IRA L. DADISMAN, III,

Grievant,

v. **Docket Nos. 98-RS-023/040**

WEST VIRGINIA DIVISION OF
REHABILITATION SERVICES,

Respondent.

D E C I S I O N

On January 26, 1998, Ira L. Dadisman, III (Grievant), filed a grievance at Level IV, as authorized under W. Va. Code § 29-6A-4(e), challenging his dismissal from employment by Respondent West Virginia Division of Rehabilitation Services (DRS). Grievant had previously initiated a separate grievance challenging a three-day suspension he received in January 1997. A Level III evidentiary hearing on that grievance was held on September 18, 1997, and a decision denying the grievance was issued on February 2, 1998. Grievant appealed his suspension to Level IV on February 10, 1998. The parties agreed that these matters could be consolidated for hearing. Following a series of continuances, a Level IV evidentiary hearing was held on May 8 and 26, June 24, July 14, August 26, and September 23, 1998. (See footnote 1) At the conclusion of the hearing, the parties agreed on a briefingschedule, and Grievant filed a timely post-hearing argument on November 25, 1998. During the first day of the Level IV hearing, DRS indicated that the undersigned Administrative Law Judge would be provided a copy of the Level III hearing transcript regarding Grievant's suspension. However, this transcript was not received until after correspondence was sent to DRS to follow up on telephonic requests from the Grievance Board staff requesting the transcript. Ultimately, the Level III transcript was received from Grievant's counsel on March 4, 1999.

BACKGROUND

On December 5, 1996, Grievant was issued a suspension notice by DRS Interim Director, William

Tanzey. Pertinent portions of that notice state:

> I am informing you of my decision to suspend you without pay from your position as a Rehabilitation Counselor with the Division of Rehabilitation Services for a period of five (5) working days. Your suspension will begin on January 6, 1997. You should return to your scheduled duties on January 13, 1997. The reason for this personnel action is your inadequate work performance.
>
> Because of your supervisor's concern regarding your work performance, she met with you on February 8, 1996, to share her concerns regarding your apparent inability in obtaining the necessary skills and knowledge in order to satisfactorily perform the required functions of a Rehabilitation Counselor. On February 12, 14, and 15, 1996, she assisted you in an attempt to better organize your office procedures. Most of your old mail was cleared and a box was made available for incoming mail and another for filing. A system was developed to assist you in keeping track of the numbers necessary to complete your progress and achievement report and review your Status 00/02 cases.
>
> You were informed that your supervisor would assist you in screening your cases for three months, that your closures must be case specific, you should complete your review of the Study Guide and to spend the first hour of the day reviewing sections in the Case Services Manual. The following recommendations were made to enhance your work performance.
>
> Vocational diagnostic inventories are to be dictated in three days, with monthly follow-up and waivers completed if eligibility cannot be established in 60 days.
>
> Mail will be acted upon within five days.
>
> Per District policy, every case will be reviewed monthly to assure appropriate action occurring. No multiple-month gaps in contact.
>
> It is your responsibility to get your cases to Karen White for necessary approvals in a timely manner.

Ensure case is in the appropriate status on Client Data List and file.

In July 1996, a follow-up audit was conducted as a result of your supervisor's concerns regarding your work performance identified in January 1996, and the plan of action developed to improve your work performance dated February 28, 1996.

Currently, territory 124 only has 48 cases. This is about one-half the average territory size. Thirty-one percent of the cases (15) are in Status 02, with 100% of these being in status more then 60 days, 86% more than six months, and 66% more than one year. Forty-three percent (21 cases) are in Status 10, with 76% of Status 10 cases having been in status more than six months, and 57% over one year, with one case over two years. This is not a normal distribution of cases and is indicative of problems. Only 16% of the cases are above Status 10, but review showed that all necessary information was in several cases in 02 and 10 to complete program. Audit forms do not show the entire picture, as your supervisor is still reviewing and approving Vocational Diagnostic Interviews, eligibilities, programs, and 21s. By this time, you should not require approval of vocational diagnostic inventories and eligibilities. However, you have not demonstrated proficiency in these areas, so you have not been released to approve them.

Following is a brief review of what was found on each case:

* * *

After approximately two years of extensive assignments in the performance of your duties as a Rehabilitation Counselor, your supervisor was discouraged with your inadequate work performance. Even though the territory is very small, it appears many clients have had little or no contact and others, while having contact, have no direction or goals in theirrehabilitation case. Disabled clients are obviously not receiving the rehabilitation services to which they are entitled. You have been informed on numerous occasions that every case must be handled on an individual basis. You do not seem to be able to abstract learning from one situation to the next situation. Your organizational skills also pose a problem. Your supervisor tried to work with you on this without success. You have to work on all cases, and when interrupted, you have to be able to go back and finish what you were working on prior to the interruption.

The above are representative of your unsatisfactory level of performance. While I would like to emphasize that some issues seems small when viewed singularly, the cumulative effect is one of unacceptable performance and our disabled clients, assigned to you, are not being adequately served.

After having reviewed your performance as demonstrated by the previously referenced examples, I can only conclude that you have been, and continue to be unable or unwilling to satisfactorily perform the functions of your position. Further, I wish to emphasize the seriousness of your failure to meet the expectations of your position. It is important that you understand that we are at a point where I conclude your performance in many areas has fallen below tolerance level.

In an effort to assist you in meeting a standard of performance consistent with my expectations, your supervisor is establishing a ninety (90) calendar day improvement period, beginning January 2, 1997 to allow you to bring your faltering performance to acceptable standards. It is my expectation that you will make significant progress toward the attainment of these task oriented goals within the initial thirty (30) days (excluding your five-day suspension period) of the improvement period. Your supervisor will meet with you periodically during the initial thirty (30) days (excluding your five-day suspension period) to discuss your progress and provide you with verbal and written feedback. If your work performance does not improve, or significant progress toward attainment of the goals is not evident, I will find it necessary to initiate disciplinary action, which may include additional suspension without pay. Continued failure to meet expectations may also ultimately lead to your dismissal.

To this end, your supervisor has reduced to writing her expectations of you in your position of Rehabilitation Counselor:

The following expectations need to be met by established deadlines:

1. You will need to correct all items listed on audit reports and forms and clear with Ms. White by **January 24, 1997**.

2. You must review all Status 02 cases and take appropriate action to move them toward eligibility/acceptability by **February 3,1997**. Ms[.] White's approval is required.

3. You are to complete waivers on all Status 02 cases over 60 days old by **February 10, 1997**, and maintain on cases as required.

4. Vocational diagnostic inventories will be dictated within **three days** of application with monthly follow-up.

5. Mail will be acted upon within **five days** of receipt.

6. Corrections of case work will be completed within **five days**.

7. You need to review the training and case services manuals, and you will be tested on your knowledge at the **end of this three-month period with 80 percent accuracy required (March 31, 1997)**.

8. You will devise a system to manage and organize your cases by **March 31, 1997**. If you have questions or need assistance, please contact Ms. White.

9. You will need to review every case **monthly** to ensure they are moving through the system in an appropriate manner.

10. A follow-up audit will be conducted starting **April 1, 1997**. Until that time, Ms. White and I will be available to address questions.

11. You will meet with your supervisor, Ms. Reed, at **9:00 a.m.** on **January 29, 1997**, **February 26, 1997**, and **March 27, 1997**. On **April 17, 1997**, you, Ms. Reed, and Ms.

> White will meet to assess and evaluate performance progress.
>
> I would like to confirm my receptiveness to any reasonable suggestion as to how your supervisor might assist you during this improvement period. Should you desire to respond to the matters of this letter, you may either meet with me or my designee in person or present me with a written explanation if you think this action is unwarranted. If you choose to meet with me, please contact my secretary for an appointment on or before December 13, 1996.

J Ex 1 at L IV (emphasis in original).

Grievant met with Interim Director Tanzey regarding this suspension on January 7, 1997. As a result of their conversation, Mr. Tanzey understood that Grievant was committed to improving his work performance. Accordingly, the suspension was reduced to three days. See J Ex 2 at L IV. Grievant filed a timely grievance contesting his three- day suspension.

On January 16, 1998, while the grievance contesting Grievant's suspension was still pending at Level III of the grievance procedure, DRS' new Director, James S. Jeffers, notified Grievant that he was being dismissed for unacceptable performance. The notice letter contained the following explanation for this action:

> Based upon recommendations of your supervisors, this letter is to advise you of my decision to dismiss you from your position of Rehabilitation Counselor with the West Virginia Division of Rehabilitation Services, effective January 31, 1998. This action is in accordance with Section 12.02 of the Division of Personnel's Administrative Rule providing a fifteen (15) calendar day written notice. You may work out your notice period; however, you are not required to do so. In any event, you will be paid for all accrued annual leave as of your last working day.
>
> The reason for this personnel action is that you have continued to perform at unacceptable levels despite continuous training and assistance from the Client Services Specialist, Ms. Karen White, since your transfer from our Disability Determination Section to our Charleston District Office on February 15, 1995. Newly hired counselors generally learn this job in six months to one year and can be released from training within this time period. Nonetheless, you continue to receive training from the Client Services Specialist and have not been released to handle the most basic functions of a rehabilitation counselor's position (i.e. applications, determination of eligibility, develop plans, initiate services, or close cases) without her approval. You have been under a Plan of Action, a Plan of Remediation, and you were even suspended for five days (later reduced to three days in order to have minimal effect on client services) in January of 1997. However, none of these actions have resulted in progress indicative of ability or desire to develop the skills necessary to perform the functions of a rehabilitation counselor. Your job performance evaluation dated January 29,1997, accurately reflected this poor performance with a rating of 2.6 out of a possible 5.0.

Since assuming the role of rehabilitation counselor in February 1995, your production has been extremely poor. Some supervisors carry partial caseloads of 60 or more clients and most rehabilitation counselors carry caseloads of 75 to 150; however, your current caseload is 34. While that is not unusual for a Social Security caseload, the other rehabilitation counselors throughout the state, who have a similar Social Security caseload, additionally carry a regular caseload as well. These other rehabilitation counselors typically are responsible for a total of 85 cases. However, due to your inability or refusal to develop as a rehabilitation counselor, you are unable to manage even a small Social Security case load. Additionally, in fiscal Year 1998, approximately 27 of the 39 clients in your caseload (Territory 124) received only diagnostic services or no services at all, and only 10 of the cases showed any major status change despite your extremely small workload. In fact, as of October 7, 1997, you have 11 cases in Status 02, a diagnostic/eligibility status (5 have been in that status since 1995, 5 since April 1996, and 1 since September 1997). You have not rehabilitated (Status 26) **any** clients this fiscal year. You have only **1** in client In Status 20, as ready for employment. You have written no Individualized Written Rehabilitation Programs (IWRPs) this fiscal year yet you have 20 Cases in Status 10, eligible but awaiting your plan of rehabilitation, (7 since 1995, 12 since 1996, and 1 since May 1997) which indicates total lack of regard for agency and federal guidelines pertaining to timely services to clients. As stated above, there are no successful employment outcomes for Fiscal Year 1998. Incredibly, it has been brought to my attention that you have only utilized/authorized $68.00 for client services during the same period. This is inexcusable and very unusual for an employee with nearly three years of rehabilitation counseling experience and even more unusual for someone with your nearly 12 years of casework experience at our Disability Determination Section.

It is obvious that persons with disabilities are not receiving the rehabilitation services needed to become gainfully employed. Your procrastination and unwillingness to perform your job as instructed has resulted in clients with great employment potential remaining on Social Security or other government assistance.

You have been given ample opportunity to improve your performance since assuming your position as a Rehabilitation Counselor on February 15, 1995. The Client Services Specialist, Ms. Karen White, has tried various methods of training including individual/group training, walk through case-by- case, observation with other counselors, manual reading, testing, questions and answers, etc. A case audit was performed by the Client ServicesSpecialist on August 13, 1996. Details of the problems found on every case were included in the audit and recommendations on how to improve your case management were included. Your failure to improve resulted in your being suspended on January 6, 1997. In the suspension letter to you dated December 5, 1996, you were told that after approximately two years of extensive assignment in the performance of your duties as a rehabilitation counselor, your supervisor was discouraged with your inadequate work performance. “Even though your territory and caseload are very small, it appears many clients have had little or no contact by you, and others, while having had contact, received no direction or goals in their rehabilitation cases.” In addition, the letter stated that if your work performance did not improve, or if significant progress toward attainment of goals was not evident, further disciplinary action would be initiated, and “continued failure to meet expectations may also ultimately lead to your dismissal.”

You were further informed that another audit would be conducted beginning April 1, 1997. This audit (enclosed) dated July 21, 1997, clearly shows that you have made virtually no improvement upon your performance. You have indubitably failed to utilize the advice given to you in the audit and follow-up meetings of 1996 and 1997, and have made no progress in meeting the minimal expectations asked of you.

Additionally, this audit indicates that you have repeatedly, even after being cautioned, violated client confidentiality by discussing the client's case with mothers, cousins, girlfriends, or whomever answers the telephone. This willful and intentional disregard for the laws of confidentiality and the deteriorating work performance you have demonstrated cannot be tolerated or condoned.

Following are **examples of major work deficiencies** you have experienced with agency policy and casework procedures over the past three years:

1. Failure to determine eligibility in a timely manner. The average length of time from application to eligibility determination is 95 days. The eleven cases you have in the applicant status have been there an average of 20.8 months. The federal goal is 60 days.

2. Failure to complete rehabilitation plans in a timely manner. The federal maximum is nine months and your average is 18.5 months.

3. You are not providing appropriate services to clients. Only 2 of your 34 cases are under an Individualized WrittenRehabilitation Program, therefore, 94.2% of your clients are not in a status where they can receive services.

4. Failure to act on specific guidance to improve or remediate cases in a timely manner.

5. Failure to maintain contact with clients even with an extremely small territory. The average territory in District I has 74.5 cases; you have only 34.

6. Lack of consideration of how the client's impairment impacts vocational tasks.

7. Inability to appropriately counsel and guide the client to establish vocational goals.

8. Inability to learn the rehabilitation process.

9. You have written no Individualized Rehabilitation Programs (IW R Ps) this fiscal year.

10. You have closed no cases in Status 26 as rehabilitated in this fiscal year.

The Division of Rehabilitation Services is mandated to provide appropriate rehabilitation services, in a confidential atmosphere, to people with disabilities. The State of West Virginia and its agencies have reason to expect their employees to observe a standard of performance and conduct which will not reflect discredit on the abilities and integrity of their employees, or create distrust with the public regarding their employees' capability in discharging their duties and responsibilities. Therefore, I have concluded that you do not meet a reasonable standard of performance and conduct as an employee of the West Virginia Division of Rehabilitation Services, thus warranting your dismissal.

J Ex 3 at L IV (emphasis in original).

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of

the evidence. W. Va. Code § 29-6A-6; Miller v. W. Va. Dep't 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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting 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. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). The public has a significant interest in ascertaining that employees such as Grievant perform the duties for which they are compensated in a reasonably competent and proficient manner. See Hein v. W. Va. Dep't of Health & Human Resources, Docket Nos. 94-HHR-1124 & 95-HHR-396 (Nov. 30, 1995). Because Grievant is tasked with attempting to take clients who are receiving public funds and placing them in a self-supporting employment situation, a significant failure to accomplish these assigned duties is hardly a trivial matter. Accordingly, if Grievant failed to perform his assigned duties as alleged by DRS, and the employer was not culpable for that failure, the employer's action must be sustained. See Deyerle v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 95-RS-034 & 96-RS-197 (Nov. 26, 1997). In this particular situation, there is little disagreement between the parties regarding the law, but they are diametrically opposed concerning the facts, and what inferences may properly be drawn from those facts. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of

bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Accordingly, it is necessary to discuss the evidence presented by the parties in some detail.

Grievant has been employed by DRS since December 1984. L IV HT, 6/24/98 at 28. Prior to February 1995, Grievant worked as a Disability Specialist in the Disability Determination Section in Charleston. Grievant testified without contradiction that he was generally successful in exceeding production goals and performing the duties of his prior position in a fully satisfactory manner. L IV HT, 7/14/98 at 94-97; G Exs LL & MM at L IV. In February 1995, he was reassigned to the Charleston District Office as a RehabilitationCounselor Trainee. L IV HT, 6/24/98 at 28. DRS employs a number of Rehabilitation Counselors who assist individuals with a variety of physical or mental impediments in obtaining appropriate vocational rehabilitation, and ultimately, in obtaining gainful employment when possible.

During his 10 years as a Disability Specialist, Grievant primarily worked with Social Security claimants, making determinations of eligibility for compensation. Upon his transfer, Grievant came under the immediate supervision of Judy Reed, District Manager of the Charleston Office. L III HT at 10-11. Grievant was assigned for training to Karen White, a Client Services Specialist, whose duties included training new counselors. Ultimately, most of the disputed facts in this grievance involve resolving conflicts between the testimony of Ms. White and Ms. Reed, with that of Grievant.

During Grievant's three-year tenure in the Charleston District Office as a Rehabilitation Counselor Trainee and Rehabilitation Counselor, his caseload, or “territory,” consisted entirely of Social Security cases. Grievant made an issue of this fact, arguing that Social Security cases are generally more difficult to process to a successful outcome than the average rehabilitation case. Ms. White testified that there are different difficulties associated with each type of rehabilitation case, but the same general process is followed by the counselor in all types of cases. Grievant, and most other witnesses, (See footnote 2) were of the opinion that Social Security cases are more difficult to process to the goal of obtaining gainful employment, because the clients are all receiving some form of federal benefitswhich they will forfeit upon obtaining employment. L III HT at 41. Thus, the counselor

has to deal with a client who has less incentive for rehabilitation than other clients served by DRS.

The credible testimony of Ms. White and Ms. Reed indicates that DRS has very few “easy” cases in any category. Nonetheless, for reasons rationally explained by Grievant and his witnesses, the undersigned finds that Social Security cases generally take longer to process to a successful resolution than other rehabilitation cases, and the success rate in rehabilitating Social Security clients is generally lower than the success rate for other rehabilitation clients. However, this factor, and the fact that Grievant was a trainee, were properly considered by Ms. Reed in that Grievant was assigned fewer active cases, usually no more than 50 to 60, while other counselors with non-Social Security cases generally had between 80 to 170 cases assigned. L III HT at 17. Ultimately, any differences between Social Security cases and other cases was not a significant factor in the decision to terminate Grievant's employment, for the reasons described in Director Jeffers' termination letter.

The argument that Social Security cases are inherently more difficult to process than other cases handled by DRS' Rehabilitation Counselors is inextricably intertwined with Grievant's contention that he was assigned an exclusive caseload of difficult Social Security cases as part of a deliberate and concerted effort by DRS to retaliate against him for grievances he had filed while working as a Disability Specialist, and to discriminate against him for a variety of reasons. The merits of Grievant's retaliation and discrimination claims will be discussed in greater detail later in this decision. However, Grievant's claim that he was “set up to fail” from the beginning will not wash. A preponderance of the evidence indicates that, in January 1995, Grievant entered into a settlement with DRS over a previous employment-related dispute that had advanced to Level IV of the grievance procedure, that Grievant was represented by counsel in that matter, and the position to which Grievant transferred as a Rehabilitation Counselor Trainee was created pursuant to an understanding reached between the parties to that settlement. L IV HT, 6/24/98 at 33-39; L IV HT, 8/26/98 at 64; G Ex E at L IV. Further, it appears that assigning Grievant an exclusive Social Security caseload was agreed upon to allow the parties to obtain mutual advantage from Grievant's experience with Social Security matters obtained during his ten years as a Disability Specialist. L III HT at 12-13; L IV HT, 6/24/98 at 39; L IV HT, 8/26/98 at 64-65. In these circumstances, Grievant must be deemed to have entered into this position with his eyes wide open, recognizing that becoming a Rehabilitation Counselor handling a caseload of Social Security cases would involve a significant challenge.

Grievant testified at Levels III and IV that he was promised training on a day-to-day basis and a

full-time secretary as part of the settlement which transferred him to the Charleston District Office as a Rehabilitation Counselor Trainee. L IV HT, 8/26/98 at 17- 18; L III HT at 59. However, the written Settlement Agreement between the parties contains no such provision. See G Ex E at L IV. Moreover, the agreement Grievant signed contains an express denial of any additional promises in the following terms:

> That no promises or representations of any kind or character have been made to Dadisman by the WVDRS [West Virginia Division of Rehabilitation Services] except for those representations which are expressly stated in this instrument.

G Ex E at L IV.

The crux of Grievant's settlement with DRS is contained in the following provision:

> In consideration of the withdrawal of the aforesaid grievances, on or about February 1, 1995, WVDRS shall transfer Dadisman to a position as a Rehabilitation Field Services, Rehabilitation Counselor Trainee to be processed as a demotion in title, only, without prejudice, for the Charleston District Office at a pay rate not less than that currently received. After one year of service in the position, Mr. Dadisman shall forthwith be classified as a Rehabilitation Counselor.

G Ex E at L IV.

As a trainee, Grievant was required to obtain approval from Ms. White to process all applications, eligibility determinations, rehabilitation programs and case closures. As trainees progress, they are approved to perform each of these respective functions independently, once they demonstrate proficiency in the function by performing all related tasks correctly a majority of the time. L IV HT, 5/8/98 at 16. Persons who are selected as Rehabilitation Counselor Trainees serve one year in a trainee status and are promoted to Rehabilitation Counselor at the end of their first year, provided their performance is satisfactory. DRS has previously terminated at least one probationary employee who failed to meet expectations of a trainee during the probationary period. Consistent with the terms of the Settlement Agreement, DRS promoted Grievant to Rehabilitation Counselor after one year. L III HT at 18-19. However, he remained in a training status where Ms. White continued to approve his eligibility determinations, rehabilitation plans and case closures until he was dismissed from employment.

In August of 1995, Ms. Reed issued an evaluation rating Grievant's performance from July 1, 1994, through June 30, 1995. R Ex 1 at L IV. This evaluation covered approximately seven months

while Grievant was working as a Disability Specialist, as well as the five months he had then been working as a Rehabilitation Counselor Trainee. L IVHT, 5/8/98 at 19-20. Grievant was rated on a scale from 1 to 5 in 10 categories. Where a rating of “3" is “adequate performance,” a rating of “2" is labeled as a “weakness,” and a rating of “4" is considered a “strength,” Grievant's overall rating was “3.2.” Ms. White and Ms. Reed considered Grievant to be performing at the average level for a new trainee at that point in time, and Grievant did not contest the rating he received. L IV HT, 5/8/98 at 20.

Subsequently, in January 1996, Ms. White and Ms. Reed met with Grievant and discussed their concerns about his lack of progress toward learning the duties of a Rehabilitation Counselor. L IV HT, 5/8/98 at 21. They observed that Grievant was not accomplishing required tasks in a timely manner, noting that the agency's rule called for monthly review of each file. See R Ex 2 at L IV. They further remarked that Grievant's failure to take timely action on his assigned cases was inexplicable, given his relatively small caseload, 29 active cases at that time. (See footnote 3) It was further observed that Grievant failed to ask Ms. White enough questions, and time was wasted when Grievant prematurely prepared rehabilitation plans that were not feasible. See R Ex 2 at L IV.

Ms. White observed that working with rehabilitation clients is not a matter of following specific instructions, because each client must be handled individually. Ms. Reed likewise related how a counselor must make a lot of judgement calls in deciding what is the best course of action to follow in assisting a client. L III HT at 25-26. Rehabilitation Counselors frequently discuss problems and concerns regarding their clients among themselves, learning from each other as they go. See L IV HT, 5/8/98 at 22. Accordingly,in Ms. White's view, Grievant's failure to ask questions was problematic. Ms. Reed likewise noted that Grievant had been encouraged to ask more questions, as that was part of the learning process for someone in training. L IV HT, 5/26/98 at 257-58.

Ms. White observed that Grievant often failed to act on suggestions she had made to him, or even act at all in a given case. Although there are many judgement calls that must be made, there are also time standards that need to be followed. L III HT at 26. Federal guidelines call for eligibility for rehabilitation services to be established within 60 days of application, and an individualized rehabilitation plan should be completed within 9 months. According to Ms. White, completion of the individualized rehabilitation plan is particularly important, because the client is ineligible for services beyond diagnostic medical care, such as training and physical therapy, until this step is completed. L IV HT, 5/8/98 at 24-25. Grievant did not meet these time standards during his tenure as a

Rehabilitation Counselor. L IV HT, 5/8/98 at 22.

On February 8, 1996, Ms. White and Ms. Reed again met with Grievant to discuss problems with his training progress. Ms. White observed that Grievant's attitude during this meeting was “positive.” L IV HT, 5/8/98 at 28. Grievant asked to work with some of the field counselors and Ms. White scheduled him to work with Ann Ballard and Tammy Roberts. (See footnote 4) Ms. Ballard was considered to be the in-house “expert” on Social Security cases at that time. L IV HT, 5/8/98 at 30. Grievant sat in with Ms. Roberts while she took applications from four or five clients. L III HT at 61. His meetings with Ms. Ballard fell through due to scheduling problems on her part, and Grievant did not follow through toreschedule, asserting that this was his supervisor's responsibility under the “chain-of- command” in the Charleston District Office.

Grievant also complained that he was not receiving adequate secretarial support. See R Ex 4 at L IV. Ms. Reed later assigned a new secretary to Grievant, but not until October 1996. L IV HT, 5/8/98 at 31; L III HT at 35. However, Ms. White observed that Grievant's work output was so minimal that it could not be related to secretarial problems. L IV HT, 5/8/98 at 32. Ms. Reed similarly observed that the delays Grievant attributed to his secretarial support could not be substantiated. L III HT at 35.

Following their February 8 meeting, Ms. White met with Grievant on February 13, 14 and 15, 1996, to review pending cases and assist him in organizing his work. See R Ex 5 at L IV. This intensive assistance extended to reviewing dictation skills, use of the Client Data List to monitor progress, and creating a system to track data required for monthly reports. L IV HT, 5/8/98 at 39. Again, Ms. White found that Grievant was receptive to her assistance. L IV HT, 5/8/98 at 34. Subsequently, on February 28, 1996, Grievant was presented with a written Plan of Action which set forth specific steps that were to be taken to remediate deficiencies in Grievant's development as a productive Rehabilitation Counselor. See R Ex 5 at L IV.

Grievant asked to work with field counselors on “special cases.” See R Ex 4 at L IV. It was noted that Grievant had been encouraged to work with Ms. Ballard on some cases, but it was up to Grievant to take the initiative in scheduling such meetings. (See footnote 5) R Ex 5 at L IV. Grievant was given specific time frames for accomplishing various tasksassociated with case management. Grievant had not been working on his study guide and he was encouraged to keep up to date on this learning tool.

The Plan of Action called for Grievant's cases to be reviewed in June 1996 to verify that he was in compliance. R Ex 5 at L IV. Ms. White delayed auditing a sample of Grievant's cases until July 1996.

L IV HT, 5/8/98 at 41. She deliberately delayed the audit because she had been out of the office more than usual in April and May attending professional conferences, and she wanted to be sure Grievant had ample opportunity to meet with her and ask questions regarding any of his pending cases. L IV HT, 5/26/98 at 200; R Ex 21 at L IV. At that time, she reviewed 31 of Grievant's 48 cases, noting that there were numerous problems indicating a failure to follow through on the guidance set forth in the Plan of Action. R Ex 6 at L IV. In a subsequent memo to Grievant and Ms. Reed setting forth the results of her audit, Ms. White commented to Grievant, “I do not believe you have the skills necessary to be a rehabilitation counselor.” R Ex 6 at L IV. She also noted that although he had asked for assistance in screening cases during the February meeting, and she had agreed to assist in such screening, Grievant had not brought any cases to her for screening. L IV HT, 5/8/98 at 43. Ms. Reed observed that Grievant performs some tasks well, such as meeting the clients and gathering data, but “spins his wheels or treads water” when he reaches the stage where he has to exercise judgement. L III HT at 26.

Although Ms. White's audit revealed that Grievant was failing to review and act on each assigned case on a monthly basis, Grievant noted in his monthly activity report for September 1996 that he had been hampered in working on his cases because Ms. White had them in her possession “for over a month” while conducting her audit. R Ex 8 at L IV. Ms. White testified that she only took 4 or 5 of Grievant's cases at a time while conducting her audit, but a few of his cases were pulled for a District-wide audit and kept for two weeks, the same as all other counselors whose cases were audited. L IV HT, 5/8/98 at 55. Because the information in the case files is also maintained in a computer file, Grievant never provided a satisfactory explanation of how the absence of the client's case file impeded his actions on the case.

The February 28 Plan of Action put Grievant on notice that his cases would be audited in June 1996. R Ex 5 at L IV. Grievant's expressed surprise upon learning his cases were being audited by Ms. White was disingenuous, at least. See R Exs 8 & 11 at L IV. On October 1, 1996, Grievant met with Ms. White and Ms. Reed to discuss the results of Ms. White's audit. The results of that meeting were summarized in a follow-up memo from Ms. Reed dated October 29, 1996, as follows:

> On Tuesday, October 1, 1996, you, Karen White, and I met to discuss the audit of your territory as well as your job performance. The audit and job performance review were scheduled in accordance with the previous meeting and subsequent memorandum of February 28, 1996, which outlined a Plan of Action for improvement.

> As was discussed, the audit showed, after a year and one-half in the job, one of which was an intensive official training status, there are still serious basics that have not been grasped; organizational skills still pose a problem; regular and timely contact or action is not occurring; and, submitting cases for approval is not timely.
>
> The seriousness of the current performance level was noted, and you were informed that Administration would need to be notified of the performance deficiencies and recommendations regarding corrective and disciplinary action.

R Ex 12 at L IV. Thereafter, on December 5, 1996, Grievant was notified of a proposed five-day suspension, which was subsequently reduced to a three-day suspension. See J Exs 1 & 2 at L IV. The suspension notice included a Plan of Remediation, with specific deadlines established for Grievant to meet as set forth earlier in the Background portion of this decision. See J Ex 1 at L IV.

On January 29, 1997, Ms. Reed issued another evaluation to Grievant covering the period from July 1, 1995, to December 31, 1996. R Ex 27 at L IV; L IV HT, 5/26/98 at 253- 55. In this evaluation, Grievant was rated a 2, or “weakness,” in 5 of 10 categories relating to job performance, for an overall rating of 2.6. See R Ex 27 at L IV. Grievant wrote a two- page response in which he agreed only with the 4, or “strength,” rating he received in the category “working with others.” Grievant contended that all other ratings should have been higher but he did not file a grievance contesting his evaluation. See R Ex 27 at L IV; L IV HT, 5/26/98 at 255.

Ms. White testified that, other than obtaining signed waivers from clients whose applications had not been processed to completion of an eligibility determination within 60 days in a majority of his cases, Grievant did not comply with the requirements in the Plan of Remediation. L IV HT, 5/8/98 at 65. In particular, Grievant failed to obtain a passing score (80%) on a written test he was administered to assess his job knowledge. Grievant only answered 72% of the questions correctly. L IV HT, 5/8/98 at 65-66, 69; R Ex 14 at L IV. Moreover, Grievant still had too many cases that had not progressed beyond the applicant stage. L IV HT, 5/8/98 at 68. Grievant's average time for a case in applicant status, according to Ms. White's audit, was 18.4 months, while the federal standard called for eligibility to be determined in 60 days. L IV HT, 5/8/98 at 69; R Ex 17 at L IV. Inaddition, Grievant was carrying one case in active status, when it had been closed almost a year before, but Grievant had not processed the necessary paperwork to take it off the active list. L IV HT, 5/8/98 at 70.

Although Grievant blamed this error on the computer in his testimony, he did not explain why he did not follow up to correct the problem sooner. The only reasonable inference from the available evidence is that Grievant was not systematically reviewing his open cases to determine what action was appropriate.

Ms. White remarked that Grievant was good about documenting the medical problems of his clients and in assisting them in obtaining medical assistance for their illnesses and injuries. However, he was unable to follow through on the process of developing a rehabilitative program to deal with their abilities. L IV HT, 5/8/98 at 70-71. Grievant also had to be counseled regarding his tendency to discuss confidential information concerning a client with their relatives, or whoever happened to answer the phone, without a client waiver to permit such conversations. L IV HT, 5/8/98 at 71. She recounted how Grievant would document repeated attempts to call a client, but not follow through with a letter when the phone calls were fruitless. L IV HT, 5/8/98 at 71.

Thus, by July 1997, Grievant was observed by Ms. White to be performing his vocational diagnostic interviews “fairly well,” but all other aspects of his work performance were significantly deficient. L IV HT, 5/8/98 at 72. Indeed, she noted that Grievant maintained a positive and cooperative attitude, but generally failed to follow through as expected. L IV HT, 5/8/98 at 89. Because Grievant was not serving his clients in an effective and timely manner, the number of referrals added to his caseload was reduced. L IV HT, 5/8/98 at 73; L IV HT, 5/26/98 at 321-22. Ultimately, on November 24, 1997, Ms. Reed wrote to her superior, John Harrison, and DRS' Assistant Director for Human Resources, James Quarles, reviewing Grievant's work history since his transfer as a Rehabilitation Counselor, and recommending his dismissal. R Ex 29 at L IV. This recommendation resulted in the termination notice issued by Director Jeffers on January 16, 1998. J Ex 3 at L IV.

According to the credible testimony of Director Jeffers, Ms. White, and Ms. Reed, and corroborated by a preponderance of the evidence of record, Grievant was not terminated because the outcomes attained by his clients did not meet some arbitrary or optimum expectation in selected cases. Rather, the decision to terminate Grievant resulted from his extended lack of progress toward knowledgeably and systematically moving his client caseload toward an outcome. Grievant's superiors reluctantly concluded that he had not demonstrated the capability of converting his positive attitude and good intentions toward DRS' Social Security clients into timely and meaningful

productivity.

Grievant selectively disputed a few of the factual allegations contained in the correspondence setting forth the reasons for his suspension and termination. To the extent those matters warrant discussion, they will be hereinafter addressed. The main theme of Grievant's defense is that he was placed in a no-win situation where his failures were elaborately documented to provide a “paper trail” to support his termination, and this course of conduct by DRS was substantially motivated by an intent to retaliate for his prior protected activity and to engage in prohibited discrimination. Given that Grievant had been a productive and successful Disability Specialist for DRS for nearly 10 years, these claims appear plausible. However, closer examination of all the facts developed in this extensive record reveals that these claims were not substantiated. In support of his theory of deliberate misfeasance by DRS to orchestrate his failure, Grievant presented substantial evidence and testimony concerning the shortcomings of the secretaries he was assigned while working as a Rehabilitation Counselor. Grievant contends that he was impeded in his effort to perform his duties in a satisfactory manner by a lack of timely and reliable secretarial support. Despite these efforts to deflect criticism toward the DRS clerical staff, the undersigned credits the testimony of Ms. Reed and Ms. White that Grievant's failure to process his cases in a timely fashion was only marginally related to any secretarial deficiencies. L IV HT, 5/26/98 at 206, 211; L IV HT, 5/26/98 at 341. See R Ex 19 at L IV.

In three years as a Rehabilitation Counselor in the Charleston District Office, Grievant had three different secretaries assigned to him, but his performance showed no significant improvement during any of this time. L IV HT, 5/8/98 at 37. Grievant conceded that DRS had a problem retaining enough trained secretaries, and does not allege that any other Rehabilitation Counselor in training status had their own secretary assigned on a full- time basis. (See footnote 6) L IV HT, 6/24/98 at 46-47. The undersigned Administrative Law Judge concludes that Grievant's productivity was marginally impeded by a lack of secretarial support at various times. However, this circumstance does not adequately explain the significant shortcomings in following through with clients described in the termination notice. Grievant similarly complained that his productivity was hampered by computer problems. He testified that he would type an entry into a client's file on the computer and his entry would be “lost,” requiring him to enter the same information repeatedly. Peggy Thompson, Secretary for Ms. Reed and Ms. White, testified that such an anomaly could occur in a software program called

First Choice, which DRS used until the Charleston District Office moved to Institute in August 1997. L IV HT, 7/14/98 at 6-10. According to Ms. Thompson, the software allowed more than one person to access the same document at the same time, without notifying the users. When that occurred, the information added to the file by the person who last “saved” their work would be retained while any other changes would be erased. L IV HT, 7/14/98 at 9-10. Ms. Thompson did not consider this to be a significant problem because a paper copy of the same data was usually generated and made a part of the file at the time.

Curiously, Grievant's expert witness on computers, Elliot Namay, testified that he was familiar with most programs from that time, including First Choice, but he was not aware that a program would allow two users to access the same document simultaneously. L IV HT, 7/14/98 at 32, 42-46. Ms. Thompson recalled that Grievant was the only person who ever complained to her about this problem. L IV HT, 7/14/98 at 10. However, Ms. Peck, who did Grievant's secretarial work for nearly one year, recalled this happening to her entries as well. L IV HT, 5/26/98 at 214-15. Ms. Schafer, who provided secretarial support to Grievant for over a year, made no mention in her testimony of this happening. A preponderance of the evidence indicates that there was a deficiency in the software DRS used prior to August 1997, but this problem was not a significant factor in Grievant's failure to produce timely and accurate work. Grievant similarly alleged that the secretaries were kept busy after the move to Institute, entering data in the computer which DRS failed to transfer to the new system, a task that could have been accomplished with minimal effort and expense, in Mr. Namay's opinion. L IV HT, 7/14/98 at 40-48. However, Ms. Thompson indicated the only additional secretarial work following the move resulted from a federal requirement that additional data be maintained for each client. L IV HT, 7/14/98 at 26-27. Ms. White's testimony was consistent with Ms. Thompson, further explaining that the new federal requirement involved entering data in six additional fields on the client database. The secretaries had to go back and add this data for cases covering a three-month time period. No more than 150 files needed to be updated to meet this requirement, but DRS had a full year to comply, using the services of approximately 15 secretaries. L IV HT, 7/14/98 at 52-55.

Thus, the hypothetical basis upon which Mr. Namay expressed his expert opinion that DRS should have transferred data in a different manner was demonstrated to be without foundation. Moreover, Grievant's assigned secretary was only required to update a total of 7 files for the 2

Rehabilitation Counselors she supported. L IV HT, 8/26/98 at 136. After reviewing all of the evidence presented, the undersigned concludes that Grievant's complaint about “lost data” was either based upon misinformation or greatly exaggerated. In any event, the time spent by the secretaries entering additional data to comply with federal regulations had no impact on the deficiencies in Grievant's performance cited by DRS.

Another significant aspect of Grievant's defense was paradoxical. Grievant complained that he did not receive adequate training from Ms. White because she and Ms. Reed were often out of the office and unavailable to answer his questions. On the otherhand, Grievant purports to be an expert on the merits of the cases he was working, asserting that he was deliberately given clients who had no hope of being rehabilitated, and complaining that Ms. White and Ms. Reed would instruct him to continue trying, even with clients who repeatedly failed to keep appointments, and he was not allowed to close a case until long after it was apparent that the client was not suitable for rehabilitation. In a similar vein, Grievant asserts that all of the “easy” Social Security cases were diverted to other counselors, or taken by Ms. Ballard, the Senior Rehabilitation Counselor who screened and assigned Social Security cases.

These somewhat contradictory allegations will be addressed in reverse order, beginning with the contention that his caseload was “stacked” against him by his superiors. In support of this proposition, Grievant made a number of assertions that directly contradicted the professional judgment of Ms. White and Ms. Reed concerning whether certain cases were appropriate for referral, when a case should be closed because the client was not an appropriate candidate for rehabilitation, and whether certain clients were even eligible for DRS' services. See, e.g., G Ex H at L IV. A preponderance of the evidence supports a finding that Grievant's testimony alleging that convicted felons are not eligible for rehabilitative services through DRS was incorrect. Grievant also testified that he was not permitted to close one client's case for failure to cooperate until she had missed 11 consecutive appointments. Ms. White credibly testified that she reviewed the case file in that particular case and only 4 missed appointments were documented. Moreover, she was certain that Grievant never informed her that this client, or any other client, had missed 11 scheduled appointments. L IV HT, 8/26/98 at 145. Once Grievant reported to Ms. White that the client had missed her fourth scheduled appointment, sheapproved closing the case. L IV HT, 8/26/98 at 145. Grievant's claim that he told Ms. White a client had missed 11 scheduled appointments, and she would not allow him to close the

file is simply not credible.

Grievant discussed several situations where his proposed action on a client's case was rejected or overruled by Ms. White or Ms. Reed. As far as the undersigned can ascertain from the record, none of these disputes involved any of the clients whose cases were specifically noted in the suspension and termination notices. Grievant generally alleges that these decisions by his superiors were part of a pattern or practice which caused him to waste his time on clients whose particular circumstances did not warrant further pursuit through the rehabilitation process. Insofar as these claims involve matters which generally fall within the peculiar expertise of witnesses such as Ms. White and Ms. Reed concerning the tenets of vocational rehabilitation, the undersigned will defer to the judgement and opinions of such experts, unless they are demonstrated to be clearly wrong. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). See generally Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985).

As for Grievant's allegation that Ms. Ballard assigned all of the “easy”cases to herself, the undersigned accepts Ms. Ballard's testimony that she actually intercepted the most difficult cases, believing she could do a better job for the client because of her 30 years of experience in rehabilitation. L IV HT, 8/26/98 at 104. Indeed, Grievant's opinion as to which cases were difficult and which were easy was not founded upon any legitimate expertise regarding the rehabilitation process, and essentially involved nothing more than self-serving and unsubstantiated claims. The next issue concerns Grievant's complaints that Ms. Reed and Ms. White were frequently unavailable to answer questions about his pending cases due to their work schedules, and the number of meetings they had to attend outside the office. Ms. Reed and Ms. White complain that Grievant did not ask enough questions, and documented their concerns repeatedly in the course of attempting to train Grievant on his duties. Grievant complained in his Level III testimony that he did not know in advance when Ms. White was going on vacation, but at Level IV he introduced copies of her monthly schedules which were readily available to anyone in the Charleston District Office. L III HT at 65; 88-89; G Ex G at L IV. After reviewing all of the evidence and arguments, it is apparent that Ms. Reed and Ms. White were busy people at the time they were respectively supervising and training Grievant. Nonetheless, it does not appear that Grievant's failure to ask questions resulted from their inaccessibility. Peggy Thompson, Secretary for Ms. Reed and Ms. White, testified that even when Ms. White was out of the office visiting one of the field offices, she could be reached by telephone. L

IV HT, 7/14/98 at 28. Grievant's failure to ask questions is similar to his lack of initiative in scheduling training sessions with more experienced Rehabilitation Counselors to sit in on their client interviews. It does not appear that Grievant took any significant initiative to locate Ms. White or Ms. Reed, or to leave messages that he needed to discuss an issue with either of them.

Grievant followed this same pattern in regard to missing files. Other than Grievant's assigned secretary, Ms. White was the one person most likely to have taken one of his files for review. The Charleston District Office had no established policy for signing out files when someone other than the counselor or the counselor's secretary removed a file from its normal location. However, Grievant's testimony indicated that he would ask thesecretaries if they had a missing file, and he would make an entry on the client's computer record that he could not locate the file. Inexplicably, he would not ask Ms. White if she had his file, or leave her a note indicating that he needed the file for some purpose. Instead, he would wait and make an entry in the narrative that the file had “mysteriously reappeared” after Ms. White had returned it when he was away from his desk. G Ex AAA at L IV. Grievant's actions in these circumstances do not reflect a good faith effort to perform his assigned duties.

There is no credible evidence that Ms. White or Ms. Reed made any effort to avoid Grievant, or refused to meet with him to discuss a question. Indeed, Grievant presented evidence that, in April 1995, he elected to participate in DRS' optional flex-time program and began working four ten-hour days, Monday through Thursday, with Fridays off. L IV HT, 5/26/98 at 265; L IV HT, 8/26/98 at 66. Because Ms. Reed also participated in flex- time, taking Mondays off, Grievant and his immediate supervisor worked at the same time only three days each week. Ms. White's availability was similarly reduced to the four days each week she and Grievant both worked, but she only worked eight hours each day.

Despite the fact that voluntarily participating in flex-time made his superiors less accessible while he was in a training status, Grievant did not complain that Ms. Reed improperly approved his participation in flex-time, or elected to take Mondays off, as part of a scheme to bring about his failure as a Rehabilitation Counselor. Indeed, Grievant seems oblivious to the fact that his decision to enjoy the benefits of flex-time while still in a training status may have contributed to his purported lack of access to Ms. White and Ms. Reed. Ultimately, there was no evidence that Grievant made a reasonable effort to seek out his superiors and obtain their guidance before taking action on matters where hehad no clear and established precedent to follow. Indeed, it is more likely that Grievant

disagreed with Ms. White's approach and philosophy to the point where he avoided her, preferring to deal with her through paper submissions, while decrying her practice of criticizing his work in written memoranda addressed to himself and Ms. Reed. (See footnote 7)

After reviewing the testimony of all the witnesses, Grievant's testimony appears to corroborate Ms. White's opinion that Grievant just failed to grasp the inherent nature of his job, seeking simple black and white solutions to complex problems where there is no clear right and wrong answer. Ms. Reed and Ms. White credibly observed that Grievant was unable to grasp the underlying concepts of vocational rehabilitation, or to recognize how the rehabilitation process differed from the simpler disability determination process in which Grievant had previously been employed. While some difficulties Grievant experienced would inevitably slow down his work to a certain extent, the credible testimony of Ms. Reed and Ms. White established that Grievant's claims were generally exaggerated. None of these factors change the underlying fact that, after three years in a training situation, Grievant was not becoming proficient at his duties. Even if all the problems Grievant identified had been eliminated, this bottom line would not have changed.

Grievant attempted to impugn Ms. White's credibility by noting the differences between two versions of a narrative which she entered in one of Grievant's case files. Grievant retained a printed copy of a portion of the file of client A.T., (See footnote 8) ostensibly to use as a sample to follow in future cases involving similar issues. Ms. White's comments, dated April 3, 1997, were clearly labeled in the file, and stated:

> This case was presented to me for approval of the detail of services sheet for her to go to the Center for a vocational evaluation. I noticed that the WVDRS-61 was signed in the wrong place and the back of the form was not completed. I called and spoke to both A.T. and her mother at the same time about going to the center for this evaluation. A.T. wanted to go. Her mother checked and decided that day they could not work out transportation on a daily basis so we decided that she would need to stay. We then had a discussion on what she should take to the center and how she was to behave while there. I forwarded a center application to her for signature the day we talked. It has been returned and the case is being sent to the center this date.

G Ex U at L IV.

The printed copy of this file, which was sent to the Rehabilitation Center on or about April 3,1997, was identical, except for the fourth sentence, which reads: “A.T. *did not know Mr. Dadisman was sending her for the evaluation but* wanted to go.” J Ex 4 at L IV (emphasis added). In addition, the phrase “the day we talked” was omitted from the next to last sentence of the copy on file at the

Center. Cf. J Ex 4 and G Ex U at L IV. Ms. White acknowledged making one of the entries, but could not recall going back to change the entry.

While it is apparent that someone must have typed a modified version on the computer for some reason, the record does not establish who this was, or what their motive was, since the version retained in the client's file, and which was relevant to thisproceeding, was not as critical of Grievant as the version sent to the Center for storage. In any event, none of these changes in a document in April of 1997 provides persuasive circumstantial evidence that Ms. White was biased against Grievant. Indeed, there was no dispute with the fact that Grievant had allowed the client to sign the form in the wrong place, or the client was not aware of the treatment planned. Ms. White's demeanor throughout these proceedings was of a professional career employee whose loyalties were aligned with the rehabilitation process, and the clients that DRS serves, more than her employer or her supervisors. In that same vein, her quarrel with Grievant is over the fact that he was not doing his job and, from her perspective, was either unwilling or unable to learn the full scope of that job.

Two of Grievant's clients, T.L.P. and K.W.D., testified that they were completely satisfied with the services they received from DRS through Grievant. L IV HT, 5/8/98 at 137-43. Ms. Reed and Ms. White agreed that Grievant had a positive attitude. Although Grievant's testimony was often rambling and repetitive, Grievant demonstrated a sincere and genuine empathy for the clients he was assigned to serve. Indeed, based upon Grievant's compassion for people and his experience as a Disability Specialist, he should have been an ideal Rehabilitation Counselor for Social Security cases. However, a preponderance of the evidence indicates that, despite some successes, Grievant did not follow through on these good intentions in the majority of cases he was assigned during the three years he was employed as a Rehabilitation Counselor.

Grievant's allegation that his supervisors selected only the most difficult cases for assignment to him, in order to assure his failure, is not credible. Grievant bemoans the fact that he never received any “easy” cases, although he believed such cases were beingassigned to other counselors. No specific example of an “easy” Social Security case that was handled by another counselor when it could have been assigned to Grievant was provided. (See footnote 9) Indeed, a preponderance of the evidence suggests that if any Social Security clients could be rehabilitated without difficulty, they would have little need for assistance from a Rehabilitation Counselor.

Grievant similarly argued that, within a month after his transfer as a Rehabilitation Counselor

Trainee, he should not have been assigned 17 open cases which were in various stages of development after being opened and worked by other counselors. Grievant noted that, as of that time, he had not yet received appropriate training on processing cases beyond the acceptance stage. L IV HT, 8/26/98 at 11-12, 89. Ms. White reasonably explained that it was not unusual for a new employee to “inherit” another counselor's territory when that other counselor moved on. Because Grievant was taking over Social Security cases that had previously been parceled out among a number of counselors, it was appropriate to assign him a caseload of open cases. Ms. White believed that rather than creating an impossible task for Grievant, this presented him with an excellent learning tool, since some of the work had already been done by knowledgeable counselors. L IV HT, 8/26/98 at 144.

One of Grievant's witnesses, Joseph F. Gwinn, Jr, although qualified as an expert in rehabilitation matters, exhibited a bias against DRS, his former employer, in the courseof his testimony before the undersigned. Indeed, Mr. Gwinn did not finish establishing his work history and credentials as an expert before he began describing some injustice he had purportedly suffered while employed at DRS. L IV HT, 5/8/98 at 146-47. Mr. Gwinn appeared to slant his testimony to be consistent with Grievant's theories in this grievance. Accordingly, Mr. Gwinn's observations that Social Security cases are generally more difficult to process to a successful vocational outcome, and that most new Rehabilitation Counselor Trainees are given an opportunity to sit in on initial client interviews with a more experienced counselor, which were supported by the testimony of other credible witnesses, will be credited. Otherwise, Mr. Gwinn's opinions regarding the agency's motives and intent in its dealings with Grievant will be discounted.

Grievant further alleges that he did not receive annual evaluations during his three years as a Rehabilitation Counselor, as required by applicable regulations of the West Virginia Division of Personnel (DOP), as well as written DRS policies. See G Ex GG at L IV. It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Further, Grievant correctly asserts that DOP's Administrative Rule requires that classified employees be evaluated annually. See 143 C.S.R. 1 § 16

(1995).

Grievant received his initial evaluation as a Rehabilitation Counselor (R Ex 1 at L IV) in substantial compliance with DOP's Rule. That evaluation, dated September 8, 1995,covered the period from July 1994 through June 1995. Grievant's next performance evaluation (R Ex 27 at L IV), dated January 29, 1997, covered a 17-month period from July 1995 through December 1996, 5 months in excess of the annual evaluation requirement contained in DOP's Administrative Rule. (See footnote 10) During this 17-month time frame, Grievant was placed on a Plan of Action to remediate performance deficiencies in February 1996, and was suspended for 3 days in December 1996. That suspension included a detailed list of expectations regarding Grievant's future performance. J Ex 1 at L IV. In these circumstances, Grievant has not demonstrated that DRS' failure to issue annual evaluations contributed in any substantial manner to his failure to meet DRS' performance expectations. Thus, Grievant failed to show “harmful error” from DRS' delay in completing his performance evaluations. See Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995).

Grievant also alleges that the suspension and dismissal actions at issue were accomplished by DRS in reprisal for the grievances he filed while employed by the agency, contrary to W. Va. Code § 29-6A-2(p). Grievant notes that while employed as a Disability Specialist he filed at least 8 grievances against DRS, prevailing on at least one occasion when he recovered back pay. L IV HT, 6/24/98 at 32. Prior to his suspension, Grievant had not filed any grievances involving Ms. White or Ms. Reed, although Ms. Reed was aware that Grievant's reassignment to the Charleston District Office was in settlement of agrievance or other form of litigation between DRS and Grievant. Ms. Reed was not told the terms of the settlement and never inquired about the matter.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging unlawful retaliation, in order to establish a prima facie case, (See footnote 11) must prove:

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

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory

motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991).

If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

In regard to Grievant's suspension, over three years had elapsed since Grievant last filed a grievance against DRS, or otherwise participated in the grievance process as a witness or representative. Despite the number of grievances which Grievant filed against DRS while he was employed in another capacity in another office, given the amount of time elapsed between Grievant's most recent grievance activity and the suspension, and the fact that Grievant's supervisors who recommended his suspension were not involved in any of the prior grievances, the undersigned Administrative Law Judge finds that no inference of a causal connection was established in these circumstances. See Whatley, supra. Therefore, Grievant did not establish a prima facie case of retaliation in regard to his 3-day suspension. However, Grievant did establish a prima facie case of retaliation regarding his termination by showing that he filed a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., challenging his suspension, and he was subsequently dismissed, while that grievance was still pending. Thus, there is a reasonable inference that Grievant's dismissal resulted from his engaging in statutorily protected activity. See Wiley, supra; Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Gruen, supra.

DRS effectively rebutted this inference by demonstrating by a preponderance of the credible evidence of record that all actions taken against Grievant were motivated by his poor performance, and not by his participation in the grievance procedure. If anything, Grievant was given a longer period of time to improve his performance to an acceptable level than required. Ms. Reed and Ms. White displayed no animus toward Grievant for his grievance activity. Indeed, Ms. White had pursued her own grievance to Level IV, and had no motive for retaliating against another employee who took part in grievance activity.

Ms. White and Ms. Reed appeared genuinely perplexed that Grievant was not learning the nuances of the Rehabilitation Counselor's duties despite a positive attitude toward his work, a sincere empathy with his clients, and extensive experience with the agency as a Disability Specialist. Their benign approach explains why Grievant was afforded additional time to learn his job and improve his performance. Ms. Reed and DRS did not proceed to suspend or dismiss Grievant until it was apparent that, for some reason, he was not going to progress to a point where he could provide client services in a timely and proficient manner. Grievant did not establish that their articulated reasons for recommending his termination were a pretext for DRS to engage in prohibited retaliation. Grievant also alleges that he was the victim of discrimination on a variety of grounds. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under Code § 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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94- DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store, supra; Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

Grievant complained that he was treated differently from other Trainees in that he was not afforded an opportunity to sit in on an initial client interview with an experienced counselor, a training method that was fairly routine in DRS. However, this was not Ms.White's preferred methodology, and there was no credible evidence that she treated Grievant any differently than anyone else assigned to her for initial training as a Rehabilitation Counselor. Ms. White credibly testified that early in his training, she sat down with Grievant and went over every form in the standard application packet. L IV HT, 8/26/98 at 142. Further, Ms. White encouraged Grievant to get together with Ms. Ballard, or another experienced counselor, if he wanted to observe their interview techniques. At one point, Grievant informed Ms. Ballard that he did not need any further training when she offered to meet with him and go over certain procedures. L IV HT, 8/26/98 at 106. The fact that Ms. White and Ms. Reed encouraged Grievant to work with other counselors, but did not personally make those arrangements for him, is insufficient to support a prima facie case of prohibited discrimination. See Runyon, supra.

Curiously, conducting vocational diagnostic interviews was the one area where Grievant was performing “fairly well,” the sole area where he demonstrated satisfactory progress in his three years working as a Rehabilitation Counselor. Neither Grievant nor any of his witnesses provided any cogent explanation how DRS' failure to conduct his training in regard to interviewing new clients in a different manner impacted on the various deficiencies noted in Ms. White's audits of his cases, such as failure to take timely action or follow through on matters that were specifically noted by his superiors. Accordingly, even if Grievant was not trained in the same manner as other trainees, it was not shown that any such treatment contributed significantly to the identified problems which led to his suspension and termination. See Skaggs v. Elk River Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996). Grievant complained that he did not receive formal training afforded to other employees, but the only specific training program he discussed covered the federal Americans with Disabilities Act (ADA). L IV HT, 6/24/98 at 45. Ms. White credibly testified that the employees who attended that

program had requested the training, and that it was not part of any training program routinely offered to Rehabilitation Counselors in training. She indicated that if Grievant had questions about the ADA, he could go to one of the employees who attended the training. Moreover, Grievant received extensive training directly relating to his duties, both formal and informal. R Exs 13 & 15 at L IV. Grievant did not establish that the other DRS employees selected to go to the ADA training were similarly situated in that they were in training status at the time. There was also no credible explanation as to how this training would have helped Grievant overcome the deficiencies in his performance, such as failing to follow up on required actions in a timely manner.

With regard to other factors which Grievant attempted to portray as discrimination, such as the apparent failure of other Rehabilitation Counselors to obtain written waivers from clients when acceptability of their claim was not established within 60 days, or the client's file was not documented as having been worked on a monthly basis, none of these examples involved an employee in training status, or indicated a systemic failure to follow agency rules and established procedures. Beyond showing that these other counselors were employed by DRS to process Social Security or other rehabilitation cases, Grievant failed to establish that these other employees were similarly situated, in a pertinent way, as required by W. Va. Code § 29-6A-2(d). See Parsons, supra.

Grievant also attempted to establish that these disciplinary actions were related to his age (over 40), national origin (German), race (white), religion (Methodist), politicalaffiliation (Democrat), and military background (Vietnam veteran). This Grievance Board may consider allegations arising under other statutes, such as the federal Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1, et seq., because these are statutes under which Grievant works as defined in the grievance procedure for state employees. W. Va. Code § 29-6A-2(i). See generally Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). However, these claims have been essentially subsumed under W. Va. Code § 29-6A-2(d), which prohibits discrimination on any basis which is unrelated to an employee's job responsibilities. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks, supra. The undersigned was not persuaded by the evidence presented that Grievant's identification with any of these categories was a motivating factor in the employer's decision to suspend or terminate him for substandard performance. See Skaggs, supra.

Grievant notes that he was employed by DRS for over 13 years, and contends that the employer

was remiss in not making an effort to transfer or demote him to another suitable position that he could perform, rather than dismissing him after so many years of service. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, DocketNo. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH- 88-063 (Mar. 31, 1989).

Grievant's termination culminated a course of progressive discipline which provided every reasonable opportunity for Grievant to improve his performance. Grievant was first placed on a Plan of Action and then suspended when he failed to meet clearly stated expectations. The suspension was mitigated from 5 days to 3 days, partly in consideration of the fact that Grievant's clients would suffer if he was off work longer than necessary to correct his conduct. A 3-day suspension was not shown to be an excessive or arbitrary penalty in the circumstances presented.

The suspension letter renewed DRS' explicit expectations regarding Grievant's future performance. Grievant was afforded a far greater period to improve than would have been afforded to a probationary employee or someone with less tenure. Despite the explicit warning in his suspension letter, Grievant made no apparent effort to improve his performance, opting to more carefully document his perceived difficulties with his trainer, supervisor, secretary and case assignments. The undersigned finds that DRS properly exercised its discretion in deciding that termination was warranted after other remedial measures had proven ineffective.

Consistent with the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant was employed by Respondent West Virginia Division of Rehabilitation Services (DRS) as a Rehabilitation Counselor in its Charleston District Office. Grievant was initially employed by DRS in December 1984, and worked as aDisability Specialist in the Charleston Office of Rehabilitation Services. L IV HT, 6/24/98 at 28.

2. In February 1995, Grievant was reassigned to the Charleston District Office as a

Rehabilitation Counselor Trainee. L IV HT, 6/24/98 at 28. Grievant received this new position under the terms of a settlement agreement entered into with DRS over an earlier grievance that had been advanced to Level IV of the grievance procedure for state employees. L IV HT, 6/24/98 at 33-39; G Ex E at L IV.

3. Karen White is employed by DRS in the Charleston District Office as a Client Services Specialist (CSS). L IV HT, 5/8/98 at 13. The Charleston District oversees DRS Branch Offices serving Charleston, Institute, Teays Valley, Logan, and Spencer. The Charleston Branch Office, Institute Branch Office, and Charleston District Office are located in the same facility at Institute, West Virginia. L IV HT, 5/8/98 at 132; L IV HT, 5/26/98 at 240. The Charleston District Office moved to the Institute location in August 1997. L IV HT, 5/26/98 at 297.

4. Ms. White began working for DRS in 1975. She has a Master's Degree in counseling and guidance. L IV HT, 5/8/98 at 113. Among other duties, Client Service Specialists are responsible for training new Rehabilitation Counselors. L IV HT, 5/26/98 at 244. When Grievant was transferred to the Charleston District Office as a Rehabilitation Counselor Trainee, he was assigned to Ms. White for training. L IV HT, 5/26/98 at 244.

5. Rehabilitation Counselors assist individuals with disabilities in obtaining appropriate rehabilitation services, with the ultimate goal being to place these persons in a gainful employment situation, whenever possible. During Grievant's tenure in the Charleston District Office, his entire caseload or “territory” was comprised of Social Securitycases involving clients who receive federal benefits under either the supplemental security income (SSI) or Social Security disability insurance (SSDI) programs. G Ex Q at L IV.

6. Social Security cases usually take more time to process to a successful resolution than most other rehabilitation cases, and the success rate for rehabilitating Social Security clients is generally lower than the success rate for other rehabilitation clients. The procedure that Rehabilitation Counselors follow in attempting to rehabilitate Social Security clients is substantially the same as the procedure followed in all other types of rehabilitation cases. The difficulty of Social Security cases versus other types of cases was not a significant factor in Grievant's failure to perform his duties in an acceptable manner.

7. Judy Reed is District Manager of DRS' Charleston District Office. She has been employed by DRS for over 30 years. L IV HT, 5/26/98 at 240. Ms. Reed was Grievant's immediate supervisor

during the entire time he worked in the Charleston District Office. L IV HT, 5/26/98 at 243.

8. Within approximately one month of transferring to the Charleston District Office as a Rehabilitation Counselor Trainee, Grievant was assigned 17 open cases in various stages of development which had been opened and worked by other counselors. At that time, Grievant had not yet received appropriate training on processing cases beyond the acceptance stage. L IV HT, 8/26/98 at 11-12, 89.

9. After Grievant was assigned an initial caseload of Social Security cases, new cases were screened and assigned to him by Ann Ballard, the Charleston Branch Office Supervisor, who also handles a caseload of Social Security cases. At one point, Grievant complained to Ms. Reed that Ms. Ballard was assigning him “bad” or “impossible” cases. When Grievant brought one of these alleged improper referrals to Ms. Reed for review, she found that the case was appropriately referred to DRS for action. L IV HT, 5/26/98 at 272- 74. Ms. Ballard properly screened all incoming Social Security cases to eliminate inappropriate referrals, before any cases were assigned to Grievant. L IV HT, 8/26/98 at 99-102.

10. In April 1995, Grievant elected to participate in DRS' optional flex-time program and began working four ten-hour days, Monday through Thursday, with Fridays off. L IV HT, 5/26/98 at 265. Because Ms. Reed also participated in flex-time, taking Mondays off, Grievant and his immediate supervisor worked at the same time only three days each week.

11. In August 1995, Ms. Reed formally rated Grievant's performance from July 1, 1994, to June 30, 1995, covering his first five months as a Rehabilitation Counselor Trainee, as well as the previous time he had worked as a Disability Specialist. Grievant received an overall rating of “3.2" on a scale from 1 to 5, indicating that he was generally performing at an “average” level for new trainees. L IV HT, 5/8/98 at 19-20; R Ex 1 at L IV.

12. In January 1996, Ms. Reed and Ms. White met with Grievant and discussed his lack of progress in learning the duties of a Rehabilitation Counselor. They particularly noted that Grievant was not accomplishing required tasks in a timely manner, and was not meeting established time standards. Even when actions were not being completed due to matters beyond Grievant's control, he was not properly documenting those delays in the file and was not obtaining appropriate waivers from his clients. Ms. Reed and Ms. White specifically encouraged Grievant to ask more questions, explaining that the process was not cut and dried, but required learning how to exercise considerable

judgement anddiscretion. L IV HT, 5/8/98 at 22; L IV HT, 5/26/98 at 257-58; L III HT at 25-26; R Ex 2 at L IV.

13. As a Rehabilitation Counselor Trainee, Grievant was required to obtain approval from his trainer, Ms. White, in order to process all applications, eligibility determinations, rehabilitation programs, and case closures. As trainees progress in learning their duties, they are approved to perform certain functions independently, once they demonstrate proficiency by performing all related tasks correctly a majority of the time. L IV HT, 5/8/98 at 16.

14. Ordinarily, persons selected for employment as Rehabilitation Counselor Trainees serve in a trainee status for one year with promotion to Rehabilitation Counselor at the end of that period, provided they are performing satisfactorily. Grievant was promoted from Rehabilitation Counselor Trainee to Rehabilitation Counselor in February 1996 in compliance with the terms of the settlement agreement he had previously entered into with DRS. However, because Grievant had not demonstrated proficiency in his duties as a Rehabilitation Counselor, he remained in a trainee status where he was required to obtain approval from Ms. White for all eligibility determinations, rehabilitation plans, and cases closures during the remainder of his employment. L IV HT, 5/26/98 at 265; L IV HT, 6/24/98 at 41, 58; L III HT at 18-19; G Ex E at L IV.

15. Grievant would propose vocational goals for clients which exceeded their physical limitations. L IV HT, 5/26/98 at 201-02, 246.

16. On February 8, 1996, Ms. Reed and Ms. White held another meeting with Grievant to counsel him regarding his lack of progress in training. Grievant complained of delays caused by lack of secretarial support. Ms. White determined that the problems shefound with Grievant's work were unrelated to any purported secretarial problems. Nonetheless, in October 1996, Ms. Reed assigned a different secretary to work with Grievant. L IV HT, 5/8/98 at 28-32; R Exs 3 & 4 at L IV.

17. Ms. White provided intensive assistance to Grievant on February 13, 14, and 15, 1996, including assisting him in organizing his work, reviewing dictation skills, using the Client Data List to monitor case progress, and creating a system to track data required for monthly reports. L IV HT, 5/8/98 at 39; R Ex 5 at L IV.

18. On February 28, 1996, Grievant was placed on a written Plan of Action which established specific steps that were to be taken by certain dates to remediate identified deficiencies in Grievant's training to become a productive Rehabilitation Counselor. R Ex 5 at L IV.

19. In July 1996, Ms. White audited a sampling of Grievant's case files, a process that was scheduled in the February 1996 Plan of Action for June 1996. Ms. White delayed the audit for one month, noting that she was out of the office more than usual in April and May of 1996, and she wanted to be sure Grievant had ample time to ask questions and resolve any pending issues. Her review of 31 of Grievant's 48 cases indicated a general failure by Grievant to follow through on the tasks set forth in the Plan of Action. L IV HT, 5/8/98 at 41-43; L IV HT, 5/26/98 at 200; R Exs 5 & 6 at L IV.

20. As the CSS responsible for training Grievant as a Rehabilitation Counselor, Ms. White would periodically take Grievant's client files for review and audit. Ms. White did not specifically inform Grievant each time she took a file for review or when she returned a file. L IV HT, 5/8/98 at 109. However, Grievant was aware that Ms. White could take such files for review whenever she needed to do so. 21. Ordinarily, Ms. White would hold Grievant's case files for no more than two or three weeks while she was auditing or reviewing as many as 4 or 5 files at one time. When Grievant was unable to locate a file, he would ask the secretaries if they knew where a file was, and would make remarks in the computer records that the file was missing, but would not go to Ms. White to ask if she had a particular file.

22. Ms. Reed and Ms. White met with Grievant on October 1, 1996, to discuss the results of Ms. White's audit which followed up on the Plan of Action. They informed Grievant that he was still not grasping certain basic principles, his organizational skills were problematic, he was not taking regular and timely action on his cases, and he was not submitting cases for approval in a timely manner. R Ex 12 at L IV.

23. On December 5, 1996, Grievant was notified of a proposed 5-day suspension by DRS Interim Director William Tanzey. J Ex 1 at L IV. After a personal meeting with Mr. Tanzey to plead his case, the suspension was reduced to 3 days. J Ex 2 at L IV. The suspension also included a written improvement plan for Grievant to follow in remediating his performance. J Ex 1 at L IV.

24. Over an extended period of time while employed as a Rehabilitation Counselor Trainee and a Rehabilitation Counselor in training status, Grievant failed to perform his assigned duties in a timely and proficient manner. Even after being specifically counseled by his supervisor and training mentor on tasks that needed to be accomplished, Grievant failed to follow through and take appropriate action in a timely manner. Grievant demonstrated an apparent inability to learn the rehabilitation

process.

25. After Grievant reached a point where it was apparent that he was not progressing with his training in a satisfactory manner, Ms. Reed determined that no newcases should be referred to Grievant, as it was unfair to assign clients to a Counselor who was not able to process their case in a timely fashion. L IV HT, 5/26/98 at 321-22. After several months, Ms. Reed elected to allow some additional cases to be referred to Grievant. L IV HT, 5/26/98 at 322. Grievant's reduced caseload did not improve his performance.

26. Grievant made repeated complaints to Ms. White and Ms. Reed that his assigned secretary was not typing his dictation in a timely manner. On each occasion when Ms. White and Ms. Reed checked into the situation, they found that Grievant's claims were exaggerated. L IV HT, 5/8/98 at 125.

27. Patty Thaxton Shafer was assigned to provide secretarial support to Grievant from February 1995 to October 1996. L IV HT, 5/8/98 at 230. Ms. Shafer also provided secretarial support to a Rehabilitation Counselor who served a caseload of blind and visually impaired clients. Because that Counselor was herself blind or visually impaired, Ms. Shafer drove her to meet with clients outside the office. As a result, she would be out of the office for part of each day on the average of three to four days each week. L IV HT, 5/26/98 at 224-25. In addition, Ms. Shafer took more sick leave than usual due to pregnancy and unrelated medical problems. L IV HT, 5/26/98 at 225-26.

28. Secretaries assigned to Rehabilitation Counselors are expected to complete assigned typing work within three days, but more often than not, that standard was not met by Ms. Shafer. L IV HT, 5/26/98 at 229-30. At most, Ms. Shafer would fall two weeks behind in completing Grievant's typing. L IV HT, 5/26/98 at 228.

29. Peggy Peck was assigned to provide secretarial support to Grievant from approximately November or December of 1996 to August or September of 1997 while PattyThaxton Schafer was on maternity leave. Ms. Peck has been employed by DRS for 23 years and worked as Ms. Ballard's secretary for 8 years. During the time she served as Grievant's secretary, she encountered no problems in returning Grievant's typing in a timely fashion. L IV HT, 5/26/98 at 213-22. Although Grievant made no complaints regarding Ms. Peck's timeliness in performing secretarial duties, there was no evidence his productivity measurably improved while she was doing his typing.

30. Sheila Kirk was assigned as Grievant's secretary after Ms. Peck. L IV HT, 5/26/98 at 247.

31. Ms. Reed did not consider Grievant for transfer to another position as a Counselor because he had not learned the basics of working as a Rehabilitation Counselor in Social Security cases. Therefore, she determined he would not be able to learn the similar process for rehabilitating other categories of clients. L IV HT, 5/26/98 at 285-86.

32. No significant portion of Grievant's failure to perform his assigned duties in a timely and competent manner was attributable to lack of secretarial support, computer problems, lack of formal training, Ms. White's absences from the office, or Ms. White's failure to respond to paperwork submitted for her action or approval by Grievant. Likewise, Ms. White's retention of certain client files for review or audit for an extended period of time only incidentally contributed to Grievant's failure to meet time standards, and does not excuse Grievant's unsatisfactory performance.

33. Grievant's average processing time for determining eligibility for his clients was in excess of 20 months, while the DRS average was under 4 months, and the federal standard calls for making those determinations in 60 days. 34. Grievant failed to complete rehabilitation plans for his clients in a timely manner, taking an average of over 18 months to complete an approved plan. After over two years of training, Grievant would draft rehabilitation plans that were not appropriate for approval.

35. Ms. Shafer also worked with Grievant when he was assigned to Disability Services. She was aware that he had filed a number of grievances but was not aware that DRS management took any action to retaliate against him. She was told that if she wanted to file a grievance, she could go to Grievant for assistance because he was familiar with the procedure. L IV HT, 5/26/98 at 236-37.

36. Grievant filed 8 or more individual Grievances against DRS while employed as a Disability Specialist between 1984 and 1994. Grievant prevailed in at least 1 of those grievances and entered into a voluntary settlement agreement to resolve another grievance at Level IV in early 1995. G Exs KK & E at L IV.

37. Grievant is a Vietnam Veteran, having served with the United States Navy from 1967 to 1971. G Ex D at L IV; L IV HT, 6/24/98 at 30-31. Prior to obtaining employment with DRS, Grievant received a five-point veteran's preference on his civil service test score in accordance with W. Va. Code § 6-13-1. L IV HT, 6/24/98 at 30. Although DRS was aware of Grievant's status as a veteran, this factor was not considered by DRS in deciding to suspend or terminate Grievant's employment.

38. Grievant is over 40 years of age, a Democrat, a Methodist, and is of Germanic national

origin. Although DRS and Grievant's supervisors may have been generally aware of these factors, the suspension and termination actions contested in thisgrievance were not motivated by any of these factors, but resulted from legitimate concerns regarding Grievant's job performance and productivity.

39. Grievant filed a grievance challenging his three-day suspension in January 1996. That grievance was still pending at Level III when DRS proceeded to terminate Grievant's employment for unsatisfactory performance. Although DRS considered the fact that Grievant had been previously suspended in an effort to improve his performance, the fact that Grievant challenged his suspension through the grievance procedure for state employees was not a factor in the decision to terminate Grievant's employment.

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. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. Respondent DRS established by a preponderance of the evidence that Grievant failed to properly perform his duties as a Rehabilitation Counselor in training in a proficient and timely manner over an extended period of time. 4. A grievant alleging unlawful retaliation in violation of W. Va. Code § 29-6A- 2(p), in order to establish a prima facie case, must prove:

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

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State

Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991).

5. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by apreponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

6. Although Grievant made out a prima facie case of retaliation in regard to his termination, DRS established by a preponderance of the evidence that the decision to terminate his employment while a grievance challenging his earlier suspension was still pending at Level III of the statutory grievance procedure for state employees was made for legitimate, non-retaliatory reasons based upon Grievant's unacceptable performance as a Rehabilitation Counselor. See Gruen, supra.

7. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant 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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

8. Grievant failed to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to the disciplinary actions he received, in that it was not demonstrated that other DRS employees training to serve as Rehabilitation Counselors had compiled a comparable record of overall ineffectiveness but had nonetheless been tolerated to remain in their positions without suffering any adverse consequences. SeeDeyerle v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 95-RS-034 & 96-RS-197 (Nov. 21, 1997); Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995); Parsons, supra.

9. Where a grievant is alleging that the employer committed a procedural error in regard to a particular disciplinary action, in addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” See McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See also Rodak v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-536 (June 23, 1997); Shoemaker v. W. Va. Dep't of Transp., Docket No. 95-RMA-238 (Sept. 29, 1995). See generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

10. Grievant failed to demonstrate harmful procedural error in regard to his suspension or termination based upon his employer's failure to evaluate his performance annually as required by administrative regulations of the West Virginia Division of Personnel and the employer's written policies. See Rodak, supra; Shoemaker, supra; McFadden, supra.

11. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dep't of Health & Human Resources, DocketNo. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH- 88-

063 (Mar. 31, 1989).

12. Grievant failed to establish that dismissal was disproportionate to the charges ultimately proven in this matter.

Accordingly, this Grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 25, 1999

Footnote: 1

Grievant was represented by counsel, Henry M. Hills with Crandall Pyles Haviland & Turner. Respondent was represented by Senior Assistant Attorney General Robert M. Nunley.

Footnote: 2

Ann Ballard, called as a rebuttal witness by DRS, testified that there are no "good" Social Security cases. In her experience, they are all "extremely difficult." L IV HT, 8/26/98 at 104.

Footnote: 3

Grievant needed to work on at least two cases each day, in order to meet the DRS expectation that each case be worked monthly.

Footnote: 4

Ms. Ballard and Ms. Roberts worked in the Charleston Branch Office, which is located in the same facility as the Charleston District Office.

Footnote: 5

Ultimately, Grievant only worked with other counselors when he was formally scheduled to do so by Ms. Reed. See L IV HT, 5/8/98 at 38.

Footnote: 6

During Grievant's initial 20 months as a trainee, Grievant's assigned secretary was Patty Thaxton Schafer. Prior to Grievant's assignment to the Charleston District Office, Ms. Schafer worked solely for the counselor to the blind and visually impaired. Although she also served as a driver for that counselor, resulting in frequent absences from the office, it appears that she was assigned to Grievant primarily because she had only been typing for a single counselor. L III HT at 90-91.

Footnote: 7

All of these memoranda in the record were reviewed. In each instance, the guidance contained therein appears appropriate for someone in a trainee status who was expected to learn from his mistakes, or who could expect to receive criticism when he failed to follow explicit instructions provided through his training.

Footnote: 8

Consistent with the practice of this Grievance Board, the names of clients will be replaced with initials to protect their privacy. See, e.g., Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995).

Footnote: 9

Grievant provided examples of "easy" cases involving audiology referrals for people requiring hearing aids. L IV HT, 6/24/98 at 77. However, there was no evidence to suggest that these cases would normally be handled by someone with an exclusive Social Security caseload. Ms. Ballard credibly explained that "early referral" cases, which Grievant believed to be very easy, involved issues that were not appropriate for a trainee, and were received in very limited numbers in any event.

Footnote: 10

DRS delayed performing its 1996 evaluations for all employees, not just Grievant, to the end of the year. L III HT at 32. The underlying reason for this delay was not explained. L III HT at 42.

Footnote: 11

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).