# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JUDY K. HALSTEAD,**
**Grievant,**

**v.** **Docket No. 2013-0865-CONS**

**DIVISION OF MOTOR VEHICLES,**
**Respondent.**

## DISMISSAL ORDER

Grievant , Judy Halstead, is employed by Respondent, Division of Motor Vehicles ("DMV"), in Charleston West Virginia. Ms. Halstead filed two level one grievance forms dated December 6, 2012. On December 18, 2012, the two grievances were consolidated because they deal with the same, or similar, incidents at the same workplace. In the first grievance Ms. Halstead alleged:

> I was two minutes late for work on 12/4/12 and I was called into the office of Todd Armstrong and Phil Kingery. At the time I was informed that I was not allowed to start working until 9:15 AM. So I left the office. We are an EOE office but my time I miss is [taken] when I take it just like everyone else should. But I have noticed that Todd and Phil take off early and come in late and they take longer lunches and do not take away their time from annual or sick. In the employees handbook the work hours are 8 hours with ½ hour for lunch. That should be for everyone, even managers and supervisors. That is not the case here. No one is watching them so they don't take their time.

For relief, Grievant states the following:

> I want to be equal. If you are late take your time, if you leave early take your time. That is why I have very little time, they take it when I use it. I'm a single parent with 3 kids and it is hard for Todd and Phil to understand anything about my life.

In her second grievance, Ms. Halstead alleged:

> I was four minutes late for work on 12/6/12 because of traffic. I came into the office and began to work on the copier which was broke from the day before and I am the only one in the office that seems to be able to fix anything, and Todd Armstrong yells at me from across the room telling me to stop working, if I don't understand what he is saying he will get someone to explain it to me. I don't believe it is right to embarrass me in front of customers and my fellow employees.

For relief in this grievance, Ms. Halstead states:

> I am very upset ready to have a nervous breakdown about this and I can't think of anything but him screaming at me, it's hard to walk into this office, relief of all this stress I am under.

A level one hearing was conducted on March 28, 2013. After the opening of the hearing, the parties entered into discussion about the nature of the grievance, and the remedies that Grievant was seeking. Prior to that time, Grievant had agreed to be transferred to the Titles and Registration unit while the grievances were pending. Mike Maggard, DMV Director, Titles and Registration, said that he would discuss the issues with the DMV Commissioner and develop a resolution prior to April 15, 2013. On April 12, 2013, Director Maggard informed Grievant that DMV would audit the leave time of the employees in the International Registration Plan ("IRP") unit where Grievant was employed, including Grievant's. Any disparities found would be adjusted. He also informed Grievant that she would remain transferred to the Titles and Registration unit so that she would no longer be under the management of Phil Kingery or Todd Armstrong. Grievant's salary was not reduced as a result of the transfer. Grievant was not satisfied with this resolution. An order was entered on April 18, 2013, stating that

"The Division of Motor Vehicles had provided the solution to both grievances. Accordingly, this grievance is dismissed."

Grievant attempted to appeal directly to level three by filing forms dated May 2, 2013. The grievances were transferred to level two for mediation by Order dated May 6, 2013. A mediation session was held on June 10, 2013. Grievant filed an appeal to level three dated June 19, 2013. By that time Grievant had been permanently transferred to the Titles and Registration unit, and demoted. These actions were not related to the grievances, but were separate instances. In her level three appeal Grievant sought to amend her grievances to include a claim that she had been worked out of classification for the prior six months. Grievant also attempted to amend her relief to include reinstatement of all sick and annual leave used during the prior six months, reinstatement to the IRP unit and a pay raise or lump sum payment for pain and suffering.[1]

A level three hearing was conducted on November 7, 2013, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant Halstead appeared *pro se*, and Respondent was represented by Gretchen A. Murphy, Assistant Attorney General. At the hearing, Respondent moved to dismiss the consolidated grievances because the relief sought by Grievant had already been granted, and Respondent had dismissed Grievant rendering this matter moot. The motion to dismiss relating to Grievant's subsequent termination of employment was denied because the period for which Grievant could contest that action had not run. The remaining motion

[1] Damages such as mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ*., Docket No. 97-20-007 (June 30, 1997).

was held in abeyance pending a hearing on the evidence. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, both of which were received on December 9, 2013. This matter became mature for decision on that date.

## Synopsis

The two grievances center on events which occurred on or before December 4 and 6, 2012. Grievant claims that sick and annual leave were not being fairly assessed by her supervisors and that her supervisors were singling her out for abuse. As a result of these grievances, Respondent conducted an audit of the sick and annual leave for all employees in the IRP unit and restored any leave which had been improperly taken from them, including Grievant. Additionally, Grievant and the upper management of DMV agreed to move Grievant out of the IRP unit during the pendency of these grievance proceedings and any investigations so she would not be under the supervision of Mr. Armstrong and Mr. Kingery. There was no other relief available to Grievant pursuant to these grievances. Accordingly, the consolidated grievances are DISMISSED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## Findings of Fact

1. Grievant, Judy Halstead, is employed by Respondent, Division of Motor Vehicles ("DMV") in Charleston West Virginia. At all times relevant to the grievances, Grievant was assigned to the DMV's International Registration Plan ("IRP").

2. Grievant was classified as a Customer Service Representative Lead ("CSR Lead") and had some supervisory authority over other employees in the IRP unit. Shortly after filing the grievances, Grievant agreed to be temporarily transferred to the Title and Registration unit at no loss of pay to perform data entry.

3. There were two employees who were the upper management of the IRP unit and Grievant's direct supervisors, Phil Kingery and Todd Armstrong.

4. Grievant's normal shift begins at 9:00 AM. On December 4, 2012, Grievant was a few minutes late for work.[2] Immediately upon arriving at work, she was called into the office of Mr. Kingery. Todd Armstrong was also present. Supervisors Kingery and Armstrong criticized Grievant for being late and told her that she had to take time in at least fifteen minute intervals and could not begin working until 9:15 AM. Thus, if she were five minutes late she had to take no less than fifteen minutes of leave to cover that time.

5. No one produced a policy, rule, regulation, or procedure that required Grievant to take leave in fifteen minute intervals when she was late for work.

6. On December 6, 2012, Grievant was approximately four minutes late for work.[3] Grievant immediately began working on the copier upon reporting to work because it was not functioning properly. Upon seeing Grievant, Todd Armstrong yelled at her from across the room that she should stop working until 9:15 AM, and if Grievant did not understand what he is saying he would get someone to explain it to her.[4]

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[2] The testimony was not specific, but in her statement of grievance, Grievant stated that she was two minutes late. This assertion was undisputed at the hearing.

[3] This specific amount of time was set out in the statement of grievance and was not disputed at the level three hearing.

[4] This incident was set out in Grievant's statement of grievance, and repeated in her level three testimony. It was not disputed at level three.

7. Mr. Kingery and Mr. Armstrong would occasionally take more than thirty minutes at lunch, come in after starting time and leave before quitting time without taking leave for the time away from work.[5]

8. A form entitled "Division of Motor Vehicles Leave Record for the Month of December 2012" was developed for the IRP unit in the normal course of business. The form listed ten employees for the IRP unit in a vertical column. Horizontally, by each name, is a slot for each work day for the month and the employee's hours of work. Grievant is the only employee on the form noted as being late. The form notes that she was late five times, and charged no less than a quarter of an hour each time.[6] Grievant's Exhibit 1.

9. On December 6, 2012, Grievant completed her two level one grievance forms and met with Michael Maggard, DMV Director of Vehicle Services and Zoe Bender, Assistant Director. During the meeting, Grievant informed the directors that she believed Phil Kingery and Todd Armstrong were not properly reporting their time when they were late, left early, or took a long lunch.

10. On January 13, 2013, Grievant and Director Maggard agreed to temporarily transfer Grievant to a data processing position in the Titles and Registration unit while the grievance was being processed. Both of these units are under the umbrella of Vehicle Services. At the level one hearing, Director Maggard agreed to conduct an investigation to ensure that leave time was being kept properly and to address other issues raised by Grievant.

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[5] Grievant's undisputed level three testimony. No specifics were given regarding when, or how often these actions occurred. Nor were any specifics given as to how long the supervisors were late reporting to work.

[6] Grievant testified that she was not the only employee who was late during December 2012, but she was the only person reported and charged leave for being late.

11. The investigation into the leave time records found irregularities. Where employees were shorted time, their leave was adjusted. Grievant had some leave restored as a result of the investigation.[7]

12. The investigation also revealed that management had created difficult working conditions with what could be considered abusive behavior. Managers Kingery and Armstrong, as well as Grievant, were disciplined as a result of the investigation.[8] Grievant was demoted and permanently assigned to data entry for the Titles and Registration unit. Grievant Halstead did not file a grievance to contest this disciplinary action.

## Discussion

Grievant attempted to amend her grievance and relief sought in her level three appeal. She changed her allegations to include a claim that she had been worked out of classification for the prior six months. That was the time that Grievant was demoted and permanently transferred to the Titles and Registration unit after a separate investigation. Grievant also attempted to amend her relief to include reinstatement of all sick and annual leave used during the same six months, reinstatement to the IRP unit and a pay raise or lump sum payment for pain and suffering. These issues and remedies all relate to the disciplinary action taken against Grievant months after the filing of her grievances in December 2012. Grievant did not contest that disciplinary action. These matters are not relevant to the present consolidated grievances,

[7] No evidence was provided revealing the specifics of the irregularities discovered, and how much leave was restored. Grievant testified that she did not believe she had been fully reimbursed, but provided no specifics as to how much leave she felt she had lost.

[8] Level three testimony of Jill Dunn, DMV General Counsel. No details were given regarding the discipline of Mr. Kingery or Mr. Armstrong beyond the fact that the topic of yelling at employees was discussed with Mr. Armstrong. It was revealed that Mr. Kingery retired and Mr. Armstrong has resigned from employment with the DMV.

accordingly, the attempt to amend the grievance to include them is denied. The consolidated grievances will be decided based upon the specific claims made at levels one and two.

As these consolidated grievances do not involve a disciplinary matter, Grievant bears the burden of proving the grievances 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).

In her consolidated grievances, Grievant complained that her leave time was not being calculated properly, and that her supervisors were treating her unfairly, including yelling at her in front of coworkers and customers. As relief, Grievant wanted to be treated fairly with regard to her leave time and relieved from the stress of her managers yelling at her.

Prior to the level one hearing, Director Maggard agreed to move Grievant out of the IRP unit, without loss of pay, while the grievance was processed. This action immediately removed Grievant from the major source of stress she had cited. She was no longer subjected to supervision from Mr. Kingery or Mr. Armstrong. While this was not an ideal solution, it certainly was a good faith stop-gap measure to which Grievant agreed. During the processing of level one, Director Maggard agreed to conduct an investigation into the leave practices of the unit over the past year. He also initiated an

investigation into Grievant's allegations of bullying by her managers. These were reasonable efforts to address the issues raised by Grievant.

Prior to the level three hearing, Respondent concluded the investigation into the leave practices of the IRP unit. Respondent found that there were irregularities in the calculation of leave, and adjusted the leave of all employees in the unit including Grievant. Since Grievant provided no specifics related to how much leave she believed she had lost, Respondent's efforts were a reasonable approach to ensuring that Grievant was treated fairly with regard to accumulation of leave. Additionally, as a result of the investigation into the allegation that her managers were yelling at her and treating her unfairly, Respondent investigated those activities, and both managers left employment with the DMV prior to the level three hearing. Accordingly, all of the relief sought by Grievant in her consolidated grievances has been granted.

The West Virginia Public Employees Grievance Board Procedural Rules provide that "a grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated were a remedy wholly unavailable to the grievant is requested. 153 C.S.R. 1 § 6.11. Since the remedies sought by Grievant, and that were available to her, have been granted, there is no longer a claim upon which relief can be granted in this matter. In situations where it is not possible for any actual relief to be granted, any ruling issued by an administrative law judge regarding the question raised in a grievance would merely be an advisory opinion. This Grievance Board does not issue advisory opinions. 153 C.S.R. 1 § 6.21; *Milam v. Div. of Rehab. Ser.,* Docket No. 2012-0890-DEA (Jan. 11, 2012) (citations omitted). Grievances in which a decision would avail nothing in the determination of controverted rights of

persons or property are moot. The Grievance Board does not decide moot issues. *Milam supra. (Citing Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)." *Pritt, et al., v. Dep't of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008)). Because there is no remedy available related to the consolidated grievances, they are moot and are DISMISSED.[9]

**Conclusions of Law**

1. As these consolidated grievances do not involve a disciplinary matter, Grievant bears the burden of proving the grievances 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. The West Virginia Public Employees Grievance Board Procedural Rules provide that "a grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated were a remedy holy unavailable to the grievant is requested. 153 C.S.R. 1 § 6.11.

[9] The undersigned is sympathetic to the financial and personal issues that have befallen Grievant as a result of the disciplinary actions that were taken by Respondent. However, those actions were taken months after the filing of these grievances, and are unrelated to the issues set out therein. If those disciplinary actions were to be contested, that would have to be done in a separate grievance. To date, it appears that Grievant has not done so.

3. In situations where it is not possible for any actual relief to be granted, any ruling issued by an administrative law judge regarding the question raised in a grievance would merely be an advisory opinion. This Grievance Board does not issue advisory opinions. 153 C.S.R. 1 § 6.21; *Milam v. Div. of Rehab. Ser.,* Docket No. 2012-0890-DEA (Jan. 11, 2012).

4. Grievances in which a decision would avail nothing in the determination of controverted rights of persons or property are moot. The Grievance Board does not decide moot issues. *Milam, supra.*

5. In as much as there is no remedy available to Grievant related to the consolidated grievances, they are moot.

Accordingly, the Grievance is DISMISSED.

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: DECEMBER 17, 2013**

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**