THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVEN PATRICK FULLERTON,
Grievant,

v. **Docket No. 2024-0091-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant, Steven Patrick Fullerton, was employed by Respondent, Department of Health and Human Resources within the Bureau for Child Support Enforcement as a Child Support Specialist II. On August 17, 2023, Grievant filed this grievance against Respondent stating:

> Regarding the Notification of Termination, I have paper copies of doctor excuses and voicemails that show several write ups and verbal warnings should have never been applied to my official work file. I also work in a slanderous and hostile environment. Defamation of my character was also brought out in public talks.

For relief, Grievant seeks "to be reinstated to normal Full Time Permanent Employment duties. Several instances of being disciplined improper and wrongfully found in violation of the Attendance Improvement Plan."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on December 11, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and *pro se*[1]. Respondent appeared by Linda Compton, Child

[1] "Pro se" is defined by Black's Law Dictionary, 5th edition as "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court."

Protective Services Supervisor, and was represented by counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for decision on January 18, 2024, upon final receipt of Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant failed to submit any Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Child Support Specialist II. Grievant was terminated for repeatedly failing to adhere to the requirements of his Attendance Improvement Plan. Respondent proved charges sufficient to establish good cause to terminate Grievant's employment due to Grievant's repeated unsubstantiated absences from work and failure to adhere to the requirements of his Attendance Improvement Plan. Grievant failed to establish that the termination of his employment was improper due to harassment or as a result of working in a hostile work environment. Accordingly, the 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 was employed by Respondent as a Child Support Specialist II.

2. Grievant has several health issues which cause him to miss work at times.

3. Grievant would often claim he was ill, at a doctor's appointment, or in the hospital but he repeatedly failed to substantiate his claims with doctor's excuses for the dates and times he was absent from work.

4. Due to continued absences, Grievant was coached and counseled to correct his attendance issues.

5. On May 5, 2022, Grievant was assigned his first Attendance Improvement Plan. One of the requirements in Grievant's Attendance Improvement Plan is that Grievant's workday began at 8:30 A.M. and if Grievant needed to call off then he was required to call in to his supervisor within 15 minutes of his start day. Grievant is also required to provide a doctor's excuse for each instance of calling off due to sickness or family illness immediately upon his return to work or would be counted as unauthorized leave.

6. On October 5, 2022, due to Grievant's failure to meet the requirements outlined in his Attendance Improvement Plan, Grievant's Attendance Improvement Plan was extended.

7. On October 17, 2022, Grievant received a written reprimand for unacceptable attendance.

8. On November 21, 2022, Grievant received another written reprimand for unacceptable attendance.

9. On February 14, 2023, Grievant received another written reprimand for unacceptable attendance.

10. Grievant was suspended for three days from April 4, 2023, to April 6, 2023, due to continued repeated absences without substantiated doctor's excuses.

11. On April 5, 2023, Grievant's Attendance Improvement Plan was extended again due to his failure to meet the requirements outlined in his plan.

12. Grievant was suspended for five days from May 11, 2023, to May 17, 2023, due to continued unacceptable absences without substantiated doctor's excuses.

13. Grievant was suspended for ten days from July 6, 2023, to July 19, 2023, due to continued unacceptable absences without substantiated doctor's excuses, and his Attendance Improvement Plan was continued.

14. Grievant did not grieve any of the above disciplinary actions.

15. On June 21, 2023, Grievant failed to call in to his supervisor within 15 minutes of his start time to indicate he would be absent that day. Grievant later provided a doctor's excuse but the excuse only stated that he was seen in the office that day and not that he was excused from work for the entire day.

16. On June 30, 2023, Grievant was absent all day but did not call in to his supervisor until 8:58 a.m. Grievant produced only a doctor's excuse for a previous absence, but that excuse specifically stated he could return to work on June 30, 2023.

17. On July 24, 2023, Grievant was absent the entire workday. Grievant produced a doctor's excuse that only was for the time of his appointment and did not cover the entire workday.

18. On July 25, 2023, Grievant called in saying he would be absent for the day due to a doctor's appointment at 9:00 a.m. The excuse Grievant provided did not support him being absent for the entire day.

19. On July 26, 2023, Grievant did not report to work and did not call in to his supervisor until 2:22 p.m. When Grievant did call in to his supervisor, Grievant indicated that he had been admitted to CAMC Memorial Hospital and would be off work on July 26 and 27, 2023. However, CAMC Memorial's records[2] indicated that Grievant was not

[2] The record is unclear how Respondent became aware of CAMC Memorial's records which showed Grievant was not there on July 26, 2023.

admitted there and had not been there since July 20, 2023. Grievant did not provide a doctor's excuse for July 26th and 27th.

20. On July 28, 2023, Grievant was absent from work for the entire day. Grievant provided an excuse that indicated he was seen in the emergency department at 6:02 a.m. The excuse did not support Grievant being absent for the entire day.

21. On July 31, 2023, Grievant reported off to his supervisor stating he had a doctor's appointment and was going to be absent the entire day. Grievant failed to provide a doctor's excuse supporting being absent on July 31, 2023, for the full day. Grievant did not return to the office until August 9, 2023.

22. On August 2, 2023, Grievant reported to his supervisor that he had a doctor's appointment. Grievant was absent the entire day. Upon Grievant's return to the office on Augst 9, 2023, Grievant failed to provide a doctor's excuse for his absence on August 2, 2023.

23. On August 3, 2023, Grievant was scheduled to start work at 9:00 a.m. Grievant failed to report to work at 9:00 a.m. and did not call in to his supervisor until 2:54 p.m. When Grievant did call in to his supervisor, Grievant informed his supervisor that he was at the hospital but was unsure whether he was going to be admitted. Upon his return to the office on August 9, 2023, Grievant failed to provide a doctor's excuse for his absence on August 3, 2024.

24. On August 4, 2023, Grievant reported to his supervisor that he was going to be off work due to being admitted to CAMC Memorial Hospital the day before on August 3, 2023. Upon his return to the office on August 9, 2023, Grievant failed to provide a

doctor's excuse for his absence on August 4, 2023. Also, CAMC Memorial's records[3] indicated that Grievant was last seen there on August 1, 2023.

25. On August 7, 2023, Grievant reported off to his supervisor saying he was seeing an infectious disease doctor at CAMC hospital. Upon his return to the office on August 9, 2023, Grievant provided a doctor's excuse from his primary physician at Cabin Creek Health that stated he had an appointment at 11:45 a.m. and could return to work on August 7, 2023. Grievant failed to return to work on August 7, 2023.

26. Pursuant to Grievant's Attendance Improvement Plan, any day where Grievant failed to provide a doctor's excuse for his time absent from work would be counted as unauthorized leave.

27. Cheryl Hudson is employed at the Bureau of Child Support and has been Grievant's supervisor since November 2022.

28. On or around August 9, 2023, Ms. Hudson instructed Grievant to attend a predetermination conference on August 11, 2023. Grievant informed Ms. Hudson that he was not going to attend his predetermination conference.

29. On August 11, 2023, Respondent terminated Grievant by letter based on Grievant's extensive history of attendance issues and not following his Attendance Improvement Plan. The effective date for his termination was August 27, 2023.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA.

[3] The record is unclear how Respondent became aware of CAMC Memorial's records of Grievant's admittance. The Grievant did not dispute Respondent's accusations of him not being admitted to CAMC, nor did Grievant complain about any privacy violations from Respondent contacting CAMC. As such, the record is void of any privacy discussions.

CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts it was justified in dismissing Grievant for his repetitive violations of his Attendance Improvement Plan and Grievant's failure to appropriately substantiate his claims for leave in violation of Division of Personnel Administrative Rule W. Va. CSR § 143-1-14.5. Grievant denies all violations of his Attendance Improvement Plan and contends he has witnesses, doctor's excuses, and voicemails which would prove his compliance with the Attendance Improvement Plan. Grievant also claims he suffered harassment and worked in a hostile work environment due to defamation of his character.

Most of the relevant facts of the grievance are in dispute. Grievant asserts that the alleged violations of his Attendance Improvement Plan are not credible because he has witnesses, doctor's excuses, and voicemails from his doctor's offices showing he had valid medical excuses for his absences. Respondent claims Grievant failed to provide valid doctor's excuses on several occasions to substantiate his claims for being absent. Respondent also claims not every doctor's excuse matched the dates and times Grievant was absent from work. Respondent also claims Grievant was informed his attendance at his predetermination conference on August 11, 2023, was mandatory. Because the material facts are in dispute credibility determinations must be made.

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. Dep't of Health & 10 Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009- 0540-DOC (Nov. 13, 2009); See also Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) Demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) The presence or absence of bias, interest, or motive; 2) 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. *Id., Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant's demeanor was extremely poor and not appropriate at the hearing. Grievant appeared angry and agitated throughout the hearing. When Respondent's witnesses would testify, Grievant would often rudely interrupt them and mutter under his breath, "Perjury is a crime." (*See Grievant's level three testimony*). Grievant's attitude throughout the hearing was extremely standoffish and he repeatedly commented he was filing a human rights lawsuit which would trump his grievance.

Grievant is motivated to be deceptive at the hearing due to losing his income and medical benefits after his termination. Grievant was inconsistent with his statements. Grievant repeatedly declared he had several witnesses and voicemails to prove his case.

However, Grievant failed to call any witnesses. Grievant instead attempted to shift the blame for his lack of witnesses by claiming that the Grievance Board refused to allow him to call witnesses. Grievant could not offer any explanation for his allegation the Grievance Board stopped him from calling witnesses. Grievant also claimed he had several voicemails to support his case. However, Grievant only played a single voicemail after he was questioned whether he had any voicemails saved on his phone. The single voicemail was only a generic voicemail confirming the date and time of a single doctor's appointment. Grievant repeatedly claimed he did not need to introduce evidence because he was bringing several human rights lawsuits against Respondent. Grievant claimed he was not given reasonable accommodations for his medical conditions. When questioned whether he requested accommodations to be made, Grievant admitted that he did not ask about any type of accommodations but should have been given them anyways. Based off Grievant's poor demeanor and his complete lack of supporting evidence for his claims, Grievant is not credible.

Respondent called Grievant's supervisor, Cheryl Hudson, to testify regarding Grievant's failure to adhere to his Attendance Improvement Plan. Ms. Hudson's demeanor was appropriate. She was professional, polite and spoke thoroughly. She demonstrated an appropriate level of memory for events that occurred months prior to her testimony and supplied an appropriate level of detail in her testimony. Ms. Hudson was unbiased in her testimony. Ms. Hudson was consistent in her testimony regarding Grievant's need for an Attendance Improvement Plan and his consistent lack of following the plan. Nothing in Ms. Hudson's testimony gave any indication of untruthfulness.

Ms. Hudson was credible. Ms. Hudson credibly discussed Grievant's repetitive failure to adhere to his Attendance Improvement Plan. Ms. Hudson credibly discussed how Grievant's excuses were not valid and did not match the dates and times when he was absent from work. Ms. Hudson credibly discussed how Grievant's continued repetitive absences reached a concerning level after several suspensions had already been implemented that a predetermination conference was needed. Based on the credibility of Ms. Hudson, it is more plausible that Grievant failed to follow the requirements of his Attendance Improvement Plan due to lacking valid doctor's excuses on multiple occasions to substantiate his claims of having valid excuses.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2. a (2022). Respondent proved charges sufficient to establish good cause to terminate Grievant's employment. Respondent established Grievant had a pattern of being absent that reached the level of needing to request appropriate substantiation of his absences through a written Attendance Improvement Plan.

Division of Personnel Administrative Rule 14.5 provides in part that:

> When an employee appears to have a pattern or incident of leave use that is inconsistent with the reasons provided in subdivision 14.4.f of this rule, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of an illness of less than three (3) consecutive scheduled work days or scheduled shifts.

> Misuse of leave may include, but is not limited to, frequent use of sick leave rendering the employee's services undependable, requesting sick leave for days when annual leave was previously denied, and requesting unplanned leave in connection with scheduled days off. The appointing authority shall give the employee prior written notice of the requirement for appropriate substantiation.

W. Va. CSR § 143-1-14.5 (2023).

The record revealed that Grievants failed to follow the requirements of his Attendance Improvement Plan. The record revealed Grievant repeatedly failed to timely contact his supervisor when he was going to be absent. Grievant also repeatedly failed to appropriately substantiate his claims for leave by failing to provide doctor's excuses for the dates and times he was absent. The record revealed that on two occasions, Grievant informed his supervisor that he was admitted to the hospital when the hospital records showed Grievant was not actually admitted. Grievant repeatedly claimed he had witnesses, voicemails, and doctor's excuses but Grievant failed to substantiate those claims and could only produce a single voicemail for one doctor's appointment. Grievant's repeatedly being absent from work and not properly notifying his supervisor, absolutely rendered his services as undependable. Grievant's inability to follow the requirements of this Attendance Improvement Plan and his blatant refusal to attend his predetermination conference demonstrates good cause for Grievant's termination.

Respondent proved that dismissal of Grievant was reasonable and not arbitrary and capricious. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is

considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Syllabus Point 3, In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" *Syl. Pt. 1, Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant's past actions of being absent and not calling in to his supervisor required the need for an Attendance Improvement Plan. Grievant's repetitive failure to adhere to the requirements of the plan established Respondent acted reasonably in dismissing

Grievant. As such, Respondent proved by a preponderance of the evidence that Grievant's actions justified his dismissal.

Nothing in the record demonstrated Grievant's allegations of harassment or working in a hostile work environment that resulted in defamation of his character. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.,* Docket No. 97-52-183 (Sept. 30, 1997). Grievant failed to establish any facts to support his allegation of harassment. The only repeated or continual disturbance was Grievant's own behavior of frequently being absent from work, not properly notifying his supervisor, and failure to substantiate his need for leave.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). 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, 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) (citing *Harris*, 510 U.S. at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "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. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999). Grievant failed to establish any facts to support his allegations of working in a hostile work environment and failed to show any evidence of defamation of character. Accordingly, the grievance should be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-

486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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. Dep't of Health & 10 Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009- 0540-DOC (Nov. 13, 2009); See also Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) Demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) The presence or absence of bias, interest, or motive; 2) 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. *Id., Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2022).

4. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Syllabus Point 3, In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" *Syl. Pt. 1, Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

6. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. Va. Code § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.,* Docket No. 97-52-183 (Sept. 30, 1997).

7. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010).

8. 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, 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) (citing *Harris*, 510 U.S. at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23.

9. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See*

Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "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. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

10. Respondent proved charges sufficient to establish good cause to terminate Grievant's employment due to his failure to follow the requirements of his Attendance Improvement Plan. Grievant failed to prove that the termination of his employment was improper due to harassment and working in a hostile work environment.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[4] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal

[4] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: March 1, 2024.

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Wes H. White Esq.
Administrative Law Judge