THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

STACY A. JOHNSON,
Grievant,

v. **DOCKET NO. 2017-2504-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Three grievances were filed by Grievant, Stacy A. Johnson, against her employer, the Division of Highways, which were consolidated at level three. The first grievance was filed on June 21, 2016, and alleges that her supervisor bullied her and created a hostile work environment. As relief, Grievant seeks to have her supervisor removed from supervising her, and that she be placed "in a suitable professional position without same hostile issue, without repercussions."

A hearing was held at level one on May 22, 2017,[1] and the grievance was denied at that level on June 9, 2017. Grievant appealed to level two on June 19, 2017, where a mediation session was held on July 31, 2017, and Grievant appealed to level three on

[1] Respondent is required to provide the level one record to the Grievance Board when a grievance is appealed to level three. Respondent did not do so in this case. When the undersigned inquired about the level one transcript at the beginning of the level three hearing, Respondent's counsel had not seen the level one transcript, but Grievant had a copy which was made available to the undersigned and was copied for the record. This transcript, however, did not include the exhibits referred to in the transcript. The parties were advised on two occasions after the level three hearing that the exhibits needed to be provided to the Grievance Board if the undersigned were to consider them in rendering a decision. Neither party has responded to these inquiries. Any exhibits introduced at level one will not be considered.

August 14, 2017. Grievant then filed two additional grievances on November 14, 2017. The parties agreed to waive levels one and two of the grievance procedure, and the grievances were consolidated with the first grievance. One of these grievances alleges a violation of the Whistle-Blower Law, and contests the failure to provide Grievant a merit raise, and complains that her work schedule was changed. As relief Grievant seeks imposition of the penalties set forth in the Division of Personnel Interpretive Bulletin on the Whistle-Blower Law, of a civil fine and discipline. The statement of grievance in the other grievance reads: "[r]etaliation for filing previous grievance. D.E. Lee Thorne and Adm. Service Manager Leslie Staggers called me to a status review meeting where they discussed my mistakes and changed my work schedule." As relief Grievant seeks "[c]ontinue working four - 10 hour days - Monday through Thursday. Stop the status review meetings."

A level three hearing was held before the undersigned Administrative Law Judge on November 27, 2017, at the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Keith Cox, Esquire, Division of Highways Legal Division. This matter became mature for decision at the conclusion of the level three hearing on November 27, 2017, as both parties declined to submit written argument.

Synopsis

Grievant alleged that her supervisor has engaged in harassment and bullying, and created a hostile work environment. Grievant demonstrated that her supervisor has raised her voice to Grievant in an inappropriate manner, and made comments to Grievant which should not have been made in the presence of other employees. However, not every action documented by Grievant was inappropriate behavior for someone who is Grievant's supervisor, and Grievant's rendition of events points, in many instances, to unreasonable

expectations by Grievant, and a lack of facts. Respondent has taken steps to try to improve the situation, but is limited in what it can do. Respondent is directed, however, to take further steps to assure that Grievant's supervisor is made aware that she is not to raise her voice to Grievant, that she is not to make comments regarding her work or attire to Grievant in the presence of other employees, and that she needs to reevaluate how she manages her employees. As to Grievant's Whistle-blower claims, Grievant did not meet her burden of proof, nor did she demonstrate that she was entitled to a merit increase, that her work schedule was improperly changed, or that her supervisors cannot require her to attend status meetings.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") in District 5, as a Personnel Specialist in the District's Human Resources office.

2. Leslie Staggers is Grievant's supervisor.

3. Sometime in the spring of 2017, Ms. Staggers raised her voice when speaking to Grievant about a mistake that she believed Grievant had made. This occurred in the hallway, and was overheard by another employee, Lisa Kisamore. The mistake was actually caused by Ms. Kisamore advising a summer employee to fax a form which had certain information marked in red ink, which did not show up on the faxed copy. Ms. Staggers did not address this issue with Ms. Kisamore. Ms. Kisamore viewed this error as a simple mistake, which was not significant enough to justify Ms. Staggers' volume or tone toward Grievant.

4. Ms. Staggers asked Grievant and Ms. Kisamore if either of them could supervise a summer worker who had attendance issues, and who Grievant believed was a drug user. Grievant told Ms. Staggers she would not do so, and Ms. Staggers did not pursue the issue.

5. On March 29, 2017, Ms. Staggers reviewed a GL5 which Grievant had prepared, marked it up in red ink, and told Grievant her calculations on this form were incorrect. Grievant pointed out to Ms. Staggers that it was Ms. Staggers' calculations which were incorrect. Grievant had to retype the form because Ms. Staggers had marked on it with a red pen.

6. On "the 22nd" (month not identified), Grievant went into Ms. Staggers' office. Ms. Staggers had what Grievant described as "all my errors laid out in front of her." Ms. Staggers asked Grievant, "what is your problem? You keep making mistakes." Grievant responded that she had been given a lot of work to do, and that she had been rushing to try to keep caught up.

7. On "the 20th" (month not identified), Ms. Staggers dropped a document onto Grievant's desk, pointed to it, and told Grievant she had made a mistake.

8. On "the 16th" (month not identified), Ms. Staggers told Grievant she needed to respond professionally to all emails.

9. Grievant attended training on the Family Medical Leave Act ("FMLA") "on the 8th" (month not identified). Grievant believed from this training that Ms. Staggers should be "taking care of this," rather than Grievant. When Grievant pointed this out to Ms. Staggers, Ms. Staggers responded that she was not going to take her to any more training.

10. On "the 9th" (month not identified), Ms. Staggers completed Grievant's evaluation, and Grievant believed she was being accused of making mistakes intentionally. Grievant told Ms. Staggers she was struggling to get all her work done in a timely manner.

11. In August 2016, Ms. Staggers and Lee Thorne, District Engineer for District 5, were not speaking and were using Grievant as a go-between. Ms. Staggers became upset about something and raised her voice to Grievant telling Grievant that she was the problem. Grievant told Mr. Thorne and Ms. Staggers that she should not have been put in the middle.

12. On August 10, 2016, Ms. Staggers called Grievant on Grievant's cell phone and raised her voice to Grievant because she had learned that a summer student's employment had been terminated, and Grievant had not told her this had happened. Grievant did not believe that Ms. Staggers wanted to be involved in summer student issues.

13. On May 2, 2016, Grievant requested annual leave for the week of July 4, 2016, by submitting a leave slip to Ms. Staggers. Ms. Staggers had told Grievant in 2014 when she did her evaluation that she would never be allowed to take off the week of July 4th again. Ms. Staggers did not approve Grievant's leave for several weeks, so while waiting for approval, Grievant went to Mr. Thorne and explained the situation, and told him her family was going to be home, and she was taking that week off. The record is unclear regarding whether Ms. Staggers eventually approved this leave, and whether Grievant took this week off work.

14. On June 3, 2015, Ms. Staggers asked Grievant to change her schedule one week so that she would be available on Friday when a change in payroll was scheduled

to occur. Grievant was unhappy with this request because she had not been allowed to make up time when she was late for work because of bad weather on December 9, 2014. She believed other unidentified employees had been allowed to work different hours to make up their time when they were late.

15. On May 29, 2015, Ms. Staggers raised her voice when speaking to Grievant because Grievant had not informed her that Mr. Thorne had taken some paperwork.

16. On April 27, 2015, Ms. Staggers accused Grievant of jumping the chain of command, and when Grievant asked that Mr. Thorne become involved, Ms. Staggers raised her voice to Grievant. Ms. Staggers had scheduled Grievant for training in Charleston that Grievant did not want to attend. Grievant had gone to Mr. Thorne and told him she did not want to go to Charleston that week because of some family obligations, and told him, "I'm never allowed to make a decision for myself."

17. At some unidentified time, Grievant, Mr. Thorne and Ms. Staggers met to discuss issues between Grievant and Ms. Staggers. Grievant felt that Ms. Staggers took control of the meeting and yelled at her and accused her of violating the chain of command. While Mr. Thorne apologized to Grievant later for the direction the meeting took, he did not believe that Ms. Staggers had taken control of the meeting, nor did he find her to be hostile or aggressive during the meeting. Mr. Thorne views Ms. Staggers as being direct, unemotional, and professional.

18. At some unidentified time, Ms. Staggers told Grievant, in the presence of another employee, that she needed to dress in a more professional manner.

19. At some unidentified time, Ms. Staggers called Grievant at home because she had not sent an email about a work matter which she was supposed to send. Grievant

admitted she had forgotten to send the email. Ms. Staggers then called Grievant into her office to further address this issue when she returned to work. Grievant characterized this encounter as "a pretty big blowup," but she did not provide any detail as to what occurred.

20. On January 13, 2015, Ms. Staggers addressed Grievant for not calling in to report off work by 6:30 a.m. Grievant had sent a text message to Ms. Staggers after 6:30 a.m. that she would not be at work or would be late. The record does not reflect whether this text message was to a personal or work phone, or what the DOH policy is for calling off work.

21. Grievant believed that Ms. Staggers put inaccurate information in a letter in 2013 explaining why an applicant was not hired for a position.

22. Ms. Staggers told an employee, Rodney Crowe, to revise a statement he had written to be more precise, because he had not identified the persons he referenced in his statement. Grievant viewed Ms. Staggers' direction to Mr. Crowe to revise his statement as inappropriate, even though Grievant did not have all the facts, and found such inappropriate behavior affected her work environment.

23. Mr. Thorne has never witnessed Ms. Staggers yelling at Grievant, but he does believe that there are issues with the manner in which Ms. Staggers points out mistakes to her subordinates.

24. Mr. Thorne has made efforts to resolve the issues between Grievant and Ms. Staggers, with little to no success. One change that has occurred is that when Grievant makes an error on a document, Ms. Staggers marks the error in red ink and gives the document to Grievant to be corrected without further discussion. Ms. Staggers cannot be completely removed as Grievant's supervisor so long as Grievant is working in the small

Human Resources department in District 5, but Mr. Thorne has been holding monthly status meetings with Grievant and Ms. Staggers to try to address the issues between the two.

25. Prior to 2017, the Governor of the State of West Virginia had for many years not allowed merit increases to reward employees whose performance merited some monetary reward. At some point during 2017, state agencies were advised that the Governor had ended this moratorium, and that merit increases could be awarded to employees where certain conditions were met. On September 14, 2017, Kathleen Dempsey, Director of the DOH Human Resources Division, sent the DOH Guidelines and organizational allocations for DOH merit increases to DOH management. These Guidelines stated that any merit increases "shall be based on 2016 performance evaluations and any other recorded measures of performance that enhance or detract from an employee's overall record." The Guidelines further state that "[e]mployees must not have shown a documented decline in performance (i.e. written reprimand or greater) since the date of their calendar year evaluations." The Guidelines also stated that the merit increases for 2017 would be in two phases, with the first submission date for recommended merit increases being September 29, 2017, effective October 28, 2017, and the second submission date being December 29, 2017, effective February 3, 2018. The total number of merit increases allotted and available to District 5 was 60, 30 in phase one and 30 in phase two. Of the 468 employees in District 5, 199 could be considered for a merit increase if they met the minimum standards.

26. In determining who would be recommended for the limited number of merit increases available in phase one, District 5 management considered factors such as

whether the employee had been disciplined at any time prior to the recommendation, whether the employee had been placed on an improvement plan, and whether the employee had abused his or her leave.

27. Grievant's work performance has declined since her last evaluation. Grievant was not recommended for a merit increase in the first phase of merit increases. If there is some improvement in her work, she will be considered for a merit increase in phase two.

28. Prior to sometime in 2017, Grievant worked four ten-hour days, Monday through Thursday. This meant that if an employee other than Grievant was absent on a Friday, there was no employee in the Human Resources office of District 5 to assist employees or answer questions. In addition, a new employee has been hired to work in the District 5 Human Resources office who will be working closely with Grievant, and who will be working on Fridays. Because of these issues, Mr. Thorne asked that Grievant's work hours be changed to five eight-hour days, Monday through Friday, to make sure the Human Resources office would be covered on Fridays.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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). "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 asserted that her supervisor, Ms. Staggers, has engaged in harassment and bullying, and has created a work environment that has affected Grievant's health and well-being. Respondent acknowledges that Ms. Staggers is very direct, and that her subordinates have issues with the way she points out mistakes, but does not believe that any of Ms. Staggers' actions rise to the level of harassment, bullying, or hostile work environment. Respondent has made efforts to improve the situation between Grievant and Ms. Staggers, but it is limited in what it can do to resolve this situation, as Ms. Staggers cannot be removed from being Grievant's supervisor.

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." 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). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

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 plaintiffs 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), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 09-AA-92 (Dec. 8, 2010). "'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. 31, 2006), *aff'd,* Cir. Ct. of Kanawha County, Civil Action No. 06-AA-65 (Jan. 4, 2007).

Bullying is not defined for purposes of the grievance procedure. Webster's online Dictionary defines the verb bully as, "to frighten, hurt, or threaten; . . . to cause (someone to do something by making threats or insults or by using force." It defines bully as a transitive verb as, "to treat abusively; to affect by means of force or coercion;" and as an intransitive verb as, "to use browbeating language or behavior."

Grievant testified to many interactions with Ms. Staggers over a period of years, which are set forth in the Findings of Fact, and which Grievant found upsetting. While Ms. Staggers' behavior has not in all instances been stellar, it is also clear that Grievant's expectations are not consistent with those of a subordinate employee, that Grievant's view of events is not always accurate, and that she has become involved in situations which do not concern her and drawn conclusions that Ms. Staggers has engaged in improper activities when Grievant did not have all the facts. In this latter situation, Grievant has only herself to blame for being upset when she jumped to conclusions which were not correct.

Ms. Staggers is Grievant's supervisor, and it is she who directs Grievant's activities, not Grievant. Grievant's statement to Mr. Thorne that "I'm never allowed to make a decision for myself," is telling. If it is Grievant's attitude that she should be making the decisions about her work and not Ms. Staggers, then she is certainly doomed to be unhappy in her work, but this does not make Ms. Staggers' directives as a supervisor harassment or bullying. No one enjoys having their mistakes pointed out to them, but it is part of Ms. Staggers' role to make sure Grievant corrects mistakes that Grievant has made, whether Grievant likes it or not.

Grievant indicated, however, that Ms. Staggers had "yelled" at her on several occasions when pointing out errors in her work. Grievant provided no detail about what Ms. Staggers had said to her, but it appears more likely than not that Ms. Staggers has indeed raised her voice toward Grievant when pointing out mistakes. While Ms. Staggers may become frustrated with her subordinates' mistakes, she should not be raising her voice toward them, particularly in the presence of other employees. Such behavior is inappropriate, and may rise to the level of bullying. It is possible that Ms. Staggers has created unreasonable work expectations, as Grievant indicated that she believed the source of the increased volume of mistakes she was making was attributable both to having to take on more work than she could handle, and Ms. Staggers' behavior toward her. However, Grievant did not provide factual information regarding her volume of work, but merely stated her opinion on the matter. The undersigned cannot draw any evidentiary conclusion from this testimony. Further, Mr. Thorne indicated that a new employee has been recently hired, and that this may alleviate some of Grievant's workload. Respondent has tried to resolve the conflicts between Grievant and Ms. Staggers, but is limited in what it can do, as is the undersigned. Respondent is directed, however, to take further steps to assure that Grievant's supervisor is made aware that she is not to raise her voice to Grievant, that she is not to make inappropriate comments to Grievant in the presence of other employees, and that she needs to reevaluate how she manages her employees.

One of the grievances alleges a violation of the Whistle-Blower law. A "whistle-blower means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent

of the employer or to an appropriate authority." W. VA. CODE § 6C-1-2(g). Information helpful in clarifying this definition is:

> "Wrongdoing" means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.

W. VA. CODE § 6C-1-2(h).

> "Good faith report" means a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

W. VA. CODE § 6C-1-2(d).

> "Appropriate authority" means a federal, state, county or municipal government body, agency, or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

W. VA. CODE § 6C-1-2(a).

Additionally, W. VA. CODE § 6C-1-3(a) indicates that discriminatory and retaliatory actions against whistle-blowers are prohibited, and states:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

An employer may not retaliate against a whistle-blower, and any such act would be seen as an act of reprisal. W. VA. CODE § 6C-1-3. "An employee alleging a violation of this

article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." W. VA. CODE § 6C-1-4. Finally, "[i]t shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." *Id.*

Grievant did not clarify at any time why she had alleged a violation of the Whistle-Blower law. Grievant did not state that she had reported or was about to report any instance of wrongdoing or waste to her employer or to an appropriate authority. Grievant did assert at the level one grievance hearing held on the first grievance that there were improprieties in the hiring process by Ms. Staggers, which could be viewed as an instance of wrongdoing. However, there is no indication that Grievant reported this to her employer or any other authority other than the allegations during the grievance process. Further, the acts of reprisal alleged by Grievant apparently are that her work hours were changed, and she was not awarded a merit increase. As to the change in work hours, Mr. Thorne explained that he needed to change Grievant's work hours so that the Human Resources office was covered on Fridays, and because a new employee would be working closely with Grievant who would be working on Fridays. Respondent demonstrated that Grievant's work hours were changed for a legitimate reason.

Mr. Thorne explained with regard to merit increases that there were a small number available in phase one, and that in narrowing the field, one of the factors he considered was whether the employee's performance had declined since 2016, and Grievant's performance had declined. Grievant argued that the Guidelines on merit increases

specified that the employee's 2016 performance evaluation was to be used in determining eligibility for merit increases, and that Respondent improperly considered her 2017 performance evaluation. The DOH Guidelines for merit increases specifically state that "any other recorded measures of performance that enhance or detract from an employee's overall record," may be considered besides the 2016 evaluation, and that "[e]mployees must not have shown a documented decline in performance (i.e. written reprimand or greater) since the date of their calendar year evaluations." (Emphasis added.) The Guidelines do not exclude from consideration in narrowing the field a decline in performance as documented by a subsequent evaluation. Respondent demonstrated that the failure to award Grievant a merit increase was based on a legitimate reason.

Moreover, an employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. *Little v. W. Va. Dep't of Health & Human Res.*, Docket No. 98-HHR-092 (July 27, 1998); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Terry v. W. Va. Div. of Highways,* Docket No. 91-DOH-186 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehabilitation Serv.,* Docket No. 89-RS-051 (May 16, 1989).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and

capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "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]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001), *aff'd,* Cir. Ct. of Kanawha County, Civil Action No. 01-AA-161 (July 2, 2002). Grievant offered no evidence that her performance was so outstanding that it was unreasonable for Respondent to fail to award her one of these 30 merit increases over another employee.

The third grievance alleged retaliation, and again referenced the change in her work schedule. 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);
> (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). "[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 Dep't 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. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004). Grievant did not demonstrate that the filing of her grievance was a factor in the decision to change her work schedule. Further, Respondent demonstrated that it had a legitimate, non-retaliatory reason for this change.

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 her 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). "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. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." 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). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

3. Bullying is not defined for purposes of the grievance procedure. Webster's online Dictionary defines the verb bully as, "to frighten, hurt, or threaten; . . . to cause

(someone to do something by making threats or insults or by using force." It defines bully as a transitive verb as, "to treat abusively; to affect by means of force or coercion;" and as an intransitive verb as, "to use browbeating language or behavior."

4. 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 plaintiffs 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), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 09-AA-92 (Dec. 8, 2010). "'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. 31, 2006), *aff'd,* Cir. Ct. of Kanawha County, Civil Action No. 06-AA-65 (Jan. 4, 2007).

5. Grievant demonstrated that her supervisor raised her voice toward her in an inappropriate manner, and that her supervisor criticized her in the presence of other employees, and that these actions impacted her ability to function in her work environment.

6. A "whistle-blower means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." W. VA. CODE § 6C-1-2(g). Additionally, W. VA. CODE § 6C-1-3(a) indicates that discriminatory and retaliatory actions against whistle-blowers are prohibited. "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." W. VA. CODE § 6C-1-4. Finally, "[i]t shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." *Id.*

7. 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);
> (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).

8. Grievant did not demonstrate that the filing of her grievance was a factor in the decision to change her work schedule. Further, Respondent demonstrated that it had a legitimate, non-retaliatory reason for this change.

9. Respondent demonstrated that it had a legitimate, non-retaliatory reason for not awarding Grievant a merit increase, and Grievant did not demonstrate that she was entitled to a merit increase.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to take further steps to assure that Grievant's supervisor is made aware that she is not to raise her voice to Grievant, that she is not to criticize or make inappropriate comments to Grievant in the presence of other employees, and that

she needs to reevaluate how she manages her employees. The remainder of the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: December 22, 2017