WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SARAH KELLY,
Grievant,

v. **Docket No. 2017-2296-DOC**

WORKFORCE WEST VIRGINIA,
Respondent.

D E C I S I O N

Sarah Kelly, Grievant, filed this grievance against her employer the Workforce West Virginia, Respondent, on May 30, 2017, protesting the termination of her employment. Grievant alleges "[r]etaliatory dismissal without good cause" and seeks "[t]o be made whole in every way including back pay with interest and all benefits restored." As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.[1]

A level three hearing was held before the undersigned Administrative Law Judge on August 2, 2017, at the Grievance Board's Charleston office. Grievant did not personally attend the hearing, but Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Greg S. Foster, Assistant Attorney General. This matter became mature for decision on August 25, 2017, the assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

[1] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

Synopsis

Grievant contests her dismissal. Grievant alleges nefarious rationale for the termination. From April 18, 2016, until her termination on May 30, 2017, Grievant was more or less continually on Performance Improvement Plans (PIP). During the course of her improvement plans, Grievant met with her supervisor on a bi-weekly basis for coaching and counseling. Ultimately, Grievant was terminated after an extended period of poor work performance. Respondent offered legitimate, non-retaliatory reasons for its action. Respondent's position is fortified by evidence of record. This grievance is DENIED.

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

Findings of Fact

1. Grievant was employed as an Employment Programs Interviewer I with Workforce West Virginia, Respondent. Grievant commenced employment with Respondent on or about May 18, 2015.

2. Generally, Grievant's job duties included assisting claimants with filling out unemployment compensation claims and assisting job seekers in finding employment. Grievant was responsible for interviewing claimants and reviewing information to determine if an eligibility or separation issue existed to assist in processing their unemployment claims.

3. Grievant went through Respondent's standard training process. This included shadowing experienced employees at various stations for each of Grievant's job

responsibilities. Once Grievant understood the responsibilities at a particular station, she was moved to the next station. Once Grievant completed all the stations with minimal errors, she was released to perform the duties on her own. Grievant completed the training process.

4. Jamie Moore has been Grievant's supervisor first as an Employment Programs Office Manager I, then as an Employment Programs Office Manager III.

5. On June 9, 2015, Grievant met with Jamie Moore for her first Employee Performance Appraisal ("EPA"). This was an EPA-1, during which Grievant's job responsibilities and performance standards were explained to Grievant. R Ex 1

6. Issues started to arise regarding Grievant's behavior, the issues included tardiness, dependability and Grievant's viewpoint on accepting feedback and constructive criticism. Grievant was tardy for work on a number of occasions, failed to inform management in advance of personal appointments, and was observed using a rude tone when responding to feedback and questions from co-workers and customers.

7. Supervisor Moore discussed these concerns with Grievant during an EPA-2 on August 18, 2015. An EPA-2 is a review of an employee's job performance during a designated time frame. Ms. Moore counseled Grievant on these concerns and placed Grievant on a 60-day PIP beginning August 18, 2015. *See* R Ex 2.

8. Grievant's performance improved during the time-period of her PIP, which expired in October 2015.

9. Grievant underwent an EPA-3 on November 6, 2015. An EPA-3 rates an employee's overall performance on an annual basis and assigns a numeric score to

determine whether that employee's performance needs improvement, meets expectations, or exceeds expectations. Grievant's numeric score was 1.91, which fell within the "meets expectations" range. R Ex 1

10. Grievant's job performance was rated as "good; meets expectations," pursuant to the EPA-2 conducted on November 20, 2015. *See* R Ex 1, pg. 12.

11. Grievant's job performance began to decline following her November 20, 2015, EPA-2.

12. Grievant's manager(s) received customer complaints about Grievant's rudeness on November 24, 2015, December 11, 2015, and December 29, 2015. Grievant was tardy to work on several occasions. Grievant was holding paperwork at her desk and not completing claims. On a number of occasions Grievant provided incorrect information to customers. Grievant was rude to her co-workers and was not receptive to feedback. R Ex 3

13. Respondent attempted to terminate Grievant's employment on about February 22, 2016. R Ex 3 On March 7, 2016, Grievant filed a grievance, Docket No. 2016-1416-DOC, contesting her February 22, 2016, dismissal. Subsequently, the parties reached a settlement. Grievant was brought back to work and placed on a 90-day Performance Improvement Plan (PIP). R Ex 4

14. Grievant was reinstated to her job effective April 18, 2016. G Ex 2

15. Grievant was retrained upon her return to work.

16. After the April 18, 2016 reinstatement, Grievant was virtually on one PIP or another till the instant discharge on May 30, 2017. R Exs 5, 6, 7 and 10

17. Relevant Performance Improvement Plans specifically cite allegation of performance shortcoming(s) or misconduct and contain the statement: "If you fail to meet performance standards during the PIP, you will be subject to further disciplinary action up to and including dismissal." *See* R Ex 5,6, and 7.

18. During her improvement plans, Grievant met bi-weekly with her supervisor, Ms. Moore, for coaching and counseling and to evaluate her progress. Grievant was evaluated on a special EPA-2 during each bi-weekly meeting throughout her PIP. Each EPA-2 documents the matters discussed, including any work performance or behavioral issues that arose in between each meeting.

19. The chart below summarizes each of the bi-weekly meetings and Grievant's work performance during the PIP in effect from April 18, 2016, until July 18, 2016.

EPA 2s – APRIL 18, 2016, to JULY 18, 2016		
DATE	**PERFORMANCE**	**COMMENTS**
5/17/16	Does not meet expectations	Issues with tone and attitude. Grievant raised her voice at internal and external customers.
5/31/16	Fair, but needs improvement	Needs to work on improving tone and attitude.
6/3/16	Does not meet expectations	Grievant was rude to internal and external customers. Tone and attitude was abrasive and not acceptable.
6/17/16	Does not meet expectations	Poor work performance. Work not completed thoroughly.
7/5/16	Does not meet expectations	Poor work performance. Not filing paperwork properly, provided inaccurate information to customers, not completing work assignments.

20. Grievant's PIP expired on or about July 18, 2016. Respondent was not satisfied with Grievant's work performance. Grievant was issued a verbal warning regarding her poor performance. R Ex 5

21. Grievant's PIP was extended an additional 90 days, from July 18, 2016, until October 17, 2016. Grievant continued to meet bi-weekly with her supervisor during this PIP. R Ex 6

22. The chart below summarizes each of the bi-weekly meetings and Grievant's work performance during the PIP in effect from July 18, 2016, until October 17, 2016.

EPA 2s – JULY 18, 2016, to OCTOBER 17, 2016		
DATE	**PERFORMANCE**	**COMMENTS**
8/2/16	Fair, but needs improvement	Incident where work was completed inaccurately.
8/23/16	Good; meets expectations	Grievant's work performance improved.
9/9/16	Good; meets expectations	Grievant doing a good job in meeting performance expectations.
9/20/16	Fair, but needs improvement	Incidents where Grievant did not timely file paperwork on a claim and failed to provide correct information to claimant.
10/14/16	Does not meet expectations	Poor work performance. Not completing work thoroughly and accurately, causing others to correct her mistakes. Grievant making same mistakes made in the past.

23. Upon expiration of this PIP on October 17, 2016, Grievant had shown some improvement. However, Respondent was of the opinion that issues still remained with Grievant's work performance, the PIP was extended an additional 90 days from October

17, 2016, until January 17, 2017. Grievant continued to meet with her supervisor bi-weekly during this PIP. R Ex 7

24. On October 21, 2016, Grievant underwent her annual EPA-3 evaluation for the rating period beginning October 1, 2015, through September 30, 2016. Grievant's numeric score was 1.48, which fell within the "needs improvement" range. *See* R Ex 1, pg. 29.

25. The chart below summarizes each of the bi-weekly meetings and Grievant's work performance during the PIP in effect from October 17, 2016, until January 17, 2017.

EPA 2s – OCTOBER 17, 2016, to JANUARY 17, 2017		
DATE	**PERFORMANCE**	**COMMENTS**
11/1/16	Does not meet expectations	Work not being performed accurately. Incident where Grievant failed to provide accurate information to claimant and also failed to obtain all necessary information from claimant to process claim.
11/14/16	Does not meet expectations	Continued issues with work performance. Grievant submitted paperwork with missing information, causing others to fix her mistakes.
11/29/16	Does not meet expectations	Grievant not completing paperwork fully and accurately.
12/16/16	Does not meet expectations	Grievant not obtaining necessary information from claimants and not completing work timely and accurately.
12/30/16	Does not meet expectations	Grievant not obtaining necessary information from claimant and not completing work accurately.
1/13/17	Does not meet expectations	Grievant not completing work timely and accurately. Failure to timely file paperwork caused delayed payment to claimant.

26. The aforementioned PIP expired on or about January 17, 2017, then Grievant was issued a written reprimand on January 20, 2017. R Ex 8

27. Grievant was placed on another PIP.

28. Grievant continued to meet bi-weekly with her supervisor.

29. The chart below summarizes each of the bi-weekly meetings and Grievant's work performance during the PIP in effect from January 20, 2017, until March 20, 2017.

EPA 2s – JANUARY 20, 2017, to MARCH 20, 2017		
DATE	**PERFORMANCE**	**COMMENTS**
2/17/17	Does not meet expectations	Work not being performed accurately. Grievant failed to obtain accurate information from claimant and submitted paperwork with a number of mistakes. Grievant's mistakes caused delay in deputy's decision.
2/24/17	Does not meet expectations	Grievant continues to make mistakes by submitting inaccurate information in paperwork. Grievant also provided confidential employer information to job seeker which resulted in the employer filing a complaint.
3/6/17	Does not meet expectations	Grievant not completing work timely and accurately causing others to fix her mistakes.

30. Grievant's poor work performance continued. Upon expiration of this PIP on March 20, 2017, Grievant was issued a five-day suspension by letter dated March 21, 2017. Grievant served her suspension and returned to work on April 11, 2017. R Ex 9

31. Paralleling the continual PIP renewals, Respondent issued a July 18, 2016, verbal reprimand, a January 20, 2017 written reprimand, and a March 21, 2017, five-day suspension. R Exs 5, 8 and 9

32. Language of the PIP in effect from April 11, 2017, until May 11, 2017 among other information specifically informed Grievant that "[c]ontinued performance and conduct issues will be viewed as unwillingness, rather than inability, to comply with reasonable expectations, and could result in further disciplinary action, up to and including dismissal." R Ex 10

33. The chart below summarizes each of the bi-weekly meetings and Grievant's work performance during the PIP in effect from April 11, 2017, until May 11, 2017.

EPA 2s – APRIL 11, 2017, to MAY 11, 2017		
DATE	**PERFORMANCE**	**COMMENTS**
4/28/17	Does not meet expectations	Grievant failed to request that a stop be placed on a claim which resulted in overpayment to a claimant.
5/5/17	Does not meet expectations	Grievant continued to make mistakes which caused a claimant to return to the office unnecessarily, and also separately caused a delay in an appeal due to failure to timely file paperwork. Grievant's paperwork continues to contain numerous errors.
5/19/17	Does not meet expectations	Grievant failed to obtain all necessary information from claimant and failed to complete work timely and accurately.

34. Upon completion of this PIP in May of 2017, Respondent proceeded with Grievant's termination.

35. Supervisor Moore, who meet with Grievant bi-weekly during the span of Grievant's PIPs, testified at the level three hearing regarding Grievant's conduct and work product. Supervisor Moore is intimately aware of Grievant's work and EPAs detailing events and/or review of Grievant's performance. There are forty-three (43) pages of EPAs. R Ex 1

36. Supervisor Moore found Grievant's work performance on innumerable occasions to not meet the reasonable expectation for her position.

37. On May 26, 2017, Grievant was provided notification of a predetermination meeting, and that "the purpose of this meeting is to provide you the opportunity to respond to the tentative conclusion that you be dismissed from your employment ...." R Ex 11

38. There was a predetermination conference held with Grievant on May 30, 2017, Grievant was officially terminated at or shortly after that meeting. R Ex 11 and 12

39. Chad Ketchum, Assistant Director of Field Operations and Jamie Moore, Manager of Charleston Local Office, held a discussion with Grievant regarding the nature of her unacceptable work performance. At that time, it was shared with Grievant that her dismissal from employment was being considered. Grievant's response was that "others were not being reprimanded, training provided was not adequate, and [her] manager was not approachable". *See* May 30, 2017 Dismissal Correspondence, R Ex 12.

40. The four-page, May 30, 2017, Dismissal Correspondence highlighted performance conduct issues, and historical facts pertaining to Grievant and her

employment as an Employment Program Interviewer 1. The document enumerated specific reasons for Grievant's dismissal.

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. As this grievance involves a disciplinary matter, Respondent bears the burden in the circumstance of this dismissal action. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

DUE PROCESS

The contention that Grievant was denied due process will be addressed:

The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ*., Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).The question is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that employer is required to provide. *Id*. at Syl. Pt. 3.

The contention that Grievant was denied due process, in the fact pattern of this case, is without merit. Grievant was informed, verbally and in written format, of Respondent's concerns regarding her job performance and this was a long-standing issue. Respondent was not pleased with the proficiency that Grievant executed a variety of her job duties. Pursuant to a May 26, 2017 Correspondence, Grievant was informed of a predetermination conference. Grievant was informed the "purpose of this meeting [was] to provide [Grievant] the opportunity to respond to the tentative conclusion that [Grievant] be dismissed from employment as an Employment Programs Interviewer I at Work Force West Virginia for poor performance." *See* R Ex 11. Respondent identified the conduct and/or lack of reliable proficient behavior it determined failed to meet expectation. Grievant contends lack of detail provided at the predisposition meeting with opportunity to be heard and truly address events.

Grievant contends that 'Respondent discharged her from employment without affording any opportunity for Grievant to respond to the specific charges allegedly giving rise to her dismissal. This is absurd. Grievant was aware of the issue(s), she met bi-

weekly with her supervisor and the evaluation of Grievant's job performance was document by corresponding performance forms. *See* charts in Findings of fact, *supra*. and R Ex 1, 46 pages (numerous EPAs). Grievant might profess a difference of opinion regarding the quality of her work performance or unfair analysis, but to contend she was unaware or Respondent neglected to inform and allow her an opportunity to rebut is transcending the realms of credibility. Grievant was repeatedly made aware that Respondent found her work place behavior substandard. The variety of issues were well documented. R Ex 1 Grievant was again provided opportunity to rebut Respondent at the predetermination conference held with Grievant on May 30, 2017. *See* R Ex 12 Grievant was not denied due process.

MERITS

It is recognized that Respondent had discretion in the circumstance of this case. Yet ultimately, Respondent chose to discharge Grievant. The concept of progressive discipline was referenced as a supportive standard and/or employment practice but not necessarily cited as the ultimate rationale for the dismissal.[2] Respondent maintained

[2] Progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. In theory, progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between (i.e., verbal warning, written warning, suspension, demotion, dismissal). However, it is important to be mindful of the fact that the level of discipline will be determined by the severity of the violation (frequency may also be relevant). Progressive discipline does not mandate that all the levels of discipline be used. In application, progressive discipline, has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a predetermined disciplinary approach in every instance. Proper disciplinary action is determined by the facts, circumstances, and applicable regulations.

this decision was rational and not motivated by undue (improper) factors. Respondent, in review of Grievant's tenure, referred to past performance evaluations and highlighted the lengths Grievant's training and retraining had undergone. Respondent acknowledges that everyone makes mistakes from time to time, but Grievant was unable to perform her job duties at an acceptable level for a deplorable span of time. Grievant suggest that this termination was retaliatory and/or contrived. Grievant suggests that after her February 2016 grievance where, there too, Respondent sought to terminate Grievant's employment, Respondent possesses nefarious motivation (a grudge) to orchestrate her termination.

Retaliation is inferred as a motive for Respondent's conduct. 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;
>
> (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).

It is arguable[3] that Grievant has a *prima facie* case for retaliation in that she: 1. "engaged in a protected activity," (previously filed a grievance to retain her employment); 2. she was treated adversely (contends work overly scrutinized, excessive review); 3. the employer had actual knowledge of the protected activity (supervisor was involved with prior and current dismissal action). Accordingly, all that is left is a causal connection. The Supreme Court has held: An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Grievant was reinstated to her job effective April 18, 2016. G Ex 2 After the April 18, 2016, reinstatement Grievant was virtually on one PIP or

[3] It is not perceived that Respondent and Grievant were without their differences. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that her 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).

another till the instant discharge on May 30, 2017. R Exs 5, 6, 7 and 10 It is not difficult to connect the two events. A causal connection 'might' be inferred that Grievant has met all four elements of retaliation and made a *prima facie* case. It is also possible that Grievant is an employee who despite being given numerous opportunities to learn and improve necessary work place skills was unable to achieve an acceptable standard of proficiency.

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

Respondent maintains the actions of its agents were reasonable and lawful. Respondents maintain Grievant was on notice regarding her performance. The examples of conduct deficiencies are well documented. There is no established factual dispute. Grievant's work performance on innumerable occasions did <u>not</u> meet the reasonable expectation for her position. There was a variety of events of novel and repetitive issues which included tardiness, dependability, not filling paperwork properly,

providing inaccurate information to customers, not completing work assignments, improperly completing claims, being rude to her co-workers and resistant to feedback.

Training and retraining was provided and bi-weekly review meetings were established. Numerous performance observations and past evaluations provided to Grievant were introduced into the record and cited to demonstrate Respondent's position. Grievant's supervisor persuasively testified.[4] Grievant was on notice regarding her job performance and Respondent provided opportunity for Grievant to correct behavioral deficiencies. Evaluations provided to Grievant left little room for ambiguity, Grievant was aware that Respondent wanted her to make specific alterations in her job performance. R Ex 1, 46 pages (numerous EPAs) Grievant failed to adequately adjust her conduct for sustained periods of time.

Grievant was repeatedly informed that her failure to meet performance standards could or would subject her to further disciplinary action up to and including dismissal. *See* R Exs 5,6, and 7. In addition to numerous PIP renewals, Respondent was issued a July 18, 2016, verbal reprimand, a January 20, 2017 written reprimand and a March 21, 2017, five-day suspension. R Exs 5, 8 and 9 Ultimately, Respondent specifically informed Grievant that "[c]ontinued performance and conduct issues will be viewed as

[4] This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

unwillingness, rather than inability, to comply with reasonable expectations, and could result in further disciplinary action, up to and including dismissal." R Ex 10

The undersigned is persuaded that Respondent had legitimate reasons for its action. The decision to terminate Grievant's employment was permissible in the circumstances of this case. Grievant failed to meet performance expectations for over a year, throughout which time she remained on PIPs and met with her supervisor on a bi-weekly basis. Grievant's inability to adequately perform the job and recurring mistakes are meticulously documented. In the circumstances of this case, the undersigned finds that Respondent offered persuasive legitimate, non-retaliatory reasons for its action to terminate Grievant employment. The reasons offered by Respondent for its determination to terminate Grievant's employment were not merely a pretext for a retaliatory motive.

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ*., Docket No. 89-02-234 (Nov. 28, 1989).

3. Grievant's due process rights were not violated.

4. 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 ;
>
> (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).

5. “[T]he critical question is whether the grievant has established by a preponderance of the evidence that her 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 her 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).

6. Grievant did not demonstrate that the decision to terminate her employment was an act of reprisal by Respondent. Grievant failed to demonstrate that she has suffered any retaliation or reprisal.

7. Respondent offered legitimate, non-retaliatory reasons for its actions. It was not established that Grievant’s protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the termination of her employment.

8. Respondent, by a preponderance of the evidence, established persuasive facts and rationale for the termination of Grievant’s employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 6, 2017

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Landon R. Brown
Administrative Law Judge