DAVID W. DEYERLE,

Grievant,

v. **Docket Nos. 95-RS-034 &**
96-RS-197

WEST VIRGINIA DIVISION OF
REHABILITATION SERVICES,

Respondent.

D E C I S I O N

David W. Deyerle (Grievant) initiated a series of grievances pursuant to W. Va. Code §§ 29-6A-1, et seq., in which he contests (1) a 10-day suspension he received for not meeting established performance standards; (2) a Performance Improvement Plan he was issued for not meeting established performance standards; (3) his performance evaluation for 1993-94; and (4) discrimination and harassment reflected by a second Performance Improvement Plan he received. Following the completion of Level III hearings covering all these matters, the grievances were consolidated at Level IV and an additional evidentiary hearing conducted. The parties were provided an opportunity to submit written post- hearing arguments, but only Grievant availed himself of this opportunity.

The parties agreed at the close of the Level IV hearing that the record in this matter would be completed upon receipt of post-hearing briefs, to be postmarked not later than January 30, 1997, and a copy of Employee Exhibit 2 from the Level II hearing conductedon July 31 and August 1, 1995. Although Grievant's timely post-hearing brief was received on February 3, 1997, Respondent has never provided a copy of Employee Exhibit 2, as agreed on the record at Level IV. However, the undersigned has determined that the document in question is adequately described in the record,

and the issue which the document was submitted upon has no bearing on the outcome of this grievance. Accordingly, this matter will be treated as mature in order to expedite a decision on this grievance.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible evidence and exhibits contained in the transcripts from Level III or presented at Level IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent Division of Rehabilitation Services (DRS) in its Disability Determination Section (DDS) in Charleston, West Virginia.

2. Grievant was initially employed by DRS in February 1992 as a Disability Evaluation Trainee and promoted to Disability Evaluation Specialist (DES) in February 1993. He was originally assigned to the Clarksburg DDS office, and thereafter transferred to the Charleston office.

3. DES Trainees are expected to maintain an average production of 8 cases per week after completing their initial three months of training.

4. Upon promotion, each DES is expected to maintain a production standard or "quota" of 10 cases per week, with a 91 percent or better accuracy rate. This production standard is calculated from data on worker productivity provided by the federal Social Security Administration (SSA). 5. DDS is funded by the federal government on the basis of production per worker year. During Fiscal Year 1993, nationwide DES productivity was 12.3 cases per week, regional productivity was 12.7 cases, and West Virginia productivity was 10.5 cases.

6. Case files are reviewed randomly to insure that the examiner's decision is correct and that the file contains adequate documentation to support the decision. Grievant has not had a problem with quality or accuracy, except during the third quarter of Calendar Year (CY) 1994 when his accuracy level fell to 73.9 percent for the quarter. 7. Beverly Howard was Grievant's immediate supervisor from approximately June 1992 to November 1993. Ann Bess was Grievant's immediate supervisor from sometime around November 1993 until October 1994. Dan Kalo succeeded Ms. Bess as Grievant's immediate supervisor in November 1994.

8. From October through December 1993, the fourth quarter of CY 1993, Grievant's average production was 8.0 cases per week.

9. On January 31, 1994, Ms. Bess issued a Performance Improvement Plan (Plan) to Grievant.

The Plan required that Grievant average 10 completed cases per week with an accuracy rate of 91 percent or greater, for the quarter ending in March 1994. Ms. Bess also considered the Plan to constitute a written reprimand.

10. Ms. Bess' memo establishing the Plan notes that Grievant's "excessive use of leave" contributed to his production problem. It was noted that Grievant had exhausted his sick and annual leave while taking seven weeks of leave during CY 93. Grievant was not alleged to have abused his leave privileges. 11. At the time Grievant was placed on an improvement plan for the first quarter of CY 94, his caseload was limited to between 90 and 100 cases in an effort to assist him in keeping up with his production requirements.

12. For January through March, the first quarter of CY 1994, Grievant's average production was 5.1 cases per week.

13. During the first quarter of CY 1994, the average DES productivity in West Virginia was 11.3 cases per week.

14. In computing average DES productivity, voluntary overtime is included. Overtime is ordinarily approved for an employee to work on cases other than their own. However, individual supervisors have discretion to permit employees to work on their own cases when circumstances warrant.

15. Grievant only worked overtime on a limited basis during the time period covered by these grievances. He declined to work more overtime due to concerns about his health and family obligations.

16. Grievant reports that he suffers from high blood pressure, obesity, sleep apnea, arthritis, asthma, and a thyroid condition. However, Grievant at no time presented medical evidence of a disability, or requested reasonable accommodation from his employer for a recognized disability.

17. Grievant declared that some of his absences from December 1993 to February 1994 were due to "bad weather," stating that he lives "on top of a mountain . . . outside the city limits." Although the Governor declared a "state of emergency" during part of that time period, state employees were not excused from reporting to work. 18. On May 24, 1994, DRS Director John M. Panza issued a 10-day suspensionto Grievant based upon Grievant's alleged inability or unwillingness to meet performance standards.

19. DRS only adjusts productivity figures for leave when an employee is on an approved leave

of absence. However, individual supervisors have discretion to consider the specific facts and circumstances of an employee's use of leave, assignment to other duties not involving case adjudication, and similar factors in determining the appropriate corrective action to take when a DES does not meet established performance standards.

20. DRS follows Division of Personnel policy and does not approve requests for medical leaves of absence until the employee has exhausted his or her sick leave. Grievant has never requested a medical leave of absence.

21. In addition to Grievant, a number of other DES's employed by DRS have failed to meet production standards. Not all of those employees were placed on formal or informal improvement plans, nor were they suspended when they failed to meet production standards for two or more consecutive quarters. DES's who averaged more than 9 cases per week in a quarter were generally not placed on formal improvement plans. Employees who are placed on formal improvement plans, and make progress toward meeting their production standard, are placed on another improvement plan, rather than being suspended.

22. Grievant, and another employee who was dismissed, demonstrated a decrease in productivity subsequent to being placed on a formal performance improvement plan. One other employee whose ultimate annual case output was 10.25 cases per week during CY 93 was nonetheless placed on an improvement plan for one quarter of the year due to substandard production during a single quarter. 23. Following his suspension, Grievant was given explicit instructions regarding organization of his desk and filing cabinet, as well as the number of cases he was expected to take action on each day.

24. On September 8, 1994, Ms. Bess issued Grievant's performance evaluation for the period from July 1, 1993 to June 30, 1994. Grievant was rated in 10 categories on a scale from 1 ("major weakness) to 5 ("major strength"). Grievant was rated a "1" in the categories Planning and Organizing, and Work Quantity. Grievant was rated a "2" ("weakness") in Attitude Toward Work, and Dependability. Grievant received "3" ("adequate performance") ratings on the remaining categories of Job Knowledge, Work Quality, Communication Ability, Working With Others, Judgment, and Initiative. Grievant's overall rating was calculated as 2.4.

25. Following his suspension, Grievant attained an adjusted production of 10.21 cases per week for the third quarter of CY 94. On October 31, 1994, Ms. Bess notified Grievant in writing that

he was performing his assigned duties at an acceptable level.

26. Grievant's average productivity fell to 7.08 cases per week during the fourth quarter of CY 94 and he was placed on another Performance Improvement Plan by his immediate supervisor, Mr. Kalo, on February 6, 1995.

27. During the first quarter of CY 95 Grievant's average productivity improved to 11.6 cases per week.

28. Janice Runyon, a Senior DES in the DDS who suffers from a bi-polar affective disorder, works three-fourths of a regular schedule and is required to complete three-fourths of the case productivity expected from a full-time Senior DES. 29. Ms. Runyon routinely works overtime in order to meet her production goals.

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 provides that the employer has the burden of proving the charges by a preponderance of the evidence. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Accordingly, DRS has the burden of establishing that the 10-day suspension issued to Grievant in May 1994, and the reprimands issued Grievant in conjunction with the Performance Improvement Plans established in January 1994 and February 1995 were proper.

Because evaluations are not disciplinary in nature, Grievant has the burden of proof in regard to the allegations made in his grievance. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Further, an employee grieving his evaluation must establish by a preponder ance of the evidence that his evaluation is incorrect because his evaluator abused his discretion in rating the grievant Messenger v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993); Wiley v. W. Va. Workers' Compensation Fund, Docket No. WCF-89-015 (July 31, 1989), or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dept. of Health & Human Services, Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); Hurst v. W. Va. Dept. of Transp., Docket No. 91-DOH- 326 (Feb. 27, 1992).

Grievant does not contest that he failed to meet established performance standards for DRS

employees in the DES classification as documented by his employer. Grievant argues that he was treated in a discriminatory manner in comparison to other DRS employees who likewise failed to meet the established performance standards. In the context of a disciplinary action, this claim raises an affirmative defense which Grievant has the burden of establishing by a preponderance of the evidence. McAllister v. Div. of Rehabilitation Services, Docket No. 94-RS-270 (Jan. 25, 1995); Young v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-541 (Mar. 29, 1991).

Grievant believes that his treatment by DRS constitutes discrimination prohibited by W. Va. Code § 29-6A-2(d). Discrimination is defined therein as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A- 2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 1) of discrimination under § 29-6A-2(d), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH- 435 (Feb. 28, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Applying this prima facie analysis to the facts presented here, the undersigned is not convinced

that Grievant was treated disparately for any reason that was not job-related. Grievant's discrimination argument is founded upon an effort to compare himself with all other DES's who were not meeting the established production standards of averaging 10 cases per week each quarter. When compared to this entire group of employees, Grievant was treated differently. However, such a comparison includes employees who were attaining production quotas of over 9 but less than 10 cases per week. The evidence indicates that on the total spectrum of DES's who met and did not meet established production standards, Grievant and another employee who was terminated were on the lower end of that spectrum.

Accordingly, the undersigned is unable to conclude that Grievant was similarly situated to all other DES's who failed to meet their production goals in one or morequarters during the periods when Grievant was being placed on formal Performance Improvement Plans and suspended for substandard performance. Moreover, even if Grievant was treated differently from other DES's within the meaning of W. Va. Code § 29- 6A-4(d), DRS established sufficient evidence to verify that any such differences were job- related.

Grievant also contends that DRS improperly required him to meet the established performance standards notwithstanding the fact that he was on approved sick and annual leave for a variety of reasons during the time periods covered by the matters grieved. Although each absence by Grievant was legitimate, all of the reasons given for Grievant's absences were personal to the Grievant, and not directly attributable to the employer. Grievant's suggestion that he had to choose between making the established production goals and sacrificing his health (See footnote 2) and family life more closely summarizes the crux of Grievant's position. DRS does not dispute that it has established a demanding performance standard for its DES's. However, it is likewise clear that DES's in West Virginia and other states in this region are fully capable of attaining and exceeding this standard.

Grievant's effort to attribute his failure to meet performance standards to the employer's refusal to accommodate his use of approved leave must fail. Grievant failed to meet his burden of establishing that, but for his legitimate use of leave, he would have met his employer's otherwise proper performance standards. Stated another way, Grievant failed to establish any correlation between his leave usage and his failure to adjudicate 10claims per week. Ultimately, Grievant only established that he does not have the same aptitude for claims adjudication as some of his fellow DES's.

After due consideration of the extensive testimony rendered at Levels III and IV, as well as the

voluminous documentary evidence produced at Level III, the undersigned is not persuaded that Grievant's challenged evaluation was improper in any significant regard. Indeed, a preponderance of the credible evidence indicates that Grievant's employer was engaged in a good-faith effort to improve Grievant's performance to an acceptable level. Grievant's evidence largely consisted of disagreement with the established standards, or an effort to substitute his judgment for that of his supervisors.

Under the previously discussed standards adopted by this Grievance Board for considering challenges to employee evaluation ratings, Grievant has neither demonstrated that his employee evaluation resulted from an abuse of discretion, or was rendered in violation of any law, policy, rule or regulation. Indeed, the weight of the evidence indicates that the evaluation ratings were substantially based upon objective criteria, or were based upon subjective deficiencies in Grievant's duty performance that were observed by his peers, as well as his supervisors.

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

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Wellman v. W. Va.Dept. of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. DRS established by a preponderance of the evidence that, despite specific warnings, Grievant failed or was unwilling to perform his assigned duties in a manner that met established performance standards. Under the circumstances, a 10-day suspension was an appropriate penalty for Grievant's failure to meet standards.

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

4. An employee grieving his evaluation may obtain relief by establishing by a preponderance of the evidence that his evaluator abused his discretion in rating him. Messenger v. W. Va. Dept. of

Health & Human Resources, Docket No. 92-HHR-388 (Apr. 7, 1993).

5. An employee challenging his evaluation may also obtain relief by establishing by a preponderance of the evidence that his performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. Maxey v. W. Va. Dept. of Health & Human Services, Docket Nos. 92- HHR-088/224/362 (Aug. 16, 1993).

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

7. Grievant similarly failed to establish that the Performance Improvement Plans which he was placed on were improper in any significant regard or were based on any consideration other than Grievant's documented substandard performance of his assigned duties as a Disability Evaluation Specialist.

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 26, 1997

Footnote: 1

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

Footnote: 2

Ms. Runyon's testimony indicates that DRS is willing to accommodate an employee with a documented disability. Grievant's evidence falls well short of establishing that he suffers from any medical condition which limits his ability to perform the essential duties of his position without accommodation.