THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARTHA GALE POORE,

Grievant,

v. **Docket No. 2010-0105-DHHR**

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES\
BUREAU FOR CHILDREN AND FAMILIES,**

Respondent.

DECISION

Grievant Martha Gale Poore[1] is an Adult Protective Service Worker employed by the Department of Health and Human Resources ("DHHR") and assigned to the Bureau for Children and Families. Ms. Poore filed a level one grievance form dated July 30, 2009, alleging that she is "being harassed and treated in a discriminatory manner by Norm Reynolds, Tina Mitchell and Anita Atkins"[2] which she alleges is in violation of the laws of the State of West Virginia. Grievant lists several items which she alleges are examples of improper treatment. As relief Ms. Poore seeks the following:

> That the harassment and discrimination cease and that I be allowed to perform my duties professionally and without unnecessary interference, harassment or discrimination, or threats of disciplinary actions to provide me with the respect that I am due as a professional social worker.

This grievance was given the docket number 2010-0105-DHHR.

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[1] Grievant is generally known by her middle name, Gale, rather than Martha.

[2] These three people are supervisors employed by the DHHR. Norm Reynolds was Grievant's direct supervisor. Ms. Mitchell is Mr. Reynold's supervisor and Ms. Atkins is Ms. Mitchell's supervisor.

The parties met on October 1, 2009, for a scheduled level one hearing. At that time, the parties agreed to waive level one and proceed to level two.

Ms. Poore filed a second level one grievance form dated October 1, 2009. In that grievance Ms. Poore contested a written reprimand that she was issued by Anita Atkins on September 21, 2009. Grievant alleges that the written reprimand was issued in retaliation for her previously filed grievances and EEO [3] complaints against her supervisors. Grievant seeks the following relief:

> –Revocation of the letter of reprimand and a cessation of all discriminatory treatment and disrespect from my supervisors.
> –Remedial training for all DHHR APS [4] supervisors in EEO and what constitutes discrimination and unfair treatment of employees.

This Grievance was assigned the docket number 2010-0448-DHHR.

The parties met on October 29, 2009, for a scheduled level one hearing. At that time the parties agreed to waive level one and proceed to level two. The parties decided not to consolidate the two grievances but asked that they be mediated together. A level two mediation was conducted with the parties on November 24, 2009, and an Order was entered the following day. Thereafter, Grievant filed a timely appeal for a level three hearing.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board over the course of six days. Those days were: February 18, 2010; March 25, 2010; March 26, 2010; June 9, 2010; June 11, 2010; and July 6, 2010. Grievant was present at the hearing and was represented by Katherine L.

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[3] EEO is an acronym for Equal Employment Opportunity.

[4] APS is an acronym for Adult Protective Services.

Dooley, Esquire. Respondent DHHR was represented by Heather L. Laick, Assistant Attorney General. The parties agreed to keep the grievances separate but that the factual record for both grievances would be made during this hearing. They requested that a separate decision be issued for each grievance. This decision related to the initial grievance which was dated July 30, 2009.

After the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals, the last of which was received by the West Virginia Public Employees Grievance Board on August 31, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant alleges that she is being harassed and discriminated against by her supervisors and lists several examples of conduct which she believes meets the statutory definitions for those terms. Respondent acknowledges that one of Grievant's supervisors made inappropriate remarks in Grievant's presence and that supervisor no longer supervises Grievant. Respondent avers that Grievant has not been the subject of harassment or discrimination but rather Grievant's work performance has been below standard and they have taken necessary steps to correct Grievant's conduct. DHHR alleges that the corrective steps they have taken are lawful and are motivated solely at improving Grievant's performance or document her lack of improvement.

Grievant proved that she was subjected to inappropriate remarks by her supervisor. Respondent counseled that employee regarding his conduct and changed his assignment so that he was no longer Grievant's supervisor. Grievant did not prove that she was being harassed or discriminated against by any other agent of Respondent as those terms are

defined in the Grievance statute. Since any inappropriate activity toward Grievant has been remedied the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Gale Poore is an African-American woman employed by the DHHR Bureau for Children and Families as an Adult Protective Services Worker. She has been employed in that capacity in the Kanawha District for three years.

2. When Grievant was initially hired her immediate supervisor was Katheren DeLuca. Ms. DeLuca was employed as an APS Supervisor.

3. Tina Mitchell is employed by the DHHR as an APS Coordinator. She is the supervisor for APS Supervisors such as Katheren DeLuca. Ms. Mitchell has been the APS Coordinator in the Kanawha District for four years.

4. Anita Adkins is the DHHR Community Services Manager for the Kanawha District. She is the manager for all community services in that district including Adult Protective Services. Ms. Adkins is the immediate supervisor for Coordinator Mitchell. Ms. Mitchell and Ms. Adkins are Caucasians.

5. During Grievant's probationary period she was a good worker with excellent documentation of her actions. After about a year her work began to decline steadily.[5]

6. All APS workers in the Kanawha District office are required to sign in upon arrival at the office and sign out when they are leaving. After Grievant's probationary

[5] Testimony of Katheren DeLuca.

period she regularly failed to sign in and out as she was supposed to do. On one occasion Supervisor DeLuca looked for Grievant in the office at 9:15 am without being able to find her only to note that Grievant had later marked the sign in sheet that she arrived at 8:30 am. On another occasion Supervisor DeLuca noted that Grievant wrote on the sign in sheet that she had worked from 8:30 am to 4:30 pm on a day that Grievant was actually off work on approved annual leave.

7. Supervisor DeLuca admonished Grievant several times regarding the importance of accurately recording her time and gave her at least one verbal reprimand. Eventually, Supervisor DeLuca required Grievant to sign in and out by e-mail so that there would be an electronic time stamp on the document to verify that the time was correct. [6]

8. Supervisor DeLuca and Supervisor Reynolds who followed her, had to correct other employees occasionally for failing to properly sign in and out but no other employee violated this procedure as frequently as Grievant.

9. When Supervisor DeLuca began bringing performance problems to Grievant's attention, Grievant began avoiding Ms. DeLuca and seeking guidance regarding her cases from another supervisor. Since Ms. DeLuca was ultimately responsible for these cases this practice created problems. Eventually, Ms. DeLuca was forced to direct Grievant to stay out of the other supervisor's office.

10. Supervisor DeLuca was documenting performance problems with Grievant in anticipation of the need to take more stringent disciplinary measures. During this time

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[6] Supervisor DeLuca required two other employees to sign in and out electronically because they had low leave balances but no other employee was required to sign in electronically as a result of chronic failure to sign in and out properly.

period Grievant filed an EEO complaint against Supervisor DeLuca alleging that she was discriminating against Grievant Poore on the basis of her race.

11. The EEO complaint was found to be unsubstantiated. Supervisor DeLuca transferred to a position as a Child Protective Service Worker ("CPS"). She was frustrated with her efforts to supervise Grievant and the complaints Grievant had filed against her.[7]

12. Norm Reynolds was hired as the new APS Supervisor to replace Katheren DeLuca in September 2008. Mr. Reynolds is Caucasian. He had been a social worker for 29 years before taking this supervisory position. Prior to and shortly after taking this position he was told that there were problems in the unit such as a clique atmosphere among a number of the employees and that there were specific performance issues with Grievant. Supervisor Reynolds had access to the personnel files of the employees he supervised but decided not to utilize the voluminous performance documentation that had been collected by Supervisor DeLuca. He preferred to make a fresh start with the employees in the Kanawha APS Unit.

13. Prior to the employment of Mr. Reynolds, Autumn Hager approached Tina Mitchell to discourage the placement of Mr. Reynolds in that position. Ms. Hager is also employed as an APS Supervisor in the Kanawha District unit. At that time, Ms. Hager was not Grievant's supervisor.

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[7] Grievant alleged in her grievance statement that the EEO complaint she filed against Supervisor DeLuca lead to her removal as a supervisor. No evidence was produced to substantiate this allegation. In fact, the EEO allegation was not substantiated. Supervisor DeLuca voluntarily took a position as a Child Protective Services Worker which resulted in a salary increase since it is in a higher pay grade than an APS supervisor. Additionally, she was frustrated with her supervisory experience, particularly with Grievant, and the CPS position allowed her to be responsible for her own cases without worrying whether they were being properly handled by others. Testimony of Katheren DeLuca.

14. On February 27, 2009, Supervisor Reynolds sent an e-mail to Grievant documenting that it was the second written notification within three days that Grievant was not properly signing in and out and that she was adjusting her schedule[8] without permission from her immediate supervisor. Supervisor Reynolds advised APS Coordinator Tina Mitchell of the situation and asked for a meeting to address these issues. Respondent Exhibit 12.

15. On that day Supervisor Reynolds also provided Grievant with a list of dates on which she had failed to properly sign in or improperly adjusted off in the past. Those dates ranged from November 5, 2008 through February 26, 2009. This document was signed by Supervisor Reynolds with a notation that Grievant refused to sign it. Respondent Exhibit 11.

16. On July 14, 2009 Norm Reynolds sent Grievant an e-mail noting that it was her third verbal / written[9] warning for failing to sign in immediately upon returning to the office. Grievant responded that she had to return the keys to a vehicle to a co-worker before she signed in and that when she would have signed in Mr. Reynolds was holding the book which kept her from entering her time. Mr. Reynolds replied that he observed

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[8] APS workers are sometimes required to work late hours to meet the needs of their clients. When that happens they are allowed to adjust their schedule so that they receive compensatory time off during the regular work day. The practice is generally referred to as "adjusting off." DHHR policy and practice requires APS workers to get approval from their supervisor before adjusting off so that scheduling problems can be avoided.

[9] These actions are called verbal warnings in the progressive discipline process. However, the fact that a verbal warning was issued is documented in writing to demonstrate that it was complete before moving to the next phase.

Grievant having a lengthy conversation with a co-worker upon returning to the office during which time the book was available for Grievant to sign in. He also reminded Grievant that the procedure required APS workers to sign in immediately upon returning to the office. Respondent Exhibit 7.

17. On July 16, 2009, Grievant was given a verbal/written warning for failing to return to the office and sign in on the afternoon of July 15, 2009. Mr. Reynolds reminded Grievant that APS procedures requires APS workers to return to the office and sign in or get permission not to return from the supervisor.

18. Occasionally Supervisor Reynolds would note the time that Grievant placed on the time sheet for return to the office would not be consistent with the time he saw her making the notation. On those instances Mr. Reynolds would make a notation on the time sheet as to the actual time he saw Grievant sign in. Supervisor Reynolds made a notation on the time sheet of August 6, 2009, that Grievant had signed back in to the office at 2:15 pm. Grievant had placed the time of 1:35 pm on the sheet. Later in the day Reynolds noted that Grievant had marked out his notation.

19. Supervisor Reynolds sent Grievant an e-mail instructing her to refrain from erasing the entries he places on the time sheet. Thereafter, Grievant removed a time sheet from the book that Supervisor Reynolds had placed a notation on and replaced it with a new time sheet. Grievant also marked through all of the blank spaces on the time sheet to impede her supervisor's ability to make notations on the sheet. Grievant was again instructed by Supervisor Reynolds to refrain from erasing his comments and to refrain from defacing the sign in sheet. Mr. Reynolds also sent an e-mail to coordinator Mitchell and manager Adkins documenting these incidents. Respondent Exhibit 9.

20. Other APS workers testified that the sign in rules were regularly enforced and that they each had been reminded of the appropriate procedure when they failed to comply. None of the other APS workers had received a written warning regarding failure to properly sign in but they did not have as many incidents of non-compliance as Grievant.[10]

21. Norm Reynolds issued a verbal/written reprimand dated June 11, 2009. Among other things, Supervisor Reynolds noted that Grievant lacked follow through on her cases, had to be regularly reminded to follow up on standard practice investigation procedures and resisted efforts by her supervisor to provide her with direction and instruction. Respondent Exhibit 17.

22. On July 13, 2009, the APS unit was advised by Thomas Memorial Hospital[11] that a client was ready for discharge. This had been previously assigned to Grievant and Grievant had made arrangements for the client to be housed in an adult care facility located in Wayne County.

23. Grievant was supposed to transport the client from the Hospital to the care facility on the morning of July 13, 2009, when the client was discharged. There was no state vehicle available to use in this transport so Supervisor Reynolds instructed Grievant to transport the client in her own vehicle. Respondent Exhibit 1.

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[10] Olivia Wood is an African American APS worker in the unit who is supervised by Autumn Hager. Ms. Wood noted that she fails to sign in about once a year and usually receives a reminder when she fails to follow the proper procedure.

[11] Thomas Memorial Hospital is located in South Charleston, West Virginia.

24. It is DHHR policy that APS workers must have a vehicle in which to transport clients if there is no state vehicle available.[12] Grievant initially refused to transport the client in her vehicle because she felt it was against agency policy. Supervisor Reynolds confirmed with Tina Mitchell that it was appropriate for APS workers to transport clients in their personal vehicles. When Grievant was told this she stated that she could not use the vehicle she was driving because it belonged to her husband and he would not allow it to be used for that reason. Respondent Exhibit 1.

25. Around 10:30 am Mr. Reynolds relayed Grievant's response to Tina Mitchell. Ms. Mitchell directed Mr. Reynolds to relay to Grievant that she was to pick up the client for transport within thirty minutes. Mr. Reynolds relayed that information to Grievant.

26. Grievant then told her supervisors that the client was medically frail and unable to be transported in her vehicle which was a Jeep Wagoneer.

27. Mr. Reynolds contacted the charge nurse at Thomas Memorial Hospital and inquired about the client's medical condition. At 11:06 am Tina Mitchell sent an e-mail to Grievant[13] informing her that the Hospital nurse stated that the client was doing extremely well and that there was no reason why the client would need any special transportation. The nurse had also noted that the client would be discharged within an hour. Ms. Mitchell reminded Grievant that it was a job requirement for APS workers to have a vehicle to transport clients when necessary. She ended by advising her that she was issuing a

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[12] Other APS workers who testified during the level three hearing agreed that they are required to transport clients in their own vehicles from time to time.

[13] This e-mail was copied to Manager Anita Adkins and Norm Reynolds since all were involved in the discussion by this time.

directive for Grievant to transport the client to the care facility and failure to do so would result in progressive discipline. Grievant Exhibit 14.

28. At 11:14 am Manager Anita Adkins sent Grievant an e-mail asking the following:

> As far as the information needed from the hospital is there something else you need Gale, or does this address everything?

Grievant responded in ten minutes stating that she would have to contact the sheriff department to get items from the client's home such as her walker and clothing. Two minutes later, Manager Adkins instructed Grievant that her first priority was to transport the client to the "AFC provider that day." Grievant responded at 11:31 am that she would need gas for the car and did not have money for it. She asked for assistance in buying the gas. Grievant Exhibit 14.

29. During the time period that this discussion was taking place another worker returned a state vehicle. Grievant was given this vehicle and instructed to pick up the client for transport immediately. Sometime after 12:00 pm Grievant left to transport the client from the Hospital to the adult care facility. Respondent Exhibit 1.

30. Grievant did not take the client's personal belongings with her to the Care Facility because she was instructed that transporting the client was her first priority. She did not follow up with the personal belongings thereafter.

31. On July 15, 2009, the APS staff for the Kanawha Unit were attending a workshop on "Guardian and Healthcare Surrogate Policy" that was being conducted by Genevieve Wily. During the question and answer session, Grievant started to ask a question regarding the transport of clients that was apparently related to the transport on

July 13, 2009. Supervisor Reynolds interrupted Grievant and told her that the question was inappropriate for this session and that it should be taken up with her managers. After a short exchange between Grievant and Supervisor Reynolds, Grievant sat down and Mr. Reynolds left the room.

32. No other employees were stopped from asking questions of Ms. Wiley. No other employees attempted to ask questions related to matters that were the basis of a dispute with their supervisors.

33. Mr. Reynolds received complaints from the manager of the Adult Care Facility that the client did not have her personal items. Supervisor Reynolds instructed Grievant to get that client's personal belongings to her. On July 16, 2009, Grievant replied that she had not been in the field or office the previous day to take care of the request.

34. On July 20, 2009, an e-mail exchange took place between Grievant and Manager Adkins wherein Grievant noted that she was instructed to take the client on July 13, 2009, and worry about the personal property later. Ms. Adkins responded that regardless what happened on the day of transport it was Grievant's responsibility to provide for the needs of the client on the short term and that responsibility did not end in one day. After more than a week Grievant did ultimately get the client's personal items to her.

35. On July 24, 2009, Norm Reynolds was walking toward his office near the fax machine. APS worker Donna Thompson and APS Supervisor Autumn Hager were in the vicinity and Grievant Poore was in her cubicle at the time. Grievant Poore could hear things being said but could not be seen by the others. Ms. Thompson allegedly told Mr.

Reynolds that she and Ms. Poore were going out in the field to do an investigation. Mr. Reynolds replied that the field was a good place to pick some cotton.[14]

36. Grievant Poore filed a grievance related to this statement on June 30, 2009. Upon learning of this allegation, Manager Anita Adkins referred the incident to the State EEO office for an investigation.

37. Donald Raynes, the DHHR EEO officer, assigned investigators Tim Harper and Charlene Hickman to take statements and investigate the claim against Norm Reynolds by letter dated August 4, 2009. Statements were taken from nine employees of the APS unit between August 14, and 25, 2009.

38. Donald Raynes has many years of experience as an investigator in the military and law enforcement. He also has received extensive training and experience in investigating EEO complaints. Mr. Raynes was Director of the Human Rights Commission for ten years, was Interim Director of the State EEO for one year and has been an EEO Specialist for two years. He is presently serving as the EEO Officer for the DHHR.

39. Officer Raynes reviewed all of the statements taken during the EEO investigation and issued a report dated September 10, 2009, regarding the claim against Norm Reynolds. He specifically found that "the allegation of an inappropriate comment made by Norm Reynolds is substantiated." Officer Raynes also noted that after making the comment he was relieved that "no person of color was present"[15] to hear it because he

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[14] Supervisor Reynolds does not dispute making the statement about picking cotton but he avers that he was looking for APS Worker Cliff Thacker and when he was told that Mr. Thacker was in the field Mr. Reynolds made a statement regarding picking cotton.

[15] Mr. Reynolds specifically mentioned Ms. Poore and Ms. Wood as being people he was glad were not there for the comment.

did not want to hurt anyone's feelings. Officer Raynes sent letters to both Grievant Poore and Mr. Reynolds to advise them of his findings. Grievant Exhibit 6a.

40. In response to an e-mail from Manager Adkins asking for more information regarding the report, Officer Raynes noted that he specifically found that Mr. Reynolds made an inappropriate comment and that he may have made others.[16] However, Officer Raynes did not find that Norm Reynolds had "discriminated against anyone based on anything." Respondent Exhibit 30.[17]

41. Grievant would sometimes go to Autumn Hager to discuss cases or ask for time off rather than discuss these matters with Norm Reynolds. Mr. Reynolds found this behavior unacceptable and reminded Grievant that she needed to clear these matters through him. This practice also created problems between Mr. Reynolds and Ms. Hager because Mr. Reynolds felt Ms. Hager was not discouraging this behavior.

42. On one occasion Grievant called the office from a training that Mr. Reynolds was also attending to ask Ms. Hager to approve her sick leave. Mr. Reynolds reported this to Ms. Adkins and Ms. Mitchell and also noted that Ms. Hager's continual acquiescence to such requests did not help him in his efforts to build a case against Grievant "regarding this

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[16] Mr. Reynolds was accused of saying that Grievant was like an old mule he once had, it was a good worker but every now and then he had to kick it to get its attention. Additionally, he was alleged to have said that his grandmother was black and then proceeded to do a jive walk. Mr. Reynolds denied making these comments and they were not raised in the grievance statement herein.

[17] In his testimony, Officer Raynes noted that one or more inappropriate comments may not necessarily constitute racial discrimination.

type of behavior which has continued for several months.[18] Respondent Exhibit 21.

43. Mr. Reynolds and Ms. Hager met with their supervisor and were instructed to work together in avoiding confusion regarding supervision of staff. After those meetings Mr. Reynolds was seen on two occasions giving Ms. Hager a stiff armed salute and saying "Seig Heil"[19] in the presence of APS staff members.

44. The salute activity was brought to Ms. Mitchell's attention and she counseled Mr. Reynolds that such actions were inappropriate and that he had to be more careful and sensitive with what he said to the staff.

45. Mr. Reynolds, Ms. Mitchell and Ms. Hager interviewed applicants for an APS worker position. One of the applicants was a dark-skinned[20] male who had a very heavy middle eastern accent. The applicant was from the Washington D.C. area. This applicant was not chosen for the position.

46. Ms. Hager reported to Ms. Mitchell and Ms. Adkins that she heard Mr. Reynolds say that he was afraid that if they hired this applicant, the applicant would end up hanging from a tree in some hollow. Ms. Hager interpreted this as a racist remark.

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[18] It was clear from the context that the phrase "building a case" referred to the process of documenting instances of poor performance which is a necessary precurser to taking progressive disciplinary action.

[19] This action is generally associated with Nazi Germany as a salute repeated as a chant on public occasions. Mr. Reynolds stated that he meant this gesture as a humorous way to demonstrate that he recognized Ms. Hager was a person in charge. The APS staff members did not seem to think it was funny.

[20] Ms. Hager testified that the applicant was African American and Ms. Mitchell testified that the applicant was Middle Eastern. Both agreed that he had dark skin.

47. Ms. Mitchell participated in the interviews and the discussions regarding the applicants and did not hear Mr. Reynolds make this comment. Ultimately, the three supervisors agreed to hire an African American woman for the position.

48. After receiving the results of the EEO investigation Ms. Adkins and Ms. Mitchell removed Mr. Reynolds as Grievant's supervisor and placed Grievant under Autumn Hager's supervision. Mr. Reynolds also attended EEO training. This switch was accomplished by the first of October, 2009.

49. When one of the APS workers left the unit, Grievant requested to be moved to his cubicle. Due to problems with changing over the computer wires, Coordinator Mitchell originally refused the request.

50. On October 2, 2009, Grievant sent an e-mail to Ms. Mitchell and Ms. Adkins explaining that she had asked to move her work station because it was located near Mr. Reynold's office and she was uncomfortable with having regular contact with him. Ms. Mitchell responded the same day that she was not aware of the reason for the original request and she authorized Grievant to move her work station. Mr. Adkins also responded that from time to time it would still be necessary for Grievant to come in contact with Mr. Reynolds in providing service to the APS clients. She ended by noting that she was open to suggestions as to how Grievant's needs could be further met while still meeting the basic responsibilities to their clients.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the

W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

Grievant makes two basic arguments. First she alleges that she has been discriminated against by her three supervisors because of her race. Second she alleges that her supervisors retaliated against her for filing grievances and an EEO complaint against her prior supervisor. Respondent argues that Grievant has a long history of performance issues that were documented by both of her immediate supervisors. Respondent notes that Grievant has regularly resisted efforts by her supervisors to correct her performance problems by attempting to go around her supervisors or by ignoring their directives. Ultimately, Respondent argues that any different treatment of Grievant from the rest of her co-workers was based upon her job performance and not prohibited discrimination.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

· (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant's first argument is that she is being criticized more than other co-workers for her job performance because of her race. One specific example that she points to relates to the sign in sheet. She argues that her supervisor gave her several verbal reprimands for failure to follow the sign in policy but did not do so to other employees. Other APS workers testified that the sign in rule was something that was closely watched. They indicated that when they failed to properly sign in their supervisors brought it to their attention and there is no reason to believe that had the problem continued that the supervisor would have taken more stringent steps. The difference with Grievant is that the problem was chronic and consistent. It began with Supervisor DeLuca who was forced to have Grievant sign in electronically and continued with Supervisor Reynolds even after he abandoned the documentation that Ms. DeLuca had assembled in an effort to give Grievant a fresh start.

Respondent also brought problems related to the handling of cases to Grievant's attention. An example of this was the transportation issue for the client from Thomas Memorial Hospital. Her supervisor instructed Grievant to transport a client in her own vehicle because there were no state vehicles available and the client was about to be discharged. It is DHHR policy that APS workers must have a vehicle to transport clients in if there is no state vehicle available. Other APS workers testified that it is rare but they have been required to transport clients in their own cars. Rather than comply with a simple

directive Grievant made numerous excuses as to why she could not use her own vehicle. By the time the matter was resolved Grievant did not have time to gather the client's personal belongings and it was several days before those were taken.

Ultimately Grievant failed to prove that she was discriminated against as that term is defined in the grievance statute. Grievant may have received more criticism than her co-workers for her job performance. Unfortunately, that was because she had more performance issues. Grievant did not demonstrate that Respondent treated her any differently than other employees who were having the same or similar employment problems. Clearly, any difference in disciplinary treatment between Grievant and other employees was related to the performance of her actual job responsibilities and not her race.

With regard to discrimination Grievant also stresses the inappropriate comments of Mr. Reynolds as evidence that he was biased toward her. There can be no doubt that some of the comments made by Mr. Reynolds were inappropriate. The comment related to picking cotton was offensive whether "a person of color" was there to hear it or not. Additionally, the use of what is commonly referred to as a "Nazi Salute" toward Ms. Hager in front of other employees was out of line. Those allegations were referred to the EEO Office for investigation by Manager Adkins as soon as they were reported. EEO Officer Donald Raynes caused a full investigation to be conducted and concluded that the comments were inappropriate. However, he did not find that the comments were directed at Grievant and he specifically communicated to Manager Adkins that Mr. Reynolds was not found to have "discriminated against anyone based on anything." Respondent Exhibit 30. Mr. Raynes has many years of experience and training in investigating allegations of

discrimination. There was not sufficient evidence to find that his conclusions were incorrect.

Within two weeks of receiving the report from the EEO Officer, Manager Adkins placed Grievant under the supervision of Autumn Hager instead of Mr. Reynolds. When Grievant made it known that she wanted to move her work space away from Mr. Reynolds that request was granted and Manager Adkins offered to talk with Grievant regarding other accommodations that could be made for Grievant within the limits of meeting the needs of the agency's constituents.

Grievant's second claim is that her supervisors were guilty of reprisal against her for filing grievances and an EEO complaint against her first supervisor, Ms. DeLuca. Grievant notes that Mr. Reynolds was told about Grievant's prior grievances and her EEO complaint before and shortly after he became Grievant's supervisor. Coordinator Mitchell admitted that she told Mr. Reynolds about these complaints and problems with other employees in the Kanawha Unit as well. She concluded that it was important for him to know what had happened before so that he could understand the challenges of his position. Grievant opines that the reason for telling this information to Mr. Reynolds was to bias his opinion against Grievant.

For purposes of the grievance procedure the term reprisal is defined as follows:

> the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

W. VA. CODE § 6C-2-2 (o). To demonstrate a *prima facie* case of reprisal Grievant must establish by a preponderance of the evidence the following elements:

(1) That she engaged in protected activity (i.e., filing a grievance);

> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
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> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Hoffman v. W. Va. State Police, Docket No. 2010-0880-MAPS (Sept. 28, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W . Va. 53, 365 S.E.2d 251 (1986).

Grievant had filed grievances against Respondent and an EEO complaint against her prior supervisor. Coordinator Mitchell told Mr. Reynolds that Grievant had filed these complaints. Mr. Reynolds also knew that Supervisor DeLuca had compiled substantial documentation regarding incidents of what she believed to be shortcomings in Grievant's work performance. However, Mr. Reynolds decided to disregard the documentation compiled against Grievant in order to make a fresh start with her. None of that documentation was used to discipline Grievant. All of the actions taken by Mr. Reynolds to correct Grievant's performance were based upon incidents that he observed during his tenure as her supervisor and the evidence does not establish that there is any connection between the actions of Mr. Reynolds with Grievant and his knowledge of her prior complaints.[21] Under the totality of the circumstances Grievant did not prove that Respondent was guilty of reprisal.

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[21] Indeed, if Grievant's supervisor had wanted Mr. Reynolds to build a case against Grievant in reprisal for her prior complaints they would have insisted that he take the documentation collected by Ms. DeLuca into consideration.

It is clear that Grievant is an intelligent, capable and strong person. She has had disagreements with her previous supervisors that have led to an unproductive work situation. Hopefully, the placement of Grievant with a new supervisor will help to alleviate that situation. However, Grievant did not prove that the difficulties were a result of discrimination or retaliation and the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant did not prove that she was treated differently from similarly situated employees because she did not establish that other employees in her Unit had similar performance issues. Additionally, any difference in treatment that Grievant may have experienced was related to the performance of her job responsibilities. Accordingly, Grievant did not prove that Respondent was guilty of discrimination as that term is defined in the grievance statute.

4. For purposes of the grievance procedure the term reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2 (o). To demonstrate a *prima facie* case of reprisal Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity (i.e., filing a grievance);
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Hoffman v. W. Va. State Police, Docket No. 2010-0880-MAPS (Sept. 28, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W . Va. 53, 365 S.E.2d 251 (1986).

5. Grievant did not prove by a preponderance of the evidence that there was any causal connection between the corrective action taken by her supervisor and her filing of previous grievances and an EEO complaint against Respondent.

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: FEBRUARY 11, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE