

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STUART PETERS,

Grievant,

v.

Docket No. 2021-2381-CONS

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

Stuart Peters, Grievant, filed this consolidated grievance against his employer, the Division of Natural Resources ("DNR"), Respondent, protesting a variety of agency actions. An original grievance (2021-2258-DOC) was filed on March 11, 2021 alleging "[r]etaliatory scheduling and staffing". For relief, Grievant seeks "[t]o be made whole in every way including fair scheduling and staffing." Following the March 29, 2021 level one conference, a level one decision was rendered on April 21, 2021 denying the grievance.

On March 26, 2021, Grievant filed a second grievance (2021-2322-DOC) against Respondent alleging "[r]etaliatory improper EPA3," and seeking "[t]o be made whole in every way including removal or revision of 2020 EPA3." Following the April 13, 2021, level one conference, a level one decision was rendered on April 21, 2021 denying the grievance.

On May 7, 2021, Grievant filed a third grievance (2021-2405-DOC) against Respondent alleging "[r]etaliatory transfer without good cause and denial of representation." As a remedy, Grievant asked "[t]o be made whole in every way including reversal of transfer." Following the May 17, 2021 level one conference, a level one decision was rendered on May 21, 2021 denying the grievance.

For each matter, Grievant timely appealed to level two. Post mediation and a period of abeyance, Grievant requested the consolidation of docket numbers 2021-2258-DOC and 2021-2322-DOC. Pursuant to a May 7, 2022 Order, the pending matters were consolidated and styled as docket number 2021-2381-CONS. On September 7, 2021, Grievant, by representative,¹ filed level three appeals and requested the consolidation of docket numbers 2021-2381-CONS and 2021-2405-DOC asserting the grievances were related to the agency's alleged retaliation toward Grievant. On September 20, 2021, the grievances were consolidated into the above-styled case.

A level three hearing was held before the undersigned Administrative Law Judge on May 9, 2022, in the Grievance Board's Charleston office.² Grievant appeared in person and was represented by counsel, Anthony Brunicardi, Esquire, Employment Law Center, PLLC. Respondent appeared by Andrea Fout-Tinsley, Human Resources Director, and was represented by counsel, Katie Franklin, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law which were submitted by both parties. This matter became mature for decision on receipt of the last of the submitted fact/law proposals on or about June 10, 2022.

¹ At the time of the filing of each grievance, as well as at the level one and two proceedings, Grievant's representative was Gordon Simmons, UE Local 170, West Virginia Public Workers Union. There was a change in representation prior to the level three hearing.

² A level three hearing was initially scheduled for January 13, 2022, but was continued without objection upon motion of Respondent due to a scheduling conflict. The hearing was next scheduled for March 22, 2022 but was continued without objection upon motion of the Grievant due to hiring new counsel. A level three hearing was ultimately held on May 9, 2022.

Synopsis

Grievant is employed by Respondent as a Park Superintendent. Grievant alleges his transfer from Cabwaylingo State Forest to Kumbrabow State Forest was retaliatory and takes issue with his representative not being allowed to attend the meeting where he was advised of the transfer. The dispute/issue surrounding representation at the notice of transfer is NOT easily discerned. The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested. Grievant provided notice and arranged for representation.

Grievant did not present any evidence relating to his claim of retaliatory scheduling or retaliatory 2020 EPA-3. Facts, law, circumstances, and intent are critical factors. Their interaction and applications are demonstrative to the instant matter. Respondent had the authority to transfer Grievant. Nevertheless, it is established that Grievant's involuntary transfer from Cabwaylingo State Forest to Kumbrabow State Forest was disciplinary in nature, or at the very least, that the topic of the May 7, 2021 meeting "could lead to discipline." Respondent's exclusion of Grievant's representative from the May 7, 2021, meeting was in violation of Grievant's statutory rights under W.Va. Code § 6C-2-3(g)(1). Accordingly, this grievance is Granted.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. There are four primary divisions within Respondent: Wildlife Resources Section; West Virginia State Parks; Law Enforcement; and Administration.

2. Grievant is employed in the West Virginia State Parks division as a Park Superintendent 3. Grievant has been employed by Respondent for over twenty-one (21) years.

3. Grievant first became a full-time employee of Respondent in 1999, when he was hired as a ranger at Tu-Endi-Wei State Park (Pt. Pleasant Battle Monument). Grievant had some seasonal, part-time park experience prior to Tu-Endi-Wei.

4. In approximately 2001, Grievant was transferred to Cabwaylingo State Forest³, where he took the position of Assistant Park Superintendent.

5. Grievant was thereafter promoted to Park Superintendent of Cabwaylingo and remained in that position for approximately eight-to-nine years prior to 2021.

6. As Park Superintendent, Grievant is responsible for the management of every aspect of the park. He is the supervisor of all full-time and part-time employees at the park, and is responsible for the care, maintenance, and safety of the park, as well as its employees and visitors. Park Superintendent is an important job that requires significant commitment. As a State Park Superintendent, Grievant lives full-time at the State Park where he is assigned to work.

7. As relevant to the instant grievances, Grievant's immediate supervisor was John "Matt" Yeager, District Administrator.

³ State forests fall under the Parks and Recreation Section of DNR and are frequently referred to as "parks."

8. Since December 2020, Bradley Reed has been the Section Chief of Parks and Recreation; immediately prior to that time, he was the Deputy Section Chief. For the relevant time-period, Respondent Director was Stephen McDaniel.⁴

9. Parks are within the realm of the hospitality business, and as such, park superintendents “work while everybody else is having fun,” including on weekends, holidays, and in the evenings. It is critical that there is always someone present and in charge of the park and that the Park Superintendent at Cabwaylingo resides on the park property in housing provided by Respondent. The ability to respond quickly to whatever situation may arise – whether it is a cabin or campground guest arriving late, or an emergency such as a natural disaster – is a cornerstone of the position. Without question, it is a difficult and time-consuming profession, which carries a tremendous amount of responsibility. See Section Chief Reed L3 testimony.

10. Normally, the second-in-command at a park is the Assistant Park Superintendent. Unlike most parks, Cabwaylingo does not have an Assistant Park Superintendent.

11. Cabwaylingo did not have an Assistant Park Superintendent for the last five years Grievant was assigned there. Grievant was of the opinion that Respondent should have resolved this issue.⁵ Chief Reed testified that he wanted an Assistant Park

⁴ Director Stephen McDaniel retired at the end of January 2022.

⁵ At one time or another, an issue in contention between the parties was Respondent's efforts to provide Grievant with additional staff at Cabwaylingo. Grievance (2021-2258-DOC) filed March 11, 2021, among other allegations contended retaliatory scheduling and staffing at Cabwaylingo. Grievant submitted little to no evidence relating to these issues at the May 9, 2022 L3 hearing or written fact/law proposals.

Superintendent at Cabwaylingo and made multiple attempts to get a posting through the Division of Personnel, but ran into various barriers.

12. On September 5, 2019, District Administrator Yeager placed Grievant on a Performance Improvement Plan ("PIP"), dated September 4, 2019.⁶ The plan was extended through March 3, 2020. One of the areas of improvement contained in the PIP was that Grievant must delegate the responsibilities of the park to his subordinates when he was absent, and he could not leave the park unattended for extended periods of time.⁷

13. Grievant was aware of the PIP and District Administrator Yeager's expectations for Grievant's performance.

14. On September 6, 2019, Grievant filed a grievance, assigned docket number 2020-0332-DOC, protesting the PIP. On October 16, 2019, Grievant's PIP grievance was denied at level one of the grievance process. Grievant did not appeal.⁸

⁶ On August 14, 2019, Chief of Parks Samuel England, Deputy Chief of Parks Bradley Reed, and Administrator Yeager conducted a management audit as a result of 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 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. See R Ex 9, *Peters v. Division of Natural Resources*, Docket No. 2021-0270-DOC (Jan 10, 2022).

⁷ The plan, which comprised nine pages, single-spaced, thoroughly detailed the concerns revealed by the management audit and provided clear explanation of Administrator 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. Citing R Ex 9; *Peters v. Division of Natural Resources*, Docket No. 2021-0270-DOC (Jan 10, 2022)

⁸ Collateral estoppel applies and the facts of the PIP grievance may not be relitigated here. See *also* R Ex 9.

15. On August 28, 2020, Administrator Yeager issued Grievant's Employee Performance Appraisal ("EPA") for the year 2019. Grievant was rated as "Meets Expectations" overall but was rated as "Need Improvement" in sixteen of the thirty-seven rating categories. Grievant filed a grievance against this EPA, assigned docket number 2021-0270-DOC. On January 10, 2022, Grievant's grievance of his 2019 EPA-3, docket number 2021-0270-DOC, was denied on all grounds. R Ex 9, Peters v. Division of Natural Resources, Docket No. 2021-0270-DOC (Jan 10, 2022). Grievant has filed an appeal to the Circuit Court of Kanawha County.

16. In February 2021, there were four full-time staff at Cabwaylingo, not including Grievant: Rose Perkins, a secretary; Eugene McCallister, the park maintenance supervisor; and two other full-time maintenance staff. Although the park is geographically large, it has a small staff of full-time employees and approximately five seasonal employees.

17. On February 27, 2021, West Virginia went under a "state of preparedness and flood warning" due to expected inclement weather. There were warnings in the news, and a text from Grievant's immediate supervisor John Yeager, District Administrator, warning about the potential of an impending flood.

18. Grievant was off work and away from Cabwaylingo on the day of the storm. His time off had been posted and approved on the Kronos time-reporting system.

19. Grievant did not delegate supervision of Cabwaylingo to another employee during his scheduled time off. Grievant acknowledges that it is and was his responsibility to delegate each time he went on leave away from the park. See Grievant's L3 testimony.

20. Grievant left Cabwaylingo abandoned without anyone in charge. Grievant's superior had given him clear direction to delegate responsibility.

21. During Grievant's absence over the last weekend in February 2021, Cabwaylingo suffered substantial flooding, resulting in \$48,532.48 worth of damage.

22. In 2021, Cabwaylingo opened to the public for ATV trails, which are part of an ATV pilot program initiated by the State Legislature. Both former Director McDaniel and Chief Reed testified as to the changing dynamics of Cabwaylingo, and specifically, that the ATV trails would make operations at Cabwaylingo far more complex than in preceding years. The success of the pilot program was of importance to the park system.

23. After the flooding, it became readily apparent to Respondent that Grievant was no longer capable of handling Cabwaylingo.⁹ Chief Reed, District Administrator Yeager, Human Resources Director Andrea Fout-Tinsley, and then-counsel Jane Charnock discussed options on how best to proceed forward.

24. Respondent eventually determined that transferring Grievant to Kumbrabow State Forest would be in the best interest of Grievant, Cabwaylingo, and Kumbrabow. The ultimate decision of whether to transfer Grievant was up to former WVDNR Director, Stephen McDaniel. See Reed L3 testimony.

25. At that time, Kumbrabow had a vacancy for Park Superintendent. The prior Park Superintendent at Kumbrabow had transferred to Cass Scenic Railroad State Park, and was working double-duty going back and forth between Kumbrabow and Cass while

⁹ 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.

his position was being filled. It was beneficial to Kumbrabow to expeditiously fill the position.

26. On May 4, 2021, Grievant received a phone call from Administrator Yeager, Grievant's Supervisor, requesting that Grievant come in for a meeting on May 7, 2021 to discuss "personnel matters." Grievant followed up on the phone conversation with an email to Matt Yeager, Brett McMillion, and Brad Reed, indicating that he would attend the meeting at 9:15am on Friday, May 7, 2021 along with his representative. G Ex 2 Grievant did not receive a response to his email.

27. On May 7, 2021, Grievant arrived at the location of the meeting alongside his representative, Gordon Simmons. Upon entering the building, Grievant and his representative were met downstairs by WVDNR Law Enforcement Officer, Bradford Debord, who informed them that Grievant's representative would not be permitted in the meeting.

28. On May 7, 2021, a personnel meeting was held at the Respondent's South Charleston headquarters. Respondent did not allow Grievant's union representative, Gordon Simmons, to attend the personnel meeting.¹⁰

29. Grievant entered the meeting without his representative to find District Administrator Matt Yeager, Deputy Section Chief Bradley Reed, Human Resources

¹⁰ The account of Grievant and Mr. Simmon that Major Bradford DeBord – the law-enforcement officer who prevented Mr. Simmons from attending the meeting with Grievant – was "aggressive" and that Major DeBord attempted to physically intimidate Mr. Simmons is vain. It is viewed as an attempt at guiding the lily. It is undisputed that representative Simmons was not permitted to attend the meeting. Grievant's overdramatized version of *how* that denial occurred is immaterial to the legal analysis and will not be addressed further.

Director, Andrea Fout Tinsley, WVDNR Director, Stephen McDaniel, and agency attorney, Jane Charnock in attendance.

30. Respondent maintains the decision to transfer Grievant was made prior to the meeting, and that the sole purpose of the meeting was to inform Grievant of that decision. See Human Resources Director Andrea Fout-Tinsley testimony.

31. After Grievant came into the meeting room, he was handed a letter dated May 7, 2021. The letter was read aloud to Grievant which informed him of his involuntary transfer effective May 22, 2021. A copy of the transfer letter is admitted as evidence of record. G Ex 1

32. The May 7, 2021, meeting in which Grievant's representative was excluded resulted in Grievant being involuntarily transferred from Cabwaylingo State Forest to Kumbrabow State Forest. The nature of this meeting is disputed by the instant parties.¹¹

33. Cabwaylingo State Park is located in Dunlow, West Virginia. Kumbrabow State Forest is located in Huttonsville, West Virginia. Cabwaylingo State Park and Kumbrabow State Forest are 216.9 miles apart.

34. The letter presented to Grievant during the May 7, 2021, meeting sets forth, in pertinent part, as follows:

I want to make it clear that the Division is not holding you responsible for the flood. The Division believes, however, that had you performed minimal flood preparation and had you been present, the losses occasioned by this flood could have been limited or minimal. This was not an

¹¹ WEST VIRGINIA CODE § 6C-2-3(g) (1) states: "(1) An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." (Emphasis added). The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested.

unexpected event. The days preceding this flood were filled with reports and warnings of a serious, potentially [sic] flooding weather event. These warnings allowed you time to take whatever actions appropriate for minimizing or eliminating the damages and loss to the Division's property at the Forest. You took no action, were not present during the flood, and as such, the Division has lost confidence in your abilities to maintain, supervise, and lead the staff at the Forest.

As the Director, I must advise you that this is not a decision that was made in haste or taken lightly. Many factors had to be weighed and considered before I came to this conclusion. The monetary value of the lost property was only one factor. I also had to evaluate park locations and positions to give you an opportunity to succeed.

It is my belief that this lateral transfer to Kumbrabow will allow you to demonstrate competence in the management of the Forest. It will also allow you to show competent leadership skills of your abilities. The area and activities at Kumbrabow State Forest are not as extensive, complex or developed as Cabwaylingo State Forest and I believe it is better suited to your demonstrated skillset. Over time, I believe that you will be able to grow into the type of leader that meets Division expectations of its superintendents.

G Ex 1 signed by WVDNR Director, Stephen McDaniel.

35. Ms. Fout-Tinsley was of the opinion that Grievant had shown multiple "failures" as a supervisor and superintendent, and that the transfer would allow Grievant a chance to "restore responsibility" to Respondent. She testified that other options were considered, such as a demotion to a lower classification, but given Grievant's long tenure, Respondent did not want to punish him.

36. As Respondent's Human Resources Director, Ms. Fout-Tinsley maintains it was not Respondent's intention to discipline Grievant but does acknowledge that she could see how Grievant might perceive the transfer as disciplinary.

37. According to Chief Reed, in deciding to transfer Grievant, Respondent considered the following: Grievant's absence and lack of delegation relating to the flooding incident; the 2019 management audit which led to the 2019 PIP; that Grievant's

girlfriend had verbally attacked Grievant's subordinate employee on park grounds and in Grievant's presence, without Grievant intervening; Grievant's prior incident of going to Hawaii without delegating Cabwaylingo to another employee, which was included in the 2019 PIP; other incidents of Grievant not being present; and especially, Grievant's "pattern of failure of leadership". Both former-Director McDaniel and Chief Reed described Grievant as being "in over his head" at Cabwaylingo, especially given the initiation of the ATV pilot program.

38. Grievant maintained his salary and his classification as Park Superintendent 3. Respondent continued to provide Grievant's housing at Kumbrabow, same as at Cabwaylingo, and paid for his moving expenses.

39. Respondent indicated a loss of confidence in Grievant's abilities to maintain, supervise, and lead the staff at Cabwaylingo State Forest. G Ex 1 Grievant's transfer was entirely involuntary. (Testimony of all witnesses, level three hearing). Respondent claims that the transfer was in no way disciplinary, however, they transferred him post a performance improvement plan, after a significant fiscal event, during the time of a pending grievance involving alleged performance issues and after losing confidence in his abilities.

40. Respondent did not consult Grievant in any way prior to transferring him. See McDaniel L3 testimony. Grievant argues that the May 7, 2021 meeting that resulted in his involuntary transfer from Cabwaylingo State Forest to Kumbrabow State Forest was an event for which he was entitled to have representation present.

41. Grievant did not present evidence relating to his schedule at Cabwaylingo, or how it was retaliatory.

42. Grievant did not present evidence relating to his 2020 EPA-3, or how it was retaliatory.

Discussion

The burden of proof in grievance matters shifts with the nature of the issue in dispute. In non-disciplinary matters, the burden is on the Grievant to prove the necessary elements of his claim by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*

This is a consolidated grievance matter. Several different issues were at one time or another in contention.

1. Grievance (2021-2258-DOC) filed March 11, 2021, alleging retaliatory scheduling and staffing at Cabwaylingo.
2. Grievance (2021-2322-DOC) filed March 26, 2021, alleging retaliatory improper 2020EPA3.
3. Grievance (2021-2405-DOC) filed May 7, 2021, alleging, retaliatory transfer without good cause and denial of representation.

All three grievances were consolidated into the instant matter docket number 2021-2381-CONS. The presentation of Grievant's arguments did not address all the issues of

contention by the various grievances. Grievant did not present evidence relating to his schedule at Cabwaylingo, or how it was retaliatory. Grievant did not present evidence relating to his 2020 EPA-3, or how it was retaliatory. Thus, Grievant did not meet his burden with relation to those issues.¹² In fact, most of Grievant's argument(s) focused on his forced transfer and Respondent's barring of representation at the May 7, 2021 meeting where he was informed of the involuntary transfer. This issue is complicated. The right of public employees to representation during certain meetings with management is not new. However, whether the instant Grievant was improperly prohibited such representative tends to be a pivotal touch stone in this case.¹³

The May 7, 2021 meeting in which Grievant's representative was excluded resulted in Grievant being involuntarily transferred from Cabwaylingo State Forest to Kumbrabow State Forest. Grievant provided advance notice of his intent to bring legal representation. The parties dispute the true nature of the meeting and whether Grievant was improperly denied a statutory right.¹⁴ Grievant asserts that he was entitled to have

¹² Grievant has the burden of proof on these issue(s), but he chose not to provide any meaningful information. Grievant has effectively abandoned these grievances and such will not be discussed any further herein.

¹³ Although the Grievance Board has previously addressed the statutory right to representation in an investigatory interview, none of those decisions squarely address the appropriate remedy for the factual circumstance present in this case. See *Koblinsky v. Putnam County Bd. of Educ.*, Docket No. 2010-1036-CONS (Nov. 8, 2010) (termination overturned when the grievant was dismissed for insubordination for refusing to attend an investigatory interview without representation); *Beaton v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2013-0496-CONS (December 20, 2013) (employer guidelines found to be contrary to law but no grievant protested any discipline issued under the guidelines); *Deyerle v. Dep't of Health and Human Res.*, Docket No. 2013-2231-CONS (July 15, 2014) (indefinite suspension overturned for violation of both the right to representation but also for the violation of the prohibition of indefinite suspension when Grievant also not afforded a pre-determination conference).

¹⁴ Grievant at one time asserted that due to his participation in an ongoing grievance at the time of the meeting request, Grievant reached out to his grievance representative, Gordon

representation present for the meeting. Respondent argues that the meeting was not in fact “disciplinary” in nature, and thus, Grievant did not have the right to have a legal representative present for the meeting.

WEST VIRGINIA CODE § 6C-2-3(g) (1) states: “(1) An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.” Simply stating that something is not disciplinary does not make it true. The fact that Respondent labeled the meeting as involving “personnel matters” in no way defines what the actual purpose of, or topics, discussed during the meeting were. Further analysis is warranted before making the determination of what the purpose of the meeting was and what topics were discussed. **If the topics that were discussed “could” have or did lead to disciplinary action, Grievant had a statutory right to have a representative present with him.** This Grievance Board has recognized that “[t]he label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if she makes such a request.” *Koblinsky v. Putnam County Health Department*, Docket No. 2010-1306-CONS (Nov. 8, 2010).

Respondent did not consult Grievant in any way prior to transferring him over four and a half hours away. Stephen McDaniel, Director of WVDNR during the time of Grievant’s transfer and meeting, testified that he does not believe that a performance improvement plan is a form of “progressive discipline” yet also claims that a “performance

Simmons, requesting that he attend the meeting along with him due to a worry that the meeting was in retaliation for his ongoing grievance filings.

improvement plan” puts an employee on the “road to being terminated.” These two statements are contradictory. Director McDaniel indicated that the flood that led to Grievant’s transfer was “one final incident,” but that additional considerations, not included in the transfer letter, were considered when making the decision to transfer Grievant. Grievant had previously been subject to a nine page, thoroughly detailed, performance improvement plan. Director McDaniel indicated when discussing the decision to transfer Grievant, that Respondent prefers to transfer rather than terminate long term employees. McDaniel L3 testimony.

While Respondent officially takes the position that the transfer was not disciplinary in nature, Respondent did in fact indicate that they had considered alternative action regarding Grievant, up to and including termination of employment. This is not inconsequential information, discipline was being considered by management.¹⁵ Respondent ultimately decided to involuntarily transfer Grievant, forcing him to move over four and a half hours away to keep his job of over twenty-one (21) years. Such draconian action is not an everyday personnel decision. Respondent SHOULD have allowed Grievant representation at the May 7, 2021 meeting.

The West Virginia Supreme Court has noted that depending on the facts, teacher transfers in this state may be either administrative or disciplinary in nature. *Holland v. Board of Educ.*, 174 W. Va. 393, 327 S.E.2d 155, (1985). While *Holland* ultimately decided based upon a state board of education policy which gives school employees certain rights

¹⁵ Respondent claims that the transfer was in no way disciplinary; however, they transferred post performance improvement plan, after a significant fiscal event, during the time of a pending grievance involving alleged performance issues and after losing confidence in his abilities.

if a transfer is disciplinary, the decision recognized the dual nature of transfers. That duality applies equally to state employees. Administrative transfers are based upon administrative need and disciplinary transfers are related to prior misconduct. See *also*, *Townshend v. Board of Educ.*, 183 W. Va. 418, 396 S.E.2d 185 (1990). Recognized by the Grievance Board in *Craig v. Div. of Natural Res.*, Docket No. 05-DNR-030 (July 20, 2005).

Respondent's authority to transfer Grievant is not in dispute.¹⁶ It is Respondent's intent that is most debatable. Respondent tends to preference the transfer as an alternative to discipline. The undersign does not agree. **Geographic transfers or reassignments in lieu of other methods of discipline have been held to be disciplinary in nature.** *Craig v. Division of Natural Resources*, Docket No. 05-DNR-030 (July 20, 2005); *Lilly v. Dep't of Transp.*, Docket No. 07-DOH-387 (June 30, 2008); *Swope v. Bd. Of Dir/Shepherd Coll.*, Docket No. 94-BOD-1095 (July 11, 1995) *aff'd*, Jefferson Cnty. Cir. Ct., Civil Action No.95-P-133 (Feb. 8, 1996).

The fact that Respondent labeled the meeting as involving "personnel matters" in no way defines what the actual purpose of or topics discussed during the meeting.

¹⁶ The West Virginia Division of Personnel Administrative Rule § 3.88 defines transfer as "[t]he movement of an employee to a different subdivision or geographic location of the same or a different agency." The Administrative Rule states in section 11.6(a) that "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time." The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. *Bever v. Dep't of Health & Human Res.*, Docket No. 96-HHR-258 (Dec. 31, 1996); *Goodnight v. W. Va. Div. of Human Serv.*, Docket No. 91-DHS-111 (May 31, 1991).

Grievant knew he was in trouble.¹⁷ Grievant gave notice and made arrangements for representation. It is more probable than not that the involuntary transfer of Grievant from Cabwaylingo State Forest to Kumbrabow State Forest was disciplinary in nature, or at the very least, that the topic of the May 7, 2021 meeting “could lead to discipline.” It would have been prudent for Respondent to be more mindful of W.Va. Code § 6C-2-3(g)(1). The label given to the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if he or she makes such a request.

Respondent’s actions were calculated and orchestrated, but the undersigned is not prepared to classify Respondent’s actions as per se retaliatory. 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, the Grievant must establish by a preponderance of the evidence the following elements:

- (1) That he engaged in protected activity;
- (2) That he was subsequently treated in an adverse manner by the employer or an agent;

¹⁷ Grievant argues that a written plan of improvement containing specific expectations and time frames in which to accomplish them, may be simultaneously implemented as a component of the corrective counseling session. (*West Virginia Division of Personnel Supervisor’s Guide to Progressive Corrective and Disciplinary Action*). The Division of Personnel indicates that even informal corrective counseling that does not amount to a verbal or written reprimand/warning are a form of progressive discipline. (*West Virginia Division of Personnel Supervisor’s Guide to Progressive Corrective and Disciplinary Action*). Part of the corrective counseling could include a written plan of improvement, which is still a part of the progressive discipline. *If informal counseling constitutes progressive discipline then clearly an involuntary transfer following a performance improvement plan clearly qualifies as a form of progressive discipline and Grievant is entitled to have his representative present for any related meetings.* [emphasis added] See Grievant’s submitted written fact/law proposal.

- (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). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a "significant," "substantial" or motivating" factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

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). There is no doubt that Grievant was engaged in activities protected by W. VA. CODE § 6C-2-3(h) which states:

(h) Reprisal. -- 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.

Grievant had previously filed a grievance against Respondent which is protected activity under the foregoing statute. Respondent was aware that Grievant was actively participating in pending grievance activities. Grievant's actions or recent inactions had significant negative economic impact (\$48,532.48 worth of damage). Further, given the timeframe, a retaliatory motive can be inferred. Grievant and Respondent were at odds regarding a number of issues.

In the shadow of Respondent's orchestrated actions, it is argued that Respondent had a legitimate rationale for Grievant's transfer. Respondent offered simple non-retaliatory reasons for the re-assignment Grievant received. E.g., *Kumbrabow had a vacancy for Park Superintendent. The prior Park Superintendent at Kumbrabow had transferred to Cass Scenic Railroad State Park and was working double-duty going back and forth between Kumbrabow and Cass while his position was being filled. It was beneficial to Kumbrabow to expeditiously fill the position.* It is evident that several factors played into Respondent's deliberation,¹⁸ but it is more probable than not, that

¹⁸ Chief Reed testified that Grievant "struggled" on "various levels" at Cabwaylingo. Grievant's absence and lack of delegation relating to the February 2021 flooding incident; Grievant's prior incident of going to Hawaii without delegating Cabwaylingo to the care of another employee, as addressed in the 2019 PIP, as well as other incidents of Grievant not being present;

Respondent's actions were intended as corrective rather than retaliatory. The true nature of Respondent's transfer is not easily discerned. Respondent's Human Resources Director, Ms. Fout-Tinsley testified that other options were considered, such as a demotion to a lower classification, but given Grievant's long tenure, Respondent chose to transfer Grievant.

The May 7, 2021 meeting in which Grievant was informed of his involuntary transfer from Cabwaylingo State Forest to Kumbrabow State Forest was disciplinary in nature, or at the very least, the topic of Grievant's conduct could reasonably lead to discipline and, as such, the meeting was in violation of Grievant's statutory rights under W.Va. Code § 6C-2-3(g)(1). In this case, Grievant was not given his statutory right to a representative at a meeting where disciplinary action was undeniably contemplated. Grievant was issued the transfer letter at the meeting. There is little reason to believe the results would have been altered by the representative's presence, Respondent establishes good cause for the transfer.¹⁹ Also see finding of fact 23. Respondent's determination was sensible given the totality of the circumstances. Therefore, it is not

the 2019 management audit which led to the 2019 PIP; and a matter involving Grievant's girlfriend verbally attacking Grievant's subordinate employee, on park grounds and in Grievant's presence, without Grievant intervening as he should. When taken as a whole, Chief Reed testified that Grievant had a "pattern of failure of leadership", which had to be addressed, especially in light of the new duties and obligations associated with the ATV pilot program at Cabwaylingo.

¹⁹ "Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). Respondent has substantial discretion in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). *Meadows, supra*

found to be feasible to invalidate the transfer, but **Respondent's conduct cannot be condoned.**

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); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993) Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The West Virginia Division of Personnel Administrative Rule § 3.88 defines transfer as "[t]he movement of an employee to a different subdivision or geographic location of the same or a different agency." The Administrative Rule states in section 11.6(a) that "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time."

3. The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n.*, 155 W. Va. 69, 181 S.E.2d 22 (1971).

4. W. VA. CODE § 6C-2-3(g)(1) provides: “An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.”

5. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right under W. VA. CODE § 6C-2-3(g)(1) to have a representative present if requested.” *Koblinsky v. Putnam County Health Department*, Docket No. 2010-1306-CONS (November 8, 2010). Regardless of the label or title given to a meeting by the employer, if the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested, pursuant to W. VA. CODE § 6C-2-3(g)(1). *Beaton v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2013-0496-CONS (December 20, 2013).

6. “An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.” W. Va. Code § 6C-2-3(g)(1). The Grievance Board has interpreted this statute to include meetings conducted for the purpose of investigation as the findings of an investigation could lead to disciplinary action. *Koblinsky v. Putnam County Health Dep’t*, Docket No. 2010-1306-CONS (Nov. 8, 2010).

7. It is established that Grievant’s involuntary transfer from Cabwaylingo State Forest to Kumbrabow State Forest was disciplinary in nature, or at the very least, that the topic of the May 7, 2021 meeting “could lead to discipline.”

8. 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, the Grievant must establish by a preponderance of the evidence the following elements:

- (1) That he engaged in protected activity;
- (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).

9. In order to establish a prima facie case of retaliation, a grievant 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).

10. 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 (198[8]).

11. "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 Cnty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

12. It is established that Grievant was involuntary transferred from Cabwaylingo State Forest to Kumbrabow State Forest. Further, Respondent provided persuasive evidence of legitimate non-discriminatory reasons for its actions. Grievant failed to prove that Respondent's action of transferring his location of employment is an act of retaliation.

13. It is established by a preponderance of the evidence that Respondent's exclusion of Grievant's representative from the May 7, 2021 transfer meeting was in violation of Grievant's statutory rights under W.Va. Code § 6C-2-3(g)(1).

Accordingly, this grievance is **GRANTED**

Respondent's conduct is NOT condoned. Respondent is required to recognize that an employee has a statutory right under W. VA. CODE § 6C-2-3(g)(1).

It is difficult to view denial of a requested right as harmless error and this type of malfeasance will not be tolerated. Nevertheless, in the circumstance of this grievance, the instant ALJ is at a loss for an appropriate remedy to properly amend for Respondent's prohibitive action.²⁰ Reversal of the transfer, while a lawful remedy, is not found to be feasible or appropriate in that Respondent establishes irrefutable cause for the transfer.

Any party may appeal this decision to the Intermediate Court of Appeals.²¹ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

²⁰ WEST VIRGINIA CODE § 6C-2-6 (2018) is entitled, "Allocation of expenses and attorney's fees. It specifically states: (a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense. It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008) also see *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001). Further, this Grievance Board does not award tort-like or punitive damages.

²¹ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to 29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: July 26, 2022

Landon R. Brown
Administrative Law Judge