THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA MCBRIDE JORDAN[1],

Grievant,

v. **Docket No. 05-DJS-306R**

WEST VIRGINIA DIVISION OF JUVENILE SERVICES/ SOUTHERN REGIONAL DETENTION CENTER,

Respondent.

DECISION

Grievant Pamela Jordan was employed by the Division of Juvenile Services ("DJS") at the Southern Regional Juvenile Detention Facility[2] ("Southern") from February 26, 1991 through August 24, 2004. On the latter date, she was transferred to new responsibilities that she performed out of her home. Grievant was classified as a Correctional Counselor 1 at Southern from October 2003 until she was reassigned. This reassignment and events leading up to it are the reasons for Grievant's two grievances, which were filed on December 6, 2004 and August 25, 2005. These grievances have had a long procedural history that will be fully set out below in the Findings of Fact. Most recently, this matter was remanded to the Public Employees Grievance Board by the Circuit Court of Mercer County in an Order entered on December 18, 2007. In that Order, the Circuit Judge reversed a

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[1] While this matter was working its way through the various levels of the judicial system, Ms. McBride married and changed her last name to Jordan.

[2] During the times most pertinent to this action and in prior decisions this facility was known as the Southern Regional Juvenile Detention Facility. Since that time it has been renamed the Sam Perdue Juvenile Center. For consistency, it will be referred to by its previous name in this decision.

Grievance Board decision that dismissed Grievant's claims based mainly upon the legal principles of *Res Judicata* and Collateral Estoppel. The Circuit Court remanded the grievance to the Grievance Board for "litigation on the merits and the granting of appropriate relief."[3] Respondent filed a Petition of Appeal from the Circuit Court decision to the West Virginia Supreme Court of Appeals. The Supreme Court refused to hear the petition and shortly thereafter, on July 31, 2008, counsel for Grievant moved that the matter be set for a hearing[4] pursuant to the remand order.

A remand hearing was held in Beckley, West Virginia on February 26, 2009. Grievant Jordan was present and was represented by John Feuchtenberger, Esquire. Respondent DJS was represented by Steven R. Compton, Esquire. By agreement, the parties submitted Proposed Findings of Fact and Conclusions of Law simultaneously on May 8, 2009. This matter became mature for decision on that date.

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[3] *McBride v. Div. of Juvenile Serv./ Southern Reg'l Juvenile Det. Ctr.,* Circuit Court of Mercer County, W. Va., Civil Action No. 05-C-819-F (Dec. 18, 2007).

[4] In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See Executive Order No. 2-07*, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Synopsis

At the remand hearing, Grievant argued that she was denied a pay raise and subjected to a hostile work environment. Respondent proved that the grievance was not filed within the time period required by the statute in effect at the time the grievance was filed. Additionally, Grievant failed to prove that she was subject to a hostile work environment. The grievance is denied.

The following Findings of Fact are based upon a thorough review of the entire record created in this matter.

Findings of Fact

1. Grievant was initially employed at Southern on February 26, 1991 as a House Parent. She held positions as a Youth Service Worker, Office Assistant 1 and Office Assistant 2 before becoming a Correctional Counselor 1 in 2003.

2. The Correctional Counselor 1 classification is compensated at pay grade ten.

3. At Southern there are security personnel whose job it is to guard the residents against escape and other activities that either violate facility rules or could cause harm to themselves or others. There are also treatment personnel whose job it is to rehabilitate the residents through counseling and education which is intended to facilitate their successful return to civilian life.

4. As with many such facilities, there was some tension at Southern between the treatment staff and the security staff because their major responsibilities tended to cause them to perceive the residents differently.

5. When Grievant was initially employed, Sam Perdue[5] was the Director of Southern. Mr. Perdue tended to be more treatment oriented toward the residents than security oriented.

6. Sam Perdue was succeeded as the Director of Southern by Gavin Todd Lane in the fall of 2003. Mr. Lane's employment history was in security and he tended to be more security oriented than Mr. Perdue, even though the State priority was moving toward more treatment.

7. As part of the treatment staff, Grievant occasionally had conflicts with members of the security staff. She did not agree with their treatment of the residents. Mr. Lane was not receptive to Grievant's views or complaints related to the security staff and tended to side with the security employees when Grievant complained about their conduct.

8. Some members of the security staff used vulgar and inappropriate language while on duty in the presence of Grievant, Mr. Lane and occasionally the residents.

9. During Mr. Lane's transition to the Director position, Grievant heard a rumor that Lane had expressed his intention to fire Grievant and a few other employees, upon becoming Director. This news made Grievant very apprehensive and she "vented in places [she] should not have vented."[6] Grievant sent an e-mail apologizing for this activity to Mr. Lane, Manfred Holland, DJS Director, and Cindy Largent-Hill, DJS Assistant Director.

10. After Mr. Lane became the Director of Southern, Grievant was given the additional responsibility of Equal Employment Opportunity ("EEO") Officer for the facility.

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[5] Mr. Perdue is the person for whom the Southern Regional Juvenile Detention Facility is now named.

[6] Grievant's Exhibit 6a.

11. Grievant received a report that a fellow employee, Jobina Chatten, had overheard Director Lane and a Correctional Officer use the “n” word when discussing a resident. Ms. Chatten had reported overhearing this conversation to Mr. Lane who had rather forcefully informed Ms. Chatten that she had misheard the conversation and neither participant had used that word. Ms. Chatten then relayed the incident to a coworker, Kathy Wyrick, who passed it on to Grievant.

12. Grievant contacted Brenda Hoylman who is a paralegal in the DJS Legal Department and the DJS EEO Coordinator.

13. In late July 2004, Ms. Hoylman met with Grievant, Ms. Chatten and Ms. Wyrick in Charleston to hear their complaints regarding problems at the facility. While the meeting was originally scheduled to hear about the incident reported by Ms. Chatten, the Southern employees discussed allegations of child abuse, hostile work environment, racial discrimination, gender discrimination and retaliation at Southern.

14. From August 9 through August 18, 2004, Brenda Hoylman and Correctional Officer 2, Timm Harper, conducted an investigation into the allegations Ms. Hoylman had received at the Charleston meeting. Mr. Lane was removed from Southern during the course of the investigation and every employee at the facility was interviewed by Hoylman and Harper.

15. Ms. Hoylman issued a report regarding this investigation to Director Holland on August 19, 2004. Ms. Hoylman reported the following findings:

- **Child Abuse**: No employee could confirm or verify that child abuse had occurred. The Department of Health and Human Resources’ Institutional Investigation Unit had previously investigated these allegations and found no abuse.

- **Racial Discrimination**: In the conversation overheard by Ms. Chatten, the "n" word was not used. However, one of the officers referred to another officer's father as a "m f' er" which is probably the word that Ms. Chatten heard and misconstrued.[7] Mr. Lane allegedly made the statement that "he should date a black woman because he needs his house cleaned." Lane denied this statement and it could not be corroborated and no similar allegations were made by other employees.
- **Sexual Discrimination**: "Several employees stated that there was an atmosphere that women are not welcome; however this comes across as jokes and bantering between employees. . . Most people feel that no one crosses the line in their joking and bantering, but in our interviews, we feel that this may have happened."

16. The report of Ms. Hoylman made no findings of a hostile work environment or retaliation and contained the following recommendations:

- Todd Lane be reinstated as Director of the Southern Facility.
- More counseling from the Central Office be provided to Mr. Lane and the employees at Southern.
- All employees be trained regarding hostile work environment, racial discrimination, diversity in the workplace and supervising for managers.
- Inform all employees that open communication among employees is essential and any retaliation against any employee as a result of this or any investigation will not be tolerated.

17. Ms. Hoylman informed Director Holland that several employees identified Grievant as someone who stirred up trouble and was generally difficult to work with. Some of this perception resulted from the strain between the security staff and the treatment staff.

18. On August 24, 2004, Director Holland and Deputy Director, Denny Dodson, held a meeting with all the employees at Southern to discuss the results of the investigation and encourage cooperation among the staff members.

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[7] The initials were used in Hoylman's report to replace expletives. The words they represent are particularly foul, and readily recognizable. The undersigned sees no reason to spell them out herein.

19. At the conclusion of the group meeting, Grievant was called into a private meeting with Holland and Dodson. At this private meeting, Director Holland told Grievant that she was a large part of the problem at the facility and everyone would be better off if she took a position away from Southern. Holland offered Grievant an opportunity to work away from Southern in a position that could lead to an advanced classification. Grievant accepted the assignment. She believed it would include a raise in salary. Grievant was instructed to leave the building through the back door and she could send for her personal belongings on a future date.

20. Grievant was given the duties of a Community Resource Case Manager and was assigned to work out of her home. This is a classification Grievant had previously applied for when a position was vacant at the Gene Spadaro Juvenile Facility located in Mount Hope, Fayette County, West Virginia. This new assignment was not posted and Grievant did not apply for it or take any examination related to it.

21. The Community Resource Case Manager classification is compensated at pay grade twelve.[8]

22. Grievant was expected to use her own computer and her own vehicle for work-related tasks. She was reimbursed for work related expenses but the reimbursements were often delayed.

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[8] In the Division of Personnel Class Specifications this position is listed as a Corrections Case Manager.

23. Grievant continued to be paid the same salary that she received at Southern as a Correctional Counselor 1.[9]

24. For more than a month, Grievant did not receive files to work on but was given some training. In November she began to receive files that she could work on independently.

25. On December 6, 2004, Grievant filed her first grievance by sending a letter to her immediate supervisor, Quewanncoii Stephens, DJS Community Resource Supervisor.

26. Grievant met with Deputy Director Dodson for an informal conference on January 7, 2005. After that meeting Dodson offered to place Grievant in a Community Resource Case Manager position at the Gene Spadaro Center in Mount Hope. Grievant declined that offer.

27. On January 17, 2005, Grievant filed her formal level one grievance form. In her "Statement of Grievance" Grievant complained about her treatment following the investigation, the fact that she had received no raise for her new assignment, that she had received no files until November 2004, and was being required to use her personal vehicle for travel and her home for an office. She was also concerned that she received no staff support or office supplies.

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[9] There is a dispute in the evidence regarding what Grievant was to be paid in this new position. Grievant states that she was promised a new job with a big raise and expected to receive at least a five percent raise immediately upon taking the job away from Southern. Deputy Director Dodson testified that the new duties were assigned to Grievant to give her experience as a Community Resource Case Manager so that she would be qualified for a promotion when the next position became available. Grievant would be paid at the Correctional Counselor 1 rate until she applied for and received a vacant position as a Community Resource Case Manager.

28. For relief, Grievant sought:

> Reinstatement to my position as Corrections Counselor 1 at the Mercer County Southern Regional Detention Center in Princeton and relief from harassment and retaliation.

29. The Grievance was denied at level one and a level two hearing was held on February 7, 2005. Deputy Director Dodson issued a decision on February 15, 2005, informing Grievant that he could not grant all her relief but she was now assigned to the Gene Spadaro Center as a Correctional Counselor 1. He also stated that:

> I can assure you that I will do everything within my power to ensure that you are treated fairly and justly and free of harassment and retaliation while you are an employee of Juvenile Services.

Grievant's Exhibit 2a.

30. Grievant worked one day, February 8, 2005, at the Gene Spadaro Center and was off work thereafter on approved leave. At first the leave was because of her sister's sudden heart attack and eventual death. Thereafter, Grievant took extended medical leave based upon stress related conditions for which she was diagnosed by her physician. Grievant continued to be paid as a Correctional Counselor 1 until April 5, 2005, when she ran out of sick and annual leave. She received no more pay from the DJS after that date.

31. Prior to holding a level three hearing scheduled for May 13, 2005, the parties entered into negotiations in an effort to settle the grievance. However, the parties were unable to consummate an agreement.

32. By letter dated June 7, 2005, Grievant, through her counsel, rejected the final settlement document proposed by DJS and requested that the level three hearing be convened within ten working days of that date.

33. By letter dated June 10, 2005, Counsel for DJS informed Grievant and her counsel that DJS was granting her grievance. The letter stated that Grievant was reinstated to her position as a Correctional Counselor 1 at Southern. It also stated that the DJS would "not tolerate any type of harassment and/or retaliation against her" and if such activity occurred DJS would deal with it appropriately.[10] DJS noted that Grievant's doctor had released her to return to work and DJS instructed her to report to Southern on June 13, 2005.

34. The letter ostensibly granting the grievance also contained a paragraph indicating that the DJS would "not tolerate the behavior of Ms. McBride which led to these series of events" and that, if necessary, Grievant would be subject to discipline like any other employee. Footnote 10, *supra.*

35. By letter dated June 15, 2005, the DJS Acting Director, Cynthia Largent-Hill[11] noted that Grievant failed to appear for work on June 13, 2005. The Acting Director informed Grievant that if she failed to resume her duties by June 21, 2005, Grievant would be dismissed for job abandonment.[12]

36. Grievant filed a "Motion for Original Relief Involving Demotion and Motion for Default" with the Grievance Board on June 16, 2005. Grievant alleged that the placement of Grievant in her original position as a Correctional Counselor 1 constituted a demotion and

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[10] Exhibit 7 from the Default Hearing in *McBride v. Div. of Juvenile Serv.*, Docket No. 05-DJS-205D (July 28, 2005) (hereinafter referred to as *McBride 1*).

[11] Ms. Largent-Hill became the Acting Director of DJS when Mr. Holland left the position of DJS Director. Ms. Largent-Hill has since left that position as well.

[12] Exhibit12 from the Default Hearing in *McBride 1*.

that by failing to hold a level three hearing DJS was in default.

37. Respondent DJS took the position that it had granted the grievance by awarding the complete remedy requested to Grievant and that everything that occurred thereafter was a nullity because the grievance was complete.

38. On July 28, 2005, an Administrative Law Judge[13] ("ALJ") for the Grievance Board issued a decision denying Grievant's motion and dismissing the grievance. *McBride v. Div. of Juvenile Serv.*, Docket No. 05-DJS-205D (July 28, 2005) (*"McBride 1"*). The ALJ ruled that DJS granted Grievant all the relief she requested and at that point the grievance was moot since there remained no legally cognizable interests in the outcome for the parties. *Id.* at p. 5. The ALJ concluded that both the Motion for Default and Grievant's effort to raise the issue of back pay were denied because they both occurred after the grievance became moot.

39. Grievant filed no appeal from the decision in *McBride 1.*

40. DJS informed Grievant by letter dated July 29, 2005, that it had received the decision in *McBride 1* and Grievant had until August 3, 2005, to return to work or be dismissed from employment for job abandonment.

41. Grievant did not return to work as directed and received a letter dated August 11, 2005, from DJS Acting Director Largent-Hill, terminating her employment fifteen calendar days from the date of the letter.[14]

42. On August 23, 2005, Grievant accepted employment with another employer.

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[13] Jacquelyn I. Custer, ALJ

[14] Respondent's Exhibit 4 in the level four hearing in *McBride v. Div. of Juvenile Serv.*, Docket No. 05-DJS-306 (Nov. 23, 2005) (hereinafter referred to as *McBride 2*).

43. Grievant filed a second grievance on August 25, 2005, re-alleging all of the matters set forth in her original grievance plus adding a discussion of the grievance and negotiation process she had been through thereafter. As relief, Grievant sought the following:

> The pay raise falsely promised to me upon my involuntary removal from my previous position August 24, 2004, through April 5, 2005; compensatory pay for the Division's actions and inactions which made it impossible for me to work from April 6, 2005, through the date of my re-employment elsewhere August 23, 2005; and for such other and proper relief as may best suit the circumstances of this grievance.

44. Grievant did not contest the actual dismissal. Further, she did not seek reinstatement to her prior position or claim that she suffered any damage as a result of the dismissal.

45. A level four hearing was held before an ALJ[15] for the Grievance Board in Beckley, West Virginia on October 17, 2005.

46. On November 23, 2005, the ALJ ruled that Grievant's claims for harassment and a hostile work environment were fully and successfully litigated in *McBride 1* and were barred from re-litigation by the doctrines of *res judicata* and collateral estoppel. The ALJ further found that Grievant's claim that she did not receive a promised raise in August 2004, was untimely. *McBride v. Div. of Juvenile Serv.*, Docket No. 05-DJS-306 (Nov. 23, 2005) ("*McBride 2*").

47. Grievant filed a timely appeal of the decision in *McBride 2* to the Circuit Court of Mercer County, West Virginia.

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[15] M. Paul Marteney, ALJ

Discussion

The Circuit Court Ruling:

The Mercer County Circuit Court vacated the decision of ALJ Marteney in *McBride 2* and remanded the matter to the Grievance Board for a new hearing. Judge Sadler concluded that the ruling that the grievance was moot, in *McBride 1,* was not a ruling on the merits. The Court noted that an essential element in both the doctrines of collateral estoppel and *res judicata* is a final adjudication of the merits. Therefore, these principals did not apply as a basis for denying the second grievance in *McBride 2,* since there was no final ruling in *McBride 1.* Based upon this ruling the grievance was remanded.

In *McBride 2,* the ALJ also decided that Grievant's claim of not receiving the promised raise in August of 2004, was untimely. With regard to that issue the Circuit Court wrote:

> This Court is not addressing the Decision's finding of untimeliness. Rather, that is an issue for the parties to address in the litigation of the merits.

McBride v. Div. of Juvenile of Juvenile Serv./Southern Reg'l Juvenile Det. Ctr., Circuit Court of Mercer County, W. Va., Civil Action No. 05-C-819-F (Dec. 18, 2007).

The Circuit Court also specifically left open the following issue:

> This Court is not addressing the issue of whether the Respondent's offer of reinstating the Grievant to her original job position fulfills the relief she requested in her first grievance.

Id, at footnote 1.

Burden of Proof:

Grievant does not contest the termination of her employment. Grievant claims that she was not given a promised raise and promotion and that she was subjected to a hostile work environment. Because Grievant is not contesting her discharge this is not a disciplinary action and Grievant bears the burden of proving her grievance by a preponderance of the evidence.[16] *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 Grievant has not met this burden. *Id*.

Default and *McBride 1*:

In *McBride 1*, Grievant was seeking a default ruling because Respondent did not schedule a level three hearing within the time frame required by the statute. Respondent did not contest that a level three hearing was not held but averred that the grievance had been granted at level two by giving Grievant all the relief she requested in her grievance statement. Grievant's request for relief was very specific in the first grievance. She sought:

> Reinstatement to my position as Corrections Counselor 1 at the Mercer County Southern Regional Detention Center in Princeton and relief from harassment and retaliation.

[16] At the remand hearing, counsel for Grievant acknowledged that Grievant bears the burden of proof in this matter.

After negotiations broke down and prior to the level three hearing, Respondent informed Grievant that it was granting the grievance and awarding the remedy she requested. Respondent reinstated Grievant to her position as a Correctional Counselor 1 at Southern as she requested. Respondent further wrote that it would not tolerate any type of harassment and/or retaliation against her and that any report of such activity would be dealt with appropriately. *See* Footnote 10, *supra*. Grievant did not allege or prove any specific damage as a result of the past or possible future harassment and the assurance of protection was the only remedy that Respondent had to offer under the circumstances.

Respondent also added to the letter a paragraph that stated that the DJS "would not tolerate the behavior of Ms. McBride which led to these series of events" and, if necessary, Grievant would be subject to discipline as would any other employee. *See* Footnote 10, *supra*. Grievant was offended by this paragraph because she did not believe that she had done anything to precipitate the problems at Southern in the first place. While this paragraph was unnecessary to the resolution of the grievance, Grievant did not suffer any actual harm from it since it did not constitute any form of disciplinary action. Additionally, the inclusion of the paragraph did not alter the fact that the entire remedy sought by Grievant was granted in the remainder of the response.

The West Virginia Supreme Court has noted that the grievance procedures that were in place when *McBride 1* was decided were intended to be a fair and expeditious process for resolving problems at the lowest administrative level. *Duruttya v. Bd. of Educ.,* 181 W.

Va. 203, 382 S.E.2d 40 (1989).[17] Upon review of the entire record, it is apparent that DJS granted all the relief requested by Grievant prior to the level three hearing. Default was properly denied because the grievance was already resolved at the lower administrative level.

The Mercer County Circuit Court specifically chose not to address this issue. Rather, Judge Sadler noted that the ALJ's conclusion was made without the parties fully litigating the issue. At the remand hearing, the parties were given an opportunity to fully litigate all issues but Grievant was unable to articulate a reasonable theory demonstrating that she not granted all the relief she requested. Grievant was understandably unhappy with the additional paragraph warning her against future behavior, but that surplus language does not diminish the remedy granted. Because Grievant chose not to appeal the decision in *McBride 1*, the first grievance ended with that decision.

Timeliness and *McBride 2*:

Ms. Jordan filed her second grievance on August 25, 2005. On August 11, 2005, Acting DJS Director Largent-Hill had sent Grievant a letter terminating her employment effective August 26, 2005. Grievant accepted employment elsewhere on August 23, 2005, two days before she filed her grievance and three days before her discharge became

[17] The language relating to the lowest administrative level was originally found in the education employees grievance statute at W. VA. CODE § 18-29-1. However, the concept has been held to apply the the state employee grievance statute as well. *Goff v. Dept. of Transp.*, Docket No. 02-DOH-245D (Sept. 10, 2002).

effective.[18] Grievant did not contest her discharge in this grievance. Rather, Grievant stated:

> I am entitled to the pay raise falsely promised to me upon my involuntary removal from my previous position August 24, 2004 through April 5, 2005, compensatory pay for the division's inactions which made it impossible for me to work April 6, 2005 through the date of my re-employment elsewhere August 23, 2005; and for such other and proper relief as may best suit the circumstances of this grievance.

All of this relief is predicated upon the allegations that Grievant was involuntarily transferred on August 24, 2004, was not paid a promised pay raise as a result of this involuntary transfer, and that she had been subject to a hostile work environment. Respondent argues that all of these claims are not timely because the events that gave rise to them occurred nearly one year before the grievance was filed. Pursuant to W. VA. CODE § 29-6A-4(a) a grievance had to be filed "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ."

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). Grievant knew that she was being assigned to a position outside

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[18] There is precedent for the proposition that Grievant no longer had standing to file a grievance on August 25, 2005, because she accepted full-time employment elsewhere two days earlier and was no longer an employee of DJS. *See Marsiciano v. Marion County Bd. of Educ.*, Docket No. 2009-0500-MmED (Apr. 23, 2009). Since neither party raised this issue it will not be further addressed herein.

Southern on August 24, 2004. That was the date that she was unequivocally notified of the transfer. She did not challenge this alleged transfer until December 6, 2004, the first time and August 25, 2005, the second time. Both grievances were not filed within the time period required by statute to contest the alleged improper transfer.

In her second grievance, Grievant claims that she did not receive the pay raise she was promised on August 24, 2004. She did not request to be paid the additional salary she would have been paid if a raise were granted for a full year after she received her new assignment. She knew, or reasonably should have known, that she was not getting a raise when she received her first pay check after the transfer. This claim was a year later and was not within the time period required by the statute.

Since this is a pay dispute, there is support for the proposition that it was a continuing violation which resulted in a new event for filing a grievance with the issuance of each new paycheck. *See Martin v. Randolph County Bd. of Educ.,* 195 W. Va. 297. 465 S.E.2d 399 (1995). Grievant received her last pay check from Respondent in April 2005. She did not file a grievance for more than four months after that date. Consequently, the grievance was not filed within the required statutory time limit even if it were considered a continuing violation.

Likewise, any claim regarding a hostile work environment ended when Grievant was no longer in the work place. Grievant left Southern on August 24, 2004. She last worked for the DJS at the Gene Spadaro Center on February 8, 2005. As with the transfer and pay claims, she waited to file her grievance regarding this issue for more than six months. This issue was raised outside the mandatory statutory time frame of ten days.

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer is asserting an affirmative defense and has the burden of demonstrating such untimely filing by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Pisino v. Div. of Corr./Pruntytown Corr. Ctr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008) (citations omitted). Respondent has met its burden and Grievant has shown no reason for filing her grievance outside the statutory time period. Grievant filed her grievance within ten days of her effective discharge date. However, Grievant specifically stated that she was not contesting her discharge. The termination of her employment did not create a new event for challenging alleged past transgressions. *See David v. W. Va. Univ. Inst. of Tech.*, Docket No. 2008-1899-CONS (Apr. 3, 2009); *Bowles v. Div. of Corr./Mount Olive Corr. Complex*, Docket No. 03-CORR-271 (Nov. 25, 2003).

Hostile Work Environment:

This Grievance Board has previously held that, if proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). However, a full hearing on the merits was held on remand and a discussion of the hostile work environment claim is appropriate.

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

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

As a result of her meeting with Grievant, Ms. Chatten, and Ms. Wyrick, the DJS EEO Coordinator, Brenda Hoylman, conducted a full investigation at Southern. The investigation took place August 9 through 18, 2004 and every employee at Southern was interviewed. Southern's Director, Todd Lane, was removed from the facility during the investigation to minimize any influence he might exert over the interviews. Ms. Hoylman investigated allegations of racial discrimination and sexual discrimination, child abuse and retaliation. In her findings, Hoylman noted that the DHHR Institutional Investigation Unit had previously investigated the same allegations of child abuse and found none to exist. She also found insufficient evidence of racial and sexual discrimination to indicate a hostile work environment existed. Hoylman recommended that all of the employees receive standard training to alert them to discrimination and diversity. She also recommended that open

communication be encouraged and employees be advised to immediately report incidents of hostility or retaliation. These findings and recommendations were supported by the evidence.

There is no doubt that security personnel were using foul language at inappropriate times and efforts were being made to end that activity following the investigation. However, there was no conduct shown to be "physically threatening or humiliating" to a reasonable person and there was no conduct shown that would unreasonably interfere with the performance of Grievant's job at Southern. Grievant was understandably upset by rumors that Mr. Lane intended to fire her. She and Lane clashed over issues of security and treatment. While this created work place discord, it did not reach the level of a hostile work environment. Grievant has the burden of proving the existence of a hostile work environment and has not met that burden.

Conclusions of Law

1. Because Grievant is not contesting her discharge, this is not a disciplinary action and Grievant bears the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 Grievant has not met this burden. *Id*.

2. Upon review of the entire record, it is apparent that DJS granted all the relief requested by Grievant prior to the level three hearing in *McBride1*. Default was properly denied because the grievance was already resolved at the lower administrative level.

3. Pursuant to W. VA. CODE § 29-6A-4(a) which was the controlling statute when the grievance was filed, a grievance had to be filed "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ."

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer is asserting an affirmative defense and has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Pisino v. Div. of Corr./Pruntytown Corr. Ctr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008) (citations omitted).

6. Respondent proved by a preponderance of the evidence that Grievant failed to file her grievance within ten days of the events upon which the grievance was based or within ten days of the occurrence of the most recent continuing practice giving rise to the

grievance. The termination of Grievant's employment did not create a new event for challenging alleged past transgressions. *See David v. W. Va. Univ. Inst. of Tech.*, Docket No. 2008-1899-CONS (Apr. 3, 2009); *Bowles v. Div. of Corr./Mount Olive Corr. Complex*, Docket No. 03-CORR-271 (Nov. 25, 2003).

7. The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed. 2d 201 (1998) (quoting *Harris,* supra). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris,* supra at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009).

8. There was no conduct at Southern shown to be "physically threatening or humiliating" to a reasonable person nor was any conduct shown that would unreasonably interfere with the performance of Grievant's job. Grievant did not prove that she was subjected to a hostile work environment as defined by the relevant case law.

Accordingly, the Grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA.

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

DATE: JULY 14, 2009

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE