RICHARD CODDINGTON, .

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Grievant, .

.

v. . DOCKET NOS. 93-HHR-265/

. 266/267

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WEST VIRGINIA DEPARTMENT OF .

HEALTH AND HUMAN RESOURCES/ .

WESTON STATE HOSPITAL, .

.

Respondent. .

D E C I S I O N

Richard Coddington (hereinafter "Grievant") is employed by the West Virginia Department of Health and Human Resources (hereinafter "DHHR") as a Health Service Associate assigned to Weston State Hospital (hereinafter "WSH"). This appeal involves three separate grievances which Grievant initiated on December 29, 1992, January 27, 1993, and April 6, 1993, respectively. Failing to obtain a favorable resolution at Levels I and II, Grievant timely elevated each grievance to Level III where the three grievances were consolidated and a hearing held on June 2, 1993. (See footnote 1) Followingdenial of the consolidated grievances at Level III, Grievant appealed to Level IV where an evidentiary hearing was conducted on November 15, 1993. (See footnote 2) This matter became mature for decision on December 29, 1993, following receipt of post-hearing submissions. (See footnote 3)

Grievant's first grievance (Docket No. 93-HHR-265, hereinafter "No. 265") reads as follows:

On November 4, 1992 I sent a memo to Gordon Steinhauer, M.A., M.B.A. reporting

a wrongful act regarding Clinical Decisions which is a breach of the public trust and clearly places employees and patients alike in serious jeopardy. On 11-6-92 I was called to Chip Garrison, Executive Assistant's Office to discuss the memo of 11-4-92. On 11-9-92 I sent a second memo to Gordon Steinhauer and made another attempt to explain my concern about making Clinical Decisions which, in my view, are contrary to statutory law. The memorandums dated 11-4-92 and 11-9-92 are enclosed as evidence. The statute in question is Article I, Section 27-1A-11 which clearly defines both the Administrator's and Clinical Director's responsibilities in making Clinical Decisions.

As the first step in relief sought I am requesting an interpretation of this Mental Health Law of the Stateof West Virginia be presented at our Level 2 hearing. In interpreting the statute I expect to receive in writing that the legislative history of the statute be studied in order to determine the legislature's intent for passing this law. The review will include reading the legislative debates recorded in the Congressional Record (or the state equivalent). In addition, I will need an interpretation of any regulations pertaining to this law from the Division of Health, Division of Personnel or any other agency which has the power to make regulations concerning application of the statute.

Since the date of my first memo, which was sent on 11-4-92, certain events took place and by 12-1-92 all seven Unit Directors had been demoted and directed to report to Dawn Scheick, Nurse Administrator. In the days leading up to our demotion negotiations were kept secret in principle but were leaked out in advance on purpose. Chip Garrison held a Unit Director's Meeting on Monday Morning at 10:00 A.M. and told us our fate just three hours before Gordon Steinhauer held an open staff meeting and made the announcements. From the time the rumors were leaked out on purpose up until now 12-29-92 our mental suffering continues. Each Unit Director has suffered extreme and grievous psychological stress and humiliation under Gordon Steinhauer's unlawful acts of tortuous conduct.

Mr. Steinhauer has used subterfuge in an attempt to evade being accused of any wrong-doing, however he was not successful.

Dawn Scheick, Nurse Administrator, stated in several meetings that when Gordon Steinhauer informed her the Unit Directors were being demoted and would report to her she was completely and totally surprised by this turn of events. She stated, she was overwhelmed by this decision and had no idea how to implement the change. She stated she had no idea what our job description was going to be and remains the same as of 12-29-92.

This decision was made by Mr. Steinhauer quickly and without any evidence of professional planning, very uncharacteristic of such a highly regarded Administrator.

I question his intent at this time and feel he clearly placed himself in the position of taking a reprisal against me. I'm convinced he demoted each Unit Director under the cloak of subterfuge to take this action against me under what he can claim is simply an organizational change. However, to make such a change without any organizational planning or technical expertise is very suspicious or he has never heard of the reasonably prudent man rule. A reasonably prudent man exercises due care, skill and diligence, and honesty whenever he makes decisions that have such an impact on his employees.

Mr. Steinhauer for taking a reprisal against me for reporting a wrongful act, I find you in violation of WV Code, Chapter 6C, Article I, which includes taking retaliation against me. Also, you are charged with discrimination under the same law.

Since each Unit Director is past the age of 40, I charge you in violation of the Age Discrimination in Employment Act.

You are also in violation of the Veterans Preference Act which states I must be given written notice ten days before my demotion and another ten days to appeal to the Civil Service Commission.

The relief I seek (See footnote 4) is for each Unit Director to be reinstated to their former position. Also, I request we be reinstated under the grandfather clause to protect us from any further retaliation from you. In addition we shall be Unit Directors, Supervisor III, reinstated to our full former positions, and not be subject to any reclassification what so ever. [sic]

Grievant's second grievance (Docket No. 93-HHR-266, hereinafter "No. 266") was initiated on January 27, 1993, and alleges the following:

Ann Jennings sent a letter on 11-10-92 which was effective on 11-24-92 giving notice of lay-off of all our 180 day temporary Health Service Workers, due to budget problems. This was done in order to save money. However we soon began having serious problems getting our Health Service work schedules covered. This wrongful act placed our Health Service Workers and patients alike in highprobability of dangerous consequences in the form of serious physical danger. Whenever anyone has to work double shifts long enough without any relief creates a dangerous place to work. Also, by the time we pay our overtime cost it will clearly show we ended up paying more than if we would have retained our 180 day temps who have no benefits to pay and would have avoided placing our people in danger.

Mr. Steinhauer, Chip Garrison and Ann Jennings are charged with gross negligence, and violation of the W.V. Code, and the Occupational Safety and Health Act, in the wrongful act of failure to provide safety for staff and patients alike. In addition this violation is also a breach of public trust.

Relief Sought:

Ann Jennings, Chip Garrison and Mr. Gordon Steinhauer should be severely reprimanded and placed in non-supervisory positions.

The third grievance (Docket No. 93-HHR-267, hereinafter "No. 267") was submitted by Grievant on April 6, 1993, and recited the following allegations:

On 4-2-93 the Administrator of Weston Hospital, Gordon Steinhauer, held a meeting which began at 10:00 A.M. to discuss possible changes in our new job description of Unit Coordinator due to our recent demotion.

Mr. Steinhauer and Dr. Haynes, our Clinical Director, had held a previous meeting with the Unit Directors shortly after we were demoted to Unit Coordinators to discuss two major points we were concerned with. Mr. Steinhauer stated during this meeting that the job description was not written in stone and could be worked out. In addition, he requested that we go ahead and work under the proposed job description for 30 days to see how everything would work. We agreed to work the tentative job description for 30 days with the understanding that there was room for change after that period of time had passed.

At our meeting of 4-2-93 Mr. Steinhauer refused to compromise in any way on the job description. Also, when we spoke up for ourselves and began to pressure him slightly, he stated that it would be better to yield to his demands because the only other alternative would be to not have a job at Weston Hospital at all. Mike Todt,Ph.D., Chief Operations Officer, was present at this meeting when Mr. Steinhauer threatened our jobs and remained silent. This indicates Dr. Todt was in agreement with Mr. Steinhauer's threat.

Mr. Steinhauer I find you and Mike Todt in violation of the law again for threatening not only my job but for threatening each Unit Coordinator with the loss of their job which includes: Nancy Rush, Kenny Reed, Larry Greenlief, Dianne Douglas, Richard Coddington and Bob Fallon, who had open heart surgery and was absent. Also, I

request this grievance dated 4-6-93 be placed with my original grievance as evidence which will give great strength to the pending charges already filed.

During this same meeting, Mr. Steinhauer and Dr. Todt announced that they had finally developed a plan of future operation for Weston Hospital which was still in a draft form because it was not finalized yet. Mr. Steinhauer stated that it would be ready soon.

I was appalled that our Administrator was making daily clinical decisions without any type of professional plan to go by. An experienced manager should have a reasonable plan of action for each and every decision made along with up to date documentation for his reasoning. This enlightening statement Mr. Steinhauer made will also give further strength to the pending charges already filed.

DISCUSSION

As should be apparent from the foregoing allegations, (See footnote 5) thesegrievances are closely related. Moreover, this entire series of events transpired following Grievant's questioning of an earlier reorganization in 1991 which placed the Nurse Administrator at WSH under the direct supervision of the Hospital Administrator rather than the Clinical Director. To more clearly place this issue in context, the text of Grievant's original memorandum to WSH's Hospital Administrator, Gordon Steinhauer, (See footnote 6) dated November 4, 1992, regarding "Clinical Decisions" is quoted as follows:

The Mental Health Laws of West Virginia, Article I, Section 27-1-27 define both the Superintendent and Clinical Director's responsibilities.

Well over 1 year ago the Administration of Weston Hospital implemented a change whereby the Nurse Administrator began reporting directly to the Administrator instead of the Clinical Director. Our mental health laws state very clearly that all clinical disciplines report to the Clinical Director. Also, they state very clearly all persons employed at a state hospital shall be under the jurisdiction and authority of the Superintendent of such state hospital. I'm concerned that we are not in compliance with our Mental Health Laws. Since all employees at Weston State Hospital are under the authority of the Administrator, according to the law, why is itnecessary to implement a change such as this? In my opinion, our Administrator, during this period of time, did not exercise skill and diligence.

Since agents are liable to third parties for wrongful acts, I'm sure you can appreciate my concern. If we are not in compliance with the law at this time, staff and patients alike are in serious jeopardy.

I'm confident you will take immediate action on this matter and communicate to those that participated in making and implementing this change of a major clinical discipline reporting to the Hospital Administrator instead of the Clinical Director.

After your consideration of this memo, I request that a copy be sent to W. Donald Weston, M.D. for his information.

The foregoing memo resulted in a meeting on November 6, 1992, between Grievant and Mr. Chip Garrison, WSH's Director of Administrative Services. That meeting generated yet another memo from Grievant to Mr. Steinhauer dated November 9, 1992, and stating the following:

On 11-6-92 I was called to Chip Garrison, Executive Assistant's Office to discuss a memo on clinical decisions which was written by me on 11-4-92. During this meeting, Chip stated that yes, Article I Section 27-1A-11 did proclaim by law that all medical disciplines report exclusively to the Clinical Director, however, Central Office did retain the right to change reporting procedures at any time. Furthermore, he stated that our Administration had full approval from Central Office before implementing the change of our Nursing Administrator reporting directly to our Hospital Administrator instead of the Clinical Director. The approval given allows the Hospital Administrator to usurp the authority to make clinical decisions from the Clinical Director which he has empowered to him by law.

The intent of the law is quite clear in this case, and that is, the Hospital Administrator makes administrative decisions only and the Clinical Director makes all clinical decisions. Also, the law further states, the Clinical Director must be a medical doctor. The reason for this division of power is, the Hospital Administrator has no medical training and is not allowed to make clinical decisions.

There isn't any one in Central Office empowered to change the law at will. Apparently Central Office did give approval for changing our reporting procedure, and in so doing, has placed the entire Division of Health at risk.

> **After your consideration of this memo, I request a copy be sent to W. Donald Weston, M.D. along with a copy of the memo dated 11-4-92 for his information.**

The grievance alleged in No. 265 is essentially twofold. First, Grievant contends that the Respondent's reorganization in 1991, which placed the Nurse Administrator under the immediate supervision of the Hospital Administrator rather than the Clinical Director, violates W. Va. Code §27-1-7. (See footnote 7) **Secondly, Grievant contends that he was "demoted" in retaliation for his actions in challenging the reorganization. This decision will first consider Grievant's allegation in No. 265 relating to the 1991 reorganization.**

Although Grievant has variously cited to "27-1-27" (G Ex 1 at L III) and "27-1A-11" (G Ex 2 at L III) as the W. Va. Code provisions which he contends that Respondent is violating, it became apparent at Level IV that W. Va. Code §27-1-7 provides the primary foundation for Grievant's contentions. That statute provides as follows:

> **(a) The administrator of a state-operated treatment facility shall be its chief executive officer and shall have the authority to manage and administer the financial, business and personnel affairs of such facility. All other persons employed at the state-operated treatment facility shall be under the jurisdiction and authority of the administrator of the treatment facility who need not be a physician.**
>
> **(b) The clinical director shall have the responsibility for decisions involving clinical and medical treatment of patients in a state-operated mental health facility. The clinical director must be a physician duly licensed to practice medicine in this state who has completed training in an accredited program of post-graduate education in psychiatry.**
>
> **(c) In any facility designated by the secretary of the department of health and human resources as a facility for the mentally retarded in which programs and services are designed primarily to provide education, training and rehabilitation rather than medical or psychiatric treatment, the duties and responsibilities, other than those directly related to medical treatment services, assigned to the clinical director by this section or elsewhere in this chapter, shall be assigned to and become the responsibility of the administrator of such facility, or of a person with expertise in the field of mental retardation, who need not be a physician, designated by the administrator.**

There was no evidence presented to indicate that WSH has been designated as a facility that falls under the exception provided in §27-1-7(c). Thus, the general rules set forth in §§27-1-7(a) and (b) are controlling. Since those provisions are clear and unambiguous, no statutory construction is required to address the issue raised in this grievance. (See footnote 8)

The statute makes it clear that "responsibility for decisions involving clinical and medical treatment of patients" is assigned to the Clinical Director. At the same time, the Hospital Administrator is provided "authority to manage and administer the financial, business and personnel affairs of such facility." The specific mandate which Grievant challenges involves requiring the Nurse Administrator to report to the Hospital Administrator in lieu of the Clinical Director. That relationship is nothing more than a "personnel" matter, a decision properly within the discretion of the Administrator under W. Va. Code §27-1-7(a).

Grievant's speculation that this arrangement is more likely to result in the Hospital Administrator rendering a clinical or medical decision in regard to some issue raised by the Nurse Administrator may have some merit. However, such infringement upon the statutory purview of the Clinical Director has not been shown to be either inevitable or inherent. (See footnote 9) **Indeed, Dawn Scheick, the current Nurse Administrator, testified that she did not meet with the Hospital Administrator to discuss direct clinical decisions. Scheick Deposition at 30-31. Patrick Haynes, M.D., the current Clinical Director at WSH, testified that he was not aware of any clinical decisions being made without his approval. Haynes Deposition at 3-4. Moreover, Dr. Haynes testified that he was not aware of any clinical decision having been made by Mr. Steinhauer. Haynes Deposition at 10. This statement is very significant in that it would be Dr. Haynes' area of responsibility that would suffer incursion from the Hospital Administrator making such decisions.** (See footnote 10) **Dr. Haynes further testified that if such decisions were being made improperly, he would leave his position as he had done under a previous administration. Haynes Deposition at 15.**

Grievant presented evidence in regard to patients mowing lawns without wearing what Grievant believed was appropriate safety equipment as an example of an improper clinical decision made by the Hospital Administrator. However, a preponderance of the evidence indicates that the decision as to which patients participate in mowing the lawn is made by the Clinical Director as a clinical decision, (See footnote 11) **while the Hospital Administrator**

determines what safety equipment will be worn by individuals mowing the lawn,be they patients or employees. (See footnote 12) Such division of authority is wholly consistent with W. Va. Code §27-1-7. (See footnote 13) Accordingly, the undersigned finds that the current arrangement whereby the Nurse Administrator reports directly to the Hospital Administrator, in the same manner as the Clinical Director reports directly to the Hospital Administrator, does not contravene W. Va. Code §27-1-7, or any other statutory provision cited by Grievant in the course of this proceeding. (See footnote 14)

Having addressed Grievant's claim that WSH and DHHR reassigned the Nursing Director contrary to the state's mental health laws, it is appropriate to proceed to the second issue in No. 265 which involves a claim that Grievant was improperly "demoted" as a result of the memoranda which he wrote to WSH administrators complaining of this reporting relationship. Essentially, Grievant alleges that he is entitled to "whistle-blower" status under W. Va. Code §6C-1-1, et seq., the "Whistle-blower Law." That statute provides in §6C-1-3(a) as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changingthe employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

This Board previously applied this state's Whistle-blower Law in Graley v. W. Va. Parkways Economic Development and Tourism Authority (See footnote 15) without rendering a specific determination on whether or not claims under this statute fall within this Board's jurisdiction. However, given our subsequent decision in Norton v. W. Va. Northern Community College, (See footnote 16) where this Board determined that it does not have jurisdiction over claims under state and federal civil rights statutes, it appears prudent to determine applicability of the Whistle-blower Law to the grievance procedure administered by this Board.

Initially, it is noted that unlike this state's Human Rights Act, the Whistle-blower Law does not create a separate entity, such as the Human Rights Commission, to hear claims arising thereunder. Cf. W. Va. Code §§5-11-1 et seq. and §§6C-1-1 et seq. Moreover, unlike the situation in Campbell v. W. Va. Division of Natural Resources, Docket Nos. 90-DNR-081/179, etc. (July 30, 1991), there is no established forum with specialized experience or expertise,

such as the Wage and Hour Administration of the United States Department of Labor, available to hear whistle-blower claims. Indeed, the type of allegations normally formulated under a"whistle-blower" statute are generically similar to the retaliation or reprisal claims which this Board routinely deals with under W. Va. Code §§29-6A-2(p) and 18-29-2(p). See, e.g., Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Hurst v. W. Va. Dept. of Transp./Div. of Highways, Docket Nos. 90-DOH-093/094/095 (Aug. 31, 1990); Gerstner v. Gilmer County Bd. of Educ., Docket No. 11-88-184 (Jan 31, 1989); Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988); Wyatt v. Marshall Univ., Docket No. BOR2-87-044-1 (Sept. 29, 1987).

W. Va. Code §6C-1-4(a) simply provides that "[a] person who alleges that he is a victim of a violation of this article may bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within one hundred eighty days after the occurrence of the alleged violation." Although this Board is not a "court," there is nothing in the statute to suggest that the courts are the exclusive forum for state employees to obtain available relief for a whistle-blower violation, (See footnote 17) given the broad definition of a grievance in W. Va. Code §29-6A-2(i):

> "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which suchemployees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

Because W. Va. Code §6C-1-2 makes it clear that the Whistle-blower Law is applicable to public employees such as Grievant, Grievant's claim directly involving a statute specifically applicable to public employees appears to state a claim which is cognizable under the statutory grievance procedure for state employees. Moreover, given the absence of the factors which persuaded this Board that the Legislature did not intend to vest it with jurisdiction over claims arising under state and federal civil rights statutes or federal wage and hour laws (Norton and Campbell, supra.), the undersigned finds that a claim by an

employee working in a nonjudicial function (See footnote 18) of a department of the state of West Virginia alleging a violation of this state's "Whistle-blower Law," W. Va. Code §6C-1-1, et seq., is a matter properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. Graley, supra.

In general, a grievant alleging discrimination or retaliation in violation of W. Va. Code §6C-1-3, in order to establish a prima facie case, (See footnote 19) must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of 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 action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Parker v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Graley, supra; Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989)

Applying these general rules to the case at hand, the undersigned accepts that Grievant's conduct in submitting complaining memoranda to WSH officials placed him beneath the protective mantleof the Whistle-blower statute. (See footnote 20) Likewise, there is no question that WSH was aware of Grievant's activities. Grievant has further established that subsequent to this participation, his duties were changed in an adverse manner and that this action came in such proximity to the protected conduct so as to create an inference that the actions were taken in retaliation for Grievant's lodging complaints. Thus, Grievant is found to have established a prima facie case of unlawful retaliation.

Once a prima facie case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. Graley, supra. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1989); Frank's Shoe Store, supra, at 258; Parker, supra. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish

by a preponderance of the evidence that the offered reasons are merely pretextual. Graley, supra. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Sheperdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342, 352 (W. Va. 1983).

Consistent with the burdens discussed above, the Respondent presented evidence that as early as August 5, 1992, Mr. Garrison discussed reclassification of the Unit Directors as Supervisor II'sin a meeting where Grievant and other Unit Directors were present. A Ex 2 at L III. Moreover, these changes were being discussed throughout the August to September 1992 time frame in conjunction with the statewide reclassification project then underway across DHHR in accordance with guidelines established by the West Virginia Division of Personnel. Lowell Basford, Assistant Director of the Division of Personnel (hereinafter "DOP") for Classification and Compensation, testified that this reclassification effort was ongoing in DHHR for approximately 18 months prior to December 16, 1992.

Thus, DHHR demonstrated that certain changes in the duties assigned to Grievant and other Unit Directors was both contemplated and initiated long before Grievant submitted his complaints to WSH management. Although the change was not announced and implemented until after Grievant's complaints, DHHR has shown that the changes which resulted in Grievant's reclassification as a Supervisor II on or about December 16, 1992 were in no way connected with Grievant's complaints. No evidence was presented that would reasonably lead to the conclusion that the explanation provided by DHHR as to this reclassification was merely a pretext for retaliation.

However, Grievant's complaint extends to a further decision to have the Unit Directors report to the Nurse Administrator and related modifications in their duties and responsibilities. This further change was initiated, with a certain degree of confusion, on or about December 1, 1992, when Grievant and other Unit Directors were directed to begin reporting to Dawn Scheick, WSH'sNurse Administrator, rather than Chip Garrison, WSH's Director of Administrative Services. The full scope of these changes was not formally announced until a series of meetings were held with the Unit Directors on December 29, 1992. As a direct result of these changes, Grievant and the other Unit Directors, now called "Unit Coordinators," were reclassified as Health Service Associates, (See footnote 21) **a position in a**

lower pay grade than Supervisor II. R Ex 1, 6, 3. This change in duties and subsequent reclassification constituted a "functional demotion" since Grievant and the other Unit Coordinators did not suffer any loss of pay as a result. (See footnote 22) Unfortunately, this reclassification determination was not made until on orabout May 17, 1993, and was not related to the Grievant until his Level III hearing when the determination arrived in the form of a facsimile message from Mr. Basford at DOP to the Level III Grievance Evaluator. R Ex 1.

Notwithstanding the fact that Grievant was functionally demoted rather than demoted for cause, this change in status constitutes an adverse employment decision that DHHR must show was taken for a legitimate, non-retaliatory reason, in order to refute Grievant's prima facie case under the Whistle-blower Law. In that regard, it was demonstrated that this decision resulted from a set of factors separate and distinct from the earlier reclassification from Supervisor III to Supervisor II. Included in those factors was the construction of a new WSH facility that reflects the revised attitudes in this state and nation toward treatment of the mentally ill. One significant result of this change is that the new WSH will be considerably smaller than the old facility with a patient capacity of only 150 versus over 600 in the old WSH. Haynes Deposition at 5. Concomitant with obtaining a new facility, WSH is seeking accreditation from the Joint Commission on Accreditation of Health Organizations (hereinafter "JCAHO"). As a result of all these changes, management has been reviewing the way WSH conducts business.

Further indicative of a revised approach for operating WSH is the fact that DHHR has contracted with Ramsey Health Care, Inc. (hereinafter "RHC"), an independent management firm, to manage WSH for the state. Gordon Steinhauer is employed by RHC as the ChiefExecutive Officer/Hospital Administrator at WSH. Although the Level III decision makes reference to an "independent consulting firm" providing advice on organizational options to enhance the accreditation effort, (See footnote 23) Mr. Steinhauer clarified in his Level IV testimony that this advice emanated from employees of RHC, Mary Flanagan and Kathy Abrahamson. Since Mr. Steinhauer, Ms. Flanagan and Ms. Abrahamson were all working for RHC under the same management contract, Mr. Steinhauer did not see any necessity to have his colleagues' advice reduced to writing. Mr. Steinhauer testified that these individuals spent considerable time at WSH (Ms. Flanagan was there for five months) and that he found their

recommendations consistent with his observations.

Dr. Haynes testified that the decision to change the duties of the Unit Directors resulted from a group discussion and that he voted in favor of the change. Haynes Deposition at 14. Since Dr. Haynes, as the Clinical Director, would be the beneficiary of Grievant's whistle-blowing complaint that clinical decisions were being usurped by the Hospital Administrator, he would have no logical motive to participate in an act of retaliation against Grievant. Accordingly, Dr. Haynes' testimony supporting this change provides significant support to Mr. Steinhauer's representations that the change in Unit Directors' duties did not result from any retaliatory motive.

Dawn Scheick testified that changing the duties of the Unit Directors and having these newly-designated "Unit Coordinators"report through nursing channels was intended to relieve nurses of certain administrative duties. This, in turn, would provide nurses with more time to perform direct patient care, a goal which tended to further WSH's intent to obtain accreditation from JCAHO. (See footnote 24) **Mr. Steinhauer similarly testified to this effect, further noting that he felt that all employees involved in direct patient care should report through nursing channels. Consistent with this testimony, the Position Description (PD) for Grievant's current position, and that of the other Unit Coordinators, contains the following "General Summary:"**

> **The Unit Coordinators shall assist the Nurse Manager in developing and carrying out plans to solve operational problems to facilitate and assure efficiency on the Unit. The primary duties shall include 24-hour coordination of the service delivery system under the direct supervision of the Nurse Manager by working within prescribed guidelines, with latitude to vary methods, approaches, and tools necessary to achieve the desired outcome. R Ex 6.**

While this change in responsibilities and organization clearly represents a "judgment call" where not all hospital administrators would necessarily have reached the same conclusion and made the same decision, Grievant did not show that Mr. Steinhauer's decision was pretextual or that his rationale to support this decision was simply fabricated to facilitate retaliation against Grievant forhis whistle-blowing allegations. In this regard, the fact that all Unit Directors had their positions changed so that Grievant was not singled out for adverse

treatment is considered significant. Moreover, DHHR demonstrated that some changes were inevitable, given the circumstances under which WSH was then operating and has been preparing to operate, in a new, hopefully accredited, facility. Thus, these changes in duties and responsibilities, while having a negative impact on Grievant and many of his co-workers, were made in good faith according to a preponderance of the evidence.

It does appear that Grievant and the other Unit Coordinators were led to believe, based upon certain comments by Mr. Steinhauer, that their new PD's would not be submitted to DOP until some further activity had occurred, such as a "trial period" that would allow a determination by WSH management whether this new arrangement was achieving the results expected. However, the PD's were subsequently forwarded to DOP where Grievant and the other Unit Coordinators were duly reclassified as Health Service Associates.

Both Mr. Steinhauer and Mr. Todt expressed surprise that this had occurred. Mr. Todt's testimony at his deposition is significant in this regard:

> **Q [By Grievant] Do you have any knowledge that this was collusion?**
>
> **A Absolutely not. As I stated before, Gordon and I -- I was very surprised and he was very surprised that they went in.**

Q But you couldn't call it back?

A No, we could not recall it back.

Q You couldn't pick up the phone and call it back?

> **A No, once it goes into the Division of Personnel and it's down there, you have got to live with that.**

Q You have got to live with it.

A The only way to change it is --

Q Mr. Todt, do you remember confiscating two witness list (sic) I circulated through the hospital on 6/7/93?

Todt Deposition at 11-12.

As Mr. Basford from DOP testified, the employing agency is free to change the duties of an employee at any time. Since Mr. Todt did not complete his answer during his deposition, it is not clear if he was aware that he could have changed the PD if he found it necessary to change the duties and responsibilities of the Unit Coordinators. Thus, it appears that Mr. Todt and Mr. Steinhauer were under the mistaken impression that they could not withdraw the PD's once they had gone to DOP. However, their failure to make any effort to retrieve the PD's pending further discussions with the Unit Coordinators was not improper, given that state employees do not have a right to negotiate the duties and responsibilities of their positions with their employer. Moreover, Mr. Garrison substantially clarified this issue through his testimony at Level IV wherein he explained that the PD's were forwarded to DOP in response to a date having been set for Grievant's Level III hearing on his grievance (No. 265). Mr. Garrison's explanation that he believed DOP should have an opportunity to review the new PD's in view of Grievant's request to be reinstated to a Supervisor III classification as a Unit Director appears reasonable. In anyevent, neither the fact that the PD's were forwarded to DOP without specific approval from Mr. Steinhauer or Mr. Todt nor that they refused to recall the PD's from DOP refutes DHHR's explanation for the changes in the duties and responsibilities of the Unit Coordinators nor demonstrates that such explanation was merely a pretext for unlawful retaliation against Grievant.

In regard to Grievant's allegation in No. 265 that DHHR and WSH violated the Age Discrimination in Employment Act (ADEA) (See footnote 25) by demoting Grievant and other Unit Directors, this charge falls under the jurisdiction of the West Virginia Human Rights Commission and the Equal Employment Opportunity Commission. Consistent with this Board's prior ruling in Norton v. West Virginia Northern Community College, (See footnote 26) the undersigned is without authority to adjudicate claims based on federal civil rights laws. (See footnote 27)

Grievant's claim in No. 265 that his "demotion" was effected contrary to notice

requirements in the Veterans Preference Act is without merit. (See footnote 28) Grievant never provided any specific reference to the state or federal law on which he based this allegation. Theundersigned is not aware of any state law which makes the federal Veterans Preference Act, 5 U.S.C. §§2101 et seq., applicable to state employees such as Grievant. Moreover, Grievant did not present evidence that he was a qualified "veteran" entitled to any form of protection under such statute. See Mitchell v. Cohen, 333 U.S. 411 (1948); Carmel v. U.S. Civil Service Comm'n, 255 F.2d 190 (D.C. Cir. 1958); Jacaruso v. Dept. of the Army, 1 M.S.P.B. 360 (1980).

Having dealt with each issue properly raised in No. 265, Grievant's second grievance, No. 266, which related to the decision to lay-off temporary Health Service Workers due to budget problems may now be addressed. This aspect of Grievant's case suffered from a paucity of proof. While it was abundantly clear that this decision was generally unpopular with many workers, despite the overtime they received as a result of the decision, there was no evidence that any employee or patient was directly harmed as the result of this reduced staffing. Likewise, there was no evidence as to how this decision violated either the federal or state Occupational Safety and Health Act (OSHA) (See footnote 29) or W. Va. Code §§21-3-1 and 21-3-2.

Dr. Haynes acknowledged that there was a "crisis" after the temporary workers were laid off. Haynes Deposition at 6. Because of increased admissions beyond the control of WSH management, it became necessary to work some employees on double shifts, contraryto an internal policy within WSH, and to assign some employees who did not have current training in CPR (cardio-pulmonary resuscitation) to work with patients. (See footnote 30) However, none of these circumstances, individually or combined, give rise to any specific violation of law required to sustain this grievance. In addition, the available evidence indicates that this "crisis" has been substantially resolved by incremental hiring of additional temporary workers (See footnote 31) while the hospital census has been reduced from over 200 to approximately 175 at the time of the Level IV hearing in November 1993.

Moreover, Grievant's only requested remedy is to have disciplinary action taken against the WSH managers who made the decision to lay off the temporary workers. Such a remedy is not available through the state grievance procedure. (See footnote 32) Accordingly,this

grievance amounts to nothing more than a request for an advisory opinion from this Board on the propriety of laying off the temporary workers. (See footnote 33) Since this Board does not render opinions that are merely advisory, particularly when the underlying problem has effectively become moot, this grievance must be rejected. Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1985); Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Lozier v. W. Va. Univ., Docket No. 30-86-231-2 (Aug. 17, 1987);

Finally, Grievant's charge in No. 267 that Mr. Steinhauer improperly threatened Grievant with the loss of his job may be addressed. Grievant alleges that Mr. Steinhauer, in the course of a meeting to discuss possible changes in the new PD's for the Unit Coordinators, "stated it would be better to yield to his demands because the only other alternative would be to not have a job at Weston Hospital at all." The Grievance Evaluator at Level III found that Mr. Steinhauer "admittedly made" the comment attributedto him by Grievant but that the comment was not intended as a threat to Grievant.

A fair reading of Grievant's third grievance (No. 267) indicates that it relates back to his first grievance (No. 265). Thus, it appears that Grievant is alleging that this comment by Mr. Steinhauer was a further violation of the Whistle-blower Law. As previously noted, that statute provides:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste. W. Va. Code §6C-1-3(a) (emphasis added).

The same analysis as was applied to No. 265, supra, to determine whether Grievant established a prima facie case is applicable here, but with a different result. As previously determined by the undersigned, Grievant's memoranda to Mr. Steinhauer on November 4 and 9, 1992, constituted employee activity protected by the Whistle-blower Law. Likewise, it was established that the employer was aware of this protected activity. Moreover, assuming that Mr. Steinhauer's comment constituted a threat (as it was clearly perceived by Grievant), the

employer participated in conduct prohibited by the statute. **(See footnote 34)**

However, unlike the adverse reclassification and functional demotion actions which were undertaken by the employer in December 1992, this comment was not made by Mr. Steinhauer until a meeting on April 2, 1993. Thus, this alleged threat did not occur within such a period of time that a retaliatory motive can necessarily be inferred under W. Va. Code §6C-1-3. See Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318 (D. Mass.), aff'd 545 F.2d 222 (1st Cir. 1976); Burrows v. Chemed Corp., 567 F. Supp. 978 (E.D. Mo. 1983); Harris v. Richard Mfg. Co., 511 F. Supp. 1193 (W.D. Tenn. 1981), aff'd in material part 675 F.2d 811 (6th Cir. 1982).

When Mr. Steinhauer's comments are placed in context, it is noted that they were made in an open meeting with the former Unit Directors who were resisting a change in their duties and seeking a return to the status quo. As there was evidence that one of Mr. Steinhauer's colleagues with RHC had proposed eliminating the Unit Coordinators' positions as a possible option, Mr. Steinhauer was simply injecting a truthful dose of reality into the conversation.

The Whistle-blower Law prohibits employers from making threats to employees only when specific circumstances are present. Thus, this statute protects public employees who engage in legitimate protected activity who are thereafter threatened as a direct result, in whole or in part, of such activity. See Whatley v. Metropolitan Atlanta Transit Auth., 632 F.2d 1325 (5th Cir. 1980). For the reasons heretofore stated, the undersigned finds that this alleged "threat" was in no way related to Grievant's earlieractivity protected by the Whistle-blower Law and that Grievant has failed to establish a violation of any applicable law, statute or regulation as to such alleged threat.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant is currently employed by Weston State Hospital (WSH) as a Health Service Associate with the working title of "Unit Coordinator."

2. Prior to December 16, 1992, Grievant was employed by WSH as a Supervisor III with the working title of "Unit Director."

3. On November 4, 1992 and November 6, 1992, Grievant submitted written memoranda to

Gordon Steinhauer alleging that current reporting procedures whereby the Nurse Administrator reported to the Hospital Administrator, rather than the Clinical Director, violated the state's mental health laws, in particular §27-1-7 of the West Virginia Code.

4. Mr. Steinhauer is employed by Ramsey Health Care, Inc. (RHC) as the Chief Executive Officer/Hospital Administrator for WSH under a contract between the Department of Health and Human Resources (DHHR) and RHC to manage WSH.

5. On December 16, 1992, Grievant and other Unit Directors at WSH were reclassified as Supervisor II's.

6. Reclassification of the Unit Directors had been under consideration since at least August 1992 in conjunction with theDHHR-wide reclassification project undertaken by the West Virginia Division of Personnel (DOP).

7. On or before December 1, 1992, Grievant and the other Unit Directors were directed to report through nursing channels to Dawn Scheick, Nurse Administrator.

8. On December 28, 1992, the Unit Directors were formally advised that their duties were being significantly changed so that they became Unit Coordinators reporting to the Nurse Administrator, rather than the Director of Administrative Services, Chip Garrison.

9. As a result of this change in their position descriptions, Grievant and the other newly-designated Unit Coordinators were reclassified by DOP as Health Service Associates on May 17, 1993. This reclassification constituted a functional demotion and was formally communicated to the Grievant via facsimile on June 2, 1993, arriving in the course of the Level III hearing on these grievances. (Neither Grievant nor any of the other Unit Directors suffered an actual decrease in pay as a result of this functional demotion.)

10. Since assuming responsibility for administration of WSH under contract with DHHR in November 1992, Mr. Steinhauer and other RHC employees had been reviewing the organization of WSH with a view toward improving efficiency of operations prior to moving to a new and significantly smaller 150-bed facility and applying for accreditation from the Joint Commission on Accreditation of Health Organizations (JCAHO).

11. Based upon suggestions from other RHC employees that the Unit Directors' duties and responsibilities either be reduced or their positions be eliminated, Mr. Steinhauer elected to modify their duties and place them under the Nurse Administrators where they could perform

administrative duties, thereby allowing the nursing staff to engage in more direct patient care.

12. In a meeting with the Unit Coordinators (former Unit Directors), including Grievant, on April 2, 1993, Mr. Steinhauer, in response to inquiries regarding the necessity for changing the duties of the Unit Directors, stated that "our option might be to eliminate all these positions totally," or words to that affect. L III T at 50.

CONCLUSIONS OF LAW

1. A grievant bears the burden of proving his or her claims by a preponderance of the evidence. Parker v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. In accordance with W. Va. Code §29-6A-3(j), this Board does not have authority to rule on matters not properly raised and included in the grievance at Level III. W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

3. DHHR and WSH are not in violation of W. Va. Code §27-1-7 by requiring the Nurse Administrator at WSH to report directly to the Hospital Administrator, who is not a physician, rather than the Clinical Director, who is (and must be) a physician.

4. An allegation of unlawful retaliation under this state's Whistle-blower Law applicable to public employees, W. Va. Code §§6C-1-1 et seq., is a matter properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. W. Va. Code §29-6A-2(i); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

5. A grievant alleging discrimination or retaliation in violation of W. Va. Code §6C-1-3, in order to establish a prima facie case, must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of 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 action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley, supra.

6. Although Grievant made out a prima facie case in regard to his reclassification as a

Supervisor II and a separate change in duties which resulted in his further reclassification and functional demotion to a Health Service Associate classification, the Employer demonstrated legitimate, non-retaliatory, non-pretextual reasons for these actions, so as to refute Grievant's claim ofretaliation or discrimination. See Graley, supra; See also Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. In regard to a statement by Mr. Steinhauer at an April 2, 1993 meeting which Grievant believed constituted a threat of losing his job, Grievant failed to establish a prima facie case that this statement resulted from Grievant's activities which were protected under the Whistle-blower law, W. Va. Code §6C-1-3. See Whatley v. Metropolitan Atlanta Transit Auth., 632 F.2d 1325 (5th Cir. 1980). 8. Grievant's only requested relief in regard to grievance No. 266, that disciplinary action be taken against those WSH supervisors who decided to lay off a group of temporary workers, is not a proper remedy available through the state grievance procedure. See W. Va. Code §29-6A-5(b).

9. Since the crisis that resulted from laying off the temporary workers has passed, and Grievant is not seeking any proper form of relief, this grievance involves a matter that is moot and, therefore, not appropriate for decision by this Board. Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1985); Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: May 19, 1994

Footnote: 1The grievance alleged in Docket No. 93-HHR-265 was previously elevated to Level IV on the grounds that Respondent had failed to hold a Level III hearing within the time limits specified by W. Va. Code §29-6A-4. That case was remanded to Level III by another Administrative Law Judge in a Remand and Dismissal Order styled as Coddington v. Dept. of Health and Human Resources, Docket No. 92-HHR-040 (Feb. 8, 1993).

Footnote: 2In addition, depositions were held on November 12, 1993, to secure testimony from additional witnesses. However, additional documents which were attached to Grievant's post-hearing submission, many of which were never offered or admitted at Level III or Level IV, were not considered. Likewise, a purported "transcript" of the Level IV hearing which accompanied Respondent's post-hearing submission has neither been considered nor relied upon by the undersigned in deciding this grievance.

Footnote: 3Grievant has requested a "default judgement" because this decision was not rendered within 30 days following the hearing or the closing of the record as required by W. Va. Code §29-6A-4(d)(2) and that his various grievances were not processed in a timely manner through Levels II and III as required by W. Va. Code §29-6A-4. The grievance procedure for state employees does not contain a default provision like that in the grievance procedure for education employees set forth in W. Va. Code §18-29-3(a). Neither procedure contains a provision providing for default at Level IV. Accordingly, Grievant is not entitled to prevail by default as to any of his grievances at any stage of the statutory grievance procedure.

Footnote: 4As Grievant was the only individual to sign the original grievance form, it is apparent that this grievance was filed as an individual grievance rather than a grievance by a group of employees, as authorized under W. Va. Code §29-6A-2(i) & (k). Thus, the remedies available do not extend to other employees who were not an original party to the grievance and never took action to obtain status as an Intervenor. Likewise, these other employees are not necessarily bound by the result in this grievance.

Footnote: 5An additional reason all three grievances are quoted in their entirety is that the record in this matter is replete with references to extraneous matters, many of which could constitute separate grievances. This includes allegations relating to promises of continued employment for current WSH employees when a new WSH facility is opened, purported violations of the Occupational Safety and Health Act and related rules concerning the storage location of lawn mowers, WSH's alleged failure to provide copies of statutes, regulations and policies relating to such matters as classification and grievances to all employees (or to properly publicize the existence and location within WSH of such documents), Mr. Steinhauer's alleged failure to properly summarize the evidence and testimony presented by Grievant at Level II, WSH's failure to pay Unit Coordinators in accordance with the equal

pay for equal work requirements of W. Va. Code §21-5B-3, whether WSH officials improperly prepared minutes of staff meetings to exclude certainissues discussed, improper handling of a grievance submitted by Kay Coddington, Mr. Todt's failure or refusal to grant written permission for Grievant to leave the hospital grounds for four hours during the work day to work on his grievance, confiscation of a "witness list" or petition which Grievant was circulating at WSH until the Attorney General advised that such solicitation of information in support of a grievance was permissible, and myriad other complaints regarding operation of the grievance procedure. Under the ruling of our Supreme Court of Appeals in W. Va. Dept. of Health and Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993), the undersigned is without authority to rule on matters not properly developed at Level III in accordance with W. Va. Code §29-6A-3(j).

Footnote: 6The reorganization which placed the Nursing Director under the Hospital Administrator was actually directed by Mr. Rein Valdov, Mr. Steinhauer's predecessor as Hospital Administrator.

Footnote: 7Although this grievance was not initiated until well after the reorganization was implemented, Respondent has never interjected any opposition on the basis of timeliness. In any event, this grievance is properly before this Board in that Grievant is essentially arguing that this purportedly improper arrangement constitutes a "continuing violation."

Footnote: 8Neither party was able to cite to any regulations which have been promulgated by DHHR or any other state agency interpreting or implementing the provisions of W. Va. Code §27-1-7. The limited legislative history available simply indicates that the 1992 amendments were intended to set forth requirements and duties of administrators and clinical directors in such facilities. Journal of the House Of Delegates 2064 (70th Legislature of W. Va., Vol. II 1992).

Footnote: 9Such events, should they transpire, might form the basis for a separate grievance, provided Grievant could show that he was sufficiently affected thereby to establish standing to grieve the matter.

Footnote: 10Calvin Sumner, M.D., who was Clinical Director at WSH when the decision to realign the Nursing Administrator under the Hospital Administrator was made, indicated that he opposed the change on "philosophical" grounds and objected to the change prior to the decision being made. Sumner Deposition at 9. Dr. Sumner expressed concern that he no longer had the authority necessary to meet his responsibility under §27-1-7 and, therefore, holds the opinion that this reporting arrangement is violative of that statute. Sumner Deposition at 17. However, Dr. Sumner did not provide specific examples of clinical decisions being made by the Hospital Administrator, the manner in which Grievant alleges the statute is being violated.

Footnote: 11While the evidence established that this decision resulted from a "team approach," consistent with the methodology employed in selecting the treatment regimen for each patient, it was clear that these decisions received the concurrence of the Clinical Director, Dr. Haynes. Haynes Deposition at 11-13; Berlin Deposition at 24.

Footnote: 12To the extent that Grievant is personally aggrieved by this decision relating to wearing safety equipment, the merits of that policy are not properly before the undersigned at Level IV. W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). See F.N. 5, supra.

Footnote: 13As noted by Mr. Valdov, if the Clinical Director determines that the Hospital Administrator is not providing appropriate safety equipment to patients mowing lawns, the Clinical Director has authority to restrict patients from participating in such activity.

Footnote: 14This conclusion is consistent with the opinion of Jeffrey K. Matherly, General Counsel to DHHR, which was provided to Ann Jennings at WSH on February 18, 1993. A Ex 10 at L III.

Footnote: 15Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Footnote: 16Docket No. 89-BOR-503 (Apr. 28, 1993).

Footnote: 17Of course, this Board would be limited to the remedies authorized by our enabling statute, W. Va. Code §29-6A-1, et seq., not having authority to grant remedies which are available only through a "court" under the plain language of the Whistle-blower Law. However, that is a decision for the aggrieved individual who may have to elect whether to pursue an alleged violation through the grievance process administered by this Board or proceed to file an action in an appropriate court.

Footnote: 18This requirement emanates from the specific definitions of "public body" and "whistle-blower" contained in W. Va. Code §§6C-1-2(e) and (g), respectively.

Footnote: 19A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 20While challenging Grievant's interpretation of W. Va. Code 27-1-7, the Respondent has never contended that Grievant's complaints were not made in good faith as required by W. Va. Code §6C-1-3(a).

Footnote: 21Although DHHR presented evidence that Grievant's proper classification, consistent with the duties of his new position as a Unit Coordinator, is Health Service Associate, that issue was never raised in any of the three grievances before the undersigned. The focus of Grievant's complaint is that his duties, and that of the other Unit Directors, were changed in retaliation for his whistle-blowing activities. However, having reviewed the available evidence, and particularly considering the testimony of Mr. Basford at Level IV, it does not appear that Grievant's classification as a Health Service Associate is clearly wrong. See W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993).

Footnote: 22The W. Va. Division of Personnel officially defines "demotion" as follows:

A change for cause in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower step in the pay range assigned to the classification. The two types of demotions are: a) Disciplinary Demotion - A reduction in pay or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct. b) Demotion Without Prejudice -A change in classification of an employee to a lower classification or a reduction of pay due to work necessity. W. Va. Administrative Rule, W. Va. Div. of Personnel, Series I (Amended), §3.26 (Aug. 1993) (emphasis added).

Footnote: 23L III Grievance Decision at 5.

Footnote: 24Grievant presented testimony from Nancy Rush, a former Unit Director, that changing the duties and responsibilities of the Unit Directors was not necessary to obtain JCAHO accreditation. It is the understanding of the undersigned that DHHR is not claiming that changing the Unit Directors was necessary to obtain accreditation but that this was a judgment call by RHC management based upon a good faith belief that such change would move WSH forward toward accreditation.

Footnote: 2529 U.S.C.A. §§ 621-634 (1985 & Supp. 1990).

Footnote: 26Docket No. 89-BOR-503 (Apr. 28, 1993).

Footnote: 27It is also noted that Grievant did not present evidence to support his claim that he is over 40 years of age so as to establish a prima facie case of age discrimination under the ADEA.

Footnote: 28There was no showing that, given that Grievant and the other Unit Directors were demoted without cause (not for disciplinary reasons) when their duties and responsibilities were changed by the Hospital Administrator and their positions were reallocated by DOP to a new classification, any specific procedural entitlements were denied. See Parker v. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992).

Footnote: 29 29 U.S.C. §651 et seq., and W. Va. Code §§21-3A-1 et seq., respectively. (Grievant never indicated which version of OSHA he was relying upon in support of his claims.)

Footnote: 30Diane Douglas, a former Unit Coordinator, testified that if all employees who were expected to be reassigned from a unit being closed had reported to their new work assignments rather than taking extended sick leave, this staffing problem would not have arisen. Ms. Douglas further indicated that once she obtained approval from Mary Flanagan, then RHC's Chief Operating Officer at WSH, to recall two of the laid off temporary Health Service Workers, the problem was alleviated.

Footnote: 31The available evidence, particularly the testimony of Rein Valdov, the previous Hospital Administrator, indicates that the original group of temporary workers who were laid off had been hired as temporaries primarily to avoid a significant lay off of employees, such as Grievant, when WSH moved to its new, down-sized facility. Moreover, DHHR presented evidence that two particularly serious incidents involving the death of two patients had occurred during Mr. Valdov's administration, long before the layoff of temporary workers which Grievant is contesting transpired.

Footnote: 32As to Mr. Steinhauer, one of the management officials Grievant wanted reprimanded and placed in a non-supervisory position, any effort to exercise disciplinary authority would beproblematic in that he is not an employee of the state. However, had Grievant requested a "cease and desist order" or similar relief, and such remedy was warranted by the facts, this Board could grant a remedy of that nature, notwithstanding that Mr. Steinhauer is employed by RHC, an independent contractor contracted by DHHR to manage WSH. See Sutton v. W. Va. Board of Trustees, Docket No. 91-BOT-509 (Apr. 30, 1993).

Footnote: 33Although Grievant was not one of the workers who was laid off, the undersigned is satisfied that Grievant has alleged (but not necessarily proven) sufficient impact (having to work excessive overtime and experiencing increased risk from having inadequately trained co-workers engaging in direct patient care) to establish standing necessary to pursue this grievance.

Footnote: 34This should not be interpreted as a finding that Mr. Steinhauer made a threat prohibited under W. Va. Code §6C-1-3. It is not necessary to make a determination on this question, given the other factual findings and legal conclusions which are dispositive of this grievance.