STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
February 22, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Lan Deyerle,
Petitioner Below, Petitioner

vs) **No. 17-0633** (Kanawha County 17-AA-23)

West Virginia Department of Health and Human Resources,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Lan Deyerle, pro se, appeals the May 3, 2017, order of the Circuit Court of Kanawha County dismissing her appeal of the February 14, 2017, decision of the West Virginia Public Employees Grievance Board upholding her termination as an employee of Respondent West Virginia Department of Health and Human Resources ("DHHR"). The DHHR, by counsel Steven R. Compton, filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's orders is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was a long-term employee of the DHHR. According to the Grievance Board's February 14, 2017, decision, it reversed a prior decision by the DHHR to terminate petitioner from employment by decision dated July 15, 2014, "solely on procedural grounds." While the DHHR initially appealed the July 15, 2014, decision, the Grievance Board explained that the DHHR later withdrew its appeal:

> Following the withdrawal of the appeal, [the DHHR] determined that [petitioner] should be placed in a different office to allow [petitioner] a fresh start. [Petitioner] was returned to work on November 3, 2014, and was placed in a temporary Office Assistant II position in the Office of Maternal, Child[,] and Family Health. There is no allegation that [petitioner]'s pay rate was reduced[[1]] or that [petitioner] objected to the decision to place her in a new office.

[1]Prior to petitioner's reinstatement, her job classification was as an Office Assistant III.

The DHHR eventually terminated petitioner from employment a second time due to misconduct occurring both before and after her return to work. The second termination took place on February 10, 2015, from which petitioner filed a grievance directly to Level III of the grievance process. Following a September 26, 2016, evidentiary hearing, an administrative law judge ["ALJ"] upheld the February 10, 2015, termination of petitioner from her employment by decision dated February 14, 2017.

Petitioner did not file an appeal from the Grievance Board's February 14, 2017, decision until April 11, 2017. Consequently, the DHHR filed a motion to dismiss the appeal on April 17, 2017, asserting that it was untimely filed. Petitioner filed a response on April 25, 2017, stating that she "filed her appeal in person on April 11, 2017, and was told by court personnel that her appeal was not late." By order entered May 3, 2017, the circuit court dismissed petitioner's appeal. The circuit court found that, pursuant to West Virginia Code §§ 6C-2-5(c) and 6C-2-2(c), petitioner had until April 5, 2017, to file her appeal and failed to do so. The circuit court further found that petitioner's representations that she was told that her appeal "was not late" were unsubstantiated:

> Petitioner's allegations are concerning as neither the [c]ourt nor the [c]ourt's personnel has ever had ex-parte communications or any other communications with [petitioner] beyond her in person delivery of a copy of her [r]esponse to [the DHHR]'s [m]otion to dismiss on April 25, 2017. The [c]ourt has not mailed any correspondence to [petitioner] and, certainly, has not advised [petitioner] that her appeal "was not late."

Following the dismissal of her appeal, petitioner wrote the circuit court various letters requesting that it reconsider its May 3, 2017, order. In a June 10, 2017, letter, petitioner acknowledged that her appeal was "six days late," but asked that the circuit court give her a "pass." Eventually, the circuit court collectively treated petitioner's letters as a motion to reconsider the dismissal of her appeal and denied the motion by order entered August 2, 2017. The circuit court found that "[t]he deadline for filing an appeal must be met by all parties, including *pro se* petitioners," and that "[t]he court lacks jurisdiction to hear untimely filed appeals."

Petitioner now appeals the circuit court's May 3, 2017, order dismissing her appeal of the February 14, 2017, decision upholding her termination from employment. In syllabus point one of *West Virginia Department of Health and Human Resources v. Hess*, 189 W.Va. 357, 432 S.E.2d 27 (1993), we held that "[West Virginia Code § 6C-2-5(c)], which allows an appeal to the circuit court within thirty days of receipt of the [ALJ]'s decision, must be read *in pari materia* with [West Virginia Code § 6C-2-5(c)], which defines 'days' as 'working days exclusive of Saturday, Sunday or official holidays.'"[2]

[2]At the time of our decision in *Hess*, those provisions were set forth at West Virginia Code §§ 29-6A-7(c) and 29-6A-2(c). When West Virginia Code § 29-6A-2(c) was repealed and reenacted as West Virginia Code § 6C-2-2(c), the Legislature excluded from the definition of "days" any day "in which the employee's workplace is legally closed under the authority of the (continued . . .)

On appeal, the parties agree that the circuit court properly calculated the time in which petitioner was permitted to appeal the ALJ's decision as expiring on April 5, 2017. Petitioner further acknowledges that she filed her appeal six days late. The parties dispute only whether this Court should find that the circuit court may consider petitioner's appeal because of excusable neglect.[3] The DHHR argues that, once the circuit court found that petitioner's appeal was untimely filed, the court's only recourse was to dismiss the appeal. *See* Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W.Va. 492, 211 S.E.2d 705 (1975) (holding that "[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket"). We agree with the DHHR.

Rule 1(b) of the West Virginia Rules of Procedure for Administrative Appeals provides, in pertinent part, that "[t]hese rules shall not be construed to extend . . . the jurisdiction of the circuit courts as established by law." In *State ex rel. Commissioner, West Virginia Division of Motor Vehicles v. Swope*, 230 W.Va. 750, 756, 742 S.E.2d 438, 444 (2013), we found that a circuit court exceeded its jurisdiction by considering an appeal of a driver's license revocation that was filed beyond the timeframe set forth in West Virginia Code § 29A-5-4(b).[4] West Virginia Code § 29A-5-4(b) provided that an appeal "shall" be filed "within thirty days after the date upon which such party received notice of the final order or decision of the agency." In *Swope*, we relied on the well-established rule that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case[,] it is the duty of the courts not to construe but to apply the statute." 230 W.Va. at 755-56, 742 S.E.2d at 443-44 (quoting Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959)).

Here, West Virginia Code § 6C-2-5(c) provides, in pertinent part, that "[a] party *shall* file the appeal in the circuit court of Kanawha County within thirty days of receipt of the [ALJ]'s decision[.]" (Emphasis added.). "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." *Brickstreet Mut. Ins. Co. v. Zurich Am. Ins. Co.*, __ W.Va. __, __ n.15, 813 S.E.2d 67, 78 n.15 (2018) (Internal quotations and citations omitted.); *see Hess*, 189 W.Va. at 360, 432 S.E.2d at 30 (same). Therefore, given the untimeliness of petitioner's appeal, we conclude that the circuit court properly dismissed the appeal because the court would have

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chief administrator due to weather or other cause provided for by statute, rule, policy or practice." *See* 2007 W.Va. Acts ch. 207.

[3]While petitioner argues that she substantially complied with West Virginia Code §§ 6C-2-5(c) and 6C-2-2(c) given her reliance on alleged verbal statements made to her by court personnel, we construe petitioner's argument as one asking this Court to excuse her neglect in failing to timely file an appeal.

[4]In making this finding, we determined that the circuit court erred in declaring that the appeal was timely filed. *Id.* at 754-56, 742 S.E.2d at 442-44.

exceeded its jurisdiction to do otherwise.

For the foregoing reasons, we affirm the circuit court's May 3, 2017, order dismissing petitioner's appeal of the Grievance Board's February 14, 2017, decision upholding her termination from employment.

Affirmed.

ISSUED: February 22, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison

DISQUALIFIED:

Justice Margaret L. Workman

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LAN DEYERLE,
Petitioner,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

2017 MAY -3 PM 2:44
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Case No.: 17-AA-23
Judge Jennifer F. Bailey

ORDER REFUSING APPEAL

The Court has reviewed the *pro se* petition for appeal and finds that it was not timely filed. W. Va. Code § 6C-2-5(c) controls the timeliness for filing appeals in public employee grievance proceedings and provides, "A party shall file the appeal in the circuit court of Kanawha County within thirty days of receipt of the administrative law judge's decision."

The West Virginia Public Employees Grievance Board issued its Final Decision on February 14, 2017. Petitioner received a copy of the Final Decision via certified mail on February 22, 2017. The petition for appeal was filed with the Circuit Court of Kanawha County on April 11, 2017.

Pursuant to W. Va. Code § 6C-2-2(c), the term "days" is defined as excluding Saturdays, Sundays, official holidays, or days for which the grievant's former workplace was legally closed. Based upon the Petitioner's receipt of the Final Decision on February 22, 2017, and accounting for the removal of Saturdays and Sundays, this appeal should have been filed on or before April 5, 2017.

Respondent filed a Motion to Dismiss on April 17, 2017 citing the incompleteness and untimeliness of the petition. The Petitioner filed a Response on April 27, 2017 contending that she contacted the "court in March about appealing the grievance decision, and the first correspondence to her, from the court, is postmarked 3/22/17" and that the correspondence "is

within the required timeframe." She further contends that she "finally received the necessary instructions and documents from the court, and provided everything that the instructions indicated that was needed, and filed her appeal in person on 4/11/17, and was told by court personnel that her appeal was not late."

Petitioner's allegations are concerning as neither the Court nor the Court's personnel has ever had ex-parte communications or any other communications with the Petitioner beyond her in person delivery of a copy of her Response to Respondent's Motion to Dismiss on April 25, 2017. The Court has not mailed any correspondence to the Petitioner and, certainly, has not advised Petitioner that her appeal "was not late."

Accordingly, the Court finds that the petition for appeal was not timely filed and **ORDERS** that this petition for appeal is **REFUSED**. The Court **DIRECTS** the Circuit Clerk to distribute copies of this order to all parties.

Entered this 1st day of May, 2017.

Judge Jennifer F. Bailey
Kanawha County Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 8
DAY OF May, 2017
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL CASE INFORMATION STATEMENT CIVILCASES
(OTHER THAN DOMESTIC RELATIONS CASES)

FILED
2017 APR 11 AM 10:54
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF Kanawha COUNTY, WEST VIRINIA

I. CASE STYLE

PLAINTIFF(S)/PETITIONER

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CITY STATE ZIP
PHONE: (304) 586 3690

CASE NO. 17-AA-23

JUDGE Bailey

VS.

DEFENDANT(S)/RESPONDENT

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PHONE: ( )

DAYS TO ANSWER | TYPE OF SERVICE

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DAYS TO ANSWER | TYPE OF SERVICE

ORIGINAL AND _____ COPIES OF PETITION ENCLOSED/ATTACHED

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAN DEYERLE,
Grievant,

v.

Docket No. 2015-0860-DHHR

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,
Respondent.

DECISION

Grievant, Lan Deyerle, was employed by Respondent, Department of Health and Human Resources ("DHHR) in the Bureau for Public Health. On February 11, 2015, Grievant filed this grievance against Respondent stating, "Grievant is being disciplined twice for the same allegations, second discharge without good cause. Grievant falsely told meeting was not disciplinary."[1] For relief, Grievant seeks "[t]o be made whole in every way including back pay with interest and benefits restored to include being made whole for the previous wrongful discharge."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The grievance has a complicated procedural history. In 2013, Grievant filed five grievances against her employer, all stemming from two instances of alleged improper conduct that resulted in a suspension for one instance, and then an investigatory suspension and termination for the second instance. The Grievance Board consolidated the grievances into docket number 2013-2231-CONS. A *Decision* granting the consolidated grievance in part was entered by Administrative Law Judge ("ALJ") Susan L. Basile on July 15, 2014. ALJ Basile upheld the disciplinary decision, but overturned

[1] Grievant made no argument at level three regarding the assertion that she was falsely told a meeting was not disciplinary, so this allegation is deemed waived.

Grievant's investigatory suspension and termination. In granting the grievance to overturn Grievant's termination, ALJ Basile found that Respondent had improperly denied Grievant procedural due process when it refused to allow her to bring her representative to the investigatory interview, thus terminating her without providing her with notice and opportunity to be heard. ALJ Basile overturned the termination solely on procedural grounds, and made no determination whether the termination was otherwise warranted, stating "it is impossible to know what discipline, if any, Grievant would have received" since she was not permitted to participate in the investigation. She further ordered that "[i]f meetings or interviews are held regarding Grievant's conduct on June 14, 2013, or any other conduct that allegedly created a hostile work environment, Respondent is ORDERED to allow Grievant to have a representative with her in those meetings/interviews as she requested."

Grievant was returned to work on November 3, 2014, but was once again terminated from employment on February 10, 2015, which termination is the subject of the instant grievance filed directly to level three of the grievance process. The Grievance Board scheduled the level three hearing for July 9, 2015. On July 8, 2015, Respondent, with the agreement of Grievant, moved for a continuance and requested that the hearing be rescheduled for September 4, 2015. The Grievance Board granted the agreed continuance and rescheduled the level three hearing for September 4, 2015. By email dated August 26, 2015, Respondent requested a pre-hearing conference "to discuss legal issues involved in this matter based upon a previous decision issued by the Board involving this Grievant. (2013-2231-CONS)."

The undersigned held a pre-hearing teleconference on August 28, 2015, in which Grievant moved to "exclude allegations and record from prior improper disciplinary actions," arguing that Grievant would be punished twice for the same conduct. The parties requested the undersigned continue the level three hearing scheduled for September 4, 2015, and render a decision on a preliminary legal issue regarding the impact of the Grievance Board's previous decision vacating Grievant's termination on due process grounds. The undersigned granted the request for continuance and ordered the parties to submit briefs supporting their claims by September 25, 2015.

By *Order* entered December 2, 2015, the undersigned denied Grievant's motion finding that ALJ Basile had specifically declined to decide the merits of the grievance and had reversed the termination based solely on procedural grounds; that Grievant was not being punished twice as she had been made whole when the grievance was granted; and that the Grievance Board had previously decided in several cases that reversal of discipline on purely procedural grounds does not bar a respondent from re-initiating discipline.

The level three hearing was held on September 26, 2016, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Steven R. Compton, Senior Assistant Attorney General. The parties agreed to submit the grievance on the record as to the events of the previous grievance and presented evidence only regarding the second investigation of the original events, the additional alleged misconduct upon Grievant's return to work, and the disciplinary process from which the instant grievance arose. This matter became mature

for decision on November 28, 2016, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law, after the undersigned granted the parties two extensions of the 20-day deadline.

Synopsis

Grievant had been employed as an Office Assistant III in the Office of Nutrition Services within the Bureau for Public Health, and her employment had been terminated. Grievant successfully grieved the termination of her employment and was reinstated as an Office Assistant II in the Office of Maternal, Child and Family Health, within the Bureau for Public Health. Grievant was again terminated from her employment. Grievant filed the instant grievance alleging Respondent terminated her employment without good cause and in retaliation for her previous successful grievance. Respondent proved it had good cause to terminate Grievant's employment and that it did not retaliate against Grievant. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance and, as moved by the parties, the record created in the previous grievance, docket number 2013-2231-CONS, for which the undersigned has reviewed the exhibits, the transcript of the level three hearing, and the portions of the hearing recording relevant to the determination of the instant grievance.

Findings of Fact[2]

1. Grievant has worked for the State of West Virginia for over seventeen years. Grievant was previously employed for four and one half years by Respondent as an Office Assistant III in the Vendor Unit of the Women, Infants and Children ("WIC") Program of the Office of Nutrition Services within the Bureau for Public Health.

2. On December 28, 2012, Grievant was placed on a Performance Improvement Program ("PIP") for the period of January 2, 2013, through February 1, 2013, for unacceptable performance of her job duties. This PIP addressed a number of deficiencies, among them, Grievant's failure to enter a sufficient number of Vendor Price Lists ("VPLs"). Significantly, the PIP stated "I believe it is important for you to understand that neither your supervisor nor the vendor unit members will perform your work for you ... " It also documented deficiencies in filing, answering phone calls and failing to be on task, e.g., being on the Internet instead of performing a directed task. (R Ex 4).[3]

3. Grievant contested the December 28, 2012, PIP in a January 2, 2013, grievance, which was denied.

4. On January 30, 2013, Grievant was repeatedly asked to assist on a time critical project of folding letters/filling envelopes for a large mailing, ("mailing") which had

[2] As the parties chose to partially submit the grievance on the record of docket number 2013-2231-CONS, some of ALJ Basile's findings in her July 14, 2014 Decision are relevant and have been adopted by the undersigned. Adopted findings will be identified by footnote. Citations to the record in adopted findings refer to the record in docket number 2013-2231-CONS. Although some findings have been adopted, the decision is based on the undersigned's independent review of the record, including the transcript and selected relevant portions of the March 10, 2014 level three hearing recording in docket number 2013-2231-CONS.

[3] Adopted finding.

to go out that day. Grievant's help was necessary because a letter-folding machine was jammed. Anyone who was "free" was asked to help.[4]

5. Ms. Maria Bowles, who was in Vendor Management on the Unit, first approached Grievant to ask for her help in stuffing the envelopes. In her role within the Unit, it was permissible for Ms. Bowles to ask Grievant to work on tasks, including the mailing. Nonetheless, Grievant refused to follow Ms. Bowles' direction to help. This made it necessary for Ms. Bowles to go to Ms. Cindy Pillo, a supervisor to Grievant, and the then acting Director for the Office of Nutrition Services, to ask her to request Grievant's help. (Testimony of Ms. Riley and Ms. Pillo and R Ex 7).[5]

6. Grievant's immediate supervisor, Ms. Sandra Riley, Program Manager for BPH/WIC, was absent that day and under her direction, via e-mail, Grievant had previously been asked to enter VPLs into the agency database. Grievant told Ms. Pillo about this directive, but Ms. Pillo informed Grievant that she needed to work on the newly assigned task instead. Rather than beginning the project, Grievant consulted with another supervisor, Ms. Heather Vanoy, as to what she should do, given this new directive from Ms. Pillo. Grievant told Ms. Vanoy there were already five other employees working on the mailing. Ms. Vanoy initially agreed that Grievant should continue "entering VPLs." However, due to the Unit's urgent need to timely send out the mailing, Ms. Cindy Pillo subsequently consulted with Ms. Vanoy and they agreed Grievant should assist with the mailing, rather than continue with her other work. (R Ex 2 and testimony of Ms. Pillo and Ms. Riley).[6]

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[4] Adopted finding.
[5] Adopted finding.
[6] Adopted finding.

7. Grievant was informed of Ms. Vanoy's and Ms. Pillo's joint decision and finally assisted with the mailing. Even Grievant's supervisor, Ms. Vanoy, assisted with the mailing. Ms. Vanoy helped Grievant by putting on labels. (R Ex 2 and testimony of Ms. Pillo and Ms. Riley).[7]

8. However, Grievant appeared "aggravated and irritated" about working on the mailing. Ms. Pillo had to correct the way Grievant was folding the letters, though Grievant had been instructed on how to fold them on previous occasions. (Testimony of Ms. Pillo).[8]

9. Grievant complained to Ms. Pillo that it was "stupid," to fold the letters and fill the envelopes as requested. In response, Ms. Pillo explained to Grievant that the letters were folded in a particular way to allow the vendors to readily see the date on the VPL. Even after Ms. Pillo's explanation of why the letters were to be folded as instructed, Grievant again pronounced the task "stupid." Ms. Pillo testified that it was simply a part of Grievant's job to assist with mailings and she found Grievant's repeated comments about the mailing to be insubordinate. (Testimony of Ms. Pillo and Ms. Nicholas).[9]

10. Ms. Rebecca Nicholas, DHHR Specialist for the WIC help desk, and a co-worker of Grievant, worked with Grievant for approximately 2 years. On January 30, 2013, Ms. Nicholas worked in a cubicle near Grievant. She overheard Grievant questioning Ms.

[7] Adopted finding.
[8] Adopted finding.
[9] Adopted finding.

Pillo about the mailing and calling either the project or Ms. Pillo stupid.[10] Ms. Nicholas thought Grievant's behavior/conversation was disrespectful to Ms. Pillo.[11]

11. Due to the incident on January 30, 2013, Grievant's continued unprofessional behavior and other performance issues, Respondent gave Grievant a PIP Addendum, dated February 12, 2013, extending the December 28, 2012, PIP to April 13, 2013, and suspended her for three days without pay.[12]

12. Grievant grieved her suspension, which was denied.

13. The February 12, 2013, PIP stated, *interalia,* that Grievant's supervisors observed her on her computer when she should have been helping the Unit, that she attended a class on February 5, 2013 sponsored by DOP, entitled Dealing with Angry and Upset Customers and Providing Exceptional Customer Service, to help her become more successful in her job duties and was scheduled for additional classes. It noted that she had been verbally counseled on numerous occasions concerning unacceptable work performance and appropriate Office Assistant III protocol and process. The PIP also noted that Grievant's activities between 4:30 PM and 5:00 PM " ... continue to fail the expectations previously set forth. You have extensive non-work-related-company between these times."[13]

14. On April 16, 2013, Grievant met with Ms. Riley, and Denise Farris, Director of the Office of Nutrition Services. During that meeting, Grievant was given her PIP Addendum and Employee Performance Appraisal ("EPA") 2, rating her performance from

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[10] The testimony of Ms. Pillo established that Grievant called the project, not Ms. Pillo, stupid.

[11] Adopted finding.

[12] Adopted finding.

[13] Adopted finding.

August 1, 2012 through February 28, 2013. Both documents outlined continued performance issues and unprofessional behavior, including VPLs that were not entered timely, VPLs sent to the incorrect region, unprofessional manners regarding phone calls, "hanging up on callers" and answering with "hello." Grievant became agitated during that meeting with her supervisors. (R Ex 6).[14]

15. On May 8, 2013, Respondent received a letter from WVU Physicians of Charleston stating that Grievant would be absent from work from May 8, 2013 through May 22, 2013. She was diagnosed with severe depression and moderate anxiety and authorized to return to work on May 23, 2013, with a physician's request for accommodations of "Low stress environment, private cubicle preferably. Change work location/switch departments, limited multitasking and exposure to employees who harass" until November 23, 2013.[15]

16. Both Ms. Riley and Ms. Pam Holt, Human Resources Director for BPH, attempted to accommodate the "change work location" request by offering a more private cubicle/workspace, but Grievant refused it. (Testimony of Ms. Holt and Ms. Riley).[16]

17. Ms. Riley had been providing Grievant with a daily email informing her of Grievant's expected daily tasks, and on June 13, 2013, instructed Grievant to work in a different area, the Vendor Unit, to complete a mass mailing and also to answer the telephones.

18. Grievant ordinarily works in a cubicle with a computer. The Vendor Unit is a large, quiet area away from Grievant's cubicle that does not have a computer. Ms. Riley

[14] Adopted finding.
[15] Adopted finding.
[16] Adopted finding.

specifically instructed that Grievant be off the computer to perform these tasks and that Ms. Riley would provide her with anything on the computer that she needed. Part of the concern with Grievant's performance in the past had been Grievant using the computer rather than completing required tasks.

19. Grievant complied with Ms. Riley's instructions on June 13, 2013, but on June 14, 2013, Grievant was not in the Vendor Unit as she had been instructed, but was on her computer in her cubicle. When Ms. Riley found Grievant was not complying with her previous instruction, Ms. Riley again instructed Grievant to return to her assigned tasks in the Vendor Unit.

20. Grievant did not comply with Ms. Riley's instruction and became hostile and argumentative. During Grievant's argumentative remarks she said, "Why do you treat me like a dog. I am not your dog," and continued to repeat those statements. After a time, Ms. Riley was able to direct Grievant back to the Vendor Unit area, but Grievant continued to be defiant. Grievant started saying that she did not understand what Ms. Riley wanted her to do and Ms. Riley said that she would explain, even though Grievant had previously performed these tasks. Eventually, Grievant informed Ms. Riley that she would not answer the phone or perform the mailing. When Ms. Riley stated that Grievant would answer the phone and would perform the task she had been assigned in the Vendor Unit area, Grievant said that if she was not allowed on the computer then Ms. Riley was not going to be on the computer. Ms. Riley informed Grievant that she was being insubordinate and Grievant still refused the tasks.

21. Throughout the incident, Grievant's voice continued to escalate until she was screaming at Ms. Riley and she repeatedly screamed at Ms. Riley. Ms. Riley

remained calm and professional and did not raise her voice. She continued to attempt to redirect Grievant and calm her down. After approximately ten minutes, Grievant went home.

22. Although Ms. Riley was not intimidated by Grievant's behavior, she believed that Grievant was trying to be very intimidating. She was concerned and felt that she would need to call security if she could not calm Grievant down.

23. Rebecca Nicholas and Melissa Larson, who witnessed the incident, felt Grievant's loss of control was scary and were disturbed by it. When she heard Grievant's raised voice, Ms. Larson was concerned for Ms. Riley and went to check on her. Ms. Nicholas went to find another supervisor to get help for Ms. Riley.

24. Grievant's behavior was disruptive and attracted approximately five other employees to the area.

25. On June 14, 2013, Ms. Larsen sent Ms. Riley an e-mail stating, "I overheard the 'conversation' held in the vendor unit between your employee, (Grievant) this is the note I am making for myself; this type of attitude is considered 'hostile environment.'" Ms. Riley forwarded Ms. Larsen's e-mail to Ms. Holt and added "now we have other employees stating it is a hostile work environment." (R Ex 8).[17]

26. Grievant admitted that she has medical conditions which affect her mood control. Grievant testified that she gets angry and that she uses her medicines to control herself. She specifically admitted that she had experienced anger issues at work.

27. The June 14, 2013 incident cannot be ascribed to cultural differences. Grievant's voice is not naturally loud and only raises a little in volume when she is excited.

[17] Adopted finding.

The tendency for a speaker to speak more loudly when excited, is common and not a cultural difference. The volume and escalation during the incident indicates an emotional response and loss of control rather than a cultural difference.

28. Due to the June 14, 2013 incident, Grievant was placed on suspension pending investigation of the allegations and was later terminated from employment for creating a hostile work environment. Grievant was not interviewed during the investigation or permitted to respond to the investigation.

29. The Grievance Board overturned Grievant's termination from employment solely on procedural grounds based by Decision dated July 15, 2014. Respondent appealed the Decision of the Grievance Board, but then withdrew its appeal.

30. Following the withdrawal of the appeal, Ann Williams, Deputy Commissioner, determined that Grievant should be placed in a different office to allow Grievant a fresh start. Grievant was returned to work on November 3, 2014, and was placed in a temporary Office Assistant II position in the Office of Maternal, Child and Family Health. There is no allegation that Grievant's pay rate was reduced or that Grievant objected to the decision to place her in a new office.

31. Deputy Commissioner Williams also determined that an independent review of the previous investigation be conducted. The previous investigation into the June 14, 2013 incident was conducted by Kerri Nice and Carlotta Gee of the Office of Human Resources Management. The second investigation was conducted by Stephanie Burdette and Dawn Adkins, also of the Office of Human Resources Management. Ms. Burdette and Ms. Adkins interviewed Grievant, with her representative present, and also reviewed the recordings of the statements made in the previous investigation. Ms.

Burdette and Ms. Adkins also concluded that Grievant had violated Respondent's Violent/Hostile Work Environment policy (Policy Memorandum 2123) and the Division of Personnel's Prohibited Workplace Harassment policy (DOP-P6).

32. Grievant's workplace is housed in the Diamond Building. Employees are required to wear and swipe security badges to enter the interior of the building. If an employee does not have his or her badge, the employee is required to sign in and security will call the employee's supervisor to come to security to escort the employee into the secured area. This is not an unusual occurrence and even high-level employees are stopped. Employees are not allowed to enter the secure area by following another employee who has scanned his or her badge.

33. Grievant was aware of the requirement to wear and swipe her security badge.

34. On November 14, 2014, Grievant swiped her security badge through her purse. A security guard asked Grievant to show him her badge, but Grievant did not stop. There was no allegation by the security guard that Grievant reacted with anger or was disruptive.

35. On December 17, 2014, Grievant did not have her security badge and was stopped by security guard, Phyllis White. Grievant would not or could not give Ms. White the name of her supervisor. Grievant was told to wait, but refused and attempted to get other employees to let her into the secure area. Grievant was agitated and angry that she was not allowed through. Grievant became so disruptive that Ms. White called Brian Pauley, Director of Safety, Security, and Loss Management, from another building to address the situation.

36. After this incident, Grievant asserted that she had been singled out and had been treated "like a terrorist."

37. On December 11, 2014, Grievant approached co-worker, Love Sabatini, behind the reception desk to ask for a telephone cord. When Ms. Sabatini stated that she did not have a cord and directed Grievant to the employee responsible for supplies, Eloise Fox, Grievant continued to demand a cord from Ms. Sabatini, growing increasingly louder and standing closer until they were arm to arm as she continued to question why she should have to go to Ms. Fox and insist that Ms. Sabatini did have a cord. Ms. Sabatini felt Grievant was loud and hostile and it made her feel nervous. Carrie Moles, who witnessed the incident felt very uncomfortable that Grievant would get so belligerent, angry and confrontational over a phone cord.

38. On January 22, 2015, Respondent conducted two separate predetermination meetings with Grievant and her representative.

39. The first meeting was regarding the June 14, 2013 incident that occurred while Grievant was employed in the Office of Nutrition Services/WIC Program. It was attended by Anne Williams, Deputy Commissioner, Cindy Pillo, Director, Office of Nutrition Services, and Pam Holt, Bureau for Public Health, Human Resources Director. Grievant stated that she had nothing to add to the response she had provided during the investigation.

40. The second meeting was regarding the three instances that had occurred while Grievant was employed in the Office of Maternal, Child and Family Health. It was

attended by Anne Williams, Deputy Commissioner, and Christina Mullins, Director, Office of Maternal, Child and Family Health.[18]

41. By letter dated February 10, 2015, Dr. Rahul Gupta, Commissioner, terminated Grievant's employment for violation of Respondent's Policy Memorandum 2123: Violent/Hostile Work Environment policy, the Division of Personnel's Policy DOP-P6: Prohibited Workplace Harassment, and Respondent's Policy Memorandum 2108: Employee Conduct for the June 14, 2013 incident. Dr. Gupta cited the November 14, 2014, December 11, 2014, and December 17, 2014 incidents, stating the incidents "tend to demonstrate continued hostility on your part." Dr. Gupta stated, "This dismissal follows a series of progressive discipline for similar behavior in the past. You have been counseled several times, received verbal and written reprimands, and been suspended. Your unprofessional behavior has continued, and increased in intensity; to the point that I feel your dismissal is appropriate."

42. The Division of Personnel's Prohibited Workplace Harassment policy (DOP-P6) Section II.H. defines nondiscriminatory hostile workplace harassment as follows:

> A form of harassment commonly referred to as "bullying " that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

[18] Although the termination letter does not indicate Grievant was asked or gave a response to the allegations of misconduct on December 11, 2014, Grievant did not allege any impropriety in the January 22, 2015 predetermination conferences.

Section III.G. further states:

> Nondiscriminatory Hostile Workplace Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:
>
> 1. Unwarranted constant and destructive criticism;
> 2. Singling out and isolating, ignoring, ostracizing, etc.
> 3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
> 4. Threatening, shouting at, and humiliating particularly in front of others.

43. Respondent's Violent/Hostile Work Environment policy (Policy Memorandum 2123) language is very similar to the Division of Personnel's definition of nondiscriminatory hostile workplace harassment and states as follows:

> Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably overburdens or precludes an employee(s) from reasonably performing her or his work. All employees are expected to refrain from disrupting the normal operations of the Agency, refrain from profane, threatening/abusive language or violent physical acts towards others.

44. The policy further states, "Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal."

45. Respondent did not submit a copy of Respondent's Policy Memorandum 2108: Employee Conduct.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA.

CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent asserts it had good cause to terminate Grievant's employment for violation of Respondent's and the Division of Personnel's policies and insubordination. Grievant asserts her termination was retaliatory, her behavior was due to cultural differences, she was subjected to conflicting directives, and that it was Respondent and not Grievant who created a hostile work environment.

Grievant seeks to attribute her behavior and the reactions to her behavior to cultural differences. This contention must be addressed first as it affects all aspects of the grievance. Grievant originates from China and English is her second language. Grievant asserts that the loudness and rapidity of her speech has a different significance in Chinese culture than in European-based culture, essentially arguing that Grievant's supervisor, co-workers, and the security guards misinterpreted Grievant's behavior. In

support of this contention, Grievant offered the testimony of James E. Hawkins in the March 10, 2014 hearing to testify about these cultural differences.

Mr. Hawkins is employed by Respondent at Sharpe Hospital as a Health Service Worker. Mr. Hawkins studied Intercultural Studies at Lee University in the late eighties to early nineties but did not complete his degree. Mr. Hawkins describes his study as a religious sociology program focused on missionary studies. Mr. Hawkins has never been to China, and his experience with Chinese culture is limited to discussions in one of his classes in college in which his professor "had spent a great deal of time in China, and that was part of his teaching." Mr. Hawkins is not an expert. He has very limited experience with Chinese culture specifically, and he has no actual knowledge of Grievant. Mr. Hawkins' testimony is entitled to no weight.

Grievant also testified that she speaks loudly and rapidly, and that even her husband, to whom she has been married a long time, cannot tell when she is speaking to her parents if they are arguing or having a normal conversation. Grievant did not indicate if she speaks to her parents in English or in Chinese. Contrary to her testimony in the hearing that she speaks loudly, Grievant did not speak loudly in her testimony. Other than when describing what she alleges Ms. Riley said to her on June 14, 2013, her voice was softer or similar in tone and volume than most other speakers during the hearing. Grievant's volume did increase as she became more animated in her testimony, which supports Grievant's statement that when she is excited her voice gets louder. However, Grievant's own witnesses do not support Grievant's contention that she is a normally loud speaker or that her volume when excited is at an unexpected level. Sam Crosby testified that she is not normally loud, stating only that her voice would "go up just a little" when

Grievant was excited. Jennifer Starr-Workman testified that Grievant is soft-spoken and that, though her voice would get louder if she was excited, it was not loud enough to disturb others.

The tendency for a speaker to speak more loudly when excited is common and not necessarily a cultural difference. Most importantly, the volume described by the witnesses[19] to the June 14, 2013 incident, specifically, is not a volume that can be attributed to cultural differences. Ms. Riley and Ms. Nicholas both described Grievant's volume as "screaming." Ms. Larsen described the volume as "yelling" which was "caustic" in tone. All witnesses described the volume as escalating. The escalation in volume and description of volume indicates an emotional response and loss of control rather than a cultural difference. This interpretation is supported by Grievant's own admission that she has medical conditions which affect her mood control. Grievant testified that she gets angry and that she uses her medicines to control herself. She specifically admitted that she had experienced anger issues at work. While cultural difference could certainly lead to misinterpretations of intentions between cultures, the evidence does not support that this was what happened in Grievant's interactions relating to this grievance.

As there are disputed facts in this grievance, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY

[19] The undersigned has found the testimony to be credible as will be discussed more fully below.

BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

As the parties chose to submit the grievance partially on the record of the previous grievance, the undersigned was unable to visually observe the demeanor of some witnesses. In addition, Grievant, as is her right, chose not to testify in the level three hearing before the undersigned. Therefore, the undersigned will adopt some credibility determinations made by Judge Basile and make additional credibility determinations based on review of the record of both grievances, including the transcript and audio recording of Judge Basile's proceeding.

As stated previously, English is Grievant's second language. Grievant has a pronounced accent. In her recorded testimony, some words and phrases in her speech were easily understandable, but other words and phrases were not understandable. However, it should be noted that the quality of the recording would contribute to that difficulty.

Judge Basile found Grievant's testimony to be less reliable than Ms. Riley's. Judge Basile stated:

> Grievant at times seemed confused and less than forthcoming. For example, when asked how long she had been living in the United States, Grievant responded that she did not know. The undersigned finds it implausible that Grievant would not recall this very basic fact. This response, and others by Grievant, indicated to the undersigned that Grievant was confused, uncooperative, or insincere.

Whether due to the memory issues she described in her testimony relating to her medical conditions and medication, or insincerity, Grievant is not a reliable witness. Grievant admitted that her memory is poor due to her medication and her testimony shows a poor memory in that she claimed not to remember Ms. Riley's last name or how many years she had been in the United States. Further, several of Grievant's contentions are contradicted by other evidence. Her contention that her speech is naturally loud is not supported by listening to Grievant's own testimony and was contradicted by her own witnesses, Mr. Crosby and Ms. Starr-Workman. Grievant asserted that she had never shouted at anyone in the workplace and that it was Ms. Riley whose tone was angry. These assertions are contradicted by the credible testimony of multiple witnesses.

Rebecca Nicholas testified during the March 10, 2014 hearing. Judge Basile did not make a credibility determination of Ms. Nicholas. Ms. Nicholas' testimony regarding the June 14, 2013 incident was very detailed, consistent with Ms. Riley's and Ms. Larson's testimony regarding the same incident, and consistent with, though more detailed, than Ms. Nicholas' previous email describing the incident. Ms. Nicholas did have one inconsistent statement regarding a subject not part of the instant grievance: that Grievant called Cindy Pillo "stupid." Ms. Pillo testified in the March 10, 2014 hearing that Grievant did not call her stupid, but only called the assignment stupid. However, Ms. Nicholas did qualify in her testimony that, while she was sure Grievant had called the assignment stupid, she was only 80% sure that Grievant called Ms. Pillo stupid. As to a bias against Grievant, Ms. Nicholas testified that she had experienced previous problems with Grievant responding angrily to disagreements regarding the division of responsibility for tasks, and that she did not want to work with her because of the bad environment Grievant

caused. Ms. Nicholas was also questioned about a used television that Grievant had given her and appeared oddly defensive about the questioning. However, receiving a gift from someone would tend to make a witness more biased for a person rather than against a person; therefore, this does not appear to be evidence of negative bias. Ms. Nicholas was credible.

Melissa Larsen testified in the March 10, 2014 hearing. Judge Basile did not make a credibility determination of Ms. Nicholas. On the recording, Ms. Larsen's voice was calm and thoughtful and she appeared to carefully consider her testimony. Ms. Larson's testimony was consistent with that of Ms. Riley and Ms. Nicholas. Although Ms. Larsen described the incident as more brief, and she did not describe the dog comment, she also stated that after she heard the initial exchange in which Grievant became very loud that she was upset and scared and she left the area to talk to others, including her supervisor. Her testimony is therefore not inconsistent with Ms. Riley's and Ms. Nicholas' testimony regarding the same incident, as they appear to be referring to different parts of the whole incident. Like Ms. Nicholas, Ms. Larson had experienced previous problems with Grievant's workplace behavior, but did not seem to exhibit any negative bias towards Grievant. Ms. Larson was credible.

Sandra Riley testified in the March 10, 2014 hearing. Judge Basile found, based on her demeanor, that Ms. Riley was "both professional and sincere." Ms. Riley testified in detail and with certainty. Ms. Riley's account was consistent with Ms. Nicholas' and Ms. Larson's testimony regarding the same incident. There is no evidence to support that Ms. Riley has any bias against Grievant. Ms. Riley was credible.

Christina Mullins testified in the September 26, 2016 hearing. Ms. Mullins' demeanor was calm, professional, and quiet. She provided thorough and relevant responses to questions. There was no indication that Ms. Mullins had any bias against Grievant. Ms. Mullins was credible.

Phyllis White testified in the September 26, 2016 hearing. Ms. White's demeanor was calm and deliberate. She was responsive to questions. Her testimony was consistent with her prior written statement of the incident in her daily log. Although Ms. White was questioned if DHHR management had previously told Ms. White anything about Grievant, Ms. White credibly testified that they had not and that she had no other knowledge of Grievant. There was no evidence Ms. White had any bias against Grievant. Ms. White was credible.

Love Sabatini testified in the September 26, 2016 hearing. Ms. Sabatini's demeanor was odd, as she had some unusual facial expressions, had poor eye contact, and looked around the room quite a bit. She seemed very hesitant in some of her answers and said she was confused by questions that seemed straightforward. However, Ms. Sabatini was obviously uncomfortable in the proceeding, so these things may be attributable to nervousness rather than dishonesty. This view is supported by the consistency of Ms. Sabatini's account of the incident with the credible testimony of Carrie Moles, which will be discussed below. There was no evidence that Ms. Sabatini has any bias against Grievant.

Carrie Moles testified in the September 26, 2016 hearing. Ms. Moles' demeanor was very good. She was polite, calm, forthright and very certain in her answers. Although, like other witnesses, Ms. Moles had other negative experiences with Grievant,

that did not indicate a bias against Grievant and there was no other evidence of bias. Ms. Moles was credible.

Sam Crosby testified in both the March 10, 2014 hearing and the September 26, 2016 hearing. Judge Basile did not make a credibility determination. Mr. Crosby's demeanor was calm, professional, and forthright. He was responsive to questions and detailed in his answers. Mr. Crosby's testimony was consistent during both hearings. Mr. Crosby is obviously fond of Grievant and had served as an employment reference for her but this does not indicate any improper bias for Grievant. Mr. Crosby was credible.

Jennifer Starr-Workman testified in the September 26, 2016 hearing. Ms. Starr-Workman testified by telephone. Ms. Starr-Workman was responsive to questions from Grievant's representative but was not responsive to Respondent's attorney. For example, when asked if she had heard any accusations against Grievant from Ms. Mullins directly, her response was "The only thing I ever heard from Christina Mullins is how bad of an employee I was." Ms. Starr-Workman has a positive view of Grievant but there is no indication she has any inappropriate bias for Grievant. Ms. Starr-Workman expressed very negative opinions of Ms. Mullins and asserted that she had taken a demotion without prejudice to get away from her, so there is possible bias against Ms. Mullins. Ms. Starr-Workman's credibility is questionable.

Respondent submitted two policies relating to nondiscriminatory hostile workplace harassment. The Division of Personnel's Prohibited Workplace Harassment policy (DOP-P6) Section II.H. defines nondiscriminatory hostile workplace harassment as follows:

> A form of harassment commonly referred to as "bullying " that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds

> of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

Section III.G. further states:

> Nondiscriminatory Hostile Workplace Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:
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> 1. Unwarranted constant and destructive criticism;
> 2. Singling out and isolating, ignoring, ostracizing, etc.;
> 3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
> 4. Threatening, shouting at, and humiliating particularly in front of others.

Respondent's Violent/Hostile Work Environment policy (Policy Memorandum 2123) language is very similar to the Division of Personnel's definition of nondiscriminatory hostile workplace harassment and states as follows:

> Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably overburdens or precludes an employee(s) from reasonably performing her or his work. All employees are expected to refrain from disrupting the normal operations of the Agency, refrain from profane, threatening/abusive language or violent physical acts towards others.

The policy further states, "Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal."

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County*

Bd. of Educ., Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

"'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

Grievant's behavior does not comfortably fit within the Division of Personnel's Prohibited Workplace Harassment policy (DOP-P6). While Grievant's screaming and comments that Ms. Riley was treating her like a dog are outrageous and clearly

unacceptable in the workplace, the Division of Personnel's policy requires repeated behavior and the general law of hostile work environment requires conditions to involve more than a few isolated incidents. Although there was some testimony regarding Grievant's perceived rudeness or inappropriate angry responses prior to June 14, 2013, Grievant was not terminated based on a history of those instances. The termination letter refers only to the history of discipline, the June 14, 2013 incident, and the three incidents that occurred after Grievant's return to work. The behavior Grievant exhibited in these instances is not consistent with "bullying" behavior on Grievant's part. While the behavior was disruptive and disturbing to others, Ms. Riley specifically stated that she was not intimidated by Grievant's behavior. Grievant's language was not profane or threatening. Grievant's screamed accusations that Ms. Riley was treating her "like a dog" were wildly inappropriate, but may or may not be considered abusive.

However, Grievant's behavior does violate Respondent's Violent/Hostile Work Environment policy (Policy Memorandum 2123). Grievant's behavior was extreme and exceeded the bounds of decency. Although Ms. Riley was not afraid or intimidated, Grievant's conduct did create fear in Ms. Nicholas and Ms. Larson, and unreasonably overburdened Ms. Riley. Grievant's behavior certainly disrupted the normal operations of the agency. Grievant also intimidated Ms. Sabatini in the later incident and disrupted normal operations during the security badge incident.

Grievant's behavior was of very serious concern and was certainly insubordinate. Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d

456, 459 (2002) (*per curiam*). *See also Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't,* Docket No. 07-CHD-121 (Dec. 14, 2007). An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,* Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *See Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See also Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Corley, et al., v. Workforce W. Va.*, Docket No. 06-BEP-079 (Nov. 30, 2006).

Grievant both refused direct orders from Ms. Riley and manifested extreme disrespect towards Ms. Riley. The incident began because Grievant had been told to work in the Vendor Unit area away from her cubicle and computer. Even though Ms.

Riley had clearly instructed Grievant to work in the Vendor Unit area, Ms. Riley found Grievant in her cubicle on her computer, which was not required for the task Ms. Riley had assigned her. When Ms. Riley directed Grievant to return to the Vendor Unit area, Grievant became hostile and argumentative and accused Ms. Riley of treating her "like a dog." After a time, Ms. Riley was able to direct Grievant to the Vendor Unit area, but Grievant continued to be defiant. Grievant informed Ms. Riley that she would not answer the phone or perform the mailing. When Ms. Riley stated that Grievant would answer the phone and would perform the task she had been assigned in the Vendor Unit area, Grievant said that if she was not allowed on the computer then Ms. Riley was not going to be on the computer. Throughout the exchange, Grievant became increasingly louder to the point that she was actually screaming at Ms. Riley. This behavior persisted even though Ms. Riley, in contrast, remained calm and professional, and continually tried to redirect and calm Grievant. It is obvious that an employee is not permitted to scream at her supervisor. Grievant was clearly insubordinate.

Grievant asserts that on June 14, 2013, she was subjected to conflicting directives, and that it was Ms. Riley and not Grievant who created a hostile work environment. Grievant's claims that Ms. Riley created a hostile work environment are not supported by the evidence. Grievant testified that Ms. Riley spoke to her in an angry and loud tone, but her testimony is refuted by Ms. Nicholas and Ms. Larson who described Ms. Riley as calm and professional throughout the incident and that her tone of voice was even or monotone. It is clear that Grievant had been receiving daily emails assigning her tasks, so it is understandable why Grievant may have felt that the instruction to work away from her desk was conflicting. Grievant also testified that she needed to be on her computer

to make labels. However, Grievant testified that the incident began when Ms. Riley received an email from her and then came and told her to turn off the computer. Grievant testified that she protested because she wanted to read an email from Ms. Larson. Ms. Riley had told Grievant that she would print out any emails that Grievant needed to see while she worked in the Vendor Unit area, and Grievant disagreed with that and continued to argue with Ms. Riley. Grievant only testified that she brought up the labels to Ms. Riley after Grievant had already argued with her about the email. Regardless, Ms. Riley clarified any confusion there may have been by again instructing Grievant to work in the Vendor Unit area when she found Grievant in her cubicle on her computer and continued to do so. Further, Ms. Riley's concern with Grievant being on the computer was particularly valid as part of the behavior that had led to Grievant's Performance Improvement Plan was Grievant's use of the computer rather than completing her assigned work. Although Grievant may have disagreed with Ms. Riley's decision, she had no excuse to fail to obey multiple direct orders.

As to the allegations of Grievant's misconduct after she returned to work, several things are unclear from the letter of termination. Although it is clear Respondent considered the three incidents to be disciplinable in nature, as Grievant was provided with a predetermination conference regarding the incidents, the letter does not make a specific disciplinary charge against Grievant for these incidents. The letter, instead, states that the incidents "tend to demonstrate continued hostility on your part." Also, the letter is clearly mistaken in reciting the facts regarding the November 14, 2014 incident. Grievant's misconduct was alleged for three separate instances that occurred on November 14, 2014, December 11, 2014, and December 17, 2014.

The two instances on November 14, 2014 and December 17, 2014 involved interactions between Grievant and building security guards regarding her employee identification badge. Respondent submitted into evidence a November 15, 2001 memorandum to "DHHR Administrative Staff" from then-Secretary, Paul L. Nusbaum outlining employee badge procedures, which includes requirements that all employees must have an official security badge, wear their badges at all times, and that each facility "must have in place procedures that will control points of entrance into secured areas..." Although Respondent did not provide documentary evidence that Grievant was aware of these procedures, Grievant's direct supervisor, Christina Mullins, testified credibly that the requirements are noted in the employee dress code policy, are highlighted clearly in orientation, and that there are also signs posted in the building.

On November 14, 2014, the termination letter alleges Grievant "disregarded the instructions of a security guard and 'piggy-backed' through the side employee entrance to the Diamond Building, rather than showing your badge as requested." This allegation is not supported by the evidence. In both his written Incident Report of the same date and his testimony at the level three hearing, the security guard, Kevin Rainwater, stated that Grievant had scanned her employee badge through her purse and then Grievant failed to comply when he asked to see her badge. "Piggy-backed" as used in the termination letter and in the level three testimony means to enter the building without scanning one's badge by following closely behind another employee who has scanned his/her badge, which Grievant did not do in this instance. Although Grievant failed to properly display her badge or respond to the security guard's request, there was no allegation from the security guard that Grievant acted with anger or caused any kind

disruption. He simply stated that Grievant ignored his request and continued on her way. The evidence does not support Respondent's contention that this incident demonstrated continued hostility on Grievant's part.

On December 17, 2014, Grievant did not have her badge and was stopped by security guard, Phyllis White. Ms. White had worked the security desk at the Diamond Building for eleven years. Ms. White testified that the required procedure if an employee does not have his/her badge is to make the employee sign in on a visitor log and then call someone from the employee's office to come down and get them. Ms. White testified this happens two or three times a week and she has even had to stop high-level employees. After Ms. White informed Grievant she would have to wait, Grievant tried to get other employees to let her through the door. When asked who her supervisor was, Grievant could not or would not give Ms. White the name of her supervisor. Grievant was agitated and angry that she was not allowed through. Grievant became so disruptive that Ms. White called Brian Pauley, Director of Safety, Security, and Loss Management, from another building to address the situation. Although Mr. Crosby expressed dismay at the situation, that Grievant was required to wait until Mr. Pauley's arrival, and stated that she was only a little excited, Mr. Crosby did not witness the entire incident. Grievant was already seated when Mr. Crosby arrived in the lobby, which was at the end of the incident as described by Ms. White.

Even after the incident was over, Grievant continued to have a disproportionate reaction to the events, asserting she had been treated like "a terrorist," even though Mr. Crosby had explained to her that this was a normal process. Multiple witnesses testified that they had been stopped by security for their badges, and Ms. White testified she had

stopped even high-level employees. Ms. White was simply following the normal procedure. Grievant had worked in the Diamond Building for at least five years, and would have been required to swipe her badge every time she entered the building, so she knew she had to have her badge. Grievant was simply asked to wait until her supervisor could come down and let her in. Grievant did not give Ms. White her supervisor's name, and continued to try to gain entry improperly even though she had been told she could not enter without her badge. Grievant turned a normal occurrence into a problem that was disruptive to the security guards and Mr. Pauley, and then she further compounded that disruption into an accusation that Ms. White had treated her like a terrorist.

On December 11, 2014, Grievant was involved in a confrontation with a co-worker, Love Sabatini. Grievant approached Ms. Sabatini behind the large reception desk at which Ms. Sabatini was working. It is unusual for an employee to come behind the desk. Grievant requested a telephone cord from Ms. Sabatini. Ms. Sabatini informed Grievant that she should request a cord from Eloise Fox, who is the employee in charge of the storage room. Grievant continued to demand a phone cord from Ms. Sabatini, growing increasingly louder and standing closer until they were arm to arm as she continued to question why she should have to go to Ms. Fox and insist that Ms. Sabatini did have a cord. This behavior was disturbing to both Ms. Sabatini and Carrie Moles, another co-worker who witnessed it. Ms. Sabatini testified that Grievant was loud and hostile and it made her feel nervous. Ms. Moles testified that Grievant kept getting closer and closer to Ms. Sabatini until she was "practically in her face." Ms. Moles testified that for Grievant to get so belligerent, angry and confrontational over a phone cord made her feel very uncomfortable.

Grievant exhibited a continuing pattern of defiant and disruptive behavior. She was placed on a performance improvement plan for her poor performance, which included her failure to obey her supervisor's instructions. She was suspended for insubordination for failure to obey instructions and for repeatedly calling the directed task "stupid." Her misconduct escalated in the incident of June 14, 2013 when she repeatedly disobeyed instructions, screamed at her supervisor, and said that her supervisor treated her "like a dog" when her supervisor was only attempting to get Grievant to comply in a calm and professional manner. After Grievant was returned to work, in a new office with entirely different supervision and coworkers, Grievant continued to display inappropriate and disproportional emotional reactions to normal situations. Respondent has proved it had good cause to terminate Grievant's employment.

Grievant also alleges that the discipline was levied in retaliation for Grievant's previous successful grievance. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

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

> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Grievant has made a *prima facie* case of reprisal. Grievant pursued a successful grievance against Respondent, which resulted in her reinstatement to employment. Grievant was subsequently terminated from employment again. Dr. Gupta was aware of the previous grievance as he cited it in his second termination letter. An inference is drawn of retaliatory motive because the second termination occurred only a few months after Grievant was returned to work following her successful grievance and the failure of Respondent's appeal.

Once a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering credible evidence of legitimate, non-retaliatory reasons for its action. *Conner v. Barbour County Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787, 791 (1997), *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377

S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). Grievant presented Ms. Starr-Workman's testimony that Ms. Mullins was trying "to get rid of" Grievant from the beginning. However, in addition to Ms. Starr-Workman's possible bias for her own asserted negative experience with Ms. Mullins, Ms. Starr-Workman's testimony was only about statements that other employees had made to her about Ms. Mullins being "stuck with" Grievant. Ms. Starr-Workman stated that she had heard gossip, and only relayed the name of one specific employee, Vicky Caruthers, who had said such things to her. There was no explanation of who Ms. Caruthers is, where Ms. Caruthers got the information, or whether being "stuck with" Grievant referred to her prior termination or Grievant's behavior once she came to the new office. Ms. Moles, for example, had testified as to improper behavior Grievant exhibited during new employee orientation.

Regardless, Respondent proved it had legitimate reasons for terminating Grievant that were not retaliatory. Grievant had exhibited a pattern of disrespectful, defiant and disruptive behaviors that spanned from before Grievant was terminated the first time to additional incidents after Grievant was returned to work following her successful grievance that demonstrated a clear unwillingness to correct her behavior. Grievant's termination had been reversed on procedural grounds only, so it was not improper for Respondent to pursue termination a second time for the behavior. *See McFadden v. Dep't of Health & Human Res.*, Docket No. 94-HHR-428 (Feb. 17, 1995); *Cassity v. Div. of Corrections*, Docket No. 97-CORR-267 (Aug. 25, 1997); *Robinson v. Dep't of Health & Human Res.*, Docket No. 2013-1533-DHHR (Aug. 26, 2013). Grievant's misconduct on

June 14, 2013, was of a serious enough nature to warrant termination, which was bolstered by her continued misconduct. It was not a pretext to retaliate against Grievant, but was a legitimate action made to protect the interests of the agency in providing a functional workplace.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work

environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

4. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

5. Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209,

212, 569 S.E.2d 456, 459 (2002) (*per curiam*). *See also Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't,* Docket No. 07-CHD-121 (Dec. 14, 2007). An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,* Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)).

6. "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *See Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See also Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Corley, et al., v. Workforce W. Va.*, Docket No. 06-BEP-079 (Nov. 30, 2006).

7. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her

participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

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

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
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9. Once a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering credible evidence of legitimate, non-retaliatory reasons for its action. *Conner v. Barbour County Bd. of Educ.*,

200 W. Va. 405, 409, 489 S.E.2d 787, 791 (1997), *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989).

10. Respondent proved it had good cause to terminate Grievant's employment and that Grievant's termination from employment was not retaliatory.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: February 14, 2017

Billie Thacker Catlett
Chief Administrative Law Judge

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAN DEYERLE,
Grievant,

v. **Docket No. 2015-0860-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,
Respondent.

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies the attached **DECISION** has been sent to the following persons and addresses by United States Mail or Certified Mail, postage prepaid:

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Certified sent this 14th day of February, 2017.

Jennifer A. Pritchard

Jennifer A. Pritchard
Secretary II