**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DAVID MONROE ANSELL,**

**Grievant,**

**v.** **DOCKET NO. 2008-1642-DOR**

**INSURANCE COMMISSION,**

**Respondent.**

## DECISION

David Monroe Ansell ("Grievant") challenges the decision of Respondent West Virginia Office of the Insurance Commission ("OIC"), to reprimand him and ultimately suspend Grievant for five days. The May 21, 2008, "Statement of Grievance" provides as follows:

> My immediate supervisor, Andrew Pauley, has wrongfully and without reasonable or good cause initiated and issued a written reprimand to me and a related and subsequent 5 day unpaid suspension from my job as Associate Counsel to the OIC [Office of Insurance Commission]. The specific charges he has listed against me (some via a letter actually signed by Bill Kenny dated 5-2-08) are exaggerated, petty, vindictive, unreasonable and in many cases totally untrue, and have therefore created a hostile work environment. His vindictive behavior towards me and his wrongful filing of said charge in violation of various West Virginia and civil service labor policies, as well as the OIC Conduct (IC-030) and the Division of Personnel's Prohibited Workplace Harassment Interpretive Bulletin.

As relief, Grievant generally seeks to be made whole including: expungement of the reprimand and suspension, back pay, transfer to another unit[1] and a finding that his

---

[1] Grievant has not addressed this remedy at Level Three or in his proposed findings of fact and conclusions of law. Nor is there any indication that a position is available in another unit. Insofar as the Grievant has not presented any further evidence or argument, this remedy is considered abandoned. *See Louk v. Barbour County Bd. of Educ.*, Docket No. 95-01-386 (May 23, 1996).

supervisor created a hostile work environment.[2]

The procedural history of this grievance is atypical. As this is a disciplinary matter, the Grievant filed directly to Level Three. *See* W.VA. CODE § 6C-2-4(a)(4). However, by Order entered May 28, 2008, the Grievance Board transferred this grievance to Level One. A Level One decision denying the grievance was entered on June 19, 2008. Thereafter, by Order entered July 7, 2008, the Grievant was permitted to skip Level Two and proceed directly to Level Three given the disciplinary nature of some[3] of his claims.

Three days of hearings were held before the undersigned Administrative Law Judge ("ALJ") in Charleston, West Virginia. Hearings were held on November 3, 2008, December 2, 2008, and April 15, 2009. Grievant appeared pro se. Respondent appeared by and through its counsel Gregory A. Elam, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 15, 2009.[4]

---

[2] After the close of the evidence, Grievant filed a *Motion to Add to the Requested Relief Previously Submitted by Grievant in this Action* on or about May 28, 2009. Respondent filed a Response. Grievant seeks that all employee performance appraisals and similar documents written by Grievant's supervisor, Andrew Pauley, be expunged from his record. Grievant has not identified the specific documents. Nor is there any indication that Grievant has timely grieved placement of these documents in his record. An application for an order by motion "must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based becomes known to the moving party." 156 C.S.R. 1 § 6.6. At this juncture in the proceedings, the amendment does not permit the presentation of the issue on the merits. It does not provide Respondent adequate notice. Accordingly, Grievant's Motion is hereby **DENIED**.

[3] Grievant alleges a non-disciplinary claim of hostile work environment. All claims, both disciplinary and non-disciplinary, arise out of a common core of operative facts.

[4] The deadline for submitting proposed findings of fact and conclusions of law was extended due to hearing recording issues.

## Synopsis

Grievant, an attorney with the Office of Insurance Commission, was issued a written reprimand for various offenses. Thereafter, he was suspended five days for insubordination.

Grievant's direct challenge of the written reprimand is untimely as it was not filed within the requisite statutory time frame. Grievant's other claims are timely.

Respondent has failed to meet its burden of proving, by a preponderance of the evidence, the allegations contained within the five-day suspension letter. Grievant has not established his claim of hostile work environment against his supervisor by a preponderance of the evidence. Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part.

The following findings of fact are based upon a thorough review of the record produced in this matter:

## Findings of Fact

1. Since late 2005, Grievant has worked as an Attorney II for the OIC. Grievant has been engaged in basically the same job duties for approximately the last nine years. For about six of those years, he worked for the former Workers' Compensation Commission ("WCC"). Then, when the WCC was privatized at the end of 2005, Grievant was transferred to the OIC office where he has continued performing the same type of injunction/collection work for about the last three years. Generally, Grievant's duties are to collect debts from employers who are in default on workers' compensation premiums/balances.

2. At all relevant times herein, Grievant was aware of and was given copies of the OIC's *Employee Conduct Policy* and *Computer Policy*. Level Three, Respondent's Exhibit 1, Part 1. Grievant had been explained and had received the West Virginia Division of Personnel's *Prohibited Workplace Harassment Interpretative Bulletin*. *Id*.

3. The transition from WCC to OIC in 2005 – 2006 could generally be described as a very rocky one for the Grievant.

4. At all relevant times herein, Mr. Andrew R. Pauley, Esquire, was an Associate Counsel and Attorney Supervisor of the Regulatory Compliance-Legal Division at OIC. Mr. Pauley was Grievant's direct supervisor.

5. On November 19, 2007, Grievant received an employee performance appraisal. His performance was rated as "Fair, But Needs Improvement." Level Three, Respondent's Exhibit 1, Part 2. The performance appraisal provided that the Grievant needed to improve on "his follow-up of assignments," "[c]ustomer service" and "[w]orking in a team environment." Grievant signed his performance appraisal and wrote "with objection" above his name. *Id*.

6. On February 15, 2008, Grievant was issued a sixteen page written reprimand. The reprimand recited an effusive list of twenty-seven alleged offenses committed by Grievant. These offenses dated back over a two-year period. The reprimand also prescribed a 90-day Corrective Action Plan, which was to be in effect from February 15, 2008, to May 15, 2008. The following expectations were provided to the Grievant:

- Be courteous, kind, respectful and patient with the public in all dealings you so have with them. This will, of course, include your co-workers, superiors and support staff. There are no excuses for being rude to the public regardless of their behavior (This, of course, would not include situations where you feel you are in imminent danger

or need to protect yourself from assault.)

- Keep your supervisor informed of all cases you are handling and keep a detailed summary concerning your actions taken in each and be prepared at all meetings to discuss progress on each.
- Be more receptive to our bi-monthly meetings and actively discuss your cases that you are involved and attempt to add positive ideas for the group.
- Endeavor to provide positive outlook and feedback on policy implementations that you are requested to perform.
- Attend DOP courses or other relevant courses on dealing courteously with the public.
- Do not openly question your superior's directives to others or directly in emails or in meetings once an opportunity has been provided for you to air your disagreement or to seek understanding of the position. You are always entitled to request a private meeting at anytime with your supervisor to discuss questions you may have.
- Report all issues to your supervisor that might appear to be considered a problem with public discourse or other units of OIC and/or relating in any way with your work assignments such as missed deadlines, service of process issues, public discontentment with any correspondence, email, and/or conversation you are aware.
- Discuss all issues you have with your supervisor.
- Reply to all telephone calls, correspondence, emails or general inquiries in a timely, respectful, and courteous manner.
- Discuss issues with your superiors first concerning other divisions, co-workers, or the public before taking actions "into your own hands."
- Complete all assigned tasks in a timely and effective manner and report that completion to your supervisor and/or other divisions so that your communicative activities will assist in the work flow at OIC or other divisions.
- Endeavor to perform requested analysis on your cases and endeavor to resolve prior to the need for litigation which should always be a last resort.
- Follow-up on your assignments.
- Follow-up with your superiors on matters where you have requested approval, information, or other requests.
- Be respectful of others opinions even though you may not personally agree.
- Courtesy me on all emails that you send in the course and scope of your employment with the State of West Virginia in your current job capacity.
- Courtesy me on all correspondence or other documents that you prepare on behalf of the State of West Virginia in your current job capacity.
- Courtesy me on all memorandum you place in files concerning fine waivers and your analysis thereof or anything other memoranda, pleadings or other work product you complete.
- Attend Continuing Legal Education courses on case management, organization and use of electronic means of data collection and use of electronic means of data collection.

7. Grievant did not file a grievance within fifteen days of receiving the written reprimand.

8. On April 30, 2008, Mr. Pauley and Kathy Damron, Human Resources Director, met with Grievant. They informed Grievant that he had violated the Corrective Action Plan and OIC policy, and a suspension was being considered.[5] Grievant was given three days to provide a response. Grievant did not provide a response.

9. By letter dated May 2, 2008, Grievant received a five-day suspension, as a result of "violations of the OIC *Conduct Policy*, OIC *Computer Policy*, Division of Personnel's *Prohibited Workplace Harassment Interpretive Bulletin*, and your [Grievant's] unacceptable performance including insubordinate behavior." Level Three, Respondent's Exhibit 2, Part 3.

10. This suspension letter referred to several incidents[6] during which Grievant allegedly violated directives and policies. The letter also referred to the previous Corrective Action Plan of February 15, 2008.

11. The May 2, 2008, suspension letter cited five specific incidents, all of which occurred in April, 2008. The first three cited incidents occurred on April 9, 2008.

---

[5] At this meeting, Grievant was apologetic and made certain statements indicating that he was sorry about the situation. Level Three, Testimony of David Monroe Ansell. These statements were made by the Grievant to preserve his employment. Grievant made these statements to avoid argument.

[6] The letter characterizes these incidents as "representative examples." Level Three, Respondent's Exhibit 2, Part 3. Apparently, these examples were the most heinous acts the Grievant committed.

**Incident One**

12. On April 9, 2008,[7] Grievant sent an email to his supervisor, Mr. Pauley. He sent copies of this email to the following: Nancy Lepp, Supervisor of Revenue Recovery, Tina Clark, Director of Revenue Recovery, and Toney Colagrosso.[8] His email apologized for a previous message that he believed could have been taken in a disparaging manner towards his secretary, Robin Hughes. Level Three, Respondent's Exhibit 4, Part 30.

13. The origin of Grievant's April 9, 2008, email flows from a March 11, 2008, email

---

[7] The suspension letter characterized this event in the following manner:

> On April 9, 2008 at 10:53 a.m., you sent an email to several people outside of Regulatory Compliance Unit including employees in the Revenue Recovery Division that Robin Hughes, a paralegal assigned to you, had inadvertently prepared the wrong Order for an injunction collection matter. When Mr. Pauley responded by questioning whether you had "inquired about the Motion/Corrected Order" and asked you "if a hearing needs to be set on it?" You responded with derogatory comments toward Robin Wayne, Paralegal. You continued to be disrespectful to Ms. Wayne wherein you openly questioned the manner in which she handled the situation. At that time Mr. Pauley discussed with you his concern that you may be creating a hostile work environment for Ms. Wayne. Mr. Pauley also reminded you that the attorney is ultimately responsible for the work product that is sent from the office. You then forwarded the following email to individuals outside of the Regulatory Compliance Unit:
>
>> "PLEASE NOTE: I now realize that my message below could easily be taken in a disparaging way towards Robin -- and I want to clarify that that's NOT how I meant it to sound -- and I apologize that it may have sounded that way. I was just trying to unravel --in my own mind-- (I was sort of "thinking out loud") what the heck happened in this confusing case--?? Whatever did happen- -- if there was a screw-up of any kind -- it is my fault as the attorney on the case, NOT my paralegals. As I know-- and I hope you all know too -- Robin is a highly competent employee."

[8] Mr. Colagrosso's title is unclear from the record.

from Mrs. Lepp. Mrs. Lepp questioned Grievant about the proper course to take against a particular employer. Mrs. Lepp copied Mrs. Clark and Mr. Colagrosso. That same day, Grievant responded and stated he would proceed with contempt. Thereafter, on April 9, 2008, Mrs. Lepp inquired as to whether a contempt hearing had been scheduled. Again, on the same day, Grievant responded and stated that he instructed Robin Hughes to prepare an order, the wrong order was prepared, and he signed it and sent it to the Court. When Grievant caught what happened, he sent a corrected final order. *Id*. Grievant sent this response to the above persons, as well as his supervisor and his co-worker, Bill Rardin, an associate attorney with OIC. Thereafter, Grievant's supervisor responded and asked when the hearing was scheduled. After talking about the issue with his secretary, Grievant then learned that there had been a miscommunication about the seeming mix-up. He needed to discuss the issue further with Mr. Colagrosso, and he believed that the issue was resolved and the correct order was entered. He relayed this information to his supervisor.

**Incident Two**

14. Prior to April 9, 2008, Mr. Pauley told Grievant and Mr. Rardin to "work out" a legal difference of opinion they had concerning the best way to collect from a defaulted employer.

15. On April 9, 2008,[9] a meeting was held within the Regulatory Compliance Unit to

---

[9] The suspension letter characterized this event in the following manner:

> On April 9, 2008 during an Affidavit Meeting which included the Revenue Recovery Division Director (RRD), RRD Credit Analysts, Bill Rardin, Attorney and Ms. Wayne, it was reported to Mr. Pauley by Tina Clark, Director of Revenue Recovery that you were confrontational with your co-worker Bill Rardin a fellow Attorney. Ms. Clark indicated that she felt a confrontation coming on between you and Mr. Rardin so she dismissed the Credit Analysts

discuss affidavits. At this meeting, Mr. Rardin and Grievant engaged in a legal discussion where both attorneys raised their voices. The raised-voice portion of the discussion lasted a few minutes. Near the end of the discussion, Mr. Rardin slammed his hand against the door frame in a forceful manner. This made a loud noise. At the time the debate occurred no OIC credit analyst was in the room. Nor was Grievant's secretary present.

16. At the end of the April 9, 2008, meeting, Grievant told Mrs. Clark, OIC Director of Revenue Recovery, that he would do whatever OIC wanted done. Mr. Rardin stated that he was tired of arguing with Grievant. Level Three, Respondent's Exhibit 4, Part 27.

17. Grievant's suspension letter did not mention that Mr. Rardin slammed his hand against the door frame. Nor was this incident mentioned in an email Mrs. Clark sent to Mr. Pauley discussing the conversation (and complaining of Mr. Ansell's challenge to his co-worker's position). Level Three, Respondent's Exhibit 4, Part 27.

**Incident Three**

18. The last April 9, 2008, incident contained in the suspension letter provides as follows:

---

> "so they would not feel uncomfortable." Ms. Wayne also excused herself from the room. The subject matter of the meeting was regarding two new paragraphs to be added to the affidavit that the Credit Analysts submit to the Regulatory Compliance Unit. Mr. Rardin suggested that a request for monetary relief be included in the affidavits. Ms. Clark stated that you were very adamant about the subject and began to challenge Mr. Rardin in a loud manner. Mr. Rardin tried to explain the thought process you continued to challenge him. It was reported that you were loud and confrontational. Mr. Rardin states that you have been loud and disruptive in your discussions with him. Mr. Rardin has tried to dismiss himself from confrontations with you by making comments such as "this isn't the time or place" or "I don't want to talk about it." However, you continue to taunt him in front of co-workers and on one occasion a client.

> Mr. Rardin sent an email to Mr. Pauley with a copy to you regarding bringing Employers into compliance through the collection of fines and old fund debt as it relates to Workers' Compensation Premiums. Mr. Rardin's email he discussed "wanting to collect the debt in Circuit Court by including in the complaint for injunction a request for monetary relief." Mr. Rardin cited portions of Rule 11 to support his proposed changes. These requests were in line with communicated goals related to converting noncompliance to a monetary collection effort.

19. On April 9, 2008, the OIC Regulatory Compliance or Revenue Recovery had no official policy requiring that debt collection activities be performed in a particular manner. That is, Grievant was never directly instructed by his supervisor or client to perform his collection activities in a particular manner. *See* Level Three, Respondent's Exhibit 4, Part 28, 137 (April 14, 2008, Email from Mr. Pauley recognizing that he is "inclined" to adopt a certain Complaint format); Testimony of David Monroe Ansell.

**Incident Four**

20. As previously mentioned in Finding of Fact 14 *supra*, Grievant's supervisor, Mr. Pauley, instructed Mr. Ansell and Mr. Rardin to engage in dialogue concerning the proper way to collect debt from defaulted employers. Mr. Pauley essentially told them to "work it out." Mr. Pauley knew that Greivant and Mr. Rardin had a legal difference of opinion on the best way to collect from a defaulted employer. A meeting was held on the morning of April 10, 2008. Mr. Ansell and Mr. Rardin again expressed their differences of opinion at this meeting. Mr. Rardin yelled "shut up" to Mr. Ansell.

21. The fourth incident cited in the May 2, 2008, letter occurred on April 10, 2008,[10]

---

[10] The suspension letter characterized this event in the following manner:

> On April 10, 2008 at 9:43 a.m. you sent Mr. Pauley an email in response. You also copied Mr. Rardin on your response. In your response you stated

at 9:43 a.m. On this date, Grievant sent an email to his supervisor, Mr. Pauley. Grievant's email expressed that both attorneys had different views, with Grievant believing a sole injunction was the best mechanism to force compliance and recover debt, while Mr. Rardin believed that the best recovery mechanism is to collect upon the debt through a debt recovery action and seek injunction as a last resort. Level Three, Respondent's Exhibit 4, Part 14. Grievant used the email to (1) express the reasonableness of his interpretation and (2) report the outcome of the meeting. In response to the Grievant's email, Mr. Rardin sent a follow-up email focusing upon sound bites of alleged statements made by the Grievant. *Id*.

**Incident Five**

22. The final cited incident in the suspension letter occurred on April 22, 2008.[11] On

---

"we remain 180 degrees in disagreement on it." You admitted that you "pressed him (Re. Rardin) in Tina's office for a more legally-based answer." You also stated in your email "I was thinking that maybe I should just drop my opposition to his plan and just go along." You have been opposed to these efforts for over a year despite Mr. Pauley repeatedly informing you this was the policy.

[11] The suspension letter characterized this event in the following manner:

On April 22, 2008 at 5:32 you [Grievant] received an email from an Attorney representing a delinquent Employer that included a proposal to pay $75,000 of a $205,000 of debt to the OIC. At 8:55 a.m. of [*sic*] April 23, 2008 send [*sic*] Mr. Pauley and email and copy the pertinent staff of the RRD. In the email you state[d,] "I have been in discussions with the above ER's attorney who has offered us $75,000 to settle our $205K claim against them. The owner recently passed away and this company is out of business. The $75,000 would come out of his life insurance proceeds – a sad situation….My opinion: I think we should take it." This raised many questions with not only Mr. Pauley but also with the other individuals that were copied on the email. If the OIC were to proceed, as you recommend, in this case it would place Jane Cline, Commissioner of the OIC at risk of being sued. The OIC has no legal authority to waive premiums.

April 22, 2008, Craig Kay sent an email to Grievant. This email stated that Mr. Kay met with a certain employer concerning a settlement. Mr. Kay included an amount of a proposed settlement and the parties involved. He concluded his email by stating "[p]lease contact me if you have any questions or require additional information." Thereafter, on April 23, 2008, Grievant sent an email to his supervisor, Mr. Pauley. He copied Tina Clark, Nancy Lepp, Drema Ledbetter[12] and Bill Rardin. In his email to his supervisor, Grievant stated that he had been in discussions with the employer's attorney, there is an offer of $75,000 coming from life insurance proceeds and his opinion was that "we should take it."

23. Mr. Pauley responded to Grievant's email and stated that a more "thorough analysis" should be performed before any action is taken. Level Three, Grievant's Exhibits 7, 8 and 9. Ultimately, Grievant's research indicated that the settlement was possible if certain contingencies existed. Level Three, Grievant's Exhibit 9.

24. The initial Policy Statement of the OIC *Conduct Policy* provides as follows: "Employees are expected to observe a standard of conduct which will not reflect discredit on the abilities and integrity of Commission employees, or create suspicion with reference to employees' capability in discharging their duties and responsibilities." The suspension letter surmised that Grievant violated this general policy.

25. The suspension letter cited several specific policy violations. First, OIC *Conduct Policy* was cited. Level Three, Respondent's Exhibit 2, Part 1. The following policy provisions were cited as violated by the Grievant:

---

[12] Mrs. Ledbetter was employed by the OIC as a Credit Analyst.

**Electronic Mail and Internet Use**
"Transmission of solicitations or obscene, profane, harassing, discriminatory, or intimidating material or messages is specifically prohibited, as is the use of the State's communication systems in violation of any policy, rule, or law."

**Harassment**
"Harassment and discrimination of any form is prohibited in the workplace . . . ."

**Insubordination**
"Employees are expected to adhere to the reasonable and legal directives of their supervisor. The refusal of an employee to perform any lawful directive by their supervisors is cause for disciplinary action. An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. Insubordination encompasses more than an explicit order and subsequent refusal or intentional failure to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer and displaying a lack of respect for the supervisor. Choosing to complete other work or refusing/failing to perform work as assigned in the functional job description or as directed by a supervisor during regular or overtime work hours may be considered insubordination and may result in progressive discipline."

26. The suspension letter secondly cited the OIC *Computer Policy* and provided the following specific policy language was violated:

> Individuals performing work using Commission IT resources are expected to use the Commission's IT resources in such a way as to not compromise the integrity, functionality or security of such systems or reflect discredit on the abilities, capabilities of Commission employees.

Level Three, Respondent's Exhibit Three, Part 2.

27. Thirdly, the suspension letter cited the Division of Personnel's *Prohibited Workplace Harassment Interpretative Bulletin* and cited the following language as a policy violated by the Grievant:

> Non-discriminatory hostile workplace harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and

sabotage of performance which may include, but is not limited to:

1. Unwarranted constant and destructive criticism;
2. Singling out and isolating, ignoring, ostracizing, etc;
3. Persistently demeaning, patronizing, belittling and ridiculing;
4. Threatening, shouting at, and humiliating particularly in front of others;
5. Bullying.

28. Grievant filed this grievance on May 21, 2008.

29. On July 1, 2008, Grievant was removed from portions of his corrective action plan. The conditions that remained were part of the Grievant's "normal and customary responsibilities." Level Three, Respondent's Exhibit 2, Part 7. Hence, as a practical matter, Grievant was totally removed from the plan.

30. Grievant never intentionally or willfully violated an OIC directive or policy.

## Discussion

There are three issues in this grievance. First, whether the Grievant timely filed his claim directly challenging the February 15, 2008, written reprimand. Second, whether the Respondent has proven the disciplinary claims contained within the Grievant's May 2, 2008, suspension letter by a preponderance of the evidence. The final issue is whether the Grievant has established that he has been subjected to a hostile work environment. This ALJ finds that the challenge of the written reprimand was untimely, and neither party has met their burden of proving their claims by preponderant evidence.

### Timeliness

The burden of proof is on the Respondent to prove this grievance was not timely filed by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the Respondent meets this burden, the Grievant

may then attempt to demonstrate that he should be excused from filing within the statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). As to when a grievance must be filed, WEST VIRGINIA CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Respondent moves to dismiss the February 15, 2008, written reprimand portion of this grievance because Grievant did not file this grievance until May 21, 2008. As an initial matter, Respondent has proven that this portion of the grievance was not filed within fifteen days of Grievant receiving the written reprimand.

As an excuse for his untimely filing, Grievant argues that the February 15, 2008, written reprimand was a continuing practice. Grievant's argument is unpersuasive and inconsistent with the jurisprudence surrounding the doctrine of continuing practice. A continuing practice generally occurs on a persistent basis and is not a single event. *See Morgan v. Division of Highways*, Docket No. 2008-1714-DOH (May 13, 2009); *Craig v. W. Va. Dep't of Health &*

*Human Res.*, Docket No. 98-HHR-344 (June 24, 1999); *Flint v. Bd. of Educ.*, 207 W. Va. 251, 531 S.E.2d 76 (1999) (overruled in part on other grounds by *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004)). Grievant was specifically provided a single written reprimand for specific conduct. Grievant received the written reprimand on February 15, 2008. He did not file his grievance until May 21, 2008, nearly three months after the reprimand. Upon receipt of the written reprimand on February 15, 2008, Grievant was "unequivocally notified" of the reprimand. *Harvey*, *supra*; *Whalen*, *supra*. Insofar as Grievant seeks to *directly* challenge the written reprimand, this claim is untimely and therefore **DISMISSED**.[13]

**Disciplinary claims**

The burden of proof for disciplinary claims rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 9 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Where an act of misconduct is included in a disciplinary document "it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If the misconduct involves persons or property, these

[13] The reprimand and the circumstances contained therein may be used as evidence to support or oppose Grievant's claim of hostile work environment against his supervisor, Mr. Pauley. Moreover, the untimely filing of this claim does not limit the remedy an ALJ may award where a hostile work environment is found to exist.

must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, in part, *Clarke v. W. Va. Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981); Syl. Pts. 4 and 5, in part, *Snyder v. Civil Serv. Comm'n*, 160 W.Va. 762, 238 S.E.2d 842 (1977); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). The burden of proof encompasses each of the incidents cited in the Grievant's May 2, 2008, suspension letter. The employer must prove that the cited incidents occurred by a preponderance of the evidence.

The primary claim against the Grievant is that his conduct was insubordinate. *See Respondent's Proposed Findings of Fact and Conclusions of Law*, unnumbered p. 7. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Riddle v. Bd. of Directors*, *So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id*.

"[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be

contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*. When one acts with willfulness there is purpose or design, actual or constructive. *Kelly v. Checker White Cab*, 131 W. Va. 816, 823, 50 S.E.2d 888, 893 (1948). Willfulness is not mere inattention or heedlessness. *Id*. Willfulness implies "a conscious purpose to do wrong. Doing a thing knowingly and willfully implies not only a knowledge of the thing done, but a determination to do it with evil purpose or motive." *United States v. Ramey*, 336 F.2d 512, 515 (4th Cir. 1964).

In this grievance the OIC has set forth a plethora of directives and policies it alleges the Grievant wilfully violated.[14] The willful violation of these directives and policies, argues the Respondent, constitutes insubordination. *See Respondent's Proposed Findings of Fact and Conclusions of Law*, unnumbered p. 7. These directives and policies include those instructions included in Grievant's Corrective Action Plan, the OIC policies and the DOP bulletin. *See* Findings of Fact 24-27 *supra*. Upon close consideration of the cited directives and policies, the Respondent has not established, by a preponderance of the evidence, that the Grievant's conduct was insubordinate. There is no indication that Grievant willfully violated the directives or policies. Moreover, Respondent has not established that it is more likely than not the Grievant actually violated a directive or policy. Consideration of this issue begins with the specific factual incidents cited in the suspension letter.

The suspension letter cites three alleged incidents on April 9, 2008. The first event

---

[14] However, in its proposed *Findings of Fact and Conclusions of Law* the violations were not articulated with clarity or precision. That is, it was not explained how the Grievant exactly violated the directives and policies.

was an email Grievant sent directly to his supervisor concerning what could have potentially, if construed strictly against the Grievant, been characterized as disparaging towards Grievant's secretary. A mix-up or miscommunication occurred prior to April 9, 2008, in regard to the status of a case. Grievant copied the email to all who had been involved since the initial email thread, plus his supervisor. Upon review of the email, it cannot be said that Grievant violated any directive or policy. He merely explained what he perceived happened at the time. In an abundance of caution, he then apologized for it, presumably to cover himself because he was on a Corrective Action Plan and believed he was being singled out.

The next April 9, 2008, event revolved around an "affidavit meeting." Mr. Rardin, Grievant's coworker, and Grievant had a legal disagreement concerning the most appropriate manner to approach debt collection. As with many spirited conversations, both attorneys raised their voices.[15] The raised voice portion of the debate lasted mere minutes.[16] At the end of the discussion, Mr. Rardin slammed his hand against the door frame. This made a loud noise. Also, at the end of the discussion, Grievant told the Director of Revenue Recovery that he would do whatever his client requested.

---

[15] It is noted that the Grievant's corrective action plan required him to "actively discuss your [Grievant's] cases that you are involved and attempt to add positive ideas for the group."

[16] Several of the OIC's directives in the Grievant's Corrective Action Plan are inexplicit, ambiguous and seemingly difficult to measure. For example, Grievant must be courteous, kind and patient. These vague terms are arguably inadequate to warn the Grievant of the potential conduct which may subject him to further discipline. *See generally Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839 (1972); *Gooden v. Board of Appeals of W. Va. Dep't of Pub. Safety*, 160 W. Va. 318, 234 S.E.2d 893 (1977). Nevertheless, assuming such directives are unambiguous, such directive must be considered and analyzed within the social context. In this context, it cannot be said that Respondent has proven a violation of these directives by a preponderance of the evidence.

The last April 9, 2008, event described in the suspension letter vaguely provides that Mr. Rardin sent an email to Mr. Pauley concerning collecting of debt by including monetary request in complaints. Finding of Fact 18 *supra*. From the suspension letter, the allegation against the Grievant in this scenario is unclear. Regardless, the record does make clear that at the time the email was sent, OIC did not have a clear policy addressing precisely how attorneys should pursue debt collection. Mr. Rardin and Grievant had a reasonable difference of opinion on how to approach debt collection.[17]

The fourth event occurred on April 22, 2008. In an email, Grievant stated that in his opinion, OIC should take a settlement from life insurance proceeds in the amount of $75,000. He sent this email to various individuals involved in the collection process. This included Grievant's supervisor and Mr. Rardin. Grievant claimed that this was just his initial "gut" reaction. Level Three, Testimony of David Monroe Ansell. Moreover, both the Grievant and Mr. Pauley pointed out that additional research needed to be done. *See* Level Three, Grievant's Exhibits 8 and 9. Grievant probably should not have stated his initial "gut" reaction in an email. He should have specifically stated that such an opinion is just an initial reaction and additional research is required, instead of leaving this to be inferred by the reader. Ultimately, as indicated by further research on the part of the Grievant, it appears his advice was sound so long as certain contingencies existed. Level Three, Grievant's Exhibit 9.

The last alleged event occurred on April 10, 2008. On this day, Grievant, in

---

[17] At Level Three, Mr. Rardin testified that the Grievant could be irritating, but the Grievant did not do so intentionally. He also testified the Grievant was not a violent person. Level Three, Testimony of Bill Rardin. Mr. Rardin "hates" conflict and confrontation. *Id*.

accordance with his Corrective Action Plan, sent an email to his supervisor concerning a meeting between Grievant and Mr. Rardin. He copied Mr. Rardin. Grievant's email simply stated the outcome of a meeting between Mr. Rardin and Grievant. It expressed that they did not agree on a legal issue. At the time the email was sent, there was simply no clear agency policy or directive on how to proceed.

When viewing these incidents in isolation or *in toto*, it simply cannot be found that the Respondent has established, by a preponderance of the evidence, that Grievant violated any directive or policy. Moreover, even if it is assumed some violation occurred, there is no indication that Grievant had the requisite "conscious purpose" to violate the directives or policies. *United States v. Ramey*, 336 F.2d 512, 515. Accordingly, Respondent OIC has not met its burden by a preponderance of the evidence. This portion of the grievance must be granted.

**Non-disciplinary claim**

As one of the Grievant's claims is non-disciplinary in nature, Grievant has the burden of proving this claim by a preponderance of the evidence. *See Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is "more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant claims that his supervisor created a hostile work environment. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive

to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 418, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). Whether a working environment is hostile or abusive can be determined only by looking at the totality of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR-130 (Jan. 29, 1999). Certainly, any act might be construed by someone as harassing, hostile, disruptive or offensive. 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. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997); *Bryant*, *supra*. These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 371 (1993); *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22, 114 S.Ct. 367, 371.

Grievant claims his supervisor, Mr. Pauley, created a hostile work environment which altered the terms and conditions of Grievant's employment. In previous decisions, this tribunal has granted grievances where a supervisor criticized an employee's work and

created unreasonable expectations, to the degree the employee could not reasonably perform his or her work. *See Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999); *Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997). However, when considering Grievant's claims in the totality of the circumstances, Grievant has not met his burden. Mr. Pauley's conduct was not severe and pervasive. Generally, this ALJ recognizes that prior to being placed on the Correction Action Plan Grievant oftentimes was not careful in his word choice when sending emails.[18] Further, prior to being placed on the Corrective Action Plan, Grievant sometimes challenged his supervisor. This seemingly upset Mr. Pauley and forced him to send emails of his own. As apparent from his characterization of the events in the suspension letter, Mr. Pauley was not careful or extremely accurate with his words and sometimes became frustrated with Grievant.[19] Mr. Pauley played an active role in placing the Grievant on the Corrective Action Plan and suspending the Grievant. Nevertheless, the mere fact that Grievant was subject to complaints about his performance and conduct, does not necessarily constitute harassment

---

[18] For instance, Grievant wrote things such as "dang– I'm GOOD! ha ha," and stated that he was going to "body slam" his opponent in court. *See generally* Level Three, Grievant's Exhibit 7, Respondent's Exhibit 2, Part 1. Further, Grievant would directly question whether the task he was assigned was better suited for the client rather than counsel, and argue that certain decisions by OIC were arbitrary and capricious. Level Three, Grievant's Exhibits 4, 5 and 6. Grievant's supervisor was not amused by Grievant's colorful usage of the English language and viewed Grievant's legal interpretations as a direct challenge to his authority.

[19] This was exceedingly apparent from Mr. Pauley's testimony at Level Three. When questioned by the Grievant, Mr. Pauley was not very courteous or patient. In fact, Mr. Pauley raised his voice at one point. Midway through questioning, Mr. Pauley became flustered and requested a break. Similar to Mr. Pauley, Grievant was likewise upset and used loud tones when questioning witnesses and testifying. It is clear why the Grievant was upset: he was suspended for five days and believed his suspension to be unwarranted. It is not so clear why Mr. Pauley became frustrated and raised his voice.

or a hostile work environment. *See Ryder v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (April 7, 2000).

When considering the circumstances, Mr. Pauley's conduct fits within what may be characterized as reasonable conduct. Grievant's conduct, prior to him receiving the written reprimand and being placed upon an improvement plan, was not exemplary. It was reasonable for his supervisor to take the necessary steps, via email or otherwise, to correct problematic behavior. He was the Grievant's supervisor at a time when OIC was essentially taking over portions of WCC. The nature of the Grievant's tasks were changing, and sometimes change can be difficult for everyone involved. Grievant has not met his burden of proving a hostile work environment by a preponderance of the evidence.

In sum, insofar as the Grievant seeks to directly challenge the written reprimand and Corrective Action Plan, his claim is untimely. The Respondent has not established, by a preponderance of the evidence, that Grievant willfully violated a directive or policy so as to warrant the five-day suspension. The suspension was without good cause. Similarly, Grievant has not met his burden of proving it is "more likely true than not" that he was subject to a hostile work environment. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). The following conclusions of law are appropriate in this matter:

**Conclusions of Law**

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996).

2. Grievances must by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). *Dodgins v. Dep't of Educ./School for the Deaf & Blind*, Docket No. 2009-0407-DOE (June 15, 2009). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

3. If the Respondent meets its burden, the Grievant may then attempt to demonstrate that he should be excused from filing within the statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

4. Respondent has established, by a preponderance of the evidence, that the Grievant's claim directly challenging the February 15, 2008, written reprimand was untimely. Grievant has not proven, by a preponderance of the evidence, an excuse for the untimely filing of his claim challenging the February 15, 2008, written reprimand.

5. The burden of proof for disciplinary claims rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

6. Respondent has not established the allegations contained within the May 2, 2008,

suspension letter by a preponderance of the evidence.

7. For the Grievant's non-disciplinary claims, Grievant has the burden of proving these claims by a preponderance of the evidence. *See Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

8. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 418, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). Whether a working environment is hostile or abusive can be determined only by looking at the totality of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR-130 (Jan. 29, 1999).

9. Grievant has not established, by a preponderance of the evidence, that he was subjected to a hostile work environment.

Accordingly, insofar as the Grievant attempts to directly challenge the February 15, 2008, written reprimand, this claim is **DISMISSED** for untimeliness. This grievance is **GRANTED**, in part. The Respondent has not established its disciplinary claims by a preponderance of the evidence. It is hereby **ORDERED** that the Grievant be reimbursed five-days back pay, plus interest and benefits, for the five-day suspension. Further, Respondent shall remove any mention of the suspension from the Grievant's personnel file. This grievance is **DENIED**, in part. The Grievant has not established his non-disciplinary claim by a preponderance of the evidence.

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

Date: September 15, 2009

_____
**Mark Barney**
**Administrative Law Judge**