DANIEL WILEY,

Grievant,

v. **DOCKET NO. 97-DNR-397**

WEST VIRGINIA DIVISION OF NATURAL RESOURCES, PARKS AND RECREATION,

Respondent.

D E C I S I O N

Daniel Wiley (Grievant) initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on May 10, 1996, challenging the annual employee evaluation he received from his supervisor, Deborah L. Keener, on May 3, 1996. The grievance was denied at Levels I and II, and appealed to Level III where an evidentiary hearing was conducted on April 11, 1997. On June 11, 1997, Robert A. Reintsema, Acting Director of Respondent West Virginia Division of Natural Resources (DNR), issued a decision denying the grievance at Level III. Grievant appealed to Level IV on June 9, 1997. A prehearing conference was conducted in this matter on September 5, 1997. Thereafter, this matter was reassigned to the undersigned administrative law judge for administrative reasons, and a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on October 7, 1997. At the conclusion of that hearing, the parties waived written post-hearing submissions, and this matter became mature for decision at that time. The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible evidence and exhibits contained in the Level III transcript or presented at Level IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Division of Natural Resources (DNR) as a Supervisor I at Beech Fork State Park (BFSP).

2. Grievant has been employed at BFSP for approximately 18 years, and has been supervising BFSP's Maintenance Department for over 15 years. Grievant directly supervises 2 permanent employees, and from 3 to 7 seasonal employees.

3. On March 1, 1995, Deborah Keener was assigned by DNR as the Superintendent at BFSP. In that capacity, Supt. Keener was Grievant's supervisor.

4. On December 26, 1995, Supt. Keener reprimanded Grievant in writing as follows:

> The purpose of this letter is to establish my expectations of you relative to the performance of your assigned duties as a Supervisor I with the West Virginia Division of Natural Resources, Beech Fork State Park. In addition, it will document and express my concern over recent acts of insubordination as well as serving as a disciplinary instrument for the same and establish my future expectations relative to your respect for the authority of the management of Beech Fork State Park.
>
> I became superintendent of Beech Fork State Park on March 1, 1995, and I believe that I now have had an adequate amount of time to assess your work performance and behavior. Quite candidly, I have serious concern about your support for the mission of this park. It is clear that your energies are often devoted to your own agenda rather than that of the park. Your position here as the immediate supervisor of much of the work force multiplies the potential detrimental effect of your negative tendencies and makes them even more of a concern.
>
> Although on numerous occasions I have attempted to discuss certain of my concerns and offer suggestions to improve your performance, youoften openly ignore directives, challenge my authority, and question my basis for making even the most routine decisions, requests, or interpretations of policy. Examples of this type of behavior follow:
>
>> On October 1, 1995, I issued a written directive instructing all staff to adhere to divisional and state governmental policy mandating advance approval of annual leave. Despite the clear, proper, and reasonable nature of this directive you not only have personally failed to comply but also have not required compliance of those employees under your immediate supervision.
>>
>> On July 4, 199[5], I initiated a discussion with you in which I expressed my concern over the standard of productivity I had observed at Beech Fork from you and those you supervise and asked that you try to improve in this respect. Your response was that I was expected and required to prove myself in the form of salary increases for staff before any changes would occur. I could only take your comments to mean that improvement was possible, but to date there has been no change

in the productivity standards you set as our maintenance supervisor. Regardless of whether improvement is possible or not, your response indicated a misunderstanding of the proper way to respond to my observation and request. It also does not due (sic) justice to the crew under your immediate supervision who I believe are all interested individually in doing the best job possible for Beech Fork.

On November 28, 1995, you questioned my decision and authority not to approve purchase of several gallons of paint you had intended for use at the park maintenance area. No reasonable superintendent would have any difficulty with resubmission by a supervisor of such a purchase request with a stronger justification that would better support the need for the purchase. However, your method was to call into question my decision-making ability, integrity, and compliance with state purchasing and budget control practices by comparing my decision on the paint with the replacement at state expense of carpeting in the superintendent residence. Furthermore, on the following day, November 29, 1995, without discussing this request with me, you misused your work time and that of the park office assistant, and violated virtually every component of proper supervisor/subordinate relationship by entering park headquarters and demanding and receiving form (sic) the office assistant, and in the presence of other subordinate staffmembers, copies of budgetary and purchasing documents for which you have no job-related need or right to review. Your intent to follow-up and reinforce your insubordinate, potentially intimidating, and unacceptable questioning of my integrity from the preceding day was abundantly clear and made even worse by your involvement of other employees.

On December 15, 1995, I came to the maintenance area to remind you to turn in your annual leave slip for the previous day. You responded, in the presence of another employee whom you directly supervise and who was in your company, by questioning my motives for making such a request and indicating your continued resistance to such a policy and your intent not to comply. Furthermore, you questioned why compli ance by staff with such a policy was necessary or fair when staff had no access to the review of my own annual leave requests.

At that point, I advised you of the highly unprofessional manner of this discussion and explained that this was not something that should be undertaken in the presence of subordinate employees. You responded in the presence of this staff member that you felt it was necessary that you have "witnesses" to our conversations. When I suggested that we meet in my office with Assistant Superintendent Mathis to continue the discussion, you expressed your "distrust" of me and Assistant Superintendent Mathis. In the course of this discussion, and still in the presence of the other employee, you continued to make numerous inappropriate and insubordinate remarks. For the sake of brevity, I paraphrase a few of the most representative and significant below:

When my concern over your copying of my office records came up, you asked me ". . . what are you hiding?"

When I explained that you obtained office records without authorization, you told me, "They are public knowledge." I explained that you did not follow proper channels, and you stated, in the course of the discussion, that I was using my title to elicit power and control.

When I recommended that you meet with Stan and I, you made it very clear your lack of trusttoward either of us. Further, you commented that you were going to find out if I was "snow balling" you.

I believe these statements made in the presence of another staffer as well as the other incidents mentioned in this section, were either designed to have or did have the practical effect of attempting to undermine my authority, credibility and integrity as well as intimidating me to the point where you could continue to pursue your own agenda and follow your own policies.

Let me now move on from specific examples of insubordinate attitudes and behavior to my concern over your work practices, priorities and supervisory performance. It is my opinion, and apparently at one time that of your past supervisor (Attachment #1-memo from Bill Moon to you dated September 13, 1988), that you fail to bring a balance to work priorities and often assign a low priority to the appearance and function of public-use areas and facilities. One thing that has perhaps hurt your ability as a supervisor to address priorities and assure reasonable staff productivity has been the aforementioned unplanned and unapproved use of annual leave. Also, you and those you directly supervise do not follow a regular work schedule. During the spring and summer seasons, I observed that you arrive at work at 6:00 a.m. while some of those you directly supervise may arrive at 7:00 a.m. and 7:30 a.m.

Other concerns relative to your priorities and supervisory practices include concentrated attention to the maintenance area when the lawns in the campgrounds and picnic areas are being neglected; assigning new employees to tasks such as operating lawn machinery or vehicles with little or no training or supervision; failure to discuss pending projects with Assistant Superintendent Mathis or myself prior to undertaking them; disinterest in making regular inspections of the grounds and buildings for the purpose of making safety checks or determining necessary repairs even after I have suggested you do so.

So that there is no misunderstanding concerning your current responsibilities, attitude, and behavior, I have reduced to writing my expectations of you as listed below. I am willing to assist you in meeting these expectations and in furtherance of that goal am establishing a sixty (60) calendar day improvement period beginning January 2, 1996, to allow you to bring your performance and behavior to acceptable standards. I will meet with you periodically during this improvement period to discuss your progress and to provide you with verbal and/or written feed back.

1. Conduct monthly inspections of the park grounds and buildings to identify problems, safety hazards, realistic improvements and other repairs that need attention. Schedule and coordinate these inspections with Assistant Superin tendent Mathis.

2. Meet with Assistant Superintendent Mathis or myself to discuss and prioritize projects not deemed as emergency or routine. Routine responsibilities shall not change and should be continued with the same importance as always. This is to include general maintenance of the park grounds, immediate attention to all safety hazards, continued operation of the sewer treatment plant and other routine maintenance necessary.

3. Participate in periodic goal setting meetings with me and Assistant Superintendent Mathis to establish future priorities and solutions to problems that may arise within the park grounds and buildings. These will be both short and long-term.

4. During the sixty (60) day improvement period, I expect you to meet with me each Friday at 8:30 a.m. in my office to review and discuss the work priorities for the week ahead. You are expected to bring sufficient documentation to each meeting to adequately discuss your work activities for the preceding week. Should scheduled annual leave or sick leave interfere with this meeting, I will schedule an alternate date.

5. Because of your failure in the past to observe consistent work hours, your work schedule will be as follows:

Any regular scheduled work day -- 7:00 a.m. to 3:00 p.m.

Lunch period -- 11:30 a.m. to 12:00 noon.

This schedule will also apply to any employees under your supervision. Any need to work more than the scheduled hours or any deviation from these hours for you or any individuals under your supervision for any workday including holidays must be approved, in advance, by me. You will begin to provide a written work schedule for you and your crew in advance of any given work week. Our work week starts on Saturday and ends through Friday. Hence, I expect submission of these schedules during our Friday morning meeting.

6. You are expected to contact me personally to request annual leave in advance of the scheduled absence by submitting directly to me an annual leave request form. You are not to observe therequested period unless you are advised by me that your request is granted. In the event that I am not available, you will submit your request to Assistant Superintendent Mathis. In the case of an emergency need for annual leave, you are to contact me directly and advise me of the circumstances and your anticipated time of arrival. If you need to utilize sick leave, you are to contact me by telephone to report your absence. In any case, immediately upon return to work from an absence for which you requested either sick leave or emergency annual leave, you are expected to submit the appropriate leave form directly to me. Failure to submit such leave form on the day of return to work will be considered insubordination. The same applies to employees under your supervision, and you are expected to assure compliance. No annual leave for any employee will be considered approved until reviewed in advance and endorsed by me.

7. You are directed to maintain a professional working relation ship with me, Assistant Superintendent Mathis, and your co-workers and obey all lawful directives issued by me and/or Assistant Superintendent Mathis.

I would like to confirm my receptiveness to any reasonable suggestion on how I might assist you during this improvement period. However, I must emphasize that should you fail to meet the expectations outlined in this letter or demonstrate further insubordination or any other misconduct, I will be required to build upon the discipline described below by recommending to my supervisors that further action be taken up to and including your dismissal. This would, of course, be dependent upon the circumstances involved with any particular incident.

At this point, I believe that discipline in the form of this written reprimand is appropriate. Although some of the issues mentioned in this letter may not call for disciplinary measures when viewed singularly, others clearly do. In fact, if my not for my assumption in your favor that your deficiencies in performance and behavior might,

> at least, be partially attributable to these things never having been pointed out clearly and firmly to you, this disciplinary action would be much more significant. The diligence with which you exercise thoroughness in the work you accomplish is to be commended; however, the aforementioned acts and practices have been very disruptive to good employer/employee relations. As employees and particularly as supervisors at this park, we all have an obligation to contribute to a positive and productive work environment. Your failure to do this has not only made it difficult for me to exert leadership but more importantly, ultimately harms the park and its ability to deliver quality service to the public. I believe it is also reasonable to expect the directives issued within this letter be extended to Assistant Superintendent Mathis and that the proper chain of command be followed in my absence. 5. Supt. Keener provided copies of the reprimand described in Finding of Fact Number 4 to her supervisors, including District Administrator Robert Beanblossom and Ken Caplinger, Deputy Chief of DNR's Parks and Recreation Service.

6. On January 5, 1996, Grievant filed a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., challenging this reprimand. See G Ex A. That reprimand has been substantially sustained this date in a separate decision, Wiley v. West Virginia Division of Natural Resources, Docket No. 96-DNR-515 (Mar. 26, 1998).

7. On March 1, 1996, Supt. Keener discussed an annual employee evaluation with Grievant covering the period from March 1, 1995, through March 1, 1996. The evaluation rated Grievant as "excellent" in 14 categories, "very good" in 8 categories, and "good" in 2 categories. Grievant received an overall rating of "excellent: work performance is consistently superior in all areas." The evaluation also contained the following comments:

> Dan is exceptional in his ability to complete a task or project within the guidelines and with absolute thoroughness. His job knowledge and eagerness to learn are also commendable.
>
> Some improvement could be made in Dan's willingness to communi cate with his supervisors and in promoting a team spirit with all staff members. This area is something Dan is working on presently, and improvement is evident.

G Ex B at L IV.

8. Supt. Keener forwarded Grievant's initial evaluation to her supervisors for review. On March 5, 1996, Mr. Beanblossom, Supt. Keener's immediate supervisor, on the recommendation of Mr. Caplinger, returned Grievant's 1995 evaluation, directing herto re-evaluate Grievant's performance for the entire year, taking into consideration the letter of reprimand Grievant received in December 1995. R Ex 1 at L III.

9. On April 20, 1996, Supt. Keener issued a revised employee evaluation to Grievant covering the period from March 1, 1995, through December 1995. The revised evaluation rated Grievant as

"excellent" in 7 categories, "very good" in 4 categories, "good" in 6 categories, "fair" in 6 categories, and "unsatisfactory" in 3 categories. The overall rating was reduced to a composite between "good: work performance satisfactory; fulfills the requirements of position," and "fair: work performance needs improvement; does not fulfill requirements of position; effects of weaker performance partially offset by stronger areas." The revised evaluation also contained the following comments:

> While Daniel demonstrates some very commendable qualities in his work such as punc[t]uality, thoroughness of his work, eagerness to learn, knowledge of wastewater operations and willingness to work with his crew, there are some areas that clearly need improvement.
>
> Areas that need some attention are Daniels' (sic) unwillingness to work closely with his supervisors, lack of regard or respect for the decisions made by his supervisors, apparent mistrust of employees in middle or upper management, prioritization of projects and his ability to change directions when necessary.
>
> I believe Daniel has a great deal of knowledge of many aspects of his job and am certain that this knowledge can be used to a fuller extent than it currently is. His attitude is somewhat negative and this is displayed to his subordinate employees.

J Ex 1 at L III.

10. Grievant's revised rating reduced the ratings he received from "excellent" to "very good" in "quality of work, job knowledge," "work habits, dependability," and "personal qualities, judgment." Grievant's ratings were reduced from "excellent" to "good" in "personal qualities, adaptability to emergencies and new situations," "supervisory ability,fairness and impartiality," and "supervisory ability, effectiveness in getting the work done." Grievant's rating was also reduced from "excellent" to "fair" in "supervisory ability, decision making." The ratings were reduced from "very good" to "good" in "work habits, ability to work without immediate supervision," "relationship with others, co-workers and/or subordinates," "supervisory ability, training and development of subordinates." Grievant's evaluation was reduced from "very good" to "fair" in "personal qualities, initiative," "supervisory ability, leadership," and "supervisory ability, organizing and assigning work." Grievant's rating was similarly reduced from "very good" to "unsatisfactory" in "work habits, maintenance of proper channels of communication," and from "good" to "fair" under "work habits, attitude toward job and agency," and from "good" to "unsatisfactory" under "relationship with others, supervisors." Cf. G Ex B at L IV & J Ex 1 at L III.

11. Grievant's revised evaluation also included ratings in two categories under "additional

factors" which had not been considered in the initial evaluation. Grievant was rated "unsatisfactory" in "willingness to accept direct supervision" and "fair" in "prioritization of projects based on importance."

12. Supt. Keener subsequently issued another evaluation to Grievant covering the period from January 1, 1996 to March 1, 1996, which included Grievant's 60-day improvement period. In that evaluation, Grievant's performance was rated higher in several categories while his overall evaluation improved to "very good." See J Ex 1 at L III.

DISCUSSION

Because evaluations are not disciplinary in nature, Grievant has the burden of proof in regard to the allegations made in his grievance. Procedural Rules of the W. Va. Educ.& State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). Further, an employee grieving his evaluation must establish by a preponderance of the evidence that his evaluation is wrong because his evaluator abused his discretion in rating the grievant, Messenger v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989); or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dept. of Health & Human Serv., Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dept. of Transp., Docket No. 91-DOH-326 (Feb. 27, 1992).

The evidence indicates that Grievant is an experienced supervisor with superior job knowledge in his area of responsibility, maintenance of a state park which is open for recreational use by the general public. It is likewise clear that Grievant has been in conflict with his immediate supervisors regarding priorities to follow in performing park maintenance. Grievant contends that his supervisor initially gave him a generally fair evaluation for 1995, and then unfairly reduced his ratings at the insistence of reviewing authorities who were not as familiar with his work performance. In addition, Grievant alleges that these ratings were lowered in reprisal for his exercise of his statutory right to file a grievance contesting a written reprimand he previously received.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general,a grievant alleging unlawful retaliation, in order to establish a prima facie case, (See footnote 1) 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. Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 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, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 489 S.E.2d 787 (W. Va. 1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds in rebutting the presumption, the employeethen has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dept. of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

Grievant established a prima facie case of retaliation by showing that he filed a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., that his supervisors were all aware of his grievance, that he thereafter received a negative job evaluation, the lowest evaluation he had received in over 18 years of employment with DNR, and the adverse evaluation was issued while the grievance was still pending. Thus, there is a reasonable inference that Grievant's lowered evaluation resulted from his engaging in statutorily protected activity when he grieved an earlier reprimand. See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Gruen, supra.

DNR effectively rebutted this inference by demonstrating by a preponderance of the credible evidence of record that the initial evaluation rendered by Supt. Keener represented a good-faith effort to give Grievant "the benefit of the doubt" regarding their prior disagreements. In particular, Supt. Keener elected to consider Grievant's positive performance during a 60-day improvement period to

offset the negative observations which led to Grievant's reprimand and establishment of the improvement period. Further, she elected to employ the evaluation process more as a motivational tool in an effort to encourage further improvement by Grievant, rather than an instrument to document Grievant's prior performance. Ultimately, Supt. Keener's credible testimony established that the initial 1995 evaluation she rendered was flawed in that it extended into another year's rating period, and more significantly, it glossed over Grievant's actions which led tohis being reprimanded for insubordination and failure to exercise his supervisory responsibilities properly in December 1995.

In accordance with standard practice, Grievant's evaluation was forwarded to Supt. Keener's supervisors for review. At that point, Mr. Caplinger, who was familiar with Grievant's December reprimand, became concerned that Supt. Keener was apparently being too generous with Grievant. In addition, Mr. Caplinger determined that Supt. Keener was improperly considering Grievant's performance after the end of December 1995, when the evaluation period should have concluded. Thus, Mr. Caplinger appropriately asked Supt. Keener's immediate supervisor, District Administrator Robert Beanblossom, to verify that Grievant's evaluation was an accurate representation of his performance during the evaluation period.

Although both Mr. Caplinger and Mr. Beanblossom were aware that Grievant had filed a grievance when they took their actions, a preponderance of the evidence indicates that this was not a motivating factor for their conduct. This conclusion emanates from the fact that, prior to filing this grievance, Grievant had received a detailed written reprimand which is generally consistent with the ultimate evaluation rendered by Supt. Keener. Correspondingly, these supervisors were personally aware of the reprimand at the time it was issued, and were logically concerned with the incongruity between the unacceptable conduct described in Grievant's reprimand, and the glowing comments prevalent in Grievant's initial evaluation for 1995. Thus, although Grievant established a prima facie case of retaliation, the employer demonstrated that the adverse action at issue was taken for good and sufficient reasons independent of any retaliatory motive, and Grievant failedto establish that the legitimate reasons proffered were merely a pretext for unlawful retaliation. See Conner, supra; Mace, supra.

After due consideration of the extensive testimony rendered at Levels III and IV, as well as the documentary evidence produced at both levels, the undersigned is not persuaded that Grievant's challenged evaluation was improper in any significant regard. It is noted that Supt. Keener lowered

Grievant's ratings in a number of categories without any specific basis for the reduced rating. Nonetheless, it is recognized that employee evaluations are necessarily subjective, particularly where the agency does not have objective performance standards in place. In any event, a preponderance of the credible evidence indicates that Grievant's employer was engaged in a good-faith effort to improve Grievant's performance to an acceptable level.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. An employee grieving his evaluation may obtain relief by establishing by a preponderance of the evidence that his evaluator abused his discretion in rating him. Messenger v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993). 3. An employee challenging his evaluation may also obtain relief by establishing by a preponderance of the evidence that his performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dept. of Health & Human Serv., Docket Nos. 92- HHR-088/224/362 (Aug. 16, 1993).

4. A grievant alleging unlawful retaliation in violation of W. Va. Code § 29-6A- 2(p), 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. Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 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, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways

Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

5. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 489 S.E.2d 787 (W. Va. 1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Pizza Hut, Inc., 180 W.Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds 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 the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dept. of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

6. Although Grievant made out a prima facie case of retaliation, DNR established by a preponderance of the evidence that the adverse performance evaluation which followed shortly after Grievant filed a grievance was rendered for legitimate, non-retaliatory reasons based upon Grievant's conduct and performance as a Supervisor I. See Gruen, supra.

7. Grievant failed to establish by a preponderance of the evidence that his evaluator abused her discretion, misinterpreted or misapplied any established policies or rules regarding the evaluation process, or otherwise acted contrary to any law, rule, regulation, or written agreement in regard to the evaluation contested by this grievance. See Messenger, supra; Maxey, supra.

Accordingly, this grievance is **DENIED**.

Any party 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: March 26, 1998

Footnote: 1

A 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).