THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASON LEE FERRELL and
NOAH JAMES MARCUM,

Grievants,

v. **Docket No. 2013-1005-CONS**

REGIONAL JAIL AND CORRECTIONAL FACILITY
AUTHORITY/WESTERN REGIONAL JAIL,

Respondent.

DECISION

Grievant, Jason Lee Ferrell, filed an expedited Level Three grievance against his employer, West Virginia Regional Jail and Correctional Facility Authority/Western Regional Jail ("RJA"), on November 20, 2012, stating as follows:

> [o]n or about November 15, 2012, Mr. Ferrell was suspended without pay. Said suspension was: (1) in violation of agency policy; (2) in violation of state personnel law; (3) contrary to preponderant evidence; (4) retaliatory; (5) in violation of substantive due process; (6) in violation of procedural due process; (7) a violation of substantial public policy; (8) without good cause; (9) discriminatory; and (10) made in bad faith. Grievant reserves the right to amend this Statement of Grievance.

As relief sought, Grievant seeks "[i]mmediate reinstatement, back-pay, lost overtime pay, removal of all related documents from the Grievant's personnel file, an order to cease further retaliatory conduct, other compensable damages, pay for participation and preparation of this grievance, and costs and attorney's fees due to Respondent's bad faith. Grievant reserves the right to amend this Relief sought." Grievant Ferrell's grievance was assigned docket number 2013-0801-MAPS.

Grievant Noah James Marcum filed an expedited Level Three grievance against

his employer, West Virginia Regional Jail and Correctional Facility Authority/Western Regional Jail ("RJA"), on November 21, 2012, stating as follows:

> [o]n or about November 14, 2012, Mr. Marcum was suspended without pay. Said suspension was: (1) in violation of agency policy; (2) in violation of state personnel law; (3) contrary to preponderant evidence; (4) retaliatory; (5) in violation of substantive due process; (6) in violation of procedural due process; (7) a violation of substantial public policy; (8) without good cause; (9) discriminatory; and (10) made in bad faith. Grievant reserves the right to amend this Statement of Grievance.

As relief sought, Grievant seeks "[i]mmediate reinstatement, back-pay, lost overtime pay, removal of all related documents from the Grievant's personnel file, an order to cease further retaliatory conduct, other compensable damages, pay for participation and preparation of this grievance, and costs and attorney's fees due to Respondent's bad faith. Grievant reserves the right to amend this Relief sought."[1] Grievant Marcum's grievance was assigned docket number 2013-0808-MAPS.

The two grievances were consolidated by Order entered January 9, 2013, and assigned docket number 2013-1005-CONS.[2]

A level three hearing was held on January 22, 2013, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia office. Grievant Ferrell appeared in person, and by counsel, Mark A. Barney, Bucci, Bailey & Javins, L.C. Grievant Marcum appeared in person, and by counsel, David R. Barney,

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[1] At the level three hearing, Grievants orally moved to amend their relief sought to include a claim for benefits, as well as statutory interest, and the same was granted.

[2] Originally, the undersigned was assigned to Grievant Ferrell's grievance action, and Acting Chief Administrative Law Judge William B. McGinley was assigned to Grievant Marcum's grievance. Upon the consolidation of the two grievances, the undersigned became the ALJ assigned to hear the consolidated grievance and to render a decision.

Thompson Barney. Respondent appeared by counsel, Anthony D. Eates, II, Senior Assistant Attorney General. Also in attendance at this hearing was Travis E. Ellison, III, Esquire, General Counsel for Respondent RJA.[3]

This matter became mature for decision on March 6, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.[4]

Synopsis

Grievants were suspended without pay from their positions pending Respondent's investigation into allegations made against them. Such was not a disciplinary suspension. The suspensions were initially for fifteen days, but Respondent discretionarily renewed the suspensions more than once which resulted in Grievants being suspended without pay for at least forty-five days. Grievants assert that their suspensions violated RJA policies and the Administrative Rule. Further, Grievants allege other claims against Respondent, including retaliation and bad faith. Grievants also seek a default judgment and immediate reinstatement as sanctions against Respondent for bad faith. Respondent denies all of Grievants claims, asserting that it

[3] Numerous telephonic hearings were conducted in this matter prior to the level three hearing to address motions filed by Grievants and discovery issues. Attorney Ellison represented Respondent in all but one of these hearings. Attorney Anthony Eates and Attorney Silas B. Taylor were substituted as counsel for Respondent just days before the level three hearing. Attorney Eates appeared at the level three hearing for Respondent; however, Attorney Taylor became Respondent's sole counsel in this matter after February 14, 2013.

[4] The mailing date set for the parties' submission of their proposed Findings of Fact and Conclusions of Law was originally February 25, 2013. Counsel for Respondent filed a Motion for Enlargement to File Findings and Conclusions on February 25, 2013, asking that the parties be allowed an additional week to file their proposals. Respondent's motion was granted that date, and March 4, 2013, was set as the new mailing date for the submission of proposals.

committed no wrongdoing, and that the suspensions were proper under RJA policy. Respondent denies that it acted in bad faith and opposes the default judgment and reinstatement. Grievants proved by a preponderance of the evidence that their suspensions violated RJA policy and the Administrative Rule. Further, Grievants proved that Respondent acted in bad faith during discovery, but did not prove that Respondent suspended them in bad faith. Grievant Ferrell further proved his claim of reprisal. Therefore, this grievance is GRANTED IN PART and DENIED IN PART.

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

Findings of Fact

1. At all times relevant herein, Grievant, Jason Lee Ferrell, was employed as a Correctional Officer III with the rank of Corporal at the Western Regional Jail. He had been employed by Respondent for ten years.

2. At all times relevant herein, Grievant, Noah James Marcum, was employed as a Correctional Officer II at the Western Regional Jail. He had been employed by Respondent for three years.[5]

3. Joe DeLong is the Executive Director of the West Virginia Regional Jail and Correctional Facility Authority. As such, Executive Director DeLong is the top official in RJA.

4. Mike Clark was the Administrator of the Western Regional Jail at all times

[5] In January 2013, prior to the level three hearing, both Grievants were terminated from their employment with Respondent RJA. The instant grievance does not pertain to the Grievants' terminations. The scope of this grievance is limited to the suspensions imposed in November 2012. Separate grievances have been filed to address the terminations.

relevant herein.

5. A few weeks before November 15, 2012, Executive Director DeLong received an anonymous, or unsigned, letter purporting to be from an inmate at the Western Regional Jail, which alleged that correctional officers had beaten another inmate. The names of inmates who allegedly witnessed the incident were provided in this letter. However, the letter did not identify the inmate who had supposedly been beaten.[6]

6. Upon review of the letter, Executive Director DeLong gave the same to Deputy Director Paul O'Dell to have someone "look into it." Mr. O'Dell assigned Henry Robinson, Deputy Chief of Operations, to investigate the allegations made in the letter. Neither Executive Director DeLong nor Mr. O'Dell set a deadline for this investigation to be completed.

7. The only person employed as investigator at RJA at the time relevant to this grievance, Austin Burke, was not assigned to investigate this matter.[7]

8. Henry Robinson began his investigation into the letter a couple of weeks

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[6] *See*, testimony of Joe DeLong. Despite the fact that this anonymous letter is what prompted the investigation involved in this grievance, the letter was not offered as an exhibit by Respondent, and Respondent had failed to provide Grievants with a copy of this letter at or before the level three hearing, even though it would have been responsive to Grievants' November 2012 discovery requests. From information provided during post-level three telephonic hearings, it appears that Respondent disclosed the anonymous letter to Grievants on or about February 5, 2013, pursuant to the undersigned's verbal order at the January 22, 2013, hearing.

[7] Respondent, by counsel, represented at the January 7, 2013, telephonic hearing that the reason its investigation took so long to complete was that RJA had only one investigator.

after he received the letter from Deputy Director O'Dell.[8] It is unclear from the evidence presented what Mr. Robinson did in the early days of his investigation. However, the evidence suggests that Mr. Robinson may have interviewed inmates, learning the identity of the inmate allegedly beaten and the correctional officers allegedly involved therein.[9]

9. At some point, Mr. Robinson implicated both Grievants in the incident.

10. Upon learning that Mr. Robinson had been assigned to conduct the investigation, Administrator Clark confirmed with Grievant Ferrell that he and Mr. Robinson had had some trouble in the past, referring to the EEOC complaint Grievant Ferrell had filed and the subsequent agreement reached limiting Robinson's contact with Grievant Ferrell.

11. Administrator Clark and Grievant Ferrell informed Executive Director DeLong of this during a telephone conference. Mr. DeLong informed Grievant Ferrell that he would have no further contact with Mr. Robinson.[10]

12. At some point before November 14, 2012, Mr. DeLong assigned Ronald Casto, Director of Training for RJA, to work on the investigation with Henry Robinson. Mr. Casto is also a former Deputy Chief of Operations for RJA.

13. Executive Director DeLong assigned Mr. Casto to work on this

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[8] *See*, testimony of Joe DeLong.

[9] The issue in this grievance is not whether the Grievants participated in the incident or whether they did anything improper. The suspensions imposed upon Grievants were not for any alleged misconduct, or wrongdoing. The suspensions were imposed to allow an investigation into the allegations made by inmate(s) against a number of correctional officers. As such, the events of October 17, 2012, are not relevant in this matter. The investigation into the incident is relevant as such is tied to Grievants' suspensions.

[10] *See*, testimony of Grievant Ferrell.

investigation, at least in part, because of Grievant Ferrell's prior EEOC action and the agreement limiting Mr. Robinson's contact or interactions with Mr. Ferrell.

14. Mr. Robinson and Mr. Casto conducted interviews with various individuals, including correctional officers and inmates, during their investigation.

15. Mr. Casto interviewed Grievant Ferrell on November 14, 2012, at approximately 11:30 p.m. following Grievant's shift.

16. Mr. Robinson reported to Executive Director DeLong that the alleged excessive use of force occurred on or about October 17, 2012, and involved inmate J.M.[11]

17. Although the investigation was not completed, Mr. Robinson reported to Executive Director DeLong that eight correctional officers were allegedly involved in the incident. Grievants were among those eight.

18. Mr. Robinson further reported to Executive Director DeLong that he had reason to believe that the J.M. incident was an unusual occurrence of some significance and that things could have been done improperly.[12] Mr. Robinson also showed Mr. DeLong two photographs of inmate J.M., one taken in booking and one taken later in the medical unit following the alleged use of force. From these, Mr. DeLong noted that in the photographs, J.M. appeared to have facial injuries in photos taken in the medical unit that were not visible in photos taken in the booking area.

19. After hearing Mr. Robinson's verbal report and after reviewing the information Mr. Robinson had provided him, Executive Director DeLong made the

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[11] To protect his identity, the inmate involved in the alleged incident will only be referred to by his initials.

[12] *See*, testimony of Joe DeLong.

decision to suspend all of the eight officers identified by Mr. Robinson, pending further investigation into the October 17, 2012, incident involving J.M.[13]

20. By identical letters signed by Administrator Clark, dated November 15, 2011 [sic][14], Grievants were *immediately* suspended without pay for "a renewable period of 15 calendar days" pending the outcome of the investigation into the allegations of excessive use of force.[15]

21. Grievant Ferrell was given his letter on November 15, 2012, after completing his shift. Grievant Marcum was verbally informed of his suspension on November 14, 2012. Grievant Marcum was called in to the jail on November 15, 2012, to receive his suspension letter. Therefore, Grievant Ferrell's suspension began on November 15, 2012, and Grievant Marcum's, November 14, 2012.

22. The suspension letters were drafted at the direction of Executive Director DeLong by Wayne Armstrong, Director of Human Resources, with input from Administrator Clark.

23. At the conclusion of Grievants' fifteen-day suspension, RJA had not

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[13] *See*, testimony of Joe DeLong.

[14] The original letters delivered to Grievants informing them of their suspensions contained a typographical error in the date thereon. In both, the date was listed as "November 15, 2011," when it should have been "November 15, 2012." Oddly, Respondent RJA revised the two letters to reflect the correct year on each, but did not deliver the corrected, or revised, letters to Grievants. The undersigned simply does not understand the purpose of this. Grievants objected to Respondent's Exhibits 1 and 2 (the November 15, *2012* suspension letters) because those were not the letters delivered to them imposing the suspensions. The undersigned admitted Respondent's 1 and 2, but little to no weight is being assigned to the same as they are not the actual suspension letters.

[15] *See*, Grievants' Exhibits 13 and 20. Further, Grievants were not suspended for improper use of force. They were suspended without pay pending investigation into allegations made against them. Therefore, this *was not* a disciplinary suspension.

completed its investigation into the October 17, 2012, incident.

24. As such, Grievants' suspensions were "renewed" for an additional fifteen days by letters signed by Adminsitrator Clark which were dated November 30, 2012.[16] Both Grievants received these letters.

25. At the conclusion of the first renewal of the suspension, Respondent had still not completed its investigation into the incident. Therefore, Respondent again "renewed" Grievants' suspensions for an additional fifteen days by letters signed by Administrator Clark which were dated December 16, 2012.[17] Grievant Marcum received this letter; however, Grievant Ferrell did not receive this letter.

26. At the conclusion of the second renewal of the suspension, Respondent had still not completed its investigation. Therefore, Respondent again "renewed" Grievants' suspensions for another fifteen days by letters signed by Administrator Clark and dated December 30, 2012.[18] Both Grievants received these letters.

27. About a month after his suspension without pay, Grievant Ferrell received a telephone call from First Sergeant Kathy Sergent during which she informed him that he was ordered to appear to the Western Regional Jail for an interview with the people assigned to conduct the investigation. Grievant Ferrell was told to be at the jail at 8:00 a.m. on a date certain.[19]

28. On the specified day, Grievant Ferrell appeared at approximately 7:45

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[16] *See*, Respondent's Exhibits 4 and 5; Grievants' Exhibits 14 and 22.

[17] *See*, Respondent's Exhibits 6 and 7; Grievants' Exhibit 23.

[18] *See*, Grievants' Exhibits 15 and 24.

[19] *See*, testimony of Jason Ferrell. The date of this interview was not identified in the proceedings.

a.m. He reported to First Sergeant Sergent upon his arrival. Sergent told Grievant Ferrell to go wait in the break room.

29. Grievant Ferrell sat in the break room all day. He was given a lunch break, but was not given a dinner break. At 7:30 p.m., Grievant Ferrell was finally called for his interview with Ron Casto.

30. Despite the EEOC agreement between RJA and Grievant Ferrell, and Executive Director DeLong's assurances, Mr. Robinson was present in the room when Mr. Casto interviewed Grievant Ferrell. However, Mr. Robinson did not speak during the interview. Nonetheless, Mr. Robinson participated in this interview. [20]

31. During his suspension without pay, Grievant Marcum also received a telephone call ordering him to appear at the jail at 8:00 a.m. on a specified date to be interviewed for the investigation.[21]

32. On the date specified, Grievant Marcum appeared at the jail, as ordered, and was told to wait in the break room. Grievant Marcum waited in the break room until 3:00 p.m. when he was finally called to speak with the investigators. Grievant Marcum was allowed a break for lunch.

33. Grievant Marcum was ordered to appear at the jail on a second day to speak with Mr. Robinson and Mr. Casto. Grievant Marcum complied and appeared at the jail as ordered. Again on that day, Grievant Marcum reported early in the day to the jail and was made to wait in the break room until the afternoon when he was called back

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[20] *See*, testimony of Jason Ferrell, Joe DeLong.

[21] The date of this interview was not identified in the record of the proceedings.

to speak with the investigators.[22]

34. At this second meeting, Grievant Marcum advised the investigators that he was represented by counsel and asked to have his counsel present by telephone for the interview. Initially, Mr. Robinson was not going to allow Mr. Marcum to have his counsel present for the interview, but then made one attempt to reach Mr. Marcum's counsel by phone. When he could not reach Grievant Marcum's counsel, Mr. Robinson informed Grievant Marcum that he would be proceeding with the interview regardless of whether his counsel was present. Grievant Marcum advised Mr. Casto and Mr. Robinson that he was not comfortable with going forward with the interview without his counsel present. In response, Mr. Robinson informed Grievant Marcum that he considered such to be a refusal to cooperate with the interview. Mr. Robinson then ended the interview.[23]

35. Grievant Marcum was called in to the jail one last time on January 4, 2013, to be terminated.

36. The record is unclear as to whether Grievants Ferrell and Marcum were paid for the time they spent at the jail for their interviews with the investigators during their suspensions.

37. Grievant Marcum was paid for the time he was at the jail on January 4, 2013, for his termination.

38. Respondent completed its internal investigation on December 26, 2012. Such is also the date of the investigative report.

39. Grievants were suspended without pay for at least forty-five days while

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[22] *See*, testimony of Noah Marcum.

[23] *See*, testimony of Noah Marcum.

RJA conducted its internal investigation into the October 17, 2012, incident.[24]

40. Grievants have not been the subjects of indictment, and no criminal proceedings have been initiated against them.

41. Henry Robinson has now retired from his position at RJA. The date of his retirement is unknown; however, it appears that he retired sometime between January 22, 2013, and April 16, 2013.[25]

Discussion

The first issue that must be addressed in this matter is which party to the action has the burden of proof. Grievants assert that Respondent bears the burden of proof on the issue of the suspensions, but that they bear the burden of proving their other claims.[26] Respondent asserts that Grievants bear the burden of proof on each of their claims, including their claims regarding the suspensions because such were not disciplinary in nature. The evidence presented establishes that Grievants were initially suspended for fifteen days "pending investigation" of allegations of use of excessive force. Grievants were not charged with any alleged misconduct. The suspensions were imposed to allow Respondent time to investigate claims made against the two. Accordingly, this was not a disciplinary suspension.[27]

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[24] During these proceedings, the parties indicated that Grievants were suspended for forty-five days. However, it appears from the evidence presented that said suspensions may have been longer than forty-five days. Grievant Marcum's suspension began on November 14, 2012, and ended upon his termination on January 4, 2013. Grievant Ferrell's suspension began on November 15, 2012, and ended upon his termination on January 8, 2013.

[25] *See*, Letter dated April 16, 2013, from Silas Taylor to Grievants' counsel.

[26] In their proposed Findings of Fact and Conclusions of Law, Grievants explicitly withdrew their discrimination claims.

In a non-disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievants have not met their burden. *Id.*

Grievants argue that their suspensions violated RJA policies and law. Respondent denies Grievants' claims asserting that the suspensions were proper. Numerous policies are at issue in this matter. West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement 3008, "Authority for Negative Personnel Action," sets forth the procedures for imposing suspensions of twenty days or more (Procedure A), and suspensions of nineteen days or less (Procedure B). Procedure A states, in part, as follows:

> 1. The Regional Jail Authority may, upon oral notice, confirmed in writing, or by written notice, suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which

[27] During the January 7, 2013, telephonic hearing, the scope of this grievance was limited to the issues surrounding the suspensions. Further, the nature of the suspensions was discussed.

> has a job related adverse impact. The written notice shall contain the following information:
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> a. the specific reasons for the proposed suspension;
> b. the date that the proposed suspension is to take place;
> c. a statement that the suspension once effective may be reviewed pursuant to the grievance procedure for Authority employees set forth in the Regional Jail Authority Policy and Procedure Number 3032.
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> 2. The suspension must be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The person being suspended shall be allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the Regional Jail Authority Central Office. The Regional Jail Authority shall file the statement of reasons for suspension and the reply with the Director of Personnel. . . .

Further, Rule 12.3 of the Administrative Rule of the West Virginia Division of Personnel states as follows:

> [s]uspension.—An appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. Accrued leave shall not be paid to employees during any period of suspension. . . .

However, RJA Policy and Procedure Statement 3036 states, in part, that, "[d]epending upon the severity of the allegations against a staff member, said staff member may be placed on non-disciplinary suspension from duty, without pay, *for a period of time pending the outcome of an investigation* of said allegations. . . ." (Emphasis added). It is noted that this policy also states, "[i]f the Chief of Operations designates a staff member to complete the investigation, said staff member shall submit his or her findings to the Chief of Operations within a time period specified by the Chief

of Operations. The Chief of Operations shall review the findings and report actions taken on minor matters, or recommendations for corrective action, in serious matters to the Executive Director."

Given the evidence, it appears that Respondent attempted to apply Procedure A of Policy and Procedure Statement 3008 in imposing the suspensions on Grievants, even though that policy is supposedly for suspensions of twenty days or more.[28] The suspensions in this matter were imposed pending RJA's investigation into allegations of misconduct made against Grievants. Policy 3008 and Rule 12.3 require that such suspensions be for a specified period of time, unless the Grievants were the subject of an indictment or other criminal proceeding. The wording of Policy 3008 and Rule 12.3 is almost identical in this regard. However, Policy 3036 does not appear to require that such suspensions be for a specific period of time. Accordingly, the policies and the rule appear to be in conflict. The West Virginia Supreme Court of Appeals has stated it is a ". . . well-established principle of West Virginia law that: . . . if statutory construction [of school and other public employee personnel laws] is necessary and warranted, such construction should go in the direction of expanding or preserving employee protection, and not in the direction of limiting that protection. 'School personnel regulations and laws are to be strictly construed *in favor of the employee.'* Syllabus Point 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). (emphasis added). *Harmon v. Fayette County Board of Education*, 205 W. Va. 125, 134 n.17, 516 S.E.2d 748, 757 n.7 (1999)" *Smith, et al. v. West Virginia Div. of Rehabilitative Services and Div. of Personnel,* 208 W. Va. 284, 540 S.E.2d 152 (2000). Further, it is important to note that Grievants have

[28] Respondent's Exhibits 1, 2; Grievants' Exhibits 13, 20-21

not been indicted, and are not the subjects of any criminal proceeding.[29] Given the foregoing, the undersigned finds that the RJA policies require the suspensions at issue to be for a specific period of time.

On the surface, RJA complied with the policies by suspending each Grievant for a specified fifteen-day period. However, RJA later "renewed" the suspensions at least twice, each for an additional fifteen days. These renewals resulted in Greivants being suspended without pay for at least forty-five days each while the investigation was pending. No timeframe for the investigation was ever established by RJA administration. The RJA policies and the Administrative Rule are silent on the issue of renewable suspensions. The discretionary renewal of suspensions creates uncertainty in what would otherwise be a specified period of time. As here, the discretionary renewals converted fifteen-day suspensions into suspensions for at least forty-five days. The renewing of suspensions is clearly not contemplated by the applicable policies, and it runs contrary to the requirement of informing an employee of the specific time for which he or she is suspended.

Respondent asserts that *Mills v. Regional Jail and Correctional Facility Authority*, Docket No. 06-RJA-256 allows indefinite suspensions pursuant to Policy 3036. However, that case is easily distinguished from the instant grievance. In that case, not only are the facts very different from that of the instant grievance, but also, the only

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[29] Evidence was presented that there is a criminal investigation surrounding the October 17, 2012, incident pending. However, no criminal actions have been brought against Grievants. The word "proceeding" is defined as "the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. . . ." See, BLACK'S LAW DICTIONARY, Sixth Edition, 1990. A criminal investigation is not a criminal proceeding. Therefore, Grievants are not the subjects of any criminal proceedings, as contemplated by Policy 3008.

policy addressed therein is Policy 3036. There is no mention, whatsoever, of Policy 3008 or Rule 12.3 in that decision. Respondent points out that at the time of the *Mills* decision, Policy 3008 and Rule 12.3 were in effect. However, it matters naught that those policies were in effect at that time if such were not at all addressed in the action. It appears that Policy 3008 and Rule 12.3 were not mentioned in that grievance decision. In the absence of those two policies, the outcome of the instant grievance would be different, too. Accordingly, the undersigned finds that Respondent violated Policy and Procedure 3008 and Rule 12.3 by failing to set a specific time period for Grievants' suspensions.

Grievant Ferrell also asserts that he has been retaliated against for having filed an EEOC claim that somehow involved Henry Robinson.[30] Mr. Robinson later investigated the incident underlying this grievance and implicated Grievant Ferrell in the October 17, 2012, incident. From the evidence presented, it appears that Mr. Robinson played a large role in this matter. Not only did he investigate the underlying incident, but Executive Director DeLong also relied on Mr. Robinson for the information on which he based his decision to suspend Grievants. Further, the length of Mr. Robinson's investigation was directly correlated to the length of time Grievants were suspended without pay. In other words, the longer it took Mr. Robinson to complete his investigation, the longer Grievants were suspended without pay.[31] Mr. Robinson had to

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[30] The details of the EEOC claim are not in evidence and are not at issue. The parties do not dispute that Grievant filed the EEOC claim at some point in the past, and that as a result of the same, there was an agreement reached which limited Henry Robinson's contact with Grievant Ferrell. Grievant Marcum was not a party to the EEOC claim, and the resulting agreement does not pertain to him.

[31] The length of the suspensions of the other six people implicated in the investigation is unknown.

be aware of that given his communications with Executive Director DeLong.

Reprisal is "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. Va. CODE § 6C-2-2(o). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

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

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dept. of Health and Human Resources/Bureau for Children and Families*, Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,'

‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

Clearly, the filing of an EEOC claim is a protected activity. The person about whom Grievant Ferrell complained later investigated an incident allegedly involving him and then implicated him in possible wrongdoing. Mr. Robinson had to have knowledge of Grievant Ferrell’s EEOC claim and the subsequent agreement at all times during his investigation. Further, despite the agreement limiting his contact with Grievant Ferrell, and Executive Director DeLong’s knowledge of the agreement, Mr. Robinson participated in his interview. The evidence establishes that Grievant Ferrell was later treated adversely as a result of Mr. Robinson’s investigation and his representations to Executive Director DeLong. Mr. Robinson had a personal conflict with Grievant Ferrell, and he should have been taken off the investigation entirely once it was discovered that Grievant Ferrell could have been involved in the underlying incident. Mr. Robinson’s participation in Grievant Ferrell’s post-suspension interview appears to be a deliberate attempt to antagonize, or intimidate, Grievant. Accordingly, the undersigned finds that Grievant Ferrell has demonstrated a *prima facie* case of reprisal.

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm’n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). “Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was

merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Respondent denies Grievant Ferrell's reprisal claim, and appears to assert that Mr. Robinson did nothing improper in his investigation. Respondent also takes the position that Mr. Robinson's presence at Grievant Ferrell's second interview with Mr. Casto was acceptable, and argues that because he asked no questions during the interview, nothing improper occurred. Respondent's reasoning is flawed. Respondent argues only that there was no reprisal. Respondent did not call Mr. Casto or Mr. Robinson as witnesses; Respondent's only witness was Executive Director DeLong, who did not conduct the investigation. Admittedly, Executive Director DeLong relied heavily on Mr. Casto and Mr. Robinson in making all the decisions regarding the suspension of Grievant Ferrell. The two investigators were given great deference, and they were solely in control of the information presented to Executive Director DeLong. It is very probable that Executive Director DeLong was unaware of any retaliatory motive on the part of his investigators. In analyzing only the second interview, one can see how poorly Grievant Ferrell was treated by the investigators. During his unpaid suspension, he was ordered to appear at the jail at 8:00 a.m. He was sat in the break room for hours and hours, given only a dinner break, and finally interviewed in the evening hours. Also, the evidence suggests that he may not have been paid for the time he was compelled to be at the jail that day. The evidence presented shows that, more likely than not, Mr. Robinson and/or Mr. Casto were retaliating against Grievant Ferrell for his EEOC claim and were trying to make things hard for him. Respondent

has failed to successfully rebut Grievant Ferrell's *prima facie* showing of reprisal. Accordingly, the undersigned must conclude that Grievant Ferrell has met his burden of proving his reprisal claim.[32]

Bad Faith

"The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of a hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(6). Grievants have asked the undersigned to find that Respondent acted in bad faith multiple times in answering discovery, as well as in its suspension of Grievants. Respondent argues that it has not acted in bad faith, and that there should be a hearing on that issue, specifically, before there can be a finding of bad faith. Given the number of hearings conducted on discovery issues, allegations of bad faith, and as there was testimony offered at the Level Three hearing about the production of documents, there is no need for another hearing on this issue. Respondent has responded to the allegations of bad faith on numerous occasions.

First, the undersigned finds that Respondent did not act in bad faith in suspending Grievants. Respondent violated RJA policy and Administrative Rule 12.3, but Executive Director DeLong, who made the decision to suspend Grievants, did not do so willfully and knowingly. As Executive Director DeLong testified, he relied on those with "expertise" in human resources and personnel matters in making his decision to suspend Grievants as he did. However, his experts were just wrong in this case.

[32] Given the rulings made herein, the issues regarding due process and public policy raised by Grievants will not be addressed.

Further, as he testified, Executive Director DeLong wanted to suspend the two *with* pay pending the investigation; however, such is not permitted by WEST VIRGINIA CODE § 12-3-13.

During the course of the litigation of this grievance, there have been numerous discovery disputes. Initially, in November 2012, Grievants served Respondent with a number of discovery requests. Respondent failed to timely respond to the same. To force disclosure, Grievants filed their first Motion to Compel and a telephonic hearing was conducted. Pursuant to the orders and directions of ALJ McGinley, Respondent began to answer discovery and served on Grievants some of its responses. However, not all requests were answered in full. Several additional telephonic hearings on discovery, another Motion to Compel, and other motions and issues, were held. Respondent was ordered to produce certain documents and other requested information by numerous written and verbal Orders.[33] As a result of each proceeding, Respondent continued to produce more requested documents.

Respondent continued to produce requested information at various times leading up to, and on the day of, the January 22, 2013, level three hearing. However, it

[33] The first telephonic hearing in this matter was conducted on December 3, 2012, by ALJ William B. McGinley. At that hearing, a level three hearing date was selected, and some discovery issues were addressed. ALJ McGinley directed the Respondent to work with the Grievants on the discovery requests. The next telephonic hearing was held on January 7, 2013, to address five motions Grievants had filed on various topics, including a Motion to Compel Discovery. The undersigned and ALJ McGinley conducted said hearing and ordered Respondent to produce copies of the investigation report(s) to Grievants by 5:00 p.m. that day, as well as ordered Respondent to immediately provide to counsel for Grievants any other documents then in its possession that were responsive to Grievants' requests. See, Order entered January 9, 2013. Further telephonic hearings on discovery issues were conducted on January 14, 2013, and January 18, 2013. At both of those hearings, Respondent was Ordered to produce certain documents and to make efforts to obtain requested information.

appeared that Respondent did not get serious about responding to discovery until after January 7, 2013. Just prior to the start of the Level Three hearing, Respondents produced a stack of redacted email communications and an audio CD reportedly containing the recordings of certain interviews taken during RJA's internal investigation. Not one of the lawyers in this case who appeared that day had ever heard the recordings on the CD. All such recordings were requested in November 2012, but were not produced until minutes before the start of the level three hearing. Discovery was ordered to be completed before the level three hearing. It was not. Further, General Counsel for RJA represented that as of the date of the level three hearing, he had still not received some of the information that had been requested. He informed the undersigned that such outstanding discovery could be obtained and turned over to Grievants' counsel within ten days. Therefore, the undersigned set February 5, 2013, as the deadline for all pending discovery responses to be produced. In turn, the undersigned granted Grievants the opportunity to move to reopen evidence for further hearing if something produced after the level three hearing triggered the need for the presentation of additional evidence. Grievants did not file a motion to reopen evidence. However, the undersigned conducted another telephonic hearing on February 14, 2013, to address the issue of the redacted emails produced at the commencement of the level three hearing. During that hearing, Grievants again asserted that Respondent had failed to comply with the discovery orders, and that Respondent failed to produce all outstanding discovery responses by February 5. Respondent denied such. However, it was learned during that hearing that the CD Respondent provided to Grievants on the day of the level three hearing would not play. As reflected in the Order entered on

February 22, 2013, Respondent was ordered to provide Grievants with a working copy of the CD, as well as certain other documents for which Respondent had asserted privilege.

Thereafter, this matter became mature for decision on March 6, 2013. It is noted that in March 2013, Respondent produced a copy of a video not previously produced. Then, despite Grievants' numerous requests for the investigators' notes, reports, and investigative documents, and the like, and Respondent's repeated claims that everything that existed had been produced, on April 12, 2013, counsel for RJA advised the Grievants and the undersigned that he had learned of the existence of two 3 ½ inch binders of documents that were assembled by investigator, Henry Robinson, at some point while this grievance was pending. In his letter, counsel went on to state that it would take him several days to review the binders and make any supplemental disclosures that were warranted. Copies of the binders of documents were delivered to counsel for Grievants on April 16, 2013. Further, as of that same date, Respondent had still yet to disclose the documents ordered in the February 22, 2013, Order, asserting that Grievants' counsel needed to execute an "Agreement Implementing Protective Order." *See*, Letter from S. Taylor dated April 16, 2013.[34] The undersigned conducted yet another telephonic hearing on April 18, 2013, to address the binder debacle. Respondent, by counsel, advised that many, but not all, of the documents contained in these binders had already been disclosed; however, the binders, as assembled, did not exist at the time of the discovery requests. The documents, however, did clearly exist. No reasonable explanation has been given for Respondent's failure to timely disclose

[34] Upon information and belief, Respondent has never disclosed those documents as ordered.

those documents.

Initially, despite Respondent's extraordinary problems in answering discovery, the undersigned viewed the problems as being the result of inexperience on the part of its original counsel, or his being overwhelmed. Nonetheless, such was extremely frustrating, caused additional work, and wasted a great deal of the Grievance Board's time. Further, many of the undersigned's orders were simply ignored. However, with the late production of the audio recordings and redacted emails, all of which were covered by Grievants November 2012 discovery requests, and already ordered disclosed prior to the level three hearing, the undersigned's perception of these disclosures began to change. Then came the post-hearing productions, such as the video, photos, and the anonymous letter that prompted the whole investigation. Then on April 12, 2013, counsel for Respondent advised Grievants and the undersigned of the discovery of the investigators' *binders* containing approximately 2000 pages of documents, some of which had never been previously disclosed despite being requested and ordered disclosed. The undersigned now views the situation differently.

As detailed herein, numerous hearings were conducted on the issues of discovery, many orders were issued, and deadlines set. With each order, Respondent produced some requested information, but such had to be ordered first. Even with the orders, Respondent repeatedly failed to fully and timely comply. On more than one occasion, counsel for Respondent assured Grievants and the undersigned that all discovery responses had been produced by the February 5, 2013, deadline. Given the significant disclosures made after that day, such simply cannot be. However, the undersigned is not of the opinion that any counsel for Respondent did anything

improper. By all accounts, counsel for Respondent made inquiries of those involved to obtain the requested information. For example, Executive Director DeLong testified that he had been asked for documents requested in discovery, and counsel for Respondent was forthcoming in their efforts to obtain the requested information.[35] The undersigned can only conclude that someone working for RJA intentionally withheld responsive documents, or other information. This is bad faith, and in this case, given the circumstances, it is extreme bad faith.

Discovery was a huge issue in this case. Given the nature of this grievance, the positions of those involved, and the extent of the litigation in this matter, the undersigned would find it very hard to believe that RJA staff/administration would not know to turn over to their counsel the documents and media in their possession when asked.[36] To illustrate this point, the unsigned, or anonymous, letter that prompted the investigation at issue was not produced prior to the level three hearing. There is no excuse for this. Upon information and belief, the letter was provided to Grievants in February 2013, after the letter was discussed during the level three hearing. This letter should have been produced long before then because it was obviously responsive to the discovery requests. When asked at the level three hearing where that letter could be found [as it had not been disclosed to Grievants' counsel], Executive Director DeLong testified that it would be in the [investigative] file, and the file was most likely in

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[35] Mr. Ellison readily gave status updates on his efforts to obtain certain requested information during telephonic hearings, and Mr. Taylor detailed his efforts in letters, copies of which were sent to the undersigned.

[36] At the April 18, 2013, hearing regarding the binders of discoverable documents, Attorney Taylor commented that it was "reasonably probable" that those in possession of the notebooks did not perceive them as responsive. The undersigned specifically rejects that notion.

the hands of Henry Robinson. Now, that was not hard. Executive Director DeLong knew where it should be located. Presumably, others, especially those with access to the investigative file, would have known where the letter could be found. Respondent's counsel had requested information from the investigators. Why, then, was this letter not disclosed before the level three hearing? This is very significant in light of the numerous problems Respondent had in obtaining and disclosing requested documents pertaining to the investigation and/or investigators' file. The investigation is at the heart of this grievance because Grievants were suspended without pay *pending the investigation*. Accordingly, documents and information about the investigation were vital to Grievants' case. Let us not forget that Respondent's most recent discovery snafu was disclosure of the two large three-ring binders containing approximately 2000 pages of documents which had been compiled and maintained by Mr. Robinson, the investigator.

As the undersigned has found that Respondent has acted in extreme bad faith, the undersigned may allocate the costs of the hearing to the Respondent. See, W. VA. CODE § 6C-2-4(4)(c)(6). "Costs" is not defined in the Code, and there are no filing fees associated with filing a grievance with the Public Employees Grievance Board. Grievants argue that upon a finding of bad faith, attorney's fees may be awarded as costs. Respondent, of course, disagrees.

There is some debate as to what types of costs the Grievance Board has the authority to award upon a finding of extreme bad faith. Grievants assert that the Grievance Board has the authority "in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith. . . ." *Syl. Pt. 3, Sally-Mike Properties v. Yokum*, 365

S.E.2d 246 (W. Va. 1986). There has been no Grievance Board decision in which a party has been awarded attorney's fees, let alone awarded such as costs upon a finding of bad faith. Generally, the Grievance Board has ruled that it does not have the authority to award attorney fees pursuant to *Smarr v. Wood County Bd. of Educ.*, Docket No. 54-86-062 (June 16, 1986). *See also Bonnell v. W. Va. Dept. of Corr.*, Docket No. 89-CORR-163 (mar. 8, 1990). However, *Smarr* and *Bonnell* have nothing to do with bad faith. Instead, in those cases, the Grievants were seeking awards of attorney fees as damages as part of the relief sought, not as a sanction for bad faith. However, there are many cases in which the Grievance Board has addressed the issue of bad faith. See, *Collins v. West Virginia Div. of Rehabilitation Services,* Docket No. 98-RS-479, Mar. 31, 1999); *Wendling v. West Virginia Real Estate Commission,* Docket No. 94-REC-514 (May 16, 1996); *Keadle v. West Virginia Dept. of Transportation, Div. of Highways and West Virginia Div. of Personnel*, Docket No. 97-DOH-306 (May 11, 2001); *Knight v. Dept. of Tax and Revenue/Alcohol Beverage Control Comm.*, Docket No. 91-ABCC-221 (June 16, 1992).

In the grievance of *Keadle v. West Virginia Dept. of Transportation, Div. of Highways and West Virginia Div. of Personnel*, Docket No. 97-DOH-306 (May 11, 2001), the administrative law judge found that the Respondent acted in extreme bad faith by failing to disclose documents requested in discovery. *See, Id.* However, the issue of costs is not fully discussed in the decision. It is noted in the decision that in an Order issued prior to the decision, the ALJ awarded certain costs and fees to the Grievant to sanction Respondent for its bad faith. *See, Id.* In the grievance of *Collins v. West Virginia Div. of Rehabilitation Services,* Docket No. 98-RS-479, Mar. 31, 1999),

the administrative law judge determined that Respondent had acted in bad faith for failing to disclose that a check that had gone missing had been later recovered.[37] The missing check went to the heart of the charges alleged against Grievant. In that case, the ALJ assessed costs against Respondent, ordering it to pay all of Grievant's costs associated with the processing of the grievance from the date of filing through its conclusion, "including *preparation time for the proposed findings of fact and conclusions of law*." *Id.* (Emphasis added). Grievant was further ordered to submit a statement of costs to the ALJ "outlining his costs, including, but not limited to *attorney travel*, copying, long-distance telephone calls, and witness fees." *Id.* (Emphasis added). In reaching this conclusion, the ALJ noted that the "Grievance Board is not authorized to award punitive damages", but is authorized to "award costs when it determines a party has acted in bad faith." *Id.*

The decision indicates that the Grievant in *Collins* was represented, at least at some point, by counsel. Clearly, the ALJ knew that there had been an attorney involved at some point in the proceeding because costs for "attorney travel" were specifically addressed. Also, the ALJ goes on to include in "costs" the time used to prepare the proposed findings and conclusions. It is not clear from the decision if Grievant or his attorney prepared the proposals. Nevertheless, such is a cost in *Collins*. From *Collins*, it is learned that at least some costs associated with the hiring of an attorney for a grievance proceeding are considered "costs" with respect to bad faith.

Therefore, in this matter, the undersigned will consider awarding costs to the Grievants. Given the procedural history of this case, Grievants have not yet submitted a

[37] It is noted that *Collins* was decided under the previous grievance procedure statutes.

statement of costs to the undersigned for consideration. It is believed that Grievants have not yet provided any such statement to counsel for Respondent. As such, further hearing should be conducted on the issues of costs and attorney's fees. Once evidence is presented on costs incurred by Grievants, and Respondent has had notice of the costs alleged, the undersigned will issue a ruling regarding the assessment of costs.

Default Judgment Sanctions

During the April 18, 2013, telephonic hearing regarding the last supplemental disclosure of documents, Grievants moved for sanctions against Respondent for its failure to disclose the documents in compliance with the undersigned's prior orders. As sanctions, Greivants seek a default judgment against Respondent, as well as immediate reinstatement into their former positions. In support of their motions, by letter dated April 29, 2013, Grievants provided the undersigned a copy of *Ohio Power Co. v. Pulman Power, LLC., et al.,* ____ S.E.2d ___, 2013 WL 1395883 No. 11-1512, January 2013 Term (W. Va. April 1, 2013) (*per curiam*). By letter dated May 1, 2013, Respondent asserts that default judgment, as well as reinstatement, would be improper, relying on *Wendling v. West Virginia Real Estate Commission,* Docket No. 94-REC-514 (May 16, 1996), *Keadle v. West Virginia Dept. of Transportation, Div. of Highways and West Virginia Div. of Personnel*, Docket No. 97-DOH-306 (May 11, 2001), *Knight v. Dept. of Tax and Revenue/Alcohol Beverage Control Comm.*, Docket No. 91-ABCC-221 (June 16, 1992).

Ohio Power Co. is easily distinguished from the matter at hand. First, *Ohio Power Co.* was in circuit court. Circuit courts have express authority pursuant to Rule 37(b) of the Rules of Civil Procedure to grant default judgment as a sanction for failure

to comply with discovery. The Rules of Civil Procedure do not apply to proceedings before the Grievance Board and the undersigned has no such express authority. Further, prior Grievance Board decisions suggest that granting a grievance as a sanction is inappropriate. *See Wendling v. West Virginia Real Estate Commission,* Docket No. 94-REC-514 (May 16, 1996); *Keadle v. West Virginia Dept. of Transportation, Div. of Highways and West Virginia Div. of Personnel*, Docket No. 97-DOH-306 (May 11, 2001); *Knight v. Dept. of Tax and Revenue/Alcohol Beverage Control Comm.*, Docket No. 91-ABCC-221 (June 16, 1992). Accordingly, Grievants motion for default judgment and motion for immediate reinstatement are denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. In a non-disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. It is a ". . . well-established principle of West Virginia law that: . . . if statutory construction [of school and other public employee personnel laws] is necessary and warranted, such construction should go in the direction of expanding or preserving employee protection, and not in the direction of limiting that protection. 'School personnel regulations and laws are to be strictly construed *in favor of the employee.'* Syllabus Point 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). (emphasis added). *Harmon v. Fayette County Board of Education*, 205 W. Va. 125, 134 n.17, 516 S.E.2d 748, 757 n.7 (1999)" *Smith, et al. v. West Virginia Div. of*

Rehabilitative Services and Div. of Personnel, 208 W. Va. 284, 540 S.E.2d 152 (2000).

3. Grievants have proved by a preponderance of the evidence that Respondent violated Policy and Procedure 3008 and Rule 12.3 by failing to suspend Grievants for a specified period of time.

4. Reprisal is "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

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

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

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

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

reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

7. Grievant Ferrell has proven his claim for reprisal by a preponderance of the evidence.

8. "The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of a hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(6).

9. Respondent has acted in extreme bad faith by failing to fully and timely answer Grievants' discovery requests. Therefore, the costs of the hearing may be assessed against Respondent. However, Respondent did not act in bad faith by suspending Grievants.

10. The Grievance Board has no authority to grant a default judgment granting a grievance as a sanction for bad faith. *See Wendling v. West Virginia Real Estate Commission,* Docket No. 94-REC-514 (May 16, 1996); *Keadle v. West Virginia Dept. of Transportation, Div. of Highways and West Virginia Div. of Personnel*, Docket No. 97-DOH-306 (May 11, 2001); *Knight v. Dept. of Tax and Revenue/Alcohol Beverage*

Control Comm., Docket No. 91-ABCC-221 (June 16, 1992).

Accordingly, this Grievance is **GRANTED IN PART and DENIED IN PART**.

Grievants' suspensions are **ORDERED REDUCED** to fifteen days. Respondent is **ORDERED** to pay each Grievant back pay (straight time only) for the days they were suspended in excess of fifteen days,[38] with interest, and restore all other benefits which Grievants lost as a result of the days they were improperly suspended, including leave and retirement benefits. Further, Respondent is **ORDERED** to pay each Grievant for any time they spent at the Western Regional Jail to be interviewed for the investigation during the first fifteen days of their suspensions. The undersigned is hereby retaining jurisdiction of this matter to address the issue of costs at a separate hearing. *See generally Kanawha County Board of Educ. v. Fulmer*, 228 W. Va. 207, 719 S.E.2d 375 (2011). Grievants are **ORDERED** to prepare a detailed statement of the costs that they are seeking to recover as a result of Respondent's bad faith, and submit the same to the Grievance Board, serving a copy of such on counsel for Respondent. An evidentiary hearing on the issue of costs shall be conducted on a later, mutually agreeable date.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of

[38] Grievants seek overtime compensation as relief, arguing that had they been working, they would have normally worked overtime hours and been compensated for the same. However, before overtime wages can be paid, an individual must work in excess of the threshold forty hours in a week. In this situation, the Grievants did not work during the time in question, so they are not eligible to receive overtime compensation.

its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: June 4, 2013.

_____
Carrie H. LeFevre
Administrative Law Judge