WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBORAH FRALEY
Grievant,

v. **Docket No. 2012-0319-CONS**

CLAY COUNTY HEALTH DEPARTMENT,
Respondent.

D E C I S I O N

This is a consolidated grievance matter regarding Grievant, Deborah Fraley and her former employer, the Clay County Health Department ("CCHD"), Respondent. On August 13, 2011, Grievant filed a level one grievance alleging a [hostile work environment] stating that an employee of the CCHD spoke to her "disrespectfully on August 2, 2011" during a conversation regarding Grievant's use of sick and annual leave. Among other things Grievant sought relief, to-wit, that "she be spoken to in a respectful manner." On September 8, 2011, Grievant filed a level three grievance against Respondent regarding termination and sought reinstatement to her former position. These two grievances were consolidated, for hearing and decision, at level three pursuant to a September 30, 2011, Public Employees Grievance Board Order.

A level three hearing was held before the undersigned Administrative Law Judge on January 12, 2012, in the Grievance Board's Charleston office. Grievant appeared with legal counsel Jesseca R. Church, Esq., of Barry L. Bruce and Associates, L.C. Respondent was represented by Christopher D. Negley, Esq., of Shuman, McCuskey & Slicer, P.L.L.C. This matter became mature for decision upon receipt of the last of the

parties' proposed findings of fact and conclusions of law on or about February 10, 2012. Both parties submitted fact/law proposals.

Synopsis

Grievant was dismissed from her probationary employment as a Breastfeeding Peer Counselor after a time period in which she had exhausted her accrued leave balances and participated in intense discussion(s) with a supervisor regarding leave usage, agency expectations and employee performance.

A probationary appointment is a trial period giving the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of the position and to assess suitability with the organization and programs of the agency. Grievant has failed to demonstrate Respondent is in violation of any known rule or regulation applicable to this situation. Grievant did not establish Respondent's actions were unlawful. Respondent choose not to permanently employ Grievant, dismissing her from probationary employment. Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The Clay County Health Department ("CCHD"), Respondent, is responsible for the administration of the Central West Virginia Women, Infants and Children program.

2. Deborah Fraley, Grievant, was appointed by Respondent as a Health and Human Resource Aide/Breastfeeding Peer Counselor for Central West Virginia WIC program.

3. Grievant began probationary employment with Respondent on March 1, 2011. Grievant's employment station was in the Greenbrier County office of the Central West Virginia WIC program.

4. Brenda Young was Grievant's supervisor.

5. Sandra Perry is the Office Manager of the Greenbrier County office.

6. For the time period relevant to this consolidated grievance, Emma Ladd-Bird was Program Director for the Central West Virginia WIC Program. Ms. Ladd-Bird's employment station is at the Clay County Health Department.

7. A probationary period is a trial work period designed to allow an appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. *See* Administrative Rules of the West Virginia Division of Personnel (DOP) 143 C.S.R. 1 § 10.1(a).

8. A probationary employee accumulates annual leave at the rate of 10 hours per month. Further, a probationary employee accrues sick leave at the rate of 12 hours per month.

9. As a part of the initial hiring process, Grievant was provided access and acknowledges that she was aware of her responsibility to review the WVDHHR Employee Handbook. Applicable procedural rules, provide that "[s]ick leave cannot be taken before it is earned." WVDHHR Employee Handbook, R. Ex. 17 and DOP Administrative Rules.

10. If an employee exhausts all of his or her sick leave, then the employee may "request to use annual leave for the absence." If an employee exhausts all of his or her sick leave and annual leave, an employee may request to take a personal leave of

absence without pay. The granting of the request is at the **discretion** of the agency's director. *See* WVDHHR Employee Handbook, R. Ex 17.

11. Grievant and Director Ladd-Bird had occasion to discuss sick leave usage policy in May, 2011. R. Ex. 6.

12. In June 2011, Grievant verbally requested to take annual leave for August 4, 2011 and August 5, 2011. It was common knowledge at the office and Grievant readily acknowledged that she was requesting the time off to attend to matters relating to her daughter's upcoming wedding on August 6, 2011.

13. At the time of the initial request, Grievant's leave balances contained sufficient accrued leave to cover the time off. Grievant's verbal request for annual leave was tentatively approved.

14. At the end of June 2011, Grievant had 24 hours of annual leave and 15 hours of sick leave. R. Ex. 12.

15. On July 12, 2011,Grievant requested eight hours of annual leave. R. Ex. 5. Grievant's request was granted.

16. On Monday, July 25, 2011, Grievant left work complaining of illness. No excuse was provided for leave.

17. On Tuesday, July 26, 2011, Grievant took sick leave.

18. On Tuesday, July 27, 2011, the Grievant faxed a "Return to Work" form from the Robert C. Byrd Clinic to the Greenbrier office. The form states that Grievant has been under care since July 26, 2011 and Grievant's return to work date is August 3, 2011. R. Ex. 8.

19. Grievant used sick leave, July 26 - 29, 2011 (Tuesday, Wednesday, Thursday and Friday).

20. Friday, July 29, 2011, was the last work day of the month. Grievant had exhausted all of her accrued sick leave. Grievant had 26 hours of annual leave accrued at that time. R. Ex. 12. Grievant begins to use annual leave for time off upon expenditure of all of her sick leave.

21. On Monday, August 1, 2011, Grievant did not work. However, as Grievant had no sick leave her annual leave was utilized.

22. On Tuesday, August 2, 2011, Sandra Perry, Office Manager, spoke with Grievant on the telephone. Perry informs Grievant that because she had zero sick hours and only 19 hours of annual leave that she would go "off of payroll," i.e., Grievant would be absent from her job without leave, beginning on August 4, 2011.[1]

23. Office Manager Perry further told Grievant that she needed to speak with Ladd-Bird, WIC Program Director, regarding this issue.

24. On Tuesday, August 2, 2011, at approximately 11:00, Grievant arrived at the Greenbrier office. At the office was Sandra Perry, Brenda Young and Candace Brooks-Fowler, a nutritionist. The office was open to the public during normal business hours.

25. A telephone conversation transpired between Grievant and Director Ladd-Bird on August 2, 2011.

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[1]"Off of payroll" is not an inconsequential condition for the employee or the agency employer involved. It is an administrative quagmire which requires numerous procedural transactions to implement and correct. State agencies and their personnel offices attempt to minimize, if not avoid, situations which necessitate an employee to go off payroll. Some state agencies attempt to enforce a minimum leave balance for employees.

26. Grievant did not like the information communicated to her by Director Ladd-Bird. Grievant's leave usage and her doctor's release statement were discussed during Grievant's and Director Ladd-Bird's first phone conversation of August 2, 2011.

27. Director Ladd-Bird and Grievant discuss that, officially, Grievant's return to work date was the following day (August 3, 2011). The Director further informed Grievant that because she does not have any leave, she can no longer take August 4, 2011 and August 5, 2011, off for annual leave. Grievant was expected to be at work on the 4th and 5th.

28. Grievant became agitated during this phone conversation. The conversation between the two progresses to a point that Grievant hangs up on Director Ladd-Bird.

29. No additional or subsequent medical release form altering Grievant's August 3 return to work date to August 2 was received by the Greenbrier County office of the Central West Virginia WIC Program.

30. After hanging up on the Program Director, Grievant later proceeded to the front of the office where Office Manager Perry and Supervisor Young were working.

31. Grievant was agitated and displayed aggressive behavior. Grievant made remarks of a threatening nature. The remarks were not of physical violence but, nevertheless, were threatening.

32. Grievant made remarks about Ladd-Bird's future within the WIC program, and Grievant threatened the job security of Director Ladd-Bird. Grievant also made remarks intended to cause anxiety for Sandra Perry and Brenda Young, then departed the Greenbrier office.

33. Later that afternoon, Grievant telephoned Director Ladd-Bird regarding the leave issue. During this conversation it was communicated by Ladd-Bird that excessive use of sick leave and the exhaustion of annual leave could constitute "leave abuse." *See* R. Ex. 14, Supervisor's Guide to Attendance Management.

34. Additionally, Director Ladd-Bird emphasized that she would not approve Grievant going "off of payroll" and that the expectation was that Grievant would report to work on August 4, 2011 and August 5, 2011. This information was displeasing to Grievant. Grievant became aggressive and stated she would file a grievance over the conversation.

35. On August 3, 2011, Grievant returned to the Greenbrier office. She arranged for a fax transmission from the Robert C. Byrd Clinic. This return to work slip indicates that Grievant was under medical care on August 2 and would be able to return to work on August 3 for five hours. R. Ex. 9.

36. Respondent, through Program Director Ladd-Bird, authorized the use of three hours of annual leave to complete Grievant's work day (August 3, 2011).

37. Later on August 3, 2011, Grievant faxed in another leave slip to the Greenbrier office. This return to work form indicated that Grievant would be off under doctor's care August 3, 2011 to August 5, 2011 and will be able to return to work on Monday, August 8, 2011. R. Ex. 18.

38. On Thursday, August 4, Grievant, after the use of seven hours of annual leave, went off payroll beginning with the last hour of work.

39. On Friday, August 5, 2011, Grievant was "off of payroll" and missed another eight hours of duty.

40. Grievant was absent from her job responsibility without either approved sick or annual leave or approved personal leave without pay.

41. On Saturday, August 6, 2011, Grievant attended her daughter's wedding.

42. On Monday, August 8, 2011, Grievant returned to work at the Greenbrier office.

43. For probationary employees such as Grievant, the rating period is the six-month probationary period. The EPA-2 is the part of the performance appraisal period and is to be conducted prior to the employee being offered permanent employment.

44. On Thursday, August 18, 2011, Director Ladd-Bird telephoned Grievant regarding Grievant's EPA-2. R. Ex. 3. It was communicated to Grievant that Director Ladd-Bird was considering not making Grievant a permanent employee.

45. Among other information, Grievant's EPA-2, signed by Director Ladd-Bird, provides that Respondent was of the belief that Grievant's actions demonstrated, "Unacceptable attendance" and "Unprofessional conduct resulting in subordination." *Id.*

46. On Tuesday, August 23, 2011, Director Ladd-Bird met with Grievant in person at the Greenbrier office. She informed the Grievant that she was being dismissed for unsatisfactory attendance and misconduct. R. Ex. 1.

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dept. of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990). When a Grievant's

dismissal for misconduct is disciplinary, and the burden of proof rests with the employer, Respondent must meet that burden by proving the charges against the Grievant by a preponderance of the evidence. *See Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999); *Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996).

It is uncontested that Grievant was a probationary employee during the time period relevant to this grievance matter. Respondent exercised its prerogative to not permanently employee Grievant citing unsatisfactory performance. Accordingly, Grievant retains the burden of proof that her performance was satisfactory. However, in review of the August 23, 2011 Letter of Dismissal (R. Ex. 1), in the present case, it is possible that Grievant, as a probationary status employee, was dismissed for both unsatisfactory performance and misconduct. Therefore, this decision will be mindful of both aspects of this matter.

The majority of the facts of this grievance are not in dispute.[2] However, there are isolated examples of vague, unclear and conflicting testimony. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2)

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[2] In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1993).

the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

In reaching a decision on the issues associated with the parties herein, it is deemed prudent to address the reliability of the "contested" information present by various witnesses with the above-cited criteria in mind. Inconsequential facts need not be discussed. To the degree that the exact words spoken by Grievant as she departed the office on August 2, are of issue, the testimony of Grievant related to this will be discussed. Grievant acknowledges that she was "upset" at the time.[3] Grievant tends to acquiesce to the statements made to Director Ladd-Bird cited on page three of the "Dismissal During Probationary Period" document (R. Ex. 1). She equivocates regarding the exact words but, nevertheless, admits to the majority of the content. *See* Grievant's L-3 cross-examination testimony. Grievant's statement regarding filing a grievance is and was not the information assessed by Respondent to be insubordinate. However, her statements pertaining to ending Director Ladd-Bird's career at the agency were perceived as threats. The testimony of Office Manager Perry, Supervisor Young and Director Ladd-Bird is consistent on this point. Grievant indicated with malice and purpose she was intent on bringing about the demise of the Director's employment. Words to the effect, "I will see to it that [Director Ladd-Bird] won't be working here after this." The words used during the phone conversations with the Director and as Grievant departed the building may differ slightly,

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[3] Grievant had applied for annual leave, several weeks in advance, to be off work on the 4th and 5th of August, for the purpose of preparing for her daughter's wedding to be held on August 6, 2011. The wedding and the activity associated with the event was of great importance to Grievant.

yet the message was direct and clear. Grievant was agitated and upset regarding the Director's usage of the terminology, "leave abuse" and the determination that Grievant was to report to work on the 4th and 5th of August. The words used by Grievant were more than a verbal affirmation to file a grievance, as Grievant would now have us to believe.

Words spoken by Grievant to Sandra Perry and Brenda Young regarding previous conversations were much less direct. Grievant made these two co-workers readily aware anything either one of them may have shared over the course of Grievant's employment was ripe for litigation. The individual testimony of Office Manager Perry, Supervisor Young and Director Ladd-Bird regarding Grievant's statements are plausible, consistent in time, place and motive. Grievant's testimony is less credible. Grievant's equivocation regarding the exact wording does little to dispel confirmed and acknowledged facts. Grievant's righteous indignation over the information communicated to her by the Director was evident on August 2, in her subsequent filings and at the level three hearing. Less weight is attributed to Grievant's rendition of conversation(s) than that of the parties, with whom she was communicating.

Grievant communicated with Director Ladd-Bird by phone at least twice on August 2, 2011. The Director reiterated her expectation that Grievant was to return to work as Grievant had no accrued leave left. Grievant expressed more negative comments toward the Director and that she was going to file a grievance over the conversation.[4] Grievant contends the Director spoke to her in an unacceptable manner, characterizing Director

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[4] It is not the statement indicating an intent to file a grievance that is perceived as a threat. *See* FOF 31, 32, R. Ex. 1, and L-3 testimony of Director Ladd-Bird, Office Manager Perry and Supervisor Young.

Ladd-Bird's tone throughout the conversation as disrespectful and derogatory. This is of issue.

Nondiscriminatory Hostile Workplace Harassment is defined in the Division of Personnel's Prohibited Workplace Harassment Interpretive Bulletin as:

> Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee(s) from reasonably performing her or his work.

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 plaintiff's 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 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'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, 513 S.E.2d

463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 30, 2006).

"Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth*., Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley, et al., supra.*

It is not established that Director Ladd-Bird created a hostile work environment for Grievant. It is not established that Director Ladd-Bird spoke to Grievant during the phone conversations of August 2, 2011 in an abusive or inappropriate manner. The Director informed Grievant of information that was disheartening to Grievant. It was accurate information that Grievant perceived was unduly punitive. Grievant's use of leave had created a problem, Grievant no longer had annual leave for the 4th and 5th of August.

Grievant was expected to come to work. Ms. Ladd-Bird communicated with Grievant as the Program Director, as Grievant's boss. It is more likely, than not, what Grievant truly found objectionable was the Director's failure to sympathize with Grievant's situation and authorize her absence from the work place.

Derogatory and/or actionable disrespectful speech is more than communicating an adverse ruling regarding the application of relevant rules and regulation. Even if Director Ladd-Bird discussed the situation in an unsympathetic manner, this is not truly actionable. Grievant has not indicated any information, words or deed that demonstrated the Director's conduct during the phone conversations with Grievant was unlawful. Conversely, it is established that Grievant's conduct upon being informed that she was expected to come to work was emotional and agitated. Respondent's expectation that Grievant conform to applicable rules and regulations governing attendance and leave usage is reasonable. An employee can request a "Personal Leave of Absence Without Pay" but that request is discretionary. DHHR Handbook, R. Ex. 17. It is not acceptable to threaten a supervisor in reaction to a supervisor's determination not to your liking.

The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." 143 C.S.R. 1 § 10.1(a). A probationary employee may be dismissed at any point during the

probationary period that the employer determines his services are unsatisfactory. 143 C.S.R. 1 § 10.5(a). The Division of Personnel's Administrative Rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). A probationary employee is;

> not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hackman v. W. Va. Dep't of Transp., Docket No. 01-DMV-582 (Feb. 20, 2002). When a probationary employee is terminated on grounds of unsatisfactory performance, the burden of proof is upon the employee to establish that her services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990). Respondent, however, bears the burden of proving allegations of misconduct by a preponderance of the evidence. *See Wolfe v. Dep't of Transp./Div. of Highways*, Docket No. 95-DOH-491 (July 31, 1996); *Nicholson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 99-HHR-299 (Aug. 31, 1999). The distinction is one that affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. *Johnson v. Department of Transportation*, Docket No. 04-DOH-215 (Oct. 29, 2004).

Grievant was appointed to the probationary position of Health and Human Resource Aide/Breastfeeding Peer Counselor, Central West Virginia WIC program, on March 1, 2011. During the probationary period an employing agency assesses an employee's

conduct. Prior to becoming classified Grievant was informed her use of leave was problematic, that she no longer could use annual leave for the 4th and 5th of August and that the Agency's expectation was that Grievant would be at work on these days, the Grievant made several verbal threats to the Director about the Director's job and hung up on the Director. She proceeded to the front of the building and maked verbal comments to the Office Manager (Sandra Perry) and her supervisor (Brenda Young) about their jobs. She made these comments in a highly agitated state. The exact wording is of limited discussion but the actions are facts certain, as is the intent. Grievant made comments in an agitated state threatening others. The testimony of Perry and Young is found to be credible with regard to Grievant's demeanor. The witnesses demonstrated appropriate respect and cooperation with the instant grievance process. Their interaction with Grievant during the course of pertinent events established an opportunity to perceive and communicate vital facts. Grievant confirms her state of mind but gets vague regarding the exact words she used. Grievant's comments were designed to create anxiety and discomfort in the minds of both Ms. Perry and Ms. Young. Grievant threatened these employees.

Grievant used all of her accrued annual leave and all of her accrued sick leave and was not approved for a personal leave of absence on August 4, 2011. Accordingly, for the remainder of that working day and all of August 5, 2011, Grievant was absent without approval. During level three proceedings Grievant admitted that she understood that she had no leave left and that she would be going off of payroll on August 4, 2011 and August 5, 2011. Grievant admitted that she had been counseled by Director Ladd-Bird that going off of payroll would be a problem. Grievant held fast to the belief that because she had a

medical excuse, Respondent was obligated to authorize her time off.[5] Further, Grievant mistakenly was of the belief that the penalty for her behavior would be much less severe than what ultimately transpired.

Grievant was a probationary employee. A probationary employee is not entitled to the usual protections enjoyed by a state employee. Upon Grievant's return to work, over the next week and a half Director Ladd-Bird communicated with Grievant about her EPA-2 on the telephone and met in person. Director Ladd-Bird informed Grievant that she had failed to meet the expectations of the job. Grievant did not fully comprehend the vulnerability of being a probationary employee. The expectation of the job included more than Grievant's ability to counsel new mothers regarding the benefits of breast-feeding. That aspect of Grievant's job performance is not disputed.

Grievant was evaluated by Director Ladd-Bird. Among other information, Grievant's EPA-2, signed by Director Ladd-Bird, provides Respondent was of the belief that Grievant's actions demonstrated "Unacceptable attendance" and "Unprofessional conduct resulting insubordination." Shortly, thereafter, Ladd-Bird dismissed Grievant from her position with the Central West Virginia WIC program.

Grievant's use of annual and sick leave was unsatisfactory to Respondent. Dismissal of a probationary employee for excessive absenteeism caused by illness is not disciplinary in nature. *Giberson v. W. Va. Division of Corrections*, Docket No. 98-CORR-002 (May 29, 1998); *Walker v. W. Va. Pub. Serv. Comm'n*, Docket No. 91-PSC-422 (March

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[5] The undersigned is not opining on the credibility of the medical explanation presented as reason and rationale for Grievant's absence on the 4th and 5th of August. Such determination is not needed to address the issues currently in litigation.

11, 1992). Respondent was within its discretionary rights to dismiss Grievant as a probationary employee. *See* Section 10.5. Grievant had the burden of proving her services were satisfactory.

Grievant did not establish that Respondent is required to retain her services. It was specifically communicated to Grievant that Director Ladd-Bird was considering not making Grievant a permanent employee. During the in person conference, it was imperative that Grievant rehabilitate herself for Respondent. The final determination regarding Grievant's future with the organization was still being pondered. Grievant had opportunity to persuade the Director that she could be a valued employee and a team player. Nevertheless, Grievant refused to sign the EPA-2, and took exception with Respondent's characterization of her conduct. It is not established that Respondent's decision not to retain Grievant's services was unreasonable.

The undersigned is mindful that a portion of the stated reason for Grievant's termination was misconduct. R. Ex. 1. Insubordination was referenced on the EPA but not necessarily cited, *per se*, on the dismissal document. The term, insubordination, is typically used when a dismissal is disciplinary. Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So.W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation): (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable. *Butts v. Higher Educ. Interim Governing Board*, 212 W.Va. 209, 569 S.E.2d 456 (2002)(per curiam). "Employees are expected to respect authority and do not have unfettered discretion to disobey or

ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dept.*, Docket No. 90-H-128 (August 8, 1990).

Grievant's threatening language toward a co-worker, her supervisor and the Program Director, flowed directly from Grievant's disagreement with established rules on attendance and the use of leave. Grievant's inability to conform to the employing agency's reasonable workplace expectation was specified as a contributory rationale for her non-retention. The undersigned finds that Grievant's verbal threats constituted inappropriate employee conduct. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance. *Johnson v. Department of Transportation*, Docket No. 04-DOH-215 (Oct. 29, 2004); *Mendenhall v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 2011-0997-CONS (Apr. 26, 2011). Respondent established by a preponderance of the evidence rational reason for determining that this probationary employee's services were unsatisfactory. Accordingly, even if Respondent had had the burden of proof, Respondent has met that burden.

Grievant did not establish that Respondent violated any rules, regulations or statutes in her dismissal from the Central West Virginia WIC program. Grievant did not establish that her services were satisfactory. Respondent complied with the provisions of the Division of Personnel Administrative Rule Sections 10.5 and 12.2 in dismissing Grievant during her probationary period. Accordingly, this consolidated grievance matter is **DENIED**.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. "'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, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 30, 2006).

2. "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley, et al., supra.*

3. Grievant failed to establish that the Program Director created an unlawful condition of employment by informing Grievant of applicable rules and regulations governing leave usage and indicating an intent to enforce such constraints.

4. It is not established that Grievant's superior communicated with her in a disrespectful manner.

5. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990).

6. The Division of Personnel's Administrative Rule establishes a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). A probationary employee is not entitled to the usual protections enjoyed by a permanent state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not retain the employee after the probationary period expires. *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002); cited in *Hammond v. Div. of Veteran's Affairs,* Docket No. 2009-0961-MAPS (Jan. 7, 2009); *Roberts v. Dep't of Health and Human Res./Lakin State Hosp.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009).

7. Grievant did not demonstrate that Respondent's determination to not retain her services was an unlawful act.

8. Grievant did not establish that her services were satisfactory. It is not established that Respondent should be required to make Grievant a permanent employee.

9. Respondent established by a preponderance of the evidence rational reason for determining that this probationary employee's services were unsatisfactory.

Accordingly, this 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: April 2, 2012

Landon R. Brown
Administrative Law Judge