Grievant proved there were procedural failures but failed to show that the result of the evaluation would have been different but for the procedural errors. Grievant failed to prove the evaluation was retaliatory. 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

Grievant is employed by Respondent as the Park Superintendent of Cabwaylingo State Forest.

For the relevant time-period, Grievant's immediate supervisor was John "Matt" Yeager, District Administrator.

As Park Superintendent, Grievant is responsible for the management of every aspect of the park. Unlike most parks, Cabwaylingo does not have an Assistant Park Superintendent. Grievant directly supervised the park's Maintenance Supervisor, Eugene McCallister, who supervised the maintenance workers and housekeepers. Although the park is geographically large, it has a small staff of only four full-time employees and approximately five seasonal employees.

Conflict arose between Mr. McCallister and one of the seasonal staff, Janie Messer. Grievant did not support Mr. McCallister in his assertions that Ms. Messer's performance was not satisfactory or regarding reports of alleged erratic behavior. As conflicts continued, Grievant spoke with both of them informally asking only if "everybody could get along." Grievant eventually took over the scheduling and supervision of Ms. Messer directly.

The week of July 29, 2019, Grievant was on leave for a vacation in Hawaii with his fiancée Elizabeth Ward.

On July 29, 2019, another conflict arose between Mr. McCallister and Ms. Messer when Ms. Messer was in the park with her husband on her day off. Ms. Messer called Grievant's fiancée, Ms. Ward, and then spoke with Grievant on Ms. Ward's telephone. Grievant took no action on Ms. Messer's complaint, only telling her he would deal with the situation upon his return.

On July 31, 2019, Ms. Messer turned in her keys and uniform to an employee at the park office.

On August 2, 2019, after learning that Ms. Messer had turned in her keys and uniform and considering that Grievant was on vacation, Mr. Yeager visited the park to check on operations. While there the employees raised concerns about Ms. Messer and about Grievant's leadership.

On August 5, 2019, Mr. Yeager emailed Grievant to inform him of his visit to the park and that Grievant was "to consider Janie as quit or suspended until further notice if she tries to come back to work," and that they needed to talk.

On the same day, Grievant's fiancée, Ms. Ward, came to the park and yelled and cursed at Mr. McCallister in Grievant's presence. Grievant took no action to intervene other than to tell Ms. Ward to leave the park.

Despite Ms. Ward's outrageous behavior, on August 10, 2019, Grievant allowed Ms. Ward to visit with him while he worked in the park's office. While there, Ms. Ward confronted another employee, Office Assistant Rose Perkins, accusing her of trying to get Grievant "in trouble with the Charleston office."

On August 14, 2019, Chief of Parks Samuel England, Deputy Chief of Parks Bradley Reed, and Mr. Yeager conducted a management audit as a result of the complaints. As part of the audit, they interviewed Grievant and all employees and reviewed Grievant's correspondence and prior evaluations and improvement plan.

The audit team found that Grievant lacked leadership and were particularly troubled that Grievant had allowed his personal relationships to impact the functioning of the park. The audit team believed that Grievant exhibited favoritism regarding Ms. Messer, which was due to a friendship between she and Grievant's fiancé. The audit team found Grievant had a lack of knowledge and teamwork in office procedures, creating undue work for office staff and that he had failed to properly communicate with staff and Mr. Yeager regarding his vacation. In addition, Grievant had failed to carry his state-issued cellphone and had contacted a Central Office staff member to turn off Grievant's state-issued cellphone in defiance of Mr. Yeager's and Chief England's instructions

On September 5, 2019, Mr. Yeager placed Grievant on a Performance Improvement Plan ("PIP"), dated September 4, 2019. The plan, which comprised nine pages, single-spaced, thoroughly detailed the concerns revealed by the management audit and provided clear explanation of Mr. Yeager's expectations for Grievant's performance. The expectations were presented in a bulleted list of twenty specific directives and included specific action items with scheduled due dates. The plan was to extend through March 3, 2020.

On September 6, 2019, Grievant filed a grievance, assigned docket number 2020-0332-DOC, protesting the PIP.

Also on September 6, 2019, WorkForce West Virginia determined Ms. Messer qualified for unemployment benefits. Respondent appealed this decision.

On September 26, 2019, Ms. Messer called Grievant to testify in her unemployment compensation hearing. Grievant testified Ms. Messer had complained to him about Mr. McCallister, he had counseled everyone involved, and he believed the issues were resolved by the time he left for vacation. Grievant testified that he believed Ms. Messer resigned because she had been bullied.

On October 16, 2019, Grievant's PIP grievance was denied at level one of the grievance process. Grievant did not appeal.

One of the specific requirements of the PIP was for Grievant to learn the "CampLife" guest services system, which had been implemented in the spring of 2019. Grievant had previously resisted attending training for the system and did

not have appropriate knowledge of the system. Grievant was to demonstrate his proficiency by the end of October 2019.

When Mr. Yeager met with Grievant at the end of October 2019, Grievant still could not perform at an acceptable level in the CampLife system.

On August 28, 2020, Mr. Yeager issued Grievant's Employee Performance Appraisal for the year 2019. Grievant was rated as "Meets Expectations" overall but was rated as "Needs Improvement" in sixteen of the thirty-seven rating categories.

The performance appraisal process is governed by the West Virginia Division of Personnel's Employee Performance Appraisal Policy, policy number DOP-17, which states in relevant part:

> Near the middle of the performance period (toward the end of the first six months of performance), supervisors/raters are required to meet individually with each subordinate employee to conduct a formal, mid-year review of the employee's performance. During this meeting, the supervisor/rater must provide feedback to the employee concerning the employee's strengths, weaknesses (if any), and performance during the primary performance period. If appropriate, the supervisor/rater may develop a performance improvement plan which describes the action(s) the employee must take to improve his or her performance to the "meets expectations" level.
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> Within 30 days following the end of the performance rating period, supervisors are required to meet individually with each of their subordinate employees to review and rate the performance of each employee during the entire performance rating period. Prior to the final review session, the completed but unsigned Employee Appraisal Form(s) shall be sent to the reviewing manager for review and approval. After approval, the reviewing manager shall return the unsigned but initial Employee Appraisal Form(s) to the

supervisor/rater for use in the review session with the employee.

Discussion

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

Grievant asserts the evaluation is invalid due to multiple procedural failures. Grievant asserts the negative evaluation was in retaliation for his prior grievance and for his testimony in the unemployment compensation hearing. Respondent acknowledges the procedural defects of the EPA but asserts the same were harmless. Respondent denies the allegation of retaliation. Respondent asserts the evaluation of Grievant's performance was proper.

As a preliminary matter, Grievant attempts to relitigate the propriety of the PIP. "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1 *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995). Collateral estoppel, or issue preclusion, applies to the decisions of administrative

agencies. *See* syl. pt. 2, *Vest v. Bd. of Educ. of the Cty. of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). Grievant asserts that Respondent was wrong in issuing the PIP and challenges the facts on which the PIP was based. That was the issue grieved in the prior grievance, which received a final adjudication under the grievance procedure when Grievant failed to appeal the level one decision denying the grievance, and which involved the same parties in the instant grievance. Grievant appears to argue that, because his representative was at fault for failing to file an appeal to the level one decision, he did not have a full and fair opportunity to litigate the issue. This argument must fail. Respondent did not take action to interfere with Grievant's ability to appeal. Grievant had the responsibility to be aware of his legal business and communicate with his representation. Once Grievant discovered that no appeal had been filed, Grievant could have chosen to file a late appeal, and if Respondent moved to dismiss, argued that the lateness should be excused. Grievant had a full and fair opportunity to litigate the PIP. Therefore, collateral estoppel applies and the facts of the PIP grievance may not be relitigated here.

An employee who grieves his evaluation may prevail where he establishes by a preponderance of the evidence that the evaluator abused his discretion in rating the employee. *Bowman v. Dep't of Health & Human Res*., Docket No. 2011-0422-CONS (Mar. 6, 2012); *Gibson v. W. Va. Dep't of Health & Human Res*., Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-388 (Apr. 7, 1993). An employee may also allege that his performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Wiley v. W. Va. Div. of Natural Res.,*

Docket No. 97-DNR-397 (Mar. 26, 1998); *Maxey v. W. Va. Dep't of Health & Human Serv*., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); *Kemper v. W. Va. Dep't of Transp.,* Docket No. 91-DOH-325 (Mar. 2, 1992); *Hurst v. W. Va. Dep't of Transp.,* Docket No. 91-DOH-326 (Feb. 27, 1992).

In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, a grievant must prove that the evaluation was the result of arbitrary or capricious decision making. *Bowman, supra; Kemper, supra.* The arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Grievant proved that his supervisor failed to issue an EPA-2, failed to review Grievant's performance within thirty days of the end of the performance rating period, and that his reviewing manager failed to review and initial the EPA-3 prior to Grievant's performance review. "An administrative body must abide by the remedies and procedures it properly established to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723 (W. Va. 1977). However, "[a]lthough public agencies are obligated to follow the rules and policies they establish, unless the employee shows that the result would have been different, an evaluation will not be overturned for purely procedural errors. *See Shaffer v. W. Va. Dep't of Health & Human Res.*, Docket No. 02-HHR-109 (July 1, 2002); *Farley v. Dep't of Health & Human Res.*, Docket No. 02-HHR-088D (May 8, 2002). *See also McFadden v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-428 (Feb. 17, 1995). *See generally Parker v. Defense Logistics Agency*, 1

M.S.P.B. 489 (1980)." *Parsons v. Gen. Serv. Div*., Docket No. 2012-0867-DOA (Apr. 17, 2013).

Grievant failed to prove that the result of his evaluation would have been different but for these procedural errors. Mr. Yeager did not issue an EPA-2 but he did meet with Grievant during the management audit, did issue a detailed PIP, and did meet with Grievant regarding the PIP. These actions served the same function as an EPA-2. Grievant could have no doubt regarding how Mr. Yeager viewed his performance and what would be required to change in order to meet Mr. Yeager's expectations. Although Grievant disagreed with the PIP, as Grievant failed to appeal the denial of his grievance of the PIP he cannot now challenge the PIP. Other than alleging Mr. Yeager was wrong in supporting Mr. McCallister, disputing that employees were unable to reach him, and asserting that he did understand the software, Grievant did not explain how Mr. Yeager erred in finding he did not meet expectations in the sixteen individual category ratings. Overall, Grievant was rated as meets expectations and provided no evidence that his overall rating should have exceeded expectations. Even if Grievant had proven the three items he specifically disputed, which he did not, that would not have substantially effected the sixteen negative individual category ratings due to the multitude of issues identified. Those ratings were justified by the identified concerns in the PIP, which was still in effect at the end of the rating period.

Grievant cites *Ratcliff v. Dep't of Envtl. Prot*. Docket No. 2011-1878-DEP (Aug.

27, 2013) and *Parsons v. Gen. Serv. Div*., Docket No. 2012-0867-DOA (Apr. 17, 2013) as support that Respondent's procedural failings mandate the removal or correction of the EPA. This case is dissimilar to *Ratcliff* and *Parsons* in that Grievant did not allege that he was unaware of his duties and responsibilities or that his performance was considered lacking. In *Ratcliff* and *Parsons*, the grievants were not made aware of their supervisors' expectations and had not been given prior notice of those areas that were found deficient in their EPAs. Grievant did not allege he was unaware of Mr. Yeager's expectations. Further, Grievant was a long-term Park Superintendent and the responsibilities he was found failing to meet in the management audit mostly involved core management responsibilities regarding which there could be no confusion. Unlike *Ratcliff* and *Parsons,* Grievant was made aware of his deficiencies in detail in the management audit and PIP and had been given clear direction through the PIP of the expectations for required improvements.

Grievant also alleges that the EPA was in retaliation for his prior grievance and testimony in Ms. Messer's unemployment hearing. "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). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

The Grievance Board has analyzed cases protesting adverse employment action less than discharge under the same standard used for retaliatory discharge. *Frost v. Bluefield State Coll.*, Docket No. 2011-0895-BSC (Jan. 29, 2014), *aff'd*, W.Va. Sup. Ct. App. Docket No. 14-0841 (June 12, 2015); *Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lewis Cnty. Cir. Ct. Civil Action No. 94-C-00036 (Jan. 25, 1995). "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"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).

Grievant's filing of a grievance and testimony in an unemployment hearing were clearly protected activities and Mr. Yeager was aware of Grievant's protected activities. However, there is no direct evidence of retaliatory motivation nor did the EPA follow within such a period of time that retaliatory motivation can be inferred. Grievant grieved the PIP and testified in Ms. Messer's unemployment hearing in September 2019 and his EPA was not issued until almost a year later in August 2020. Even if retaliatory motivation could be inferred, Respondent rebutted that presumption in that the dissatisfaction with Grievant's work pre-dated his protected activities as shown by the management audit and issuance of the PIP. Grievant failed to prove Mr. Yeager's reasons were a pretext. While Grievant alleges that Mr. Yeager was motivated by some personal relationship with Mr. McCallister, Grievant provided no evidence of the same. Mr. Yeager's concerns with Grievant's performance were reasonable and were shared by Deputy Chief Reed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

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

2. "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1 *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995). Collateral estoppel, or issue preclusion, applies to the decisions of administrative agencies. *See* syl. pt. 2, *Vest v. Bd. of Educ. of the Cty. of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

3. Grievant is estopped from relitigating the performance improvement plan upon which his evaluation was mostly based.

4. An employee who grieves his evaluation may prevail where he establishes by a preponderance of the evidence that the evaluator abused his discretion in rating the employee. *Bowman v. Dep't of Health & Human Res*., Docket No. 2011-0422-CONS (Mar. 6, 2012); *Gibson v. W. Va. Dep't of Health & Human Res*., Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health & Human Res*., Docket No.

92-HHR-388 (Apr. 7, 1993). An employee may also allege that his performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Wiley v. W. Va. Div. of Natural Res.,* Docket No. 97-DNR-397 (Mar. 26, 1998); *Maxey v. W. Va. Dep't of Health & Human Serv*., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); *Kemper v. W. Va. Dep't of Transp.,* Docket No. 91-DOH-325 (Mar. 2, 1992); *Hurst v. W. Va. Dep't of Transp.,* Docket No. 91-DOH-326 (Feb. 27, 1992).

5. In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, a grievant must prove that the evaluation was the result of arbitrary or capricious decision making. *Bowman, supra; Kemper, supra.* The arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

6. "An administrative body must abide by the remedies and procedures it properly established to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723 (W. Va. 1977).

7. "Although public agencies are obligated to follow the rules and policies they establish, unless the employee shows that the result would have been different, an evaluation will not be overturned for purely procedural errors. *See Shaffer v. W. Va. Dep't of Health & Human Res.*, Docket No. 02-HHR-109 (July 1, 2002); *Farley v. Dep't of Health & Human Res.*, Docket No. 02-HHR-088D (May 8, 2002). *See also McFadden v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-428 (Feb. 17, 1995). *See*

generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980)." *Parsons v. Gen. Serv. Div.*, Docket No. 2012-0867-DOA (Apr. 17, 2013).

8. Grievant proved there were procedural failures but failed to show that the result of the evaluation would have been different but for the procedural errors.

9. "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). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

10. The Grievance Board has analyzed cases protesting adverse employment action less than discharge under the same standard used for retaliatory discharge. *Frost v. Bluefield State Coll.*, Docket No. 2011-0895-BSC (Jan. 29, 2014), *aff'd*, W.Va. Sup. Ct. App. Docket No. 14-0841 (June 12, 2015); *Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lewis Cnty. Cir. Ct. Civil Action No. 94-C-00036 (Jan. 25, 1995).

11. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to

prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

12. "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).

13. Grievant failed to prove the evaluation was retaliatory.

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: January 10, 2022

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Billie Thacker Catlett
Chief Administrative Law Judge