

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARCH A. TUCKER,

Grievant,

v.

Docket No. 2016-1684-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,**

Respondent.

DECISION

This matter concerns four separate grievances filed by Grievant, March A. Tucker, against his employer, Respondent, Department of Health and Human Resources (“DHHR”)/Bureau for Public Health (“BPH”). On October 23, 2015, Grievant filed a level one grievance contesting a written reprimand he had received, and requested the following relief: “[w]ithdrawal of the October 5, 2015 written reprimand and cessation of the hostile work environment fostered by the OEMS Director, plus an award of attorney fees and expenses incurred by Grievant.”¹ This grievance was assigned the Docket Number 2016-0693-DHHR. On or about May 19, 2016, Grievant filed a level three grievance contesting a May 5, 2016, suspension letter, and requested the following relief: “[r]eversal of the May 5, 2016 written notice of unpaid suspension by OEMS Director. Reinstatement of full pay lost by Grievant. An award of attorney fees and expenses incurred by Grievant.” This grievance was assigned the Docket Number 2016-1659-DHHR. The parties agreed to waive the grievance filed at level one, Docket Number

¹ It is noted that the Grievance Board has no authority to award relief for tort-like claims or punitive damages. See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

2016-0693-DHHR to level three, and by Order entered June 1, 2016, the two grievances were consolidated and assigned the Docket Number 2016-1684-CONS.

On November 10, 2016, Grievant filed a level one grievance contesting an employee performance appraisal dated October 27, 2016, and requested the following relief: “[w]ithdrawal of EPA3 dated October 27, 2016. Cessation of the ongoing hostile work environment fostered by OEMS Director Melissa Raynes. An award of attorney’s fees and expenses incurred by Grievant.” This grievance was assigned the Docket Number 2017-1169-DHHR. Also on November 10, 2016, Grievant filed a level one grievance contesting the issuance of a predetermination conference notice dated November 4, 2016, and requested the following relief: “[w]ithdrawal of Predetermination Conference Notice dated November 4, 2016. Cessation of the ongoing hostile work environment fostered by OEMS Director Melissa Raines. An award of attorney’s fees and expenses incurred by Grievant.” This grievance was assigned the Docket Number 2017-1170-DHHR. These two grievances were consolidated at level one of the grievance procedure, and assigned the Docket Number 2017-1173-CONS. This matter was then waived upon agreement of the parties to level three of the grievance procedure on or about December 7, 2016.²

By Order entered December 22, 2016, the undersigned administrative law judge consolidated all of these pending grievances at level three of the grievance procedure into Docket Number 2016-1684-CONS. The consolidated grievance was then scheduled to be heard at level three on February 21, 2017.

² See, L1 Notice of Agreed Waiver, dated December 7, 2016, signed by Christina M. Bailey, Esquire, Grievance Evaluator.

This ALJ conducted a level three hearing on this consolidated grievance on February 21, 2017, and May 9, 2017 at Grievance Board's office in Charleston, West Virginia. Grievant appeared in person, and by counsel, Edward P. Tiffey, Esquire, Tiffey Law Practice, PLLC. Respondent appeared by counsel, James "Jake" Wegman, Esquire, Assistant Attorney General. This matter became mature for decision on July 3, 2017, upon the receipt of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant filed four separate grievances against Respondent challenging various actions taken against him. These grievances were eventually consolidated and heard together as one grievance at level three. Grievant challenged a written reprimand he was issued in October 2015, a three-day suspension without pay issued in May 2016, an employee performance evaluation issued in October 2016, and the issuance of a notice of predetermination conference issued in November 2016. In each of these grievances, Grievant challenged the action taken and asserted claims of hostile work environment and harassment in violation of DHHR and Division of Personnel policies. Respondent denied Grievant's claims of harassment and hostile work environment, and argued that it properly followed DHHR's progressive discipline policy to address Grievant's performance issues, and that the written reprimand and suspension were proper. Respondent also argued that the evaluation at issue was correct, as was the issuance of the notice of predetermination conference.

Grievant proved his claims of hostile work environment and harassment by a preponderance of the evidence. Respondent failed to prove most of the charges listed in the written reprimand and suspension letter, and failed to prove that these disciplinary

actions were justified. Grievant proved that the employee performance evaluation issued in October 2016 was incorrect, and that his supervisor abused her discretion when evaluating him. Grievant proved the notice of predetermination conference was indicative of harassment and the hostile work environment created. As Grievant did not pursue any other claims regarding this notice at level three, any such claims previously raised are deemed abandoned.

Therefore, the grievance is GRANTED IN PART and DENIED IN PART.

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 is employed by Respondent DHHR/BPH in the Office of Emergency Medical Services (“OEMS”). Grievant is classified as a Program Manager 2, and his position title is Director of EMS Programs. Grievant oversees the certification of emergency medical technicians (“EMT”), paramedics, first responders, and emergency vehicle operators. Grievant also oversees the licensure of EMS agencies, continuing education, investigation of complaints, and testing of individuals. Grievant has held this position since October 2008. Grievant previously worked at OEMS from 1996-1999 as a Certification Coordinator.

2. Danny Anderson is employed by OEMS as the Certification Coordinator. Grievant is his direct supervisor. Mr. Anderson has held this position since October 2015. Jimmy Sadler is employed by OEMS as the Agency Licensing Coordinator. Grievant is his direct supervisor. Mr. Sadler has held this position since in or about December 2014. John Thomas is also employed by OEMS, and Grievant is his direct supervisor. Herb

Doss is employed by OEMS as an investigator. Mr. Doss is the only investigator employed by OEMS. Grievant is his direct supervisor.

3. OEMS regulates emergency medical services providers and agencies within the state. OEMS processes about 6,000 certification and recertification applications each year.

4. Melissa Raynes is the Director of OEMS. She was first appointed as the Interim Director of OEMS in March 2014, and later appointed as Director in August 2015. While Director Raynes served as Interim Director, she split her time between her position at OEMS and her former position at the Office of Threat Preparedness (“OTP”). Director Raynes is Grievant’s direct supervisor. Dr. Michael Mills is the Medical Director of OEMS. Director Raynes and Dr. Mills manage OEMS.

5. In their positions at OEMS, Grievant, Danny Anderson, and Jimmy Sadler deal with the regulatory and enforcement sides of OEMS on a daily basis. Director Raynes and Dr. Mills do not.³

6. Since becoming the Director of OEMS, Director Raynes has instituted a number of changes in the office, such as in procedures, policies, and job responsibilities. Director Raynes has asserted that such changes were directed by BPH Commissioner Tierney. The greatest change has been to move OEMS from being a strict, regulatory body to a more EMS community-friendly agency, placing an emphasis on “customer service.”

7. Grievant had little interaction with Director Raynes during her first few months at OEMS. She was splitting her time between her two offices, and was not in the

³ See, testimony of Director Melissa Raynes.

office for full work days. However, in March 2014, they rode together to attend an EMSAC meeting in Flatwoods, West Virginia, and Director Raynes had held one-on-one meetings with the staff, including Grievant. The EMSAC meeting was undisputedly unpleasant, with those in attendance verbally attacking OEMS and Grievant.

8. The West Virginia Division of Personnel “Prohibited Workplace Harassment” policy defines nondiscriminatory hostile workplace harassment as follows:

[a] form of harassment commonly referred to as “bullying: that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bonds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

9. West Virginia Division of Personnel “Prohibited Workplace Harassment” policy describes nondiscriminatory hostile workplace harassment as follows:

[n]ondiscriminatory hostile workplace harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, and sabotage of performance which may include, but is not limited to:

1. Unwarranted constant and destructive criticism;
2. Singling out and isolating, ignoring, ostracizing, etc.;
3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
4. Threatening, shouting at, and humiliating particularly in front of others.

10. DHHR Policy Memorandum 2123, “Violent/Hostile Work Environment,” adopts the DOP definition of nondiscriminatory hostile workplace environment as stated in its “Prohibited Workplace Harassment” policy, and lists the following as its stated purpose: “WVDHHR adopts a policy of zero tolerance for workplace violence and/or creating a hostile working environment. This policy includes incidents occurring on or off state property.”

11. Sometime in her first few months at OEMS, Director Raynes concluded that Grievant was failing to provide “good customer service” to the EMS agencies and providers in the field, being rude to those in the EMS community, and resisting the changes she had implemented. During her testimony at the level three hearing, Director Raynes indicated that complaints had been made about Grievant, but she gave little specific information about such. The evidence is unclear as to who made complaints, to whom they were made, and when they were made.

12. On or about June 2, 2014, Director Raynes issued Grievant a document entitled “Performance Standards and Expectations” which included a number of bullet points regarding the performance of his duties. This receipt of this document was Grievant’s first indication that Director Raynes did not think he was performing his work in a suitable fashion. Director Raynes had not discussed any performance issues with Grievant prior to issuing this document. While this document is unsigned, Director Raynes admits that she drafted the same specifically for Grievant and issued it to him.⁴

⁴ See, testimony of Director Melissa Raynes.

13. In the June 2, 2014, "Performance Standards and Expectations" document, under the "Credibility" section, Director Raynes listed the following in bullet point form in all capital letters:

[w]ILL NO LONGER ATTEND MPCC, EMSAC, TSN, RETI, OR OTHER MEETINGS REGULARLY SCHEDULED OUTSIDE OF THE OEMS DIAMOND BUILDING. ATTENDANCE WILL BE ON AN 'AS NEEDED' BASIS AND THE FOCUS AND CONTENT OF PARTICIPATION WILL BE MAINTAINED TO FOCUSED TOPIC(S) AS DIRECTED BY THE OEMS DIRECTOR. WILL NOT ISSUE ANY POLICY CHANGES OR CIS/FIELD EMS COMMUNICATIONS WITHOUT THE PRIOR CONSENT AND APPROVAL OF THE OEMS DIRECTOR. WILL NOT INITIATE ANY EMS PROGRAMMATIC CHANGES WITHOUT THE EXPRESS CONSENT AND APPROVAL OF THE OEMS DIRECTOR.⁵

14. In the "Customer Service" section of the June 2, 2014, "Performance Standard and Expectations" Director Raynes included the following expectations:

- Implementation of a call log to track when calls received, responded to and information provided for performance improvement purposes. This log will include a section for phone calls as well as a section for email contacts. This will be in place by June 30, 2014.
- Implementation of tracking device for recertification and application packets. When these items received, contact back to the EMS personnel for missing items, when packet complete and comments for other miscellaneous contacts this will be in place by June 30, 2014.⁶

15. Director Raynes made a number of changes to Grievant's job duties in the June 2, 2014, "Performance Standards and Expectations" document. Grievant had always gone into the field and interacted with agencies and providers as the Director of

⁵ See, Grievant's Exhibit 3, "Performance Standards and Expectations."

⁶ See, Grievant's Exhibit 3, June 2, 2014, "Performance Standards and Expectations."

EMS Programs. With the issuance of this document, he could not. Such limited his communication with those regulated, and his access to information. Director Raynes also imposed requirements on Grievant to track and review all of his email communications, his calls, and the actions he takes to provide customer service.⁷ There has been no evidence presented to suggest that Director Raynes imposed such restrictions on any other employee.

16. Director Raynes has not issued Grievant a new job description. Grievant still holds the position of Director of EMS Programs; however, he is to perform his job in a manner much different than he had in the past.

17. On April 2, 2015, Director Raynes issued Grievant an EPA-2 “interim” rating for the period September 1, 2014, to March 31, 2015, in which she rated Grievant as “Fair, But Needs Improvement.” In the “General Comments” section, Director Raynes stated as follows: “There have been no noted improvements in performance from the EPA3 completed in September. This review is a status quo of that issued via the EPA3. Mr. Tucker is not cooperative with OEMS leadership or staff. This lack of cooperativeness continues to be evidenced from complaints from EMS personnel that come in contact with Mr. Tucker.”⁸ No September 2014 EPA-3 was presented as evidence in this matter.

18. Also on April 2, 2015, Director Raynes and Dr. Mills met with Grievant concerning fourteen applicants whose packets were approved for certification. Director Raynes and Dr. Mills asserted that Grievant certified these individuals in error as they

⁷ See, Grievant’s Exhibit 3, June 2, 2014, “Performance Standards and Expectations”; testimony of March Tucker; testimony of Director Melissa Raynes.

⁸ See, Respondent’s Exhibit 3, EPA-2 dated April 2, 2015.

lacked certain requirements.⁹ While the application packets were in the room during the meeting, Grievant was not given the opportunity to review the same. Grievant eventually received redacted copies of these packets through discovery in this grievance matter. This meeting was considered a verbal counseling.¹⁰ Grievant did not grieve the same.¹¹ These fourteen applications were not mentioned in Grievant's April 2, 2015, EPA 2.

19. On or about August 14, 2015, Grievant approved an applicant for Critical Care Transport ("CCT") certification who Director Raynes determined lacked the required three years of paramedic experience for the certification. The individual had experience going back to 2013, and Grievant was counting the years 2013, 2014, and 2015 as the three. Director Raynes informed Grievant that he had calculated the years of experience incorrectly, and that the applicant had only two years of experience.¹²

20. On September 28, 2015, Grievant received his annual Employee Performance Appraisal 3 ("EPA-3") for the time period September 1, 2014, to August 31, 2015. In this EPA-3, Director Raynes rated Grievant as "Needs Improvement" in thirty-four out of thirty-seven performance factors and standards evaluated. He also received an overall score of "Needs Improvement."¹³ In this evaluation, Director Raynes made comments including the following:

March still does not respond to changes in a positive manner.
He is not open to suggestion from staff or field providers. His

⁹ See, testimony of Grievant; testimony of Director Raynes; Respondent's Exhibit 1, October 5, 2015, reprimand letter.

¹⁰ See, Respondent's Exhibit 2, copy of notation of Director Raynes dated April 2, 2015.

¹¹ Grievant argues at level three that after he received the copies in discovery, he was able to determine the file names for thirteen of the fourteen packets, and that he reviewed the same. He contends that he was correct in approving them in 2015.

¹² See, Respondent's Exhibit 11, email thread dated August 14, 2015, one page of which bears Director Raynes' handwritten notations.

¹³ See, Respondent's Exhibit 4, EPA-3 dated September 28, 2015.

response is that we have tried that & it didn't work or something similar. Positive resolutions are not offered in response;

March is not compliant with expectations provided to him June 2014. He responds to some emails [illegible] other emails he does not respond to but forwards to Dir for response;

March has been overheard to say "that is not my role or I could help you" & said similarly to staff;

March received a verbal coaching on 4/2/15 related to inappropriately approved Cert packets. Another packet approved 8/14 inappropriately;

March does not consistently attend staff mtgs. He then states publicly that he doesn't know what is going on. He does not participate in staff mtgs when he does attend. This is not an acceptable level of involvement or behavior to be modeled by subordinate staff; and,

March is still not a motivated leader. He directs staff to the Dir [illegible] questions stating he doesn't know his role, that is not his role, etc. He creates a very divisive environment with the behavior being exhibited. He isolates himself & does not participate as a part of a team.¹⁴

21. The September 28, 2015, EPA-3 contained the following summary comments and improvement and/or development plan:

March has great knowledge in his area of expertise. He chooses to isolate himself from the overall ops of the ofc. He has great potential, but must choose to be a part of the team. . . Participate in OEMS.BPH perf imp initiative[.] Participate in at least one self-development program or training.

22. Grievant received an EPA-1 dated September 28, 2015, setting forth his duties, responsibilities, and performance standards and expectations for the rating period August 31, 2015, to September 1, 2016. Attached to the standard Form EPA-1 was a

¹⁴ This is a direct quote from the EPA-3. It contains typographical and grammatical errors that were included in the actual document.

document entitled “Performance Standards and Expectations” prepared by Director Raynes that detailed additional expectations in the areas of Flexibility, Credibility, Customer Service, Quantity of Work, Quality of Work, Availability for Work, Leadership, Management, and Work Environment. Such was similar to the June 2, 2014, “Performance Standards and Expectations” document, but more detailed.¹⁵

23. On September 30, 2015, there was a staff meeting held at OEMS at which Grievant, Dr. Mills, Director Raynes, Danny Anderson, and possibly other employees, were in attendance. During this meeting, Grievant questioned the legality of some of the directives issued by Director Raynes regarding the review and approval of certification/recertification packets. Grievant expressed his disagreement with the directives and questioned the same. Thereafter, Grievant and Director Raynes engaged in some debate.¹⁶

24. Director Raynes characterized Grievant’s behavior during the September 30, 2015, staff meeting as argumentative and confrontational, and asserted that Grievant’s behavior was inappropriate at a “public” meeting.¹⁷ However, Grievant did not raise his voice, use inappropriate language, or become verbally abusive.¹⁸ Grievant questioned the legality of the directive announced by Director Raynes, informed her that he disagreed, and there was some debate. Further, this was not a public meeting; it was an OEMS staff meeting.

¹⁵ See, Respondent’s Exhibit 5, EPA-1 dated September 28, 2015.

¹⁶ See, testimony of Dr. Michael Mills; testimony of Danny Anderson; testimony of Grievant; testimony of Director Raynes.

¹⁷ See, testimony of Director Melissa Raynes.

¹⁸ See, testimony of Danny Anderson; testimony of Dr. Michael Mills; testimony of Grievant.

25. By letter dated October 5, 2015, only days after the staff meeting, Director Raynes informed Grievant that she had decided to issue him a written reprimand “due to failure to comply with expectations established within EPA3 provided to [him] on 9/29/15¹⁹ and approving certification outside of the OEMS requirements for certification.”²⁰ This letter further states, in part, as follows:

Prior to the final decision to implement this disciplinary action, you met with Dr. Mills and myself on 9/29/15 to discuss this matter. . .²¹

[s]o that you may more fully understand the reason this action is being taken, I will summarize what has transpired. On 8/14/15, you approved an individual for certification that did not meet OEMS requirements for that certification level. You were previously provided a verbal counseling on inappropriately approving individuals for certification on 4/2/15.²² During the staff meeting on 9/30/15, you were argumentative and confrontational with the Director of OEMS. You called into question direction provided by the Director and the actions of 2 of your own subordinate staff in a public meeting. This is inappropriate behavior that is counter to the expectations provided to you during your EPA3 review conducted on 9/29/15.

26. Also on October 5, 2015, Director Raynes placed Grievant on a performance improvement plan, known as an “Employee Performance Improvement Recommendation” (“EPIR”).²³ This was a written plan that set forth a number of new expectations and requirements for Grievant in the areas of “maintains flexibility,”

¹⁹ This letter says that the EPA-3 was given to Grievant on September 29, 2015, but the EPA-3 indicates Grievant and Director Raynes signed it on September 28, 2015. The undersigned ALJ considers this to be a typographical error.

²⁰ See, Respondent’s Exhibit 1, October 5, 2015, letter.

²¹ The date is underlined in the original document.

²² Upon information and belief, Grievant did not grieve the April 2, 2015, verbal counseling he received.

²³ See, Respondent’s Exhibit 7, “Employee Performance Improvement Recommendation” dated October 2, 2015, and signed by Director Raynes and Grievant on October 5, 2015.

“demonstrates credibility,” “customer service,” “quantity of work,” and “quality of work.”

The requirements listed in the improvement plan are as follows:

Maintains Flexibility

1. Employee must work well with others to achieve organization’s goals. This includes being professional and civil to other staff, co-workers, colleagues at all times. Exhibiting behaviors associated with a hostile work environment will not be tolerated. Examples of such include outbursts, confrontations, arguments in public setting such as staff meeting.

Demonstrates Credibility

1. Employee will share information with others when appropriate. This includes copying OEMS Director of all email correspondence and maintains call log as other Certification Unit does that includes the date of the call, issue/questions, response provided to caller and response to questions indicated during staff meeting (did I treat you well and did I assist you with your problem).
2. Performs work according to current guidelines this includes review/approval of certification packets and licensure reports. A listing of all certification packets and licensure reports reviewed by employee will be provided to OEMS Director on a monthly basis.
3. Employee will email OEMS Director time in/out of the office including lunch breaks. Any activities outside of the office must have prior approval of the OEMS Director including licensure inspections, education site visits, instructor evaluations, etc.
4. Employee will attend all OEMS staff meetings. Oct, Nov, Dec dates TBD. 1/27/16, 2/24/16. 3/23/16, 4/27/16.

Customer Service

1. Employee will address conflicts and problem situations with patience and tact. Employee will seek the assistance of the OEMS Director for the resolution of

conflicts and/or problem situations with other staff, co-workers, colleagues, etc. Employee will not engage in any arguments, loud disagreements, etc.

Quantity of Work

1. Employee will produce work output that matches the expectations established.
2. Employee will complete all assignments given by the date requested, or notify this supervisor as to reason why. If assignments are not completed by requested date and justification is not provided or if justification is not adequate, further disciplinary action may occur.
3. Employee consistently meets deadlines.

Quality of work

1. Employee's work product is thorough and complete without flaws and errors.²⁴

27. On November 5, 2015, Director Raynes emailed Grievant asking if he was aware of any issues with a particular applicant's recertification packet that was pending approval. Attached to the recertification packet had been a "military security clearance." Grievant explained to Director Raynes that he was aware of no issues, but that the applicant needed four hours Haz Mat and four hours CE, and that the military security clearance that was attached has "never been accepted prior," indicating that a background check was still needed. When Director Raynes asked why OEMS would not accept the military security clearance in lieu of a new background check, Grievant emailed back, stating as follows:

Military and federal clearances vary so greatly and review to different standards so much we could never get consistent

²⁴This is a direct quotation from the Employee Performance Improvement Recommendation. It contains typographical errors and grammatical errors as stated in the actual documents. See, Respondent's Exhibit 7.

review. Most of the time trying to review the federal entity responsible, they would not let us know what their review was for or what it covered because of security concerns. We worked with agencies like Sugar Grove, Summit Point and Border Patrol and basically the easiest solution was determined to have their personnel just submit to our backgrounds. Another issue has come up on review of his ce hours. He was issued a 48 hr paramedic recert certificate from Rick Gobble but he does not appear on the class roster. I will have John review for your decision.²⁵

Thereafter, the following email exchange occurred between Director Raynes and Grievant:

Raynes: I am sure if we asked, [applicant name] or DSHEM will provide that information. We don't require backgrounds on nurses, law enforcement, etc, so it may appear that we are being difficult on this issue. Let's work on this one a bit more. Think from a customer service perspective-how can we help this 'customer' rather than putting barriers in the way? Thanks!

Grievant: It was more how do we meet the requirements of legislative code in 16-4C. This decision was again not mine then but the directors and commissioners at the time.

Raynes: It doesn't matter whose decision it was. The issue needs resolved now. I will deal with it next week when I am back in the office.

Grievant: What resolution do you want to apply? I will process as you direct.

Raynes: Contact [applicant name] and/or his supervisor regarding the clearance provided to see if it meets our needs.²⁶

²⁵ See, Grievant's Exhibit 9, email thread November 5, 2015-November 9, 2015.

²⁶ See, Grievant's Exhibit 9, email thread November 5, 2015-November 9, 2015.

28. On November 7, 2015, in an email bearing the subject line "Focus," Director Raynes emailed Grievant the following message:

March

I am very disappointed by your response related to [applicant with the military security clearance] recert. It is indicative of very narrow focus. This is not about you. This is about OEMS and the bigger picture of EMS-improving both. We will move forward. As I stated in your EPA review, it is your choice if you come along or not.²⁷

29. Director Raynes cited Grievant's actions in November 2015 with respect to the applicant who had submitted a military security clearance with his application for recertification, as stated in the Finding of Fact above, as an example of Grievant's failure to provide good customer service.

30. On December 18, 2015, Grievant received an Employee Performance Appraisal 2 ("EPA-2") from Director Raynes evaluating his compliance with requirements of the EPIR issued on October 5, 2015. Director Raynes rated Grievant as "Does Not Meet Expectations," and attached a copy of the October 2, 2015, EPIR which contained her notations as to Grievant's noncompliance. Such included the following:

1. Director is not being copied on any emails as indicated in email 11/30/15. Employee's response was that he infrequently gets emails or calls. No emails have been copied to Director as of this date.
Call log was provided on or about 11/30/15.
2. [written, but crossed out by drafter]
3. Admin Rule allows 4 hr prep time on grievance. This time has been met. AL must be used for future grievance prep work.
11/10 9:12-11:51
10/23 8:57-11:46

²⁷ See, Grievant's Exhibit 9, pg. 3, email dated November 7, 2015.

4. Assignments are not being completed as indicated in #2 above. Also newsletter articles requested 7/29 & 12/1 have not been submitted (Sep, Oct, Nov & Dec not submitted).²⁸

31. On or about March 17, 2016, Grievant, Danny Anderson, Jimmy Sadler, and John Thomas, met with Dr. Mills regarding the review and approval of recertification packets for paramedics. Grievant was seeking clarification as to what he was to approve and what he was to deny. Grievant did not want to do anything wrong. Dr. Mills informed Grievant and his staff that if the forms were signed and complete, OEMS needs to approve them. Dr. Mills told those present that he would approve packets they brought him, which he did.²⁹

32. Director Raynes scheduled a predetermination conference for Grievant to be held on April 22, 2016. Such was held as scheduled, and Grievant, Director Raynes and Dr. Mills were present.³⁰

33. By letter dated May 5, 2016, Director Raynes informed Grievant of her decision to suspend him without pay for three working days for failing to comply with certain terms of the October 5, 2015, EPIR. Specifically, Director Raynes listed that Grievant had failed to timely submit the monthly logs of certification packets and licensure reports reviewed for the months of February and March. Further, Director Raynes stated that Grievant was not completing all assignments within given timeframes, such as reviewing and approving certification packets, drafting new policies, and providing

²⁸ See, Respondent's Exhibit 8, EPA-2 dated December 18, 2015.

²⁹ See, testimony of Danny Anderson; testimony of Dr. Michael Mills; testimony of Jimmy Sadler.

³⁰ See, Respondent's Exhibit 6, May 5, 2016, letter. It is unclear from the record as to when Grievant was informed of this predetermination conference, and what he was told, if anything, as to the purpose of the conference.

monthly submissions to the OEMS newsletter. Director Raynes also stated that Grievant was not sharing information with others when appropriate as required by the EPIR.³¹

34. Near the end of the May 5, 2016, suspension letter, Director Raynes stated in part, as follows: “. . . [a]ccordingly, any further neglect of duty or any other infractions will be viewed as unwillingness, rather than inability, to comply with reasonable expectations, and shall result in further disciplinary action, up to and including dismissal.”

35. Grievant served his three-day suspension without pay from May 24, 2016, through May 27, 2016.

36. On or about October 27, 2016, Director Raynes issued an EPA-3 for Grievant for the rating period September 1, 2015, to August 31, 2016. Director Raynes rated Grievant as “Needs Improvement” in thirty-five out of thirty-seven categories, and “Meets Expectations” in only two categories. Director Raynes did not rate Grievant as “Exceeds Expectations” in any category.³² In this evaluation, Director Raynes made the following comments:

March is not open to learning or doing new things. He consistently wants Licensure and Certification to function as they have in years past. He is not receptive to leadership philosophy of working with the EMS community and getting them to buy-in to changes needed to advance the EMS system. March does not work well with others. Nor does he seek to improve any current processes. Investigations take months to complete, certification packets are not completed within a reasonable timeframe and he has not developed any plans or implemented any strategies to improve these processes. Individuals are permitted to test without requirements being met to qualify to test.

March continues to be noncompliant with expectations set forth in a 2015 EPIR. He has been subject to the progressive

³¹ See, Respondent’s Exhibit 6, May 5, 2016, letter.

³² See, Respondent’s Exhibit 9, EPA-3 dated October 26, 2016.

disciplinary process as a result. A verbal reprimand in April 2015, a written warning and improvement plan were issued in October 2015 and a 3-day suspension was issued in May 2016.

Even though March has attended monthly staff meetings in which customer service training is provided, he has not applied any of the skills or knowledge that had been shared. He is not helpful to individuals ([applicant name] emails from Nov 2015). He refers inquiries to the OEMS Director or Medical Director rather than seeking assistance and learning how to deal with customer service issues in a positive manner.

March has been given assignments for policy development that he has not completed within the timeframe allotted. March was directed to obtain & distribute guidebooks from DHSEM to all EMS agencies. March delegated this to members of his staff & TSN which was not part of the directive.

March does attend staff meetings and does email the OEMS Director as directed in/out of the office. March was directed to obtain approval for all out of office duties in his 2015 EPIR. That was not complied with in May 2015 on two separate occasions (on or about May 17).³³ March is also required to provide the OEMS Director with his monthly work scheduled which he has not complied with. He is to notify OEMS Director of AL/SL to be utilized 24 hours prior to being out of the office. He was not compliant 8/29 or 8/3-8/5 (Dr. Mills signed slip which is not part of the EPIR).

March does not exhibit behavior that is to be modeled by other employees. He is defiant and argumentative at meetings. He is not friendly or polite to all staff. He can at times be loud and disruptive while working in his cubicle. He does not provide clear direction to his staff. Staff frequently seek clarification from the OEMS Director or Medical Director due to confusing direction provided by March. The behaviors described above do not empower his staff to achieve goals or objectives. It is divisive and damaging to the operations of OEMS.

As noted previously, investigations take too long to complete and the number of days to process certification/recertification

³³ It is noted that this occurred outside the rating period being evaluated herein. The rating period for this EPA-3 started September 1, 2015, and ended August 31, 2016.

packets takes too long. March has not intervened or developed any plans to correct these situations.

Staff are confused and unmotivated by March's behavior. He is not a good role model and does not promote a positive, healthy place to work and grow.

37. Director Raynes stated the following in the Summary Comments section of the Grievant's October 27, 2016, EPA-3: "March has great knowledge and potential. He chooses not to be a part of the OEMS team. He chooses to be noncompliant with expectations and all attempts to engage him and improve his performance." She left the next section, "Improvement and/or Development Plan," blank.³⁴

38. Attached to the October 27, 2016, EPA-3 was another EPIR dated October 1, 2016, which, again, listed actions Grievant would be required to take to be deemed improved. Some of the actions listed were the same as the previous EPIR. However, this one was longer, much more detailed, and included many new requirements.

39. Grievant prepared and submitted a five-page, type-written response to Director Raynes regarding his October 27, 2016, EPA-3 and the new EPIR. In this response, also dated October 27, 2016, Grievant challenges the ratings he received in each performance factor and standard listed in the EPA-3, and two of the items listed in the improvement plan, by explaining in detail his opposition to the rating he received. Neither Director Raynes nor Dr. Mills replied to Grievant's response in any way. Also, neither discussed this document, or its contents, with Grievant.

40. By letter dated November 4, 2016, Director Raynes notified Grievant that a predetermination conference would be held on November 14, 2016, regarding

³⁴ See, Respondent's Exhibit 9, EPA-3 dated October 27, 2016.

“noncompliance with terms of your EPIR” and “1-DHHR Policy 2108-Employee Conduct.” The notice further states that the purpose of the meeting was “. . . to give you an opportunity to respond to the aforementioned items and provide input for our consideration. You may present any information you believe would be supportive of your position.”³⁵

41. A predetermination conference was held on November 14, 2016, as scheduled. In attendance were Grievant, his attorney, Director Raynes, and Dr. Mills. Grievant’s attorney spoke on behalf of Grievant during this meeting. Director Raynes took no action on this matter, disciplinary or otherwise, following this conference.

42. Neither party presented any of Grievant’s EPAs for years prior to 2015. Director Raynes repeatedly testified that an EPA-3 accompanied the “Performance Standards and Expectations” dated June 2, 2014, but no such document was produced. The record contains no EPA of any kind issued to Grievant for any year prior to 2015. However, on Grievant’s EPA-2 dated April 2, 2015, there is a reference to an EPA-3 completed in September 2014, but nothing in June 2014.³⁶

43. One of the requirements Director Raynes imposed on Grievant in the October 5, 2015, EPIR was that he email her when he arrives and leaves the office each day, including when he leaves and returns from lunch breaks.³⁷ Director Raynes Respondent’s very detailed EPAs, improvement plans, expectations and standards, reprimand letter, and suspension letter presented herein make no mention of Grievant

³⁵ See, Respondent’s Exhibit 10, November 4, 2016, Predetermination Conference Notice.

³⁶ See, Respondent’s Exhibit 3, EPA-2 dated April 2, 2015.

³⁷ See, Respondent’s Exhibit 7, EPIR dated October 5, 2015, “Demonstrates Credibility” section, paragraph 3.

having any attendance or time reporting issues. Director Raynes testified that Grievant had this problem in the past, but she did not indicate when, or how she came to that conclusion, and Respondent presented no evidence to support her allegation. No valid reason has been provided as to why Director Raynes included this requirement.

44. In order to shift the OEMS focus to providing customer service, Director Raynes has instituted numerous changes in the policies regarding certifications since coming to OEMS. These changes have caused confusion for both those who are applying for certifications and those at OEMS. As of March 14, 2016, there had been four different versions of the recertification policy issued in three years.³⁸ Such was verified by Dr. Mills in an email to Grievant, copying others including Director Raynes, on that date. In this email, Dr. Mills went on to state as follows:

This (sic) current policies for recertification are complex. We have had 4 different versions of the recertification policy in the past 3 years. Due to the variation in the directives, we need to make every effort to review the applications for sufficient data in order to issue recertification cards. This process has been confusing to the field personnel secondary to the many changes. They have not had clear direction due to the many changes. Some agencies have followed one or more of the policies this office has posted online. Therefore, during this recertification period, review the submitted documentation and if the minimum requirements are met in any or a combination of the policies you may grant certification. Any combination of skills sheets and other forms, if satisfactorily completed, will be acceptable. I am available to assist in any way to help. The next recertification period will be less complicated and should resolve the current issues. --doc³⁹

³⁸ See, Grievant's Exhibit 1, March 14, 2016, email from Dr. Michael Mills to Grievant and others, bearing the subject line "recertification March 2016."

³⁹ See, Grievant's Exhibit 1, March 14, 2016 email from Dr. Michael Mills.

45. Since in or about April 2014, Director Raynes has not allowed Grievant to attend meetings outside the office, such as town hall meetings, or regular EMS Advisory Counsel (“EMSAC”) meetings. Only she and/or Dr. Mills attend these meetings now. Director Raynes does not inform Grievant of anything that occurred at these meetings, or give him any information regarding issues discussed. As the Director of EMS Programs, such information is relevant to his job. In the past, Grievant had attended such meetings.

46. Grievant is frequently left out of email communications from Director Raynes regarding issues relevant to his job responsibilities. Many times, Grievant’s staff has received these communications, noticed that Grievant was not included, and forwarded him the communication to make sure he was in the loop.⁴⁰ However, Director Raynes has repeatedly noted that one of Grievant’s deficiencies is that he “fails to share information.”

47. Grievant has significantly more experience in the EMS field than Director Raynes. Director Raynes’ background is, primarily, in nursing home management. She even acknowledged that Grievant has a wealth of knowledge in EMS in at least one of his evaluations, and at the level three hearing,

48. Director Raynes’ appointment in 2014 signaled a change in the way OEMS was to operate. Director Raynes implemented changes that were more in line with what the EMS providers and agencies in the field wanted. That being, less regulation and strict enforcement. Such is the basis of the “customer service” model repeatedly referenced by Director Raynes, as opposed to the strict regulation previously exercised.⁴¹

⁴⁰ See, testimony of Danny Anderson; testimony of Grievant.

⁴¹ See, testimony of Melissa Raynes; testimony of Grievant.

49. No documentary evidence was presented to support the claim that BPH management directed OEMS change from a strict regulatory agency to a customer service-based agency. Further, it does not appear that anything in writing was issued to those employed at OEMS to announce the change, or to guide them through it. The evidence presented suggests that only Director Raynes was sent in to make the change. Neither party called as witnesses any members of BPH management such as the Commissioner, or any Deputy Commissioners.

50. There has been no evidence presented to suggest that either Director Raynes or Dr. Mills consulted any legal unit assigned to OEMS about Grievant's concerns about the legality of the changes in procedures. No legal opinion has been presented as evidence in this case, nor has any policy or memoranda pertaining to the same.

51. Neither Director Raynes nor Dr. Mills sent Grievant to any Division of Personnel ("DOP") trainings to help him improve in any of the areas identified in his numerous EPAs as needing improvement, such as leadership skills, working with others, or team building.

52. Grievant has, admittedly, at times, turned in his call logs late. Also, there were months during which he did not submit required monthly newsletter articles.

53. During the course of this grievance, Director Raynes has repeatedly described Grievant as "argumentative," "confrontational," "loud," "belligerent," "unfriendly," and "not positive or constructive," and the like. She has also complained that Grievant makes "divisive comments," is not a "motivational leader," is "negative," "creates a divisive environment," and that he "isolates himself." However, she provided few

examples of specific things Grievant has said or done to make her arrive at these conclusions.

54. In this grievance, Respondent has never alleged that Grievant was insubordinate.

Discussion

This matter presents claims that are both disciplinary and non-disciplinary in nature. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). In non-disciplinary matters, the Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “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.*

As there were four separate grievances filed and consolidated in this matter, numerous issues and claims have been raised. Respondent issued Grievant a written reprimand, and later a three-day suspension, both for alleged failures to comply with his EPIR. Grievant challenges both of these disciplinary actions, and denies Respondent's allegations of noncompliance. Grievant has grieved the performance appraisal he received on or about October 27, 2016, and the issuance of Notice of Predetermination Conference dated November 4, 2016. Further, in each of his four separate statements of grievance, Grievant has alleged that Director Raynes has subjected him to a hostile work environment and harassment. Respondent denies all of Grievant's claims, and asserts that the performance appraisal was proper, and that it has properly followed its progressive discipline policy in addressing Grievant's performance issues.

Many of the facts of this grievance are in dispute. As such, credibility determinations must be made. Given the number of claims made, and the lengthy, complicated history of interactions between Grievant and Director Raynes, the undersigned ALJ will address the credibility determinations at the outset of the analysis. 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 & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The 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. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 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 *Id.*; *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Director Raynes testified extensively at the level three hearing during both days of hearing. Director Raynes is the person who drafted the many standards and expectations documents, improvement plans, EPAs, and disciplinary action correspondence at issue herein. She is also the person who made the decision to issue Grievant the written reprimand and the three-day suspension. It is also she who Grievant claims has been harassing him and subjecting him to a hostile work environment. Given that many of her actions and decisions are specifically at issue in this matter, such can be considered a bias, and a motive for Director Raynes to be untruthful.

Director Raynes' demeanor varied during the level three hearing. During her direct examination, she appeared mostly calm, direct, knowledgeable, and maintained good eye contact with counsel for Respondent. She answered the questions asked of her and did not appear evasive. However, she seemed frustrated with all that had occurred with Grievant leading up to this matter. She fidgeted some, and talked with her hands. During

her cross examination, at times, she appeared knowledgeable, and answered the questions asked of her. However, a number of times she answered that she “did not recall,” and that she did not remember “specifics” of events that occurred and actions she had taken against Grievant. This seemed somewhat implausible given the level of detail and documentation she has used to chronicle what she believes are deficiencies in Grievant’s performance. Director Raynes appeared less direct in answering Grievant’s counsel’s questions. She seemed annoyed and defensive at times, and at other times, very matter-of-fact in her answers. It is certainly possible that Director Raynes was merely trying to be cautious in answering his questions, or that she feared a “gotcha.” Nonetheless, this made her seem less credible at times. Director Raynes made no noticeable eye contact with Grievant during any of her testimony. Also, when Grievant was testifying during his direct examination on day two, Director Raynes was looking down and writing feverishly on a notepad almost the entire time. The undersigned ALJ did not once observe her making eye contact with Grievant or looking at him. Director Raynes gave the overall impression that she does not like Grievant very much, and that she is annoyed by these grievances. This attitude also diminishes her credibility.

Grievant testified at the level three hearing on the last day. Grievant has an interest in this matter as these are his claims and he is seeking the removal of discipline previously imposed. Accordingly, such could be a motive to be untruthful. Grievant was calm and direct in answering the questions asked of him. He did not appear evasive. In fact, many of his answers were very long and detailed. Grievant answered many of the questions asked of him in a matter-of-fact manner. However, his tone did not come off as rude, or confrontational. Grievant made good eye contact when answering questions of both his

counsel and Respondent's counsel. However, at times, Grievant appeared to get a little red in the face, and looked like he was trying to hold in anger or emotion. Grievant appeared very knowledgeable, but seemed frustrated, and somewhat angry, by everything that has happened leading up to this grievance. For instance, he referred to Grievant's Exhibit 3, the June 2, 2014, "Performance Standards and Expectations" document as his "nonparticipation order." During his testimony, Grievant was not observed making eye contact with Director Raynes, or looking in her direction. This is very similar to the way Director Raynes behaved during her testimony. As with Director Raynes, Grievant gave the impression that he does not like Director Raynes very much, and such diminishes Grievant's credibility some. Overall, Grievant appeared credible.

Danny Anderson and Jimmy Sadler testified at the level three hearing. Both displayed the appropriate demeanor, and answered the questions they were asked. They did not appear evasive. They are not interested parties in this grievance. However, they report directly to Grievant. They work with Grievant on a daily basis, and are stationed in the same office as Grievant. Danny Anderson noted during his testimony that he believed that Grievant had a big role in his being hired at OEMS. Given that Mr. Anderson and Mr. Sadler work with Grievant and report to him, such could indicate bias in his favor, or motivation to be untruthful. However, both Mr. Anderson and Mr. Sadler appeared credible. Mr. Anderson had some trouble remembering some things he was asked about, but such could easily be explained by the passage of time as some of the events he was asked about occurred about a year before he testified.

Dr. Mills testified at the level three hearing. Dr. Mills displayed the proper demeanor during the majority of the hearing, and was not evasive, for the most part.

There was one instance where Dr. Mills questioned the relevance of a question asked by counsel for Grievant. Counsel for Respondent had not objected, and the undersigned ALJ instructed him to answer the question if he could. Dr. Mills then answered the question, but it was somewhat evasive. Dr. Mills appeared mostly calm and professional. However, there were times when he did not appear to want to answer certain questions, and seemed irritated or frustrated. Dr. Mills had trouble remembering all of what occurred during certain meetings with Grievant. However, such can easily be explained by the passage of time. Also, Dr. Mills seemed to try to avoid expressing any disagreement with Director Raynes. As Dr. Mills reportedly manages OEMS with Director Raynes, such could suggest a bias in her favor, and a motive to be untruthful. Also, it is noted that Dr. Mills appeared to contradict himself to some extent when testifying about the September 30, 2015, staff meeting. Dr. Mills agreed that Grievant did not raise his voice or use inappropriate language during his exchange with Director Raynes. The most he would say about the exchange between Grievant and Director Raynes was that it was “heated.” However, thereafter, he testified that Grievant “lambasted” and “embarrassed” Director Raynes and him in front of the staff. Such a contradiction diminishes Dr. Mills’ credibility. While there were issues with Dr. Mills’ testimony, overall, he appeared credible.

Hostile Work Environment and Harassment

Grievant asserts that Director Raynes has engaged in conduct that has created a hostile work environment for him in violation of DHHR Policy Memorandum 2123, and that her conduct constitutes “nondiscriminatory hostile workplace harassment” in violation of the DOP-P6 “Prohibited Workplace Harassment” policy. Grievant bears the burden of proof as this claim is not disciplinary in nature. Grievant argues Director Raynes has

been hypercritical of him, has singled him out, isolated him from the other EMS management and staff, as well as the EMS community at large, kept him under constant threat of “further action,” and has harassed and humiliated him. Grievant asserts that, since Director Raynes started at OEMS, she has been taking actions to get rid of him. One of Grievant’s main arguments is that Director Raynes has placed him in a “*Catch-22*” situation, wherein he is required to follow the applicable certification/recertification requirements when making decisions to approve or deny applications, and has received discipline for allegedly failing to do so. However, at the same time, he is expected to not strictly comply with those same requirements in order to provide “good customer service.” Director Raynes has consistently given Grievant low ratings on his performance evaluations for failing to provide good customer service. Respondent denies all of Grievant’s claims.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any “mathematically precise test.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance,” but are by no means limited to them,

and “no single factor is required.” *Harris, supra* at p. 23; *Rogers v. W. Va. Reg’l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

“To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.’ *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).” *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). “As a general rule ‘more than a few isolated incidents are required’ to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm’n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997).” *Marty v. Dep’t of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006). However, “[m]ere 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)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

Further, the West Virginia Division of Personnel “Prohibited Workplace Harassment” policy defines nondiscriminatory hostile workplace harassment as follows:

[a] form of harassment commonly referred to as “bullying: that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bonds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

W. Va. DOP-P6, "Prohibited Workplace Harassment," Section II(H).⁴² This policy goes on to state that,

[n]ondiscriminatory hostile workplace harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, and sabotage of performance which may include, but is not limited to:

1. Unwarranted constant and destructive criticism;
2. Singling out and isolating, ignoring, ostracizing, etc.;
3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
4. Threatening, shouting at, and humiliating particularly in front of others.⁴³

DHHR Policy Memorandum 2123, "Violent/Hostile Work Environment," adopts the definition of nondiscriminatory hostile workplace environment set forth in the DOP-P6 above. However, this policy lists a stated "purpose" for the policy and a set of specific procedures to be followed by managers/supervisors to address incidents of nondiscriminatory hostile workplace harassment and workplace violence.⁴⁴ The stated "purpose" is as follows: "WVDHHR adopts a policy of zero tolerance for workplace violence and/or creating a hostile working environment. This policy includes incidents occurring on or off state property."⁴⁵ The policy memorandum goes on to state the following with respect to "procedures:"

⁴² See, Grievant's Exhibit 6, DOP-P6, "Prohibited Workplace Harassment."

⁴³ See, Grievant's Exhibit 6, DOP-P6, "Prohibited Workplace Harassment," Section III (G).

⁴⁴ See, Grievant's Exhibit 5, Policy Memorandum 2123, "Violent/Hostile Work Environment."

⁴⁵ See *Id.*

DHHR does not tolerate threatening or assaultive behavior. Managers/Supervisors must resolve any such inappropriate conduct on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. Any person (e.g., client, customer, vendor, visitor, etc.) who exhibits threatening, hostile, or abusive behavior, either physically or verbally, or who otherwise willfully interrupts or molests the orderly and peaceful proves of any department, division, or agency of State government, may be denied services, and be subject to arrest and criminal prosecution.

COURSE OF ACTION FOR:

- A. Offensive or Intimidating Conduct
 - 1. Separate the employees.
 - 2. Report through your chain of command and to the liaison officer,
 - 3. Investigate the allegations and take written statements.
 - 4. Discipline offending employees appropriately based on the severity of the incident.⁴⁶

There is no course of action specifically listed for nondiscriminatory hostile workplace harassment. Also, there are no procedures listed for a situation in which a supervisor, or member of management, is engaging in prohibited behavior.

The evidence presented demonstrates that Director Raynes has issued Grievant a steady flow of poor EPAs, standards and expectations documents, improvement plans, threats of discipline, and disciplinary action since she began at OEMS in 2014. Such will be addressed in chronological order to analyze Grievant's claim. Director Raynes issued her first "Performance Standards and Expectations" document to Grievant on or about June 2, 2014, after being at OEMS for about three months. The receipt of this document

⁴⁶ See, Grievant's Exhibit 5, Policy Memorandum 2123, "Violent/Hostile Work Environment," Section 4.0, "Procedures."

was the first time Grievant was informed that Director Raynes did not think he was performing his duties in an acceptable manner. She did not discuss anything in this document with him prior to its issuance. Before that, Grievant had had little in-person interaction with Director Raynes. Director Raynes was not in the office every day because she was splitting her time between OEMS and OTP. She had conducted short one-on-one meetings with each staff member, including Grievant, during her first months at OEMS to familiarize herself with the staff and their positions. Also, Grievant and Director Raynes rode together to attend an EMSAC meeting in Flatwoods, West Virginia, in March 2014. Aside from these two instances, it appears that the bulk of their interactions during these first few months was through email.

Director Raynes had trouble remembering things that occurred during her first months at OEMS. Director Raynes testified that she could not recall the specifics of her one-on-one meeting with Grievant, and had no independent recollection of his answers to the set of questions she asked all of the employees. Director Raynes testified that she could not recall when the Flatwoods meeting occurred, but testified that during that meeting OEMS and Grievant were verbally “attacked” by some of those in attendance. However, she could not recall the specifics of the attack.⁴⁷ Director Raynes did not assert that Grievant acted inappropriately at that meeting. She questioned the date she issued Grievant’s first “Performance Standards and Expectations,” asserting that June 2, 2014, may have been the date the form was revised. However, in the body of the document, she set forth certain deadlines, the earliest being June 6, 2014, and the last being June 30, 2014. Therefore, this document was most likely issued on or about June 2, 2014.

⁴⁷ See, testimony of Melissa Raynes.

The “Performance Standards and Expectations” document is somewhat troubling. Therein, Director Raynes made a number of changes to Grievant’s job duties, and indicated that Grievant was not performing, at least, some of his duties in an acceptable manner. The document is divided into sections entitled “Flexibility,” “Credibility,” “Customer Service,” “Quantity of Work,” “Quality of Work,” “Availability for Work,” “Leadership,” “Management,” and “Work Environment.” While this is not the form EPIR Director Raynes later used for Grievant’s improvement plan, this document reads somewhat like a performance improvement plan. For example, Director Raynes instituted the following three changes under the “Credibility” section:

- WILL NO LONGER ATTEND MPCC, EMSAC, TSN, RETI, OR OTHER MEETINGS REGULARLY SCHEDULED OUTSIDE OF THE OEMS DIAMOND BUILDING. ATTENDANCE WILL BE ON AN ‘AS NEEDED’ BASIS AND THE FOCUS AND CONTENT OF PARTICIPATION WILL BE MAINTAINED TO FOCUSED TOPIC(S) AS DIRECTED BY THE OEMS DIRECTOR;
- WILL NOT ISSUE ANY POLICY CHANGES OR CIS/FIELD EMS COMMUNICATIONS WITHOUT THE PRIOR CONSENT AND APPROVAL OF THE OEMS DIRECTOR; and,
- WILL NOT INITIATE ANY EMS PROGRAMMATIC CHANGES WITHOUT THE EXPRESS CONSENT AND APPROVAL OF THE OEMS DIRECTOR.⁴⁸

As Director of EMS Programs, Grievant had always attended outside meetings to stay informed and involved in the EMS community so that he could better perform the duties of his job. Before this document was issued, Director Raynes had told Grievant that things were going to be changing in order to “protect” him in response to what occurred at the

⁴⁸ See, Grievant’s Exhibit 3; testimony of Melissa Raynes; testimony of Grievant.

March EMSAC meeting. However, no such new provisions regarding his job duties and responsibilities were mentioned. Director Raynes' decision to prohibit Grievant from attending meetings outside of the Diamond Building, as stated in the first bullet point above, limited and restricted Grievant's interactions with state EMS providers and agencies as a whole. As Grievant is the Director of EMS Programs, such effectively cut him out of the information loop regarding EMS issues. While Director Raynes and Dr. Mills now attend these meetings as the OEMS representatives, there was no evidence to suggest that they have briefed Grievant on the issues discussed at the various meetings, or in any way conveyed such information to him. Also, the evidence presented demonstrated that Director Raynes has left Grievant out of email regarding EMS issues that she has sent to other OEMS staff.⁴⁹ At times, Danny Anderson would forward Grievant emails that he had received regarding EMS issues so that Grievant would be aware of current issues. These actions by Director Raynes isolated Grievant, and made it more difficult for him to do his job.

It is unknown why Director Raynes implemented the other two bullet point directives. Director Raynes testified that she had no knowledge of Grievant issuing any policy or program changes without her consent, and such has not been otherwise alleged. However, she testified that Grievant is her subordinate, and that she is responsible for his conduct and that she did not want any changes made without her knowledge. The undersigned ALJ respects that Director Raynes did not want any changes made without her consent, and such is reasonable given her position. However, there is no evidence that Director Raynes issued such a document, or directives, to any other staff members,

⁴⁹ See, testimony of Danny Anderson.

or members of OEMS management. This would suggest that rather than ensuring that her subordinates were not doing things without her knowledge, Director Raynes was singling Grievant out, attempting to diminish his authority, or attempting to make it appear that Grievant had been acting inappropriately.

In this document, Director Raynes also added the following responsibilities in the “Customer Service” section of the “Performance Standards and Expectations” document:

- IMPLEMENTATION OF A CALL LOG TO TRACK WHEN CALLS RECEIVED, RESPONDED TO AND INFORMATION PROVIDED FOR PERFORMANCE IMPROVEMENT PURPOSES. THIS LOG WILL INCLUDE A SECTION FOR PHONE CALLS AS WELL AS A SECTION FOR EMAIL CONTACTS. THIS WILL BE IN PLACE BY JUNE 30, 2014.
- IMPLEMENTATION OF TRACKING DEVICE FOR RECERTIFICATION AND APPLICATION PACKETS. WHEN THESE ITEMS RECEIVED, CONTACT BACK TO THE EMS PERSONNEL FOR MISSING ITEMS, WHEN PACKET COMPLETE AND COMMENTS FOR OTHER MISCELLANEOUS CONTACTS THIS WILL BE IN PLACE BY JUNE 30, 2014.

Additionally, under the “Quantity of Work” section, Director Raynes included the following bullet point:

- MR. TUCKER WILL INCLUDE HIMSELF IN THE SCHEDULE TO COMPLETE THE INSPECTIONS. NO NEGATIVE, DEROGATORY OR DIVISIVE VERBALIZATIONS WILL BE TOLERATED FROM OEMS [or TSN] STAFF DURING TIME IN THE FIELD CONDUCTING SUCH INSPECTIONS. REPORTS OF SUCH VERBALIZATIONS MAY BE SUBJECT TO PROGRESSIVE DISCIPLINE.

Lastly, in the “Work Environment” section of this document, Director Raynes included the following bullet point:

- A COOPERATIVE, NON-HOSTILE WORK ENVIRONMENT WILL BE CREATED FOR STAFF. STAFF WILL BE ENCOURAGED TO TAKE INITIATIVE IN RESOLVING PROBLEMS, ASK QUESTIONS, ETC.

Upon information and belief, no other OEMS management members had to implement call logs or track their communications for Director Raynes. Further, the only explanation given as to why these two provisions were created was “customer service.” Director Raynes had decided that Grievant was providing poor customer service. It is unclear how she came to this conclusion, but her testimony suggests that it was based upon secondhand information provided to her mostly by unnamed sources. Director Raynes testified that people had complained about Grievant, but gave few, if any, specific details about such. Director Raynes made it very clear throughout her testimony that she viewed Grievant as being divisive, and asserted that he made divisive statements. While it is clear that Grievant is being threatened in the provision above about making “negative, derogatory or divisive” statements, it is unclear as to what prompted Director Raynes to include this provision, or what, if anything, she had heard caused her to include it. Also, she did not provide any examples of, or specify, what she meant by “negative, derogatory or divisive.”

Director Raynes admittedly drafted this document specifically for Grievant and delivered it to him. Given their little interaction during the months prior to its issuance, it is unclear as to where Director Raynes got the information she relied upon in drafting this document. Director Raynes was asked a number of questions about the bullet point provisions she included in this document, and she testified that she could not recall the specifics of many of them. She testified that the document had been attached to an EPA-

3, and she would have to refer to that to answer Grievant's counsel's questions. However, nothing was attached to this document, and no EPA-3, or other type of EPA, issued in the year 2014 was presented by either party as evidence in this matter. Only two EPA-3s were presented as evidence, those being one dated September 28, 2015, and one dated October 27, 2016. The evidence presented suggests that Grievant was given an EPA-3 in or about September 2014.⁵⁰ However, as such was not presented, the ratings given therein are unknown.

Following the issuance of the June 2, 2014, "Performance Standards and Expectations" document, Director Raynes began diligently using the Employee Performance Appraisal system to assess Grievant's work performance and to communicate with him. It is noted that Director Raynes has rated Grievant's work performance as poor and needing improvement in every EPA-2 and EPA-3 she has completed for him since she came to OEMS.

The earliest evaluation document presented in this matter is an EPA-2 Director Raynes issued to Grievant dated April 2, 2015. The EPA-2 is an "Interim Rating," meaning it is to be issued between the annual EPA-3s. In this EPA-2 Director Raynes rated Grievant's performance as "Fair, But Needs Improvement."⁵¹ She stated in the "General Comments" section, "[t]here have been no noted improvements in performance from the EPA3 completed in September. This review is a status quo of that issued via the EPA3. Mr. Tucker is not cooperative with OEMS leadership and staff. This lack of cooperativeness continues to be evidenced by complaints from the EMS personnel that

⁵⁰ See, Respondent's Exhibit 3, April 2, 2015, EPA-2, "General Comments."

⁵¹ See, Respondent's Exhibit 3, April 2, 2015, EPA-2.

come in contact with Mr. Tucker.” No specifics regarding the “complaints” and how Grievant was “not cooperative with OEMS leadership and staff” were provided in this document. With respect to this document, Director Raynes testified at level three that she was charged with implementing “customer service” at OEMS, and that the OEMS staff were not to be “dictators,” or as strict as during previous administrations. They were to be more cooperative with people and such was considered “good customer service.” Director Raynes complained that Grievant was being too strict, and that he was not providing good customer service.

Director Raynes issued Grievant an EPA-3 dated September 28, 2015. This was an “Annual Rating” for the time period September 1, 2014, to August 31, 2015. There are a total of thirty-seven factors to be evaluated in this EPA-3. Director Raynes rated Grievant as “Needs Improvement” in thirty-four of the thirty-seven factors. She rated him as “Meets Expectations” in only the following three factors: “[m]aintains personal appearance appropriate to job,” [e]xhibits ability to secure and evaluate facts before taking action,” and “[e]mployee’s attendance supports the expected level of work.” Director Raynes did not rate Grievant “Exceeds Expectations” in any factor.

The first comment Director Raynes wrote in this evaluation was that “March still does not respond to changes in a positive manner. He is not open to suggestions from staff or field providers. His response is that we have tried that & it didn’t work or something similar. Positive resolutions are not offered in response.” Director Raynes did not explain who provided her this information, who the staff and field providers were, or whether these suggestions were viable, lawful, or appropriate. In the next comment section, Director Raynes confirms that Grievant’s Exhibit 3, the “Performance Standards and Expectations”

document, was given to Grievant in June 2014. She states that he is not complying with the same with respect to responding to email. In the “Customer Service” section, Director Raynes wrote, “March has been overheard to say ‘that is not in my role or I could help you’ & said similarly to staff.” Director Raynes did not state that she heard Grievant make this statement. Instead, she seemed to indicate that unidentified staff informed her of these statements. Director Raynes also comments later in the document that Grievant does not consistently attend staff meetings and that he is “still not a motivational leader.” While Director Raynes marked Grievant as Needs Improvement in every factor in the “Work Environment” section, including “[m]aintains a safe and healthy workplace,” she included nothing in the comments to explain this. The comments section is blank.

On or about the same time as he received the EPA-3 dated September 28, 2015, he received an EPA-1 also bearing that date. Attached to it was a new “Performance Standards and Expectations” that Director Raynes had prepared for Grievant. Some of the expectations and standards listed therein are the same as, or similar to, the June 2014 version, but Director Raynes added numerous new ones. These new requirements cover many aspects of Grievant’s job, and vary from setting deadlines for Grievant and requiring him to be courteous, to “[p]laces computer in locked mode prior to leaving work station unsupervised.”

A few days after the September 2015 EPA-3, Director Raynes next issued Grievant a written reprimand on October 5, 2015, for “failure to comply with expectations established within EPA3 provided to you on September 29, 2015 and approving certification outside of the OEMS requirements for certification.” In this same letter, Director Raynes states that Grievant’s behavior at the September 30, 2015, staff meeting

was inappropriate and “counter to the expectations” provided to him during his EPA-3 review on September 29, 2015. Grievant filed a grievance challenging the written reprimand, and this topic will be addressed in detail later in this decision.

Thereafter, on or about October 5, 2015, Director Raynes issued Grievant a document entitled “Employee Performance Improvement Recommendation” (“EPIR”), in which she listed specific actions Grievant would be required to complete in order to be considered improved.⁵² Director Raynes issued this document on the same day as the written reprimand, which was only days after the staff meeting during which Grievant questioned the legality of her directives. One of the requirements listed therein states as follows: “[e]mployee must work well with others to achieve organization’s goals. This includes being professional and civil to staff, co-workers, colleagues at all times. Exhibiting behaviors associated with a hostile work environment will not be tolerated. Examples of such include outbursts, confrontations, arguments in public setting such as staff meeting.”

Also, included in this document is a requirement that Grievant email Director Raynes “time in/out of the office including lunch/breaks.” Thus, Grievant has been required to email Director Raynes when he gets to the office each morning, when he leaves for lunch or breaks and when he returns from the same, and again when he leaves for the day. There has been no allegation that Grievant was having any time reporting or attendance issues, and no other employee is known to be required to do this. In fact, “[e]mployee’s attendance supports the expected level of work” was one of only three factors that were rated as “Meets Expectations” in Grievant’s EPA-3 dated September 28,

⁵² See, Respondent’s Exhibit 7, Employee Performance Improvement Recommendation.

2015, issued just days before the EPIR.⁵³ It is also noted that, “[e]mployee’s attendance supports the expected level of work” was one of only two factors rated as “Meets Expectations” in his EPA-3 dated October 27, 2016.⁵⁴ Director Raynes tried to explain this during her testimony by stating that Grievant had had these issues in the past. However, Director Raynes also testified that she talked to no one about Grievant before she began at OEMS, and nothing from 2014 forward presented in this matter indicates that he has had any attendance or time reporting issues that would require such monitoring. Director Raynes’ explanation is not supported by the evidence presented, and appears implausible.

On or about December 18, 2015, Director Raynes issued Grievant an EPA-2 for the period October 5, 2015, to December 12, 2015. Director Raynes rated Grievant as “Does Not Meet Expectations,” and noted in the “Performance Development Needs” section, “[s]ee EPIR highlighted & attached. Submit monthly newsletter articles as directed via email on 7/29 7 12/1/15.”⁵⁵ Despite this, Director Raynes wrote in the comments section, “March is completing emails in/out as instructed. March is notifying Director of AL/SL as instructed. March is very knowledgeable in his area of expertise & has the potential to be a great asset to OEMS.”

By letter dated May 5, 2016, Director Raynes informed Grievant of her decision to suspend him from employment without pay for three days for failing to comply with the EPIR issued on October 5, 2015. Grievant served his suspension from May 24, 2016,

⁵³ See, Respondent’s Exhibit 4, EPA-3 dated September 28, 2015.

⁵⁴ See, Respondent’s Exhibit 9, EPA-3 dated October 27, 2016.

⁵⁵ See, Respondent’s Exhibit 8, EPA-2, December 18, 2015.

through May 26, 2016. Grievant grieved this suspension, and such will be addressed more fully later in this decision.

On or about October 27, 2016, Director Raynes issued Grievant an EPA-3 for the rating period of September 1, 2015, to August 31, 2016. Director Raynes rated Grievant as “Needs Improvement” in thirty-five of the thirty-seven factors evaluated. She rated Grievant “Meets Expectations” in only two of the thirty-seven factors evaluated, those being, “maintains personal appearance appropriate to job” and “employee’s attendance supports the expected level of work.” This rating is lower than his previous EPA-3 rating in which she rated him as “Meets” in three of the thirty-seven factors. Grievant’s overall rating was “Needs Improvement.” Grievant submitted a five-page typewritten response to Director Raynes on or about October 27, 2016. Grievant had never done this before. Director Raynes never met with Grievant regarding his comments and concerns contained in his written response, nor did she communicate with him about them in any way. Grievant has grieved this evaluation, and such will be discussed more fully later in this decision.

Days after issuing the EPA-3, Director Raynes issued to Grievant a Predetermination Conference Notice dated November 4, 2016, informing him that a predetermination conference would be held on November 14, 2016, regarding “(1- DHHR Policy 2108-Employee Conduct) Noncompliance with terms of your EPIR.” Grievant grieved the issuance of this Predetermination Conference Notice, and such will be more fully addressed later in this decision. The predetermination conference was held as scheduled. Grievant brought his counsel with him to the conference, and counsel spoke on Grievant’s behalf. Following this conference, Director Raynes and Dr. Mills took no

action, disciplinary or otherwise, regarding the allegations made in the predetermination conference notice. During her testimony, Director Raynes noted that Grievant did not say anything during the meeting, and that his attorney did all of the talking. Her comment suggests that Director Raynes viewed this negatively, at least, somewhat. There is absolutely nothing wrong with Grievant's attorney speaking on his behalf at such a meeting. Grievants have a statutory right to have counsel present at any meeting at which discipline is being contemplated.

Respondent argues that Director Raynes was properly addressing Grievant's performance issues using progressive discipline pursuant to DHHR Policy Memorandum 2104.⁵⁶ Director Raynes started with a verbal warning, or reprimand, on April 2, 2015, then a written reprimand on October 5, 2015, and a suspension on May 5, 2016. She issued a Predetermination Conference Notice on November 4, 2016, and held a predetermination on November 14, 2016. Given this, based upon DHHR Policy Memorandum 2104, it appears that Director Raynes was on track to demote or dismiss Grievant following that predetermination conference. After hearing Grievant's response to the allegations of noncompliance, Director Raynes took no action, disciplinary or otherwise, with respect to the alleged noncompliance. No evidence suggests that Director Raynes informed Grievant and his counsel in writing, or otherwise, of any decision she made following the predetermination. She simply took no further action.

Director Raynes had the authority to use progressive discipline to address performance issues. No one has alleged that the progressive discipline policy has been

⁵⁶ See, Respondent's Exhibit 13, DHHR Policy Memorandum 2104, "Guide to Progressive Discipline."

violated. Clearly, she followed the steps set out in that policy very deliberately. The issue is whether Director Raynes used the EPA system and progressive discipline, as well as other means, to harass Grievant and to create a hostile work environment for him in violation of both law and policy. Based upon the evidence presented, the undersigned ALJ concludes that she did.

Starting with the "Performance Standards and Expectations" issued in June 2014, Director Raynes has treated Grievant differently from other employees. Only Grievant received such a document. Therein, Director Raynes informed Grievant of a number of changes to his job and how he is to perform his duties. Director Raynes' decision to make some changes in general is not the problem. However, through this document she restricted Grievant's ability to communicate with the EMS community he and his staff regulates. Such has negatively impacted Grievant's ability to do his job. Moreover, the fact that this document was issued at all is troubling. Director Raynes had little interaction with Grievant before its issuance, so it is unclear how she concluded that Grievant was not performing his duties in a suitable manner, or not providing good customer service. Director Raynes denied talking to anyone about Grievant, and denied consulting with industry agents and lobbyists regarding Grievant. Based upon comments in the various EPAs, she has relied upon hearsay from unnamed staff members in making decisions in the past. It is more likely than not Director Raynes obtained at least some of the information relied upon from an unidentified third party, and accepted what that person communicated as the truth. She certainly did not communicate with Grievant, or address any alleged problem before issuing the document. Additionally, the wording of the bullet point provisions suggests that Grievant had been acting improperly. Director Raynes,

admittedly, had no evidence to suggest that Grievant had been issuing policy changes or programmatic changes without her consent when he issued this document. It was not happening. Nonetheless, this document suggests that she was correcting improper conduct, or reining him in.

Director Raynes' use of the EPA system is quite telling. She has rated Grievant as "Fair, But Needs Improvement" on one of the two EPA-2s, and "Does Not Meet Expectations" on the other. Despite her rating of "Does Not Meet Expectations" on the one, she wrote in the general comments section that he was complying with two of the provisions of the EPIR she imposed, and that he is "very knowledgeable in his area of expertise." She has also rated Grievant as "Needs Improvement" in nearly every single factor on the two EPA-3s at issue. Frankly, no one who is coming to work can be that bad. These evaluations read as if Grievant has no redeeming qualities. She says nothing positive about Grievant or his performance in the various comment sections. Instead, her comment sections read like lists of criticisms, complaints, and insults. They contain no constructive criticism, or recommendations for how to solve any problems chronicled. In some sections, she has rated Grievant "Needs Improvement" in every listed factor, but wrote no comments to explain the rating. These evaluations are so negative they are suspicious and lack credibility.

Throughout these various EPA documents and at the level three hearing, Director Raynes repeatedly alleged that Grievant is negative, divisive, not a motivational leader, rude, loud, belligerent, prone to outbursts, argumentative, confrontational, defiant, and disruptive. The only evidence presented to support these allegations was the testimony of Director Raynes and all of her paperwork, which contains little specific information, or

examples, in support of these conclusions. Mr. Sadler and Mr. Anderson, who actually work alongside Grievant every day, and even Dr. Mills, contradicted Director Raynes' allegations. These evaluations suggest that Director Raynes has let her personal feelings toward Grievant affect her judgment and interfere with her ability to objectively evaluate Grievant. They are replete with constant, destructive criticism. It is very clear that Director Raynes does not like Grievant. She does not like his personality, or that he has questioned some of her directives. She apparently views any disagreement with her as a confrontation, or an argument. The simple acts of questioning, or disagreeing with, one's supervisor alone do not constitute improper conduct. Director Raynes is not required to like Grievant, but she is required to treat Grievant no differently than anyone else, and to evaluate him in an objective manner. She has not done so. Instead, it appears that Director Raynes has used the EPAs to harass Grievant and to repeatedly ridicule him.

Further, the evidence demonstrates that Director Raynes has sabotaged Grievant's performance by placing him in impossible positions. She has directed OEMS to be more cooperative and less strict with those who it regulates, and she has criticized Grievant for being too strict and resistant to the change. She has then given Grievant poor evaluations for not being receptive to the new leadership philosophy and for providing poor customer service. Despite this, she has also imposed discipline on Grievant for allegedly approving certification/recertification packets for people who lacked the necessary requirements. This is the "*Catch-22*" Grievant complained of. He was instructed to loosen up on the rules for customer service, but at the same time, disciplined for allegedly not being strict enough in applying the rules. Further, Director Raynes would

not provide him with guidance on how to apply her interpretation of the rules. Director Raynes has changed the policy on approving certifications/recertification numerous times, which created confusion throughout OEMS.⁵⁷ Such actions caused Grievant to reach the point where he did not feel he knew the answers to staff questions anymore, or whether to approve certifications/recertification packets. He felt like no matter what he answered or did, it would be wrong.⁵⁸ Because of this, and fearing “further action” against him, Grievant has referred staff and questions to Director Raynes for answers, and sent some packets to Dr. Mills for decision on approval. Director Raynes then repeatedly gave Grievant negative ratings for referring questions and packets to her and Dr. Mills instead of addressing them himself. Such has also been the basis for discipline imposed, and for findings that he failed to meet aspects of the different improvement plans and standards.

Director Raynes placed Grievant on a formal improvement plan, the EPIR, in October 2015. Director Raynes designed and drafted the same. This EPIR consisted of a lengthy, detailed list of actions Grievant was to take in order to be deemed improved. Some items on the list are very specific, such as “attend all OEMS staff meetings,” but others are seem vague and subjective. For example, “[e]mployee will address conflicts and problem situations with patience and tact.”⁵⁹ Some of the requirements appear arbitrary, such as the requirement that Grievant email Director Raynes when he arrives at work and leaves. Another requirement of this EPIR was “[e]mployee’s work product is thorough and complete without flaws and errors.” On its face, this does not appear to be

⁵⁷ See, testimony of Grievant; testimony of Dr. Mills; Grievant’s Exhibit 1, March 14, 2016 email from Dr. Mills.

⁵⁸ See, testimony of Grievant, March Tucker.

⁵⁹ It is readily apparent that Director Raynes and Grievant may disagree as to what constitutes “patience” and “tact.”

an unreasonable demand. However, if taken literally and strictly, Grievant could be subject to discipline for any error, no matter how insignificant it may be.

Director Raynes would evaluate Grievant's improvement plan performance using the EPA-2 form. As one can guess, she has concluded that he was not complying several times. The failure to comply with the provisions of the EPIR was then the basis for Grievant's May 5, 2016, three-day suspension and the Notice of Predetermination Conference issued on November 4, 2016. With each reprimand and discipline imposed, Grievant was informed that if his offending conduct or performance continued, such could result in further disciplinary action. As such, Grievant has been under the threat of further action for most of Director Raynes' tenure at OEMS. Grievant's testimony at level three indicated that such has made him fearful, interfered with his ability to perform his work, and caused him anguish.

After a review of all the EPAs, standards and expectations, improvement plans, emails, and discipline, it is readily apparent that Director Raynes unreasonably overburdened Grievant with requirements and expectations that she made impossible to meet. Thereafter, she would give him a poor evaluation rating. Despite there being an improvement plan in place, and Director Raynes' repeated complaints that Grievant "does not work well with others" and has no leadership skills, she apparently did not send him to any DOP trainings to attempt to address these issues. She just told him to improve. She suggested that he participate in at least one self-development program or training in his September 28, 2015, EPA-3, but there was no evidence to suggest that she exercised her leadership skills by directing her subordinate to attend training. The improvement plan reads more like a list of demands, rather than an actual plan explaining how Grievant

was to improve his performance. It suggests that Director Raynes did not want Grievant to improve. Instead, she created a system in which Grievant could never win. Director Raynes' conduct has been extreme and outrageous.⁶⁰ She designed the evaluations to lead to the improvement plan, which was designed to ensure Grievant's failure, and his failure to comply with the improvement plan would lead to discipline.

Director Raynes' actions have had a significant impact on Grievant. Grievant testified that all of this has been physically draining, and has caused him distress, frustrated him, and affected his ability to perform his job. He also testified that Director Raynes' actions have made him feel attacked and humiliated. Grievant is a long-term employee, who has served in this position for at least four years. Until Director Raynes came to OEMS, he had not received poor evaluations, or had performance issues. He testified that, despite this, he has been under constant threat of further action since June 2014, and such is supported by Director Raynes' documentation. Grievant is not perfect; no one is. Everyone has room for improvement. However, the evidence presented demonstrates that Director Raynes has placed unreasonable demands on Grievant designed, not to help him improve, but to make him go away. Accordingly, Grievant has met his burden of proving by a preponderance of the evidence his claims of hostile work environment and non-discriminatory hostile workplace harassment in violation of DOP-P6 "Prohibited Workplace Harassment," and DHHR Policy Memorandum 2123, "Violent/Hostile Work Environment."

⁶⁰ See, Respondent's Exhibits 4 and 9, Grievant's EPA-3s.

Written Reprimand

Director Raynes' stated in the October 5, 2015, written reprimand that such was being issued because of Grievant's "failure to comply with expectations established within EPA3 provided to you on 9/29/15 and approving certification outside of the OEMS requirements for certification." Respondent bears the burden of proof on these two disciplinary actions. Given that the undersigned ALJ has concluded that the EPAs were flawed, or otherwise reflect an improper evaluation of Grievant's performance, any discipline arising from such would also be improper. However, even if that were not correct, Respondent failed to meet its burden.

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *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." *Id.* (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).

Further, the "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. See *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Director Raynes stated in the October 5, 2015, written reprimand that,

[o]n 8/14/15, you approved an individual for certification that did not meet OEMS requirements for that certification level. You were previously provided a verbal counseling on inappropriately approving individuals for certification on 4/2/15. During the staff meeting on 9/30/15, you were argumentative and confrontational with the Director of OEMS. You called into question direction provided by the Director⁶¹ and the actions of 2 of your own subordinate staff in a public setting. This is inappropriate behavior that is counter to the expectations provided to you during your EPA3 review conducted on 9/29/15.⁶²

The undersigned ALJ is somewhat confused by statements made in this written reprimand. The letter states that Director Raynes and Dr. Mills held the predetermination on this matter on September 29, 2015, the same day Grievant was given his EPA-3 referenced therein, and a day before the September 30, 2015, staff meeting, also referenced therein. If the predetermination were held on September 29, 2015, the staff

⁶¹ “The Director” refers to Director Raynes, who is the drafter of this letter/written reprimand.

⁶² See, Respondent’s Exhibit 1, October 5, 2015, letter/written reprimand; Respondent’s Exhibit 4, EPA-3 dated September 28, 2015.

meeting had not yet occurred, and Grievant's actions and statements made at that meeting could not have been discussed at the predetermination.

Director Raynes does not specify as to which "expectations" stated in the September 29, 2015, EPA-3 she was referring. However, Respondent clearly asserts that Grievant erroneously approved a recertification application on August 14, 2015, because the applicant lacked the required three years of experience. The parties agree that there is a three-year experience requirement. The issue here concerns how the years are to be counted. Grievant counted them one way, and Director Raynes said it should be another. Neither party presented any policies, or rules, regarding how the years are to be counted. Nonetheless, it appears that the applicant did not have thirty-six full months of experience at the time of application. Grievant processes about six-thousand applications each year. It is true that the original verbal reprimand in April 2015 was based upon Grievant's alleged error in approving fourteen other applications. Even if Respondent were correct that Grievant erred on a total of fifteen applications in 2015, that is a tiny percentage of the applications he processes, and it does not seem to rise to the level of warranting discipline. Therefore, a written reprimand on this charge is not justified.

It appears that the "failure to comply with expectations established in the EPA3" charge as stated in the written reprimand is referring to Grievant's actions during the September 30, 2015, staff meeting. Again, this meeting occurred a day after the predetermination conference. The written reprimand was issued only five days after the staff meeting. During that meeting, Grievant questioned the legality of some of the directives Director Raynes announced. The evidence presented demonstrated that

Grievant did not raise his voice, use inappropriate language, or become verbally abusive during this meeting.⁶³ Instead, he questioned the directives, expressed his disagreement, and there was some debate between Director Raynes and him. There was no confrontation or argument. Initially, the most Dr. Mills would say was that the discussion became “heated.” However, he later changed his mind and testified that Grievant “lambasted” and “embarrassed” them in front of the staff. As such, Dr. Mills’ testimony on this point is questionable. Except for Director Raynes, no other witness to the incident characterized Grievant’s behavior as inappropriate. Further, this was not a “public” meeting. It was a staff meeting attended by only those employed by OEMS.

Given the evidence, it is more likely than not Director Raynes issued the written reprimand because she was angered by Grievant questioning her directive at the staff meeting. Even though Grievant did not raise his voice or use inappropriate language, Director Raynes viewed such as a challenge to her authority, and it embarrassed her. Therefore, she deemed it to be inappropriate behavior. Disagreeing with management or a supervisor, or questioning a directive, is not necessarily inappropriate behavior. It depends on the manner by which it is done. Accordingly, Respondent proved by a preponderance of the evidence that Grievant erred in approving the one application on August 14, 2015. However, Respondent did not prove such justified a written reprimand. Respondent has failed to prove by a preponderance of the evidence that Grievant exhibited inappropriate behavior at the September 30, 2015, staff meeting. Therefore, Respondent was not justified in issuing a written reprimand on this charge.

⁶³See, testimony of Danny Anderson; testimony of Grievant; testimony of Dr. Mills.

Three-day Suspension

By letter dated May 5, 2016, Director Raynes informed Grievant that he was being suspended without pay for three days as a result of “performance issues.”⁶⁴ Director Raynes stated in this letter that Grievant was failing to comply with the following terms of his October 5, 2015, EPIR: failing to submit monthly logs of all certification packets and licensure reports reviewed for February and March 2015; failing to complete all assignments within given timeframes; and failure to share information with others when appropriate. As with the written reprimand, given that the undersigned ALJ has concluded that Director Raynes used the EPA process, EPIR, and progressive discipline to harass Grievant and to create a hostile work environment for him, any discipline arising from such would also be improper. Even if that were not correct, Respondent failed to prove the charges it alleged against Grievant in the suspension letter, and failed to prove the suspension without pay was justified.

In the suspension letter, Director Raynes states that, in March 2016, Grievant did not timely complete his review of the paramedic certification packets, and that Grievant deferred thirteen to Dr. Mills instead of doing them as he was supposed to do. This is a mischaracterization of what occurred. The evidence presented established that there was confusion regarding the applicable policy because it had been changed four times at that point. As such, Grievant and his staff met with Dr. Mills for clarification. Dr. Mills agreed with this during his testimony. Dr. Mills further testified that during the meeting he found out that thirteen packets were being held for various reasons, and that he told Grievant to give him the remaining packets, and he would approve them. While Grievant’s

⁶⁴ See, Respondent’s Exhibit 6, May 5, 2016 Suspension Letter.

testimony as to what occurred at their March meeting differs some with Dr. Mills' account, the gist is the same. Grievant did not just pass his work off onto someone else as suggested in the letter.

Further, Director Raynes does not specify which policies she claims Grievant failed to complete in the letter. The only drafting assignment discussed in any detail at the level three hearing was Grievant's assignment to draft an audit policy, and there was evidence that a draft was submitted, and that Grievant had requested a meeting to address questions he had, but no meeting was scheduled. Instead, Director Raynes sent Grievant a lengthy email containing questions and suggestions for revision. Grievant replied to this email, responding to each of the questions and/or suggestions. He informed Director Raynes that he did not have the answers to the questions asked, and that she and Dr. Mills were in a better position to answer them. Grievant did not receive a response to his email.

Director Raynes also lists as a basis for his suspension the fact that Grievant had failed to submit articles to her for the OEMS newsletter. Grievant credibly testified that some staff members refused to be interviewed, and as Director Raynes had severed his ability to communicate with people in the field, he had problems completing this task. As for the sharing of information, Director Raynes accused Grievant and his staff of being aware of an exemption allowing three training institutes to offer testing, but failed to share this information with the person responsible for testing. She then went on to state that "[t]his is unacceptable as it degrades the credibility of OEMS with our partners and has a negative impact on employee morale."⁶⁵ Grievant testified that he had no knowledge of

⁶⁵ See, Respondent's Exhibit 6, Suspension Letter dated May 5, 2016.

what was going on with this because he was left out of the meetings and communications, and he was not part of the discussion.

Most of the alleged performance issues listed in this suspension letter are questionable, and do not rise to the level of warranting suspension. The allegation that Grievant improperly deferred packets to Dr. Mills instead of doing them himself is just not true.⁶⁶ The allegation that Grievant failed to complete policy drafting assignments lacks specificity and ignores facts. Further, Grievant's failure to submit articles for the OEMS newsletter is simply not justification for a three-day suspension without pay. Director Raynes' allegation that Grievant failed to share information is debatable, and the person responsible for testing, Johnna Hess, was not called as a witness in this matter. Moreover, even if Director Raynes' allegation were true, she totally exaggerates how this impacts OEMS as a whole.

Respondent failed to prove most of the charges listed in the suspension letter. The one charge that is not disputed, regarding the monthly newsletter submissions, is largely trivial, and does not warrant suspension. Overall, the reasons set forth in the suspension letter appear petty. Instead of jumping to these disciplinary actions, and making lists of demands and detailed requirements designed for Grievant to fail, Director Raynes could have sent Grievant to training, worked with him one-on-one, or scheduled meetings with him to discuss progress and any concerns. Thus, instead of working toward more severe discipline, Director Raynes actually could have been trying to improve things. This further

⁶⁶ See, testimony of Dr. Mills; testimony of Grievant; testimony of Danny Anderson; and, testimony of Jimmy Sadler.

supports Grievant's argument that Director Raynes was trying to get rid of him, and that she was harassing him and subjecting him to a hostile work environment.

Employee Performance Appraisal October 27, 2016.

Grievant contests the EPA-3 dated October 27, 2016, in which Director Raynes rated him with a score of 1.05 "Needs Improvement." Employees grieving their evaluations must establish by a preponderance of the evidence that their evaluations are wrong because the evaluator abused his discretion in rating the employees. *Bowman v. Dep't of Health & Human Res.*, Docket No. 2011-0422-CONS (Mar. 6, 2012); *Gibson v. W. Va. Dep't of Health and Human Res.*, Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-388 (April 7, 1993). Employees can also allege that the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Gibson, supra*; *Wiley v. Div. of Natural Res.*, Docket No. 97-DNR-397 (Mar. 26, 1998). In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, grievant must prove that the evaluations were the result of arbitrary or capricious decision-making. *Gibson, supra*; *Kemper v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-325 (Mar. 2, 1992).

As previously addressed herein, Director Raynes did not objectively evaluate Grievant in this EPA-3. She allowed her feelings toward Grievant to affect her judgment, and she used this EPA-3, as well as others, to harass Grievant and create a hostile work environment for him. This EPA-3 is clearly the result of arbitrary and capricious decision-making. The fact that Director Raynes rated Grievant as "needs improvement" in all but two of the thirty-seven factors evaluated demonstrates that this evaluation is flawed and

lacks credibility. Not one positive thing is said about Grievant in the document. Further, there has been little evidence presented to justify all these negative ratings. Accordingly, Grievant has proved by a preponderance of the evidence that this EPA-3 dated October 27, 2016, is wrong because Director Raynes abused her discretion in rating his performance.

Predetermination Conference Notice

Grievant has grieved the issuance of a predetermination conference notice dated November 4, 2016. However, in this claim, Grievant appears to primarily assert that the issuance of the notice is indicative of harassment and hostile work environment. Grievant does not appear to make any other claims about this document, such as to its form or the manner by which it was issued. This document was addressed earlier in this decision with respect to Grievant's over-arching claim of harassment and hostile work environment, and was found to be evidence that Director Raynes harassed Grievant and created a hostile work environment for him. Grievant did not raise any other claims with respect to the issuance of notice at level three or in his proposals. Therefore, no further analysis is needed, and any other claim Grievant may have raised with respect to this document is deemed abandoned.

Attorney's Fees

Lastly, Grievant has made requests for attorney's fees in each of his statements of grievance. "[A]n ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health*

Dep't, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011). Accordingly, Grievant's request for attorney's fees must be denied.

For the reasons set forth herein, this grievance is GRANTED IN PART and DENIED IN PART.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). In non-disciplinary matters, the Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

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 & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. The 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. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 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 *Id.*; *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

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 plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

5. "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). However, "[m]ere 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)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. Grievant proved his claims of hostile work environment by a preponderance of the evidence. Grievant also proved by a preponderance of the evidence his claims of

prohibited workplace harassment in violation of DOP-P6, "Prohibited Workplace Harassment" policy, and DHHR Policy Memorandum 2123.

7. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *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." *Id.* (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).

8. Respondent failed to prove by a preponderance of the evidence all of the charges set forth in its written reprimand and its suspension letter. Further, Respondent failed to prove that the discipline imposed was justified.

9. Employees grieving their evaluations must establish by a preponderance of the evidence that their evaluations are wrong because the evaluator abused his discretion in rating the employees. *Bowman v. Dep't of Health & Human Res.*, Docket No. 2011-0422-CONS (Mar. 6, 2012); *Gibson v. W. Va. Dep't of Health and Human Res.*, Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Messenger v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-388 (April 7, 1993). Employees can also allege that

performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Gibson, supra; Wiley v. Div. of Natural Res.*, Docket No. 97-DNR-397 (Mar. 26, 1998).

10. In order to prove that a supervisor has acted in a manner that constitutes an abuse of discretion, grievant must prove that the evaluations were the result of arbitrary or capricious decision-making. *Gibson, supra; Kemper v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-325 (Mar. 2, 1992).

11. Grievant proved his claim that his October 27, 2016, EPA-3 was wrong in that Director Raynes abused her discretion in evaluating his performance. Director Raynes allowed her personal feelings toward Grievant to affect her judgment, resulting in her failure to provide him an objective evaluation.

12. “[A]n ALJ for the Grievance Board is not authorized by law to grant attorney’s fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep’t of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep’t*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep’t of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, ‘(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.’ W. VA. CODE § 6C-2-6.” *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011).

Accordingly, this grievance is **GRANTED IN PART and DENIED IN PART**.

Respondent is hereby **ORDERED** to take all actions necessary to stop Director Raynes from engaging in prohibited workplace harassment toward Grievant, and to stop her from creating a hostile work environment for Grievant. Further, Respondent shall remove the October 5, 2015, written reprimand from Grievant's personnel file, and remove all references to the written reprimand that may be contained in any and all records it maintains. Respondent shall pay Grievant all the wages he was denied during his three-day suspension, plus interest. Respondent shall also restore all benefits, including accrued leave, tenure, insurance, and retirement benefits, that Grievant lost during the three-day suspension, as if the suspension never occurred. Respondent shall remove all references to the May 5, 2016, suspension from Grievant's personnel file, as well as from any and all records it maintains. Respondent is shall remove the EPA-3 dated October 27, 2016, from Grievant's personnel file. Any claims Grievant has raised with respect to the issuance of the predetermination conference notice other than its relation to his hostile work environment and harassment claims shall be deemed abandoned. Grievant's requests for an award of attorney's fees and costs, or other tort-like damages, shall be **DENIED**.

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

included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: November 21, 2017.

Carrie H. LeFevre
Administrative Law Judge