WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THEODORE B. STUART,

Grievant,

v. **Docket No. 2011-0970-MAPS**

DIVISION OF JUVENILE SERVICES/LORRIE YEAGER JR. JUVENILE CENTER,

Respondent.

DECISION

_____Grievant, Theodore B. Stuart, filed this grievance against his employer, Respondent Division of Juvenile Services/Lorrie Yeager Jr. Juvenile Center, on January 6, 2011, stating as follows:

> In a letter written on December 23, 2010 my employer, WV Divison of Juvenile Services, informed me that my Health and Life Insurance coverage would cease after December 31, 2010.
>
> I contend that this is a violation of, and/or discrimination of, the workers compensation anti-discrimination law. Following is the statute with emphasis added: § 23-5A-2 . . . .
>
> This is just one example in a long history of my employer continuing to discriminate against me for filing workers compensation claims and prior grievances. As such, I contend that they have also violated the following statute: § 23-5A-1 . . . .
>
> I also assert that this action has been brought forth in retaliation due to the filing of prior grievances in which my employer has also violated the workers compensation anti-discrimination laws. Thus, I am also filing for a hostile workplace violation. My employer has also issued a no contact order against me. Employees at the facility in which I am employed have been ordered not to have contact with me by the Director of the Division of Juvenile Services and/or the Division's Attorney, and I have been ordered by my facility

> director on 01/06/2011 not to have contact with them.

Mr. Stuart seeks the following relief:

> I ask that my health and life insurance be reinstated with the understanding that I will continue the employee share of the premium.
>
> I ask that my employer cease and desist their current and future retaliatory actions of my filing workers compensation claims and the filing or prior grievances asserting violations of the workers compensation law and multiple other laws.
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> I also ask that my employer lift their no contact order so that I may continue to comply with required notifications of injury status, doctor's orders, and any other business that has or may arise. I also ask that it be lifted for my planned eventual return to duty so that I may conduct business accordingly.
>
> I also ask for an investigation by the appropriate party(s) into the hostile workplace violations.[1]

A Level One conference was held on January 27, 2011. The grievance was denied at Level One as stated in the decision dated February 15, 2011.[2] Grievant appealed to Level Two of the grievance process on February 28, 2011, at which time he amended his grievance to include the claim of "bad faith" against Respondent.[3] A Level Two Mediation was conducted on April 29, 2011. The Level Three appeal was perfected on May 10, 2011. A Level Three grievance hearing was conducted by the undersigned administrative

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[1] Pursuant to the record and decision from the Level One proceeding, Grievant withdrew his request for an investigation into the alleged "hostile workplace violations." However, at Levels Two and Three Grievant continued to allege that Respondent created a hostile workplace for him.

[2] The Level One conference was recorded at the request of Grievant. This audio recording has been submitted to the Grievance Board. However, no transcript of the same has been provided.

[3] *See*, Level Two appeal form, "Request for Level 2 Mediation."

law judge at the West Virginia Public Employees Grievance Board's Charleston, West Virginia, office on July 28, 2011.[4] Grievant appeared in person, *pro se*. Respondent appeared by counsel, Steven R. Compton, Esq., Senior Assistant Attorney General. This matter became mature for decision on September 27, 2011, upon the receipt of the last of the parties' proposals.[5]

On October 12, 2011, Grievant filed a written Motion to Supplement Record. The undersigned conducted a telephonic hearing on this motion on October 28, 2011. Respondent appeared by counsel, Mr. Compton. Grievant appeared *pro se*. Grievant alleged that Respondent misrepresented the facts in its proposed Findings of Fact and Conclusions of Law. Upon hearing from both parties, it was discovered that the basis for Grievant's motion was a typographical error contained in footnote one of Respondent's proposal. Respondent admits the typographical error. Accordingly, the undersigned found that such was harmless error, noted the error, and denied Grievant's request to further supplement the record.

Synopsis

After Grievant had been on a medical leave of absence without pay for one year, Respondent ceased paying the employer portion of Grievant's insurance benefits. Thereafter, Grievant's insurance coverage was canceled for nonpayment. In this action,

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[4] The undersigned conducted a telephonic hearing on July 27, 2011, to address Respondent's Motion to Quash Subpoena and Motion to Continue. At the phone hearing, Respondent appeared by counsel, Mr. Compton, and Grievant appeared *pro se*. The undersigned granted the Respondent's Motion to Quash Subpoena, but denied the Motion to Continue.

[5] The due date for submission of proposed Findings of Fact and Conclusions of Law was extended twice at the request of Grievant.

Grievant asserts a number of claims against Respondent regarding its decision to cease paying the employer portion of his insurance premiums, such as discrimination in violation of certain workers' compensation statutes and retaliation. Grievant also argues that Respondent created a hostile work environment by issuing and failing to lift a "no-contact order" against him and by failing to timely provide him with requested documents and other information. Lastly, Grievant claims that many of Respondent's actions during the litigation of this grievance constitute bad faith. Respondent denies all of Grievant's allegations and asserts that it lawfully ceased payment of the employer portion of Grievant's insurance premiums. Grievant failed to prove each of his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Theodore B. Stuart, was hired as a Correctional Counselor II at the Lorrie Yeager Juvenile Detention Center on January 16, 2006.

2. Grievant suffered job-related injuries in October 2006 and April 2009. As a result of the April 2009 injury, Grievant received Temporary Total Disability Benefits ("TTD") through workers' compensation until August 16, 2009.[6]

3. Grievant returned to work at the Lorrie Yeager, Jr. Juvenile Center on August 17, 2009, and continued to work until December 2009.

4. Grievant reported for work on December 8, 2009, but left work early that day

[6] These benefits terminated when Grievant returned to work on August 17, 2009.

because he was experiencing pain.

5. Grievant reported to work on December 11, 2009, but left work after about one hour, again due to pain. Grievant did not request to take any type of leave before leaving work this date.

6. When Grievant left work on December 11, 2009, he completed no leave request forms. No such form or forms have been completed by the Grievant since he left work on December 11, 2009.

7. Accordingly, Grievant's accrued sick leave and annual leave were used to cover his absences from December 11, 2009 forward until the same were exhausted on December 29, 2009. Thereafter, the Director of the Lorrie Yeager, Jr. Juvenile Center, David Jones placed Grievant in the status of "medical leave of absence without pay."

8. Jones chose to place Grievant in the status of "medical leave of absence without pay" because Grievant had not requested any type of leave when he left work on December 11, 2009.

9. When an employee is off work, his or her leave is designated as falling within some type of category for personnel purposes. Because Grievant was not receiving workers' compensation benefits, had exhausted his accrued leave, and had not requested any type of leave or leave status, Jones chose the status of medical leave of absence without pay.

10. In or about June 2010, Sharon Hayes, DJS Human Resources Director, mailed Grievant a request for Medical Leave of Absence Without Pay form, which was dated December 29, 2009, for his signature. Grievant refused to sign the same because it was "back-dated." Grievant has further refused to sign any request for a leave of

absence without pay.

11. Since leaving work on December 11, 2009, Grievant has attempted to reopen his workers' compensation claims for TTD benefits with Brickstreet Insurance, but Grievant's requests have been denied. Grievant has appealed those decisions, and such remain pending.

12. Grievant's TTD claim was closed as of August 16, 2009.

13. Grievant's treating physician has not released Grievant to return to work.

14. Grievant's treating physician has never identified to Respondent any accommodations that need to be made for Grievant to return to work.

15. Grievant has been on a medical leave of absence without pay since December 29, 2009.

16. Respondent has allowed Grievant to remain on a medical leave of absence without pay longer than it has allowed other employees in the past.

17. Respondent paid the employer portion of Grievant's insurance premiums from December 2009 through December 31, 2010. During his time, Grievant paid the employee portion of his insurance premiums.

18. Respondent informed Grievant of its intent to cease paying the employer portion of Grievant's insurance premiums during conversations with Grievant's former counsel.

19. Grievant informed Respondent that he would not be continuing his insurance after December 2010 because of its cost.

20. By letter from Steven R. Compton to Grievant dated December 23, 2010, Respondent confirmed that it would cease paying the employer portion of Grievant's

insurance premiums at the end of the month. Further, Grievant was advised that if he wished to keep his health insurance, he would be required to reimburse Respondent the full cost of the premium each month, that being $937.52, starting with the January 2011 premium. In this same letter, it is noted that Grievant had indicated to Sharon Hayes, Human Resources Director, that he would not be continuing his health insurance coverage.[7]

21. Grievant did not inform Respondent that he wished to retain his health insurance coverage.

22. Respondent ceased paying the employer portion of Grievant's insurance premiums at the end of December 2010, that being one year after Grievant began his medical leave of absence without pay. Thereafter, Grievant's insurance benefits were terminated for nonpayment.

23. Grievant filed a prior grievance action against Respondent in August 2010.[8] In that action, a hearing on the issue of default was conducted on November 9, 2010, at the Grievance Board's Charleston, West Virginia, office. On December 20, 2010, the hearing to address the remedy for default was held at the same location.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health &*

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[7] *See,* Letter dated December 23, 2010, Grievant's Exhibit 4.

[8] *See*, *Stuart v. Div. of Juvenile Services/Lorrie Yeager Jr. Juvenile Center and Div. of Personnel*, Docket No. 2011-0171-MAPS (Sept. 23, 2011).

Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant makes numerous claims against Respondent within this grievance. First, Grievant argues that Respondent's decision to cease paying the employer's share of his health and life insurance benefits is a discriminatory act in violation of WEST VIRGINIA CODE §§ 23-5A-1 and 23-5A-2 because he is off work due to a compensable injury and his workers' compensation claims are pending appeal. Grievant further asserts that Respondent has, generally, discriminated against him for filing workers' compensation claims. Respondent denies discriminating against Grievant in any way and asserts that its decision to cease paying the employer's portion of Grievant's insurance premiums was lawful.

"'In order to make a prima facie case of discrimination under W. VA. CODE § 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE § 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.' Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W. Va. 700, 403 S.E.2d 717 (1991)." *Addair v. Dep't of Health and Human Resources/Welch Community Hosp.*, Docket No. 03-HHR-147 (Feb.

2, 2004). Discrimination against workers' compensation claimants is prohibited. Pursuant to WEST VIRGINIA CODE § 23-5A-1, "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." Further, "discrimination" in that context is defined by WEST VIRGINIA CODE § 23-5A-3, which states, in part, as follows:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and *is receiving or is eligible to receive* temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work. . . .

(Emphasis added) *Id.* An employee is not "eligible to receive temporary total disability benefits" during the appeals period after the TTD benefits have been discontinued. *See, Little v. Dep't of Environmental Protection,* Docket No. 05-DEP-248 (May 2, 2006); *Addair v. Dep't of Health and Human Res.,* Docket No. 03-HHR-147 (Feb. 2, 2004); *Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 486 S.E.2d 768 (1997).

It is undisputed that, in the past, Grievant sustained two on-the-job-injuries for which he received temporary total disability ("TTD") benefits through workers' compensation. However, Grievant's TTD benefits terminated on August 16, 2009, upon his return to work. Grievant then worked from August 17, 2009, until December 11, 2009. On December 11, 2009, Grievant left work early due to pain. Grievant has remained off work since that date.

Grievant argues he is off work due to injuries compensable under workers' compensation. Grievant has made efforts to reopen his workers' compensation claims with Brickstreet Insurance, but his requests have been denied. Grievant has appealed Brickstreet's decisions, and his appeals remain pending. However, Grievant has not received workers' compensation benefits since August 2009. Accordingly, Grievant cannot be considered *eligible* to receive workers' compensation TTD benefits. As such, Grievant cannot, by definition, establish that Respondent discriminated against him in violation of WEST VIRGINIA CODE § 23-5A-1.

WEST VIRGINIA CODE § 23-5A-2 states, in part, as follows:

> Any employer who has provided any type of medical insurance for an employee or his dependents by paying premiums, in whole or in part, on an individual or group policy shall not cancel, decrease his participation on behalf of the employee or his dependents, or cause coverage provided to be decreased during the entire period for which that employee during the continuance of the employer- employee relationship is claiming or is receiving benefits under this chapter for a temporary disability. If the medical insurance policy requires a contribution by the employee, that employee must continue to make the contribution required, to the extent the insurance contract does not provide for a waiver of the premium. . . .

Id. Further, the West Virginia Supreme Court of Appeals has held that,

> A workers' compensation claimant who is protesting the closure of her claim for temporary total disability benefits and/or the denial of additional temporary total disability benefits does not come within the meaning of the terms "is claiming" found in West Virginia Code § 23-5A-2 (1994). Accordingly, an employer who ceases to pay the health insurance premiums for a claimant who is protesting or appealing the closure or denial of temporary total disability

> benefits does not commit an act of discrimination within the legislative intent of West Virginia Code § 23-5A-2.

Syllabus Point 6, Rollins v. Mason Co. Bd. of Educ., 200 W. Va. 386, 489 S.E.2d 768 (1997). *See also, Syl. Pt. 2, Wriston v. Raleigh County Emergency Servs. Auth.*, 205 W. Va. 409, 518 S.E.2d 650 (1999). WEST VIRGINIA CODE § 5-16-24 states, in pertinent part, that,

> [a]ny employee who is on a medical leave of absence, approved by his or her employer, is subject to the following provisions of this paragraph, is entitled to continue his or her coverage until he or she returns to his or her employment, and the employee and employer shall continue to pay their proportionate share of the premium costs as provided by this article: Provided, That the employer is obligated to pay its proportionate share of the premium cost only for a period of one year: Provided, however, That during the period of the leave of absence, the employee shall, at least once each month, submit to the employer the statement of a qualified physician certifying that the employee is unable to return to work.

Id.

From December 2009 until December 2010, Respondent paid the employer portion of Grievant's insurance premiums and Grievant paid the employee portion. At the time Respondent ceased paying the employer portion of the insurance premiums, Grievant's workers' compensation TTD benefits had been discontinued. Further, Grievant's requests to have his claims reopened have been denied. In the *Rollins* and *Wriston cases*, the Supreme Court held that a claimant protesting the closure of his claim or the denial of additional TTD benefits does not come within the meaning of "is claiming" found in WEST VIRGINIA CODE § 23-5A-2. As Grievant's TTD benefits have been terminated, Grievant does not come within the meaning of "is claiming" found in WEST VIRGINIA CODE § 23-5A-2.

As such, the protections of WEST VIRGINIA CODE § 23-5A-2 do not apply to Grievant. Pursuant to WEST VIRGINIA CODE § 5-16-24, an employer is only required to pay its portion of the employee health insurance benefits for one year, unless the employee is covered by the protections set forth in WEST VIRGINIA CODE § 23-5A-2. Here, Respondent paid the employer's portion of Grievant's insurance benefits for one year before terminating payment. When Respondent ceased payment of the employer portion of Grievant's insurance benefits, Greivant was not, and has not since, received TTD benefits. Respondent was within its rights to stop paying its portion of Grievant's insurance premiums. Therefore, Respondent's decision to stop paying the employer portion of Grievant's insurance benefits is not a discriminatory act in violation of WEST VIRGINIA CODE § 23-5A-2.

Grievant also argues that the 2005 restructuring of the West Virginia Workers' Compensation system and laws has placed him in the position of one who "is claiming" temporary total disability benefits under the Code. Grievant cites no law in support of this position. However, Grievant cites the Supreme Court's decision in *Wriston* in support of his argument that he "is claiming" TTD benefits pursuant to WEST VIRGINIA CODE § 23-5A-2. However, in *Wriston*, the Court quotes its decision in *Rollins,* again finding that one who is protesting the closure or denial of his TTD benefits does not come within the meaning of "is claiming" as found in WEST VIRGINIA CODE § 23-5A-2, and that an employer who stops paying insurance benefits for such a person does not commit an act of discrimination. *See, Syllabus Point 6, Rollins v. Mason Co. Bd. of Educ.,* 200 W. Va. 386, 489 S.E.2d 768

(1997); *Syl. Pt. 2, Wriston v. Raleigh County Emergency Servs. Auth.*, 205 W. Va. 409, 518 S.E.2d 650 (1999). Therefore, Grievant's argument is without merit.

For the reasons set forth herein, the undersigned cannot find that Grievant has met his burden of proving that Respondent has discriminated against him in violation of WEST VIRGINIA CODE §§ 23-5A-1 and 23-5A-2.

Grievant next asserts that Respondent's decision to cease paying the employer portion of Grievant's insurance premiums is retaliation for his filing previous grievances and workers' compensation claims. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal 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." To demonstrate a prima facie case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
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> (2) That he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 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). "[T]he

critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant did not demonstrate that any protected activity in which he participated was a significant, substantial, or motivating factor in Respondent's decision to terminate his insurance coverage. By law, Respondent is only required to pay the employer portion of employee insurance premiums for one year while an employee is on a medical leave of absence. Although the timing of Respondent ceasing to pay its portion of the premiums was close in time to the Level Three hearing in Grievant's prior grievance action, it was also very close to the date on which Grievant's leave of absence would reach the one-year

mark. The evidence also demonstrates that Respondent informed Grievant of its intent to cease paying its portion of the insurance premiums well before that hearing. Further, Grievant did not receive, and was not eligible to receive, workers' compensation TTD benefits during any of the time he has been off work since December 2009; therefore, any protections afforded by the workers' compensation provisions of the Code are not extended to Grievant. Accordingly, the undersigned cannot find that Grievant has met his burden of proving his reprisal claim.

At Level Two of the grievance process, Grievant amended his grievance to include a claim of bad faith against Respondent for failing to lift a "no-contact order" in place against him at the Lorrie Yeager, Jr. Juvenile Center and for failing to provide him with a copy of the Level One conference recording.

WEST VIRGINIA CODE § 6C-2-4(b)(4)(c)(6) states as follows: "[t]he administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." *Id.* However, WEST VIRGINIA CODE § 6C-2-6(a) provides that, "[a]ny expenses incurred relative to the grievance procedure at levels one, two, or three shall be borne by the party incurring the expenses." *Id.*

The "no-contact order" was nothing more than an email sent by Respondent's counsel on December 21, 2010, requesting that all communication between Grievant and Respondent about the issues being litigated in the prior grievance be directed through

counsel.[9] At the Level One conference on January 27, 2011, it was clarified that Grievant was to be permitted to contact the necessary employees at the Lorrie Yeager, Jr. Juvenile Center to provide his employer with required medical and business information. This clarification was noted in the Level One decision issued on February 15, 2011. However, on February 17, 2011, Grievant was denied entry to the Lorrie Yeager, Jr. Juvenile Center. Grievant contacted Respondent's counsel and the matter was resolved. Grievant was then allowed to conduct his business at the facility. Grievant has not attempted to return to the facility since February 17, 2011. Grievant has since conducted his business with Respondent through the DJS Central Office.

This entire "no-contact order" saga has been nothing more than one misunderstanding after another. It is a standard practice that during litigation all communications between the parties be directed through counsel. This was not an unreasonable request and the clarifications made at the Level One conference were appropriate. However, the staff at the Lorrie Yeager, Jr. Juvenile Center should have been advised that Grievant could come to the facility to conduct his required business. Nonetheless, the misunderstanding was quickly resolved and Grievant was allowed to conduct his business at the facility. Grievant presented no evidence that any "no-contact order" remains in effect against him at the Lorrie Yeager, Jr. Juvenile Center. Accordingly, the undersigned cannot find that Respondent's actions were so extreme as to rise to the level of being bad faith. The same is true for Respondent's delay in providing Grievant with a copy of the Level One conference recording.

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[9] *See*, Grievant's Exhibit 1.

Lastly, Grievant alleges that Respondent has subjected him to a hostile work environment. As evidence of this claim, Grievant points to the “no-contact order” saga and Respondent’s delay in providing him with documents requested for this grievance. Further, Grievant generally alleges that Respondent’s conduct has made him feel “isolated,” “ignored,” and “ostracized.” 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 p.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).

At no time since the filing of this grievance has Grievant returned to work. He has only been present at the facility to make copies, to provide required documentation, and to serve subpoenas for this grievance action. Further, since February 2011, Grievant has conducted much of his required business through the DJS Central Office. The Respondent's delay in providing Grievant the items he requested and the issuance of the "no-contact order," and how the same was eventually resolved, could not and did not create a hostile work environment for Grievant. Grievant has not worked in his work environment since December 2009. Respondent's actions, as identified by Grievant, may have inconvenienced and annoyed Grievant, but they simply do not rise to the level of creating a hostile work environment.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the 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). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. "'In order to make a prima facie case of discrimination under W. VA. CODE § 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. VA. CODE § 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.' Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W. Va. 700, 403 S.E.2d 717 (1991)." *Addair v. Dep't of Health and Human Resources/Welch Community Hosp.*, Docket No. 03-HHR-147 (Feb. 2, 2004).

3. "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." W. VA. CODE § 23-5A-1

4. "Discrimination" is defined by WEST VIRGINIA CODE § 23-5A-3, which states, in part, as follows: "(a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work

due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. . . ."

5. An employee is not "eligible to receive temporary total disability benefits" during the appeals period after the TTD benefits have been discontinued. *See, Little v. Dep't of Environmental Protection,* Docket No. 05-DEP-248 (May 2, 2006); *Addair v. Dep't of Health and Human Res.,* Docket No. 03-HHR-147 (Feb. 2, 2004); *Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 486 S.E.2d 768 (1997).

6. "Any employer who has provided any type of medical insurance for an employee or his dependents by paying premiums, in whole or in part, on an individual or group policy shall not cancel, decrease his participation on behalf of the employee or his dependents, or cause coverage provided to be decreased during the entire period for which that employee during the continuance of the employer-employee relationship is claiming or is receiving benefits under this chapter for a temporary disability. If the medical insurance policy requires a contribution by the employee, that employee must continue to make the contribution required, to the extent the insurance contract does not provide for a waiver of the premium. . . ." W. VA. CODE § 23-5A-2.

7. "A workers' compensation claimant who is protesting the closure of her claim for temporary total disability benefits and/or the denial of additional temporary total disability benefits does not come within the meaning of the terms "is claiming" found in WEST VIRGINIA CODE § 23-5A-2 (1994). Accordingly, an employer who ceases to pay the health insurance premiums for a claimant who is protesting or appealing the closure or

denial of temporary total disability benefits does not commit an act of discrimination within the legislative intent of West Virginia Code § 23-5A-2." *Syllabus Point 6, Rollins v. Mason Co. Bd. of Educ.,* 200 W. Va. 386, 489 S.E.2d 768 (1997). *See also, Syl. Pt. 2, Wriston v. Raleigh County Emergency Servs. Auth.*, 205 W. Va. 409, 518 S.E.2d 650 (1999).

8. An employer is only obligated to pay its portion of employee health insurance premiums for a period of one year for employees who are off on medical leaves of absence. *See,* W. VA. CODE § 5-16-24.

9. Grievant has failed to meet his burden of proving by a preponderance of the evidence that Respondent discriminated against him in violation of WEST VIRGINIA CODE §§ 23-5A-1 and 23-5A-2 by ceasing to pay the employer portion of his insurance premiums.

10. Reprisal is "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).

11. To demonstrate a prima facie case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
>
> (2) That he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 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).

12. Grievant has failed to prove by a preponderance of the evidence that Respondent's decision to cease payment of the employer portion of his insurance premiums was an act of reprisal, or in retaliation for his filing workers' compensation claims and/or prior grievance actions.

13. "The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(b)(4)(c)(6).

14. Respondent's actions regarding the so called "no-contact order," and its delay in providing Grievant with requested items do not constitute bad faith as described in WEST VIRGINIA CODE § 6C-2-4(b)(4)(c)(6).

15. "'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).

16. The Grievance Board generally follows 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, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris,* supra); *Rogers v. Reg. Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (April 23, 2009).

17. Grievant has failed to prove by a preponderance of the evidence that he has been subjected to a hostile work environment created by Respondent.

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 (eff. July 7, 2008).

DATE: April 13, 2012.

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Carrie H. LeFevre
Administrative Law Judge