ALLEN CODY,

Grievant,

v. **Docket No. 02-DJS-174**

DIVISION OF JUVENILE SERVICES/

INDUSTRIAL HOME FOR YOUTH,

Respondent.

DECISION

Allen Cody ("Grievant") filed this grievance at level four in June of 2002, challenging his demotion from the position of Deputy Superintendent at the Industrial Home for Youth ("IHY"). After this matter was held in abeyance for an extensive period of time (See footnote 1) at the request of the parties, a level four hearing was conducted on January 21, 22, and 23, April 5, and June 9, 2004. Grievant was represented by counsel, Michael J. Romano, and Respondent was represented by counsel, Steven E. Dragisich, Assistant Attorney General. After a transcription of the level four hearing was obtained by the parties, this matter became mature for consideration upon receipt of the parties' final fact/law proposals on November 29, 2004.

The following facts have been proven by a preponderance of the evidence.

Findings of Fact

1. On a date not specified in the record, Grievant began employment at IHY as a recreation assistant, and was eventually promoted to recreation specialist. Prior to thattime, he had worked several years in the juvenile detention system at Pruntytown Correctional Center in its education department.

2. Sometime in mid-2000, the Division of Juvenile Services ("DJS") posted a vacancy for the position of Deputy Superintendent at IHY. Grievant and others applied for the position.

3. In September of 2000, DJS Director Manfred Holland was called to then- Governor

Underwood's office for a meeting with Jim Teets (position not specified) and Otis Cox, Cabinet Secretary for the Department of Military Affairs and Public Safety. Director Holland was advised that “politicians” wanted Grievant to be placed in the Deputy Superintendent position, to which Mr. Holland responded that he would resign first, because he did not believe Grievant had sufficient experience for such a high level administrative position. Ultimately a bargain was struck, whereby Director Holland was allowed to replace the superintendent at IHY in exchange for hiring Grievant as Deputy Superintendent.

4. Because he did not believe Grievant was qualified for the position, and due to the political pressure surrounding Grievant's hiring, Director Holland decided to place Grievant in an “in-training” status with no supervisory authority over other employees. Grievant reported directly to the new Superintendent, Alvin Ross. He was advised by Director Holland that his progress would be monitored, which could eventually result in him being given supervisory authority over other employees at IHY.

5. The classification specification for Grievant's position states that such an individual “assists in the direction, supervision, and organization of a juvenile correctionalfacility.” The specification further specifically states that the employee “supervises staff in maintaining and enforcing disciplinary, safety, security and custodial measures.”

6. By the fall of 2001, Superintendent Ross had given Grievant the responsibility of overseeing specific projects at the institution.

7. One of Grievant's responsibilities was oversight of the vehicle fleet. As part of those duties, Grievant was to make sure that all vehicles met safety requirements, which include the mandate that there be a fire extinguisher in every vehicle at all times.

8. Sometime in December of 2001, a conversation took place in the parking area at IHY between Grievant, Virgil Stephenson (buildings and grounds) and Kathy Hess, the Assistant Superintendent of Finance and Administration. It had come to Grievant's attention that fire extinguishers were missing from several vehicles. Mr. Stephenson advised Grievant that he would check with Jerry Nelson, who worked with the vehicle fleet, and have him contact Ms. Hess if fire extinguishers needed to be replaced.

9. Shortly after the conversation in the parking lot, Grievant phoned Mr. Stephenson regarding the fire extinguishers. Mr. Stephenson told Grievant that Mr. Nelson had been directed to contact Ms.

Hess about ordering the fire extinguishers.

10. On January 9, 2002, Grievant issued a memorandum to Ms. Hess, which stated, in part:

> [Virgil Stephenson] informed me that in the past he (Mr. Stephenson) told you to purchase [fire extinguishers] and you had not done so.
>
> I don't like having to put vehicles on the road without the proper safety equipment. This is a breach of safety. It could mean life or death.
>
> I am sending a copy of this letter to Mr. Ross, Superintendent. If you have any questions, please contact me at Ext. 182 or see me in person.

11. All of Grievant's memos to IHY employees were typed by Superintendent Ross' secretary, and Mr. Ross had to approve them before they were distributed.

12. Also in late 2001, Grievant was in charge of the “work skills program,” which involved having IHY residents assemble products (such as a hygiene kit containing shampoo and bathing products) which were sold to other institutions. After residents assembled the packets, Grievant's “team” was responsible for selling them.

13. Ms. Hess was part of the team involved with the work skills program. She made some calls in mid-December 2001, to institutions, attempting to sell the packets. These efforts were unsuccessful. By January of 2002, thousands of boxes of these products were stored at IHY and had not been sold.

14. Grievant believed that Ms. Hess was responsible for getting the packets sold. Therefore, he issued another memo to her on January 9, 2002, which stated, in part:

> It has been brought to my attention that calls concerning the Work Skills Program have not been made and followed up on. . . .
>
> . . . [Others involved with the project] and I have asked you to make or have these calls made on several occasions. It's not happening. Please correct this. . . . Please have these calls made and a record of calls by January 15, 2002.

15. The work skills memo from Grievant to Ms. Hess reflected a “cc” to her personnel file. However, Superintendent Ross did not believe it was necessary for this memo to be placed in Ms.

Hess' personnel file, so he removed it.

16. The January 9 fire extinguishers memo had the following handwritten notation at the bottom: “bcc: Personnel File”. This notation does not appear to be Grievant's handwriting, and no one at IHY knows who wrote it. This memo also did not go to Ms. Hess' personnel file. 17. Ms. Hess is the direct supervisor of the telephone operators who answer all incoming calls at IHY. On January 8, 2002, operators Wanda Burton and Jessica Landis came to Ms. Hess to report that several IHY employees were receiving an excessive number of personal telephone calls. Ms. Hess discussed this information with Superintendent Ross, who directed her to have the operators document the calls.

18. In response to the superintendent's directive, Ms. Burton and Ms. Landis prepared an “incident report” reflecting that approximately six employees were receiving a large number of personal phone calls from friends and family. Grievant's name was included on the list.

19. Superintendent Ross issued a memo, dated January 9, 2002, to each employee on the operators' incident report, advising them to curtail their excessive personal phone calls. The memo was placed in each employee's personnel file. Grievant received one of these memos.

20. Upon receipt of Mr. Ross' memo regarding personal telephone calls, Grievant went to the superintendent's office to discuss the matter with him. Mr. Ross was out of the office for most of that day, January 9, 2002.

21. Knowing that Ms. Hess supervised the telephone operators, Grievant called her during the morning of January 9, 2002, after receiving the memo, to ask her who authorized the monitoring of his phone calls. Ms. Hess refused to tell him, only stating that “someone higher up” had authorized it. (See footnote 2) 22. Later in the day on January 9, 2002, around lunch time, Ms. Hess was leaving the building and saw Grievant standing in the parking area. She approached Grievant and told him “don't take it personally” regarding the phone call memo, because other people were on the list. Grievant again questioned who authorized the monitoring, and Ms. Hess refused to tell him.

23. Near the end of the workday on January 9, 2002, Grievant went to Ms. Hess' office to inquire again about the phone call memo. While in a sitting position, he stated “I am giving you a direct order as Deputy Superintendent to tell me who gave the information about the personal phone calls.” Ms. Hess told Grievant that the telephone operators had written an incident report and that she [Ms. Hess] had referred it to Mr. Ross per his direction. Grievant responded “Okay,” and stood up like he was leaving. Ms. Hess then repeated that several people were reported, and he should not take it

personally. Grievant responded “it is personal” and stated he “would pull out all his favors and get to the bottom of this.” He also stated this was “chicken shit,” then apologized for his language.

24. When Mr. Ross returned to the institution at the end of the day on January 9, 2002, Ms. Hess reported the conversations between Grievant and herself regarding the phone calls issue. Mr. Ross advised her to document it, and Ms. Hess prepared a written statement, outlining the events as represented in Finding of Fact No. 23, above. She also stated that she felt Grievant was “threatening [her] with his demeanor and tone.” She noted that she was only to report to the superintendent and not to Grievant, and suggested that, in the future, Grievant only be allowed to speak to her in Mr. Ross' presence. Mr. Ross received this statement sometime early in the day on January 10, 2002. 25. On January 10, 2002, Grievant, Ms. Hess and others were gathered in Superintendent Ross' office for a meeting regarding an unrelated matter. After the meeting, Mr. Ross asked Grievant and Ms. Hess to meet with him regarding their discussions about the phone calls memo. During this discussion, Grievant continued to demand to know who had directed that his calls be monitored, and Mr. Ross stated that he had directed Ms. Hess to supply the information, and that he, as superintendent, had a responsibility to act on it. Superintendent Ross advised Grievant that, if he was going to be upset, he should be upset with him [Mr. Ross]. Grievant appeared to be upset when Mr. Ross advised him that the fire extinguisher and work skills memos would not be placed in Ms. Hess' file, because Grievant did not have the authority to do so.

26. James Terango is employed at IHY as a magistrate. He telephoned Wanda Burton at home on the evening of January 9, 2002. He wanted to know if he [Mr. Terango] was on the list of people who were getting too many phone calls, and Ms. Burton assured him he was not. Also during this conversation, Ms. Burton expressed anxiety over “everyone being mad at her” about the phone call memo, and they discussed Grievant. Mr. Terango assured Ms. Burton that Grievant was not upset with her, and mentioned that Grievant had previously recommended her for a merit raise.

27. On January 9, Ms. Burton was paged by Ms. Landis, the other phone operator, and was advised that Grievant was looking for her. Grievant and Ms. Burton had a discussion in his office, at which time Grievant assured her he was not upset with her, but that he was upset only with Ms. Hess. Grievant also advised Ms. Burton that he had previously gotten her placed on day shift and had recommended her for a merit raise. After the discussion, Ms. Burton thought “what a nice guy” Grievant was. 28. On January 25, 2002, Ms. Hess filed an EEO (Equal Employment

Opportunity) complaint against Grievant, alleging he created a hostile work environment and retaliated against her. She specifically cited the discussion between herself and Grievant in her office on January 9, 2002, stating Grievant “threatened and intimidated” her with his “tone and demeanor.” She also stated Grievant had treated Wanda Burton in a similar fashion.

29. On January 30, 2002, Ms. Burton prepared an incident report, in which she discussed her conversations with Mr. Terango and Grievant regarding the phone calls memo. Although stating that she had been reassured that Grievant was not upset with her, she filed the report because she believed that Grievant had enough power to take her job away.

30. Ms. Hess' complaint was referred to Director Holland by Johnny Richardson, EEO Coordinator for DJS. He directed an investigation be conducted by James Spriggs, an officer with the State Police, and Vickie Elkins, an employee of the Bureau of Employment Programs.

31. After the investigation was concluded, the EEO investigators determined that the charges of hostile work environment and retaliation against Ms. Hess had been substantiated.

32. By letter dated May 29, 2002, Director Holland advised Grievant that the two EEO charges had been substantiated, and, as a consequence, Grievant would be demoted from his position as Deputy Superintendent to Corrections Program Supervisor, with a five percent pay cut. He further directed that Grievant would be required to enroll in “Sexual Harassment, Harassment in the Workplace: Employee Awareness and AngerManagement training.” The letter further stated “[t]he reason for this disciplinary action is your repeated failure to adhere to the instructions of your immediate supervisor, disrespectful conduct by using abusive language, engaging in conduct unbecoming of state employee, and your engagement in unlawful employment practices (including creation and maintenance of a hostile workplace, and retaliation).”

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of

the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). Respondent contends that Grievant's demotion was justified, due to the EEO findings that he created a hostile work environment and engaged in retaliation, both against Kathy Hess. Also, as a result of those charges being substantiated, Respondent charges that Grievant violated various provisions of its Policy Directive 4.01 “Employee Standards of Conduct and Performance”, including the following: (See footnote 3)

Section 6.01 Sexual Harassment and Other Discrimination

> Employees found to have engaged in discrimination on the basis of race, color, religion, national origin, political affiliation, handicap, age or sex, (including sexual harassment) shall be counseled and shall be disciplined for a Class B or C offense, depending on the specific facts and circumstances surrounding the incident.

Section 7.00 Offenses and Sanctions

A. Class A Offenses

> A4. Disrespectful conduct, use of insulting, abusive, or obscene language to or about others.

B. Class B Offenses

> B2. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable established written policy of procedures.

B23. Other actions of similar nature and gravity.

Each of the charges against Grievant will be discussed separately.

Hostile Work Environment for Ms. Hess

Obviously, Respondent's provision prohibiting “sexual harassment” has not been implicated here. Even Ms. Hess testified that she had not accused Grievant of sexual harassment, and her gender played no part in the events which took place. Accordingly,this matter must be viewed strictly from the standpoint of whether or not Grievant's conduct created a hostile work environment for Ms. Hess.

Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. See Spencer v. Bureau of Employment Programs, Docket No. 98-HHR-130 (Jan. 29, 1999). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. Graley v. W. Va. Parkways and Economic Development Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000). Accord Lanehart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997). “To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. See Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995).” Napier v. Stratton, 513 S.E.2d 463, 467 (1998).

Respondent's allegation that Grievant created a hostile work environment for Ms. Hess is based upon the various conversations which took place between them on January 9 and 10, 2002. However, it must be noted that Ms. Hess' EEO complaint only alleged that the conversation in her office in the late afternoon on January 9 was the cause of the hostile work environment. It was during that conversation that she alleges she felt “threatened” and “intimidated” by Grievant's tone and demeanor.

The evidence submitted in this case simply does not support the conclusion that “the conditions of Ms. Hess' employment” were altered by the conversations between her and Grievant. Granted, the final discussion which took place on January 9, 2002, in Ms. Hess' office was probably not pleasant. While Ms. Hess contended at one time that Grievant“pointed his finger” at her and “leaned toward her,” causing her to feel intimidated and threatened, at other times she merely described his tone as “stern.” Moreover, much of Ms. Hess' contention regarding why she felt threatened arose from Grievant's parting statements to the effect that he would “get to the bottom of this” and that it “was

chicken shit." However, when analyzed more closely, it must be noted that these statements were not made until Grievant had gotten up to leave, and they were prompted by Ms. Hess' statement that he should not take the matter personally. Additionally, these statements were made after Ms. Hess had informed Grievant that the calls were monitored by the telephone operators at Superintendent Ross' direction. Therefore, a reasonable person in her situation would likely conclude that any implied "threats" in Grievant's statement would be directed toward the superintendent or the operators, not Ms. Hess. It is difficult to believe that Ms. Hess felt threatened or intimidated, at least not to the degree she has contended.

It appears from the EEO investigative report and from the letter demoting Grievant that this charge was substantiated, at least partly, due to an erroneous allegation by Ms. Hess that the meeting which occurred in Superintendent Ross' office was actually on January 9, 2002, prior to Grievant coming to her office at the end of the day. Viewed from Respondent's standpoint, this would make Grievant's statements to Ms. Hess in her office even more egregious, because he continued to "hound" her about who authorized the phone call monitoring, even after Superintendent Ross had explained why the memo was issued. In addition, this supports Respondent's allegation that Grievant directly disobeyed his superior's instructions, i.e. refusing to "let the matter drop" between himself and Ms. Hess. However, the undersigned's review of the evidence simply does not support Ms.Hess' contention that the meeting in the superintendent's office took place on January 9, 2002.

When witnesses have given different versions of events, credibility determinations must be made. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 4) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

With regard to the meeting in Mr. Ross' office, Ms. Hess' testimony cannot be found to be credible, because it simply is not plausible. It does not make sense that Grievant would continue to question Ms. Hess about the monitoring after it had been explained by Superintendent Ross.

Moreover, Ms. Hess' testimony on this point conflicts with that of Grievant and Mr. Ross, who both stated that the meeting was after the events of January 9. This would be logical, because Mr. Ross would not have received Ms. Hess' written statement regarding the events in her office until January 10, 2002, after he had advised her to prepare it the evening before, which would give him cause to try to “settle” thedispute between the two of them. Finally, all of these witnesses agreed that Mr. Ross was away from the institution for at least part or most of the day on January 9, 2002, so it would not have been possible for a meeting to have occurred in his office on that day after several of these events had occurred (such as the initial phone call from Grievant to Ms. Hess and their lunchtime conversation outside). In light of all of the evidence, the undersigned cannot find that Respondent has proven it is more likely than not that the meeting occurred prior to the discussion in Ms. Hess' office late in the day on January 9.

The circumstances surrounding Ms. Hess' complaint should also be discussed, in that they further provide evidence of inappropriate motivation on her part. (See footnote 5) Even after Grievant, Ms. Hess and Mr. Ross had met in Mr. Ross' office, and Grievant had clearly been told to drop the matter--which he did--Ms. Hess felt compelled to file an EEO complaint against him two weeks later. (See footnote 6) In addition, Ms. Hess included in her complaint a statement that Grievant had similarly mistreated Wanda Burton, who made no allegation of impropriety by Grievant until January 30, 2002, some three weeks after her discussion with Grievant. Ms. Burton's “complaint” is highly suspicious in both its motivation and timing, especially in light of her admission during her level four testimony that she thought Grievant seemed like “a nice guy” after he reassured her that he was not upset with her. Likewise, none of the statements in Ms. Burton's January 30, 2002, incident report allegeany threat or improper conduct on Grievant's part, yet she felt compelled to file a written complaint. In light of Ms. Hess' testimony that Ms. Burton's alleged mistreatment prompted her to file a complaint regarding her own mistreatment, one could easily conclude that Ms. Burton's report was filed at Ms. Hess' urging in order to support her own complaint.

Accordingly, the undersigned finds that Respondent has failed to prove Ms. Hess was the victim of a hostile work environment. One unpleasant conversation with a coworker simply does not rise to the level of pervasive conduct which would alter the conditions of one's employment. The entire matter had been resolved by January 10, 2002, and Superintendent Ross had clearly taken Ms. Hess' “side” in the matter when he admonished Grievant that he had no authority over Ms. Hess.

Therefore, it is impossible to conclude that these events altered Ms. Hess' working environment or the conditions of her employment. (See footnote 7)

Retaliation

The EEO investigation concluded that Grievant engaged in retaliation against Ms. Hess when he wrote the two memorandums regarding the work skills program and the fire extinguishers. Respondent contends that the timing of these memos, along with the fact that Grievant had no authority to issue them, proves that he issued them in retaliation for his belief that Ms. Hess was behind the phone call monitoring. Insofar as the grievance procedure is concerned, retaliation is only prohibited within the context of “reprisal,” which is retaliation by an employer against an employee who has participated in the grievance process. See W. Va. Code § 29-6A-2(p). Retaliation against another employee has no legal definition, nor has Respondent provided one. Accordingly, Respondent's claim that Grievant engaged in retaliation which justified his demotion may only be addressed within the context of DJS' own policy regarding employee conduct, which will be discussed below.

Violations of DJS Policy

The letter of demotion also cited the above-quoted portions of Policy Directive 4.01 as justification for the discipline imposed upon Grievant. As discussed above, Respondent has obviously failed to prove any sexual harassment violations occurred. Accordingly, the remaining charges would relate to whether or not Grievant engaged in disrespectful or abusive conduct, violated directives or policies of his supervisor or the agency, or engaged in conduct of similar gravity.

It has been previously observed that an employer is entitled to expect its employees to conform to certain standards of civil behavior. Graley, supra; Redfearn v. Dep't of Labor, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." See Fonville v. DHHS, 30 MSPR 351 (1986)(citing Glover v. DHEW, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Graley, supra; Hubble v. Dep't of Justice, 6 MSPR 553 (1981).

When viewed in light of this standard, there can be no question that Grievant's conduct toward Ms. Hess, both during the discussion in her office and in issuing thememorandums, was at the very least disrespectful, and it certainly was not “conducive to a stable and effective working environment.”

It is undisputed that Grievant had no supervisory authority over any employees at IHY, much less Ms. Hess, so his giving her “a direct order” to provide him with certain information was certainly not appropriate, and could possibly be described as abusive. As to the memorandums, despite Grievant's attempts to justify them as necessary under the circumstances, their timing is nothing but suspicious. (See footnote 8) Moreover, the evidence regarding both programs and Ms. Hess' responsibilities relating to them was quite muddled, and it is not entirely clear whether the failures which occurred were her fault. Nevertheless, the bottom line is that Grievant had no authority over Ms. Hess, and he attempted to have at least one of the memos placed in her personnel file as revenge for actions he believed she had taken against him. Such conduct can easily be described as disrespectful and abusive.

Accordingly, Respondent has proven by a preponderance of the evidence that Grievant did engage in disrespectful and/or abusive conduct in violation of its policy regarding employee conduct. Therefore, the remaining issue is whether or not the discipline imposed was appropriate for the offenses committed.

Mitigation

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievantbears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's

assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

If there were ever a case for mitigation, this is certainly it. While Grievant did step out of line, it is quite obvious that DJS was merely waiting for him to do so, so he could be removed from a position that no one wanted him to have in the first place. Director Holland made it abundantly clear that he believed Grievant was not qualified for this position and even threatened to resign over the issue. Especially since Respondent has failed to provethat Grievant committed the EEO violations of which he was accused, mitigation is certainly appropriate.

Respondent has established that Grievant's conduct toward Ms. Hess violated Policy Directive 4.01, Section A4, prohibiting disrespectful and abusive conduct. This policy provides that, for Class A offenses, the first offense is punishable by official reprimand to a five-day suspension, the second offense by six-day to fifteen-day suspension, and a third offense by sixteen-day suspension to dismissal. Demotion is mentioned in the policy as an alternative to dismissal, when either four Class A violations or three Class B violations have occurred. The evidence in this case would not have justified termination. Even if viewed as separate occurrences, Grievant has, at the most, committed two or three Class A offenses in the “disrespectful conduct” category. Accordingly, demotion is too severe a punishment, and the undersigned finds that a 30-day suspension is appropriate. (See footnote 9)

Grievant's Supervisory Authority

Many months ago, the parties to this grievance advised the undersigned that they had agreed to “bifurcate” the issue of whether or not Respondent had the authority to deprive Grievant of supervisory duties when it placed him in the Deputy Superintendent position. Although the parties have indicated that they believe additional evidence must be taken in order for the undersigned to address it, I do not believe this is necessary, because no meaningful relief may be granted at this time with regard to this issue. Grievant is being returned to his position as Deputy Superintendent as relief in thisgrievance, and the propriety of Mr. Holland's decision to deny him supervisory authority in the past is not relevant at this point. The fact of the matter is that Grievant was stripped of any supervisory authority contained in the job description for his position from the day he was placed in the job, and the only possible relief would be an opinion as to whether or not this was proper. (See

footnote 10) Any opinion the undersigned would give on the issue would merely be advisory, and this Grievance Board does not issue advisory opinions. Collins v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-227/248 (Jan. 20, 2003). However, if DJS decides to deprive Grievant of supervisory authority when he is returned to his position as Deputy Superintendent, and Grievant feels harmed by that decision, it would be Grievant's option to file a grievance if or when that occurs. Nevertheless, in view of the events which led to the discipline which prompted this grievance, and the resulting suspension, some limitations upon Grievant's supervisory duties initially upon return to his position would not seem out of the question. (See footnote 11)

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 2. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. See Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995)." Napier v. Stratton, 513 S.E.2d 463, 467 (1998).

3. Respondent has failed to prove by a preponderance of the evidence that Grievant created a hostile work environment for Kathy Hess.

4. Abusive language and abusive, inappropriate and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Graley v. W. Va. Parkways and Economic Development Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000); Hubble v. Dep't of Justice, 6 MSPR 553 (1981).

5. Retaliatory acts by one employee against another do not fall within the scope of prohibited reprisal. See W. Va. Code § 29-6A-2(p).

6. Respondent has established that Grievant's conduct toward Ms. Hess violated DJS Policy Directive 4.01, Section A4, prohibiting disrespectful and abusive conduct.

7. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded

the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). 8. Because Respondent failed to prove allegations that Grievant committed violations of the Equal Employment Opportunity laws, mitigation of the punishment in this case is appropriate.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to reinstate Grievant to his position as Deputy Superintendent, with all applicable back pay and benefits. Grievant's demotion is to be substituted with a thirty-day unpaid suspension. All further relief requested is hereby **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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: December 10, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant had claimed default in a related grievance, Docket No. 02-DJS-127D, which was ultimately appealed to the Circuit Court of Harrison County. Because of the related issues and potentially conflicting outcomes, this case was held in abeyance until the appeal of that matter was resolved.

Footnote: 2

Ms. Hess repeatedly insisted that Grievant's continued questioning on this issue did not make sense to her, because only Superintendent Ross was above her at the institution.

Footnote: 3

These provisions were also cited in Grievant's demotion letter.

Footnote: 4

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 5

Of course, Grievant is not totally without fault in this matter, which will be discussed later in this Decision.

Footnote: 6

Also of questionable credibility are Ms. Hess' assertions, raised for the first time during the level four hearing, that she had diarrhea and an upset stomach for weeks after the confrontation between herself and Mr. Cody. These physical ailments were not mentioned at any time previously, and one would think she would have at least mentioned them in her complaint.

Footnote: 7

It should also be noted that Title VII, Equal Employment Opportunity (Pub. L. 88- 352) only prohibits discrimination based upon race, color, religion, sex, or national origin, none of which have been alleged in this case. See Cohenour v. Div. of Corrections, Docket No. 03-CORR-055 (Oct. 23, 2003).

Footnote: 8

The superintendent's secretary testified that it would not be unusual for her to date a memo with the date she typed it, but it would not be distributed until the following day. Thus, it is not difficult to believe that Grievant composed the memorandums sometime on January 9 between confrontations with Ms. Hess, but it was not approved and distributed until the next day.

Footnote: 9

Pursuant to W. Va. Code § 29-6A-5b, the undersigned is authorized to provide whatever relief is "fair and equitable" and will make the employee "whole."

Footnote: 10

Additionally, there can be no question that a grievance filed approximately a year and a half after this occurred would be severely untimely.

Footnote: 11

Due to the outcome of this grievance, as based upon the findings and discussion set forth thus far in this Decision, it is not necessary to address Grievant's claims of discrimination based upon disciplinary matters involving other DJS

employees.