

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONI WHITT,
Grievant,

v.

Docket No. 2017-0971-DHHR

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

DECISION

Grievant, Joni Whitt, is employed by Respondent, Department of Health and Human Resources, ("DHHR") in the Bureau for Child Support Enforcement. Grievant works out of the Fayette County office and her position is classified as a Child Support Specialist. On a level three form dated September 9, 2016, Ms. Whitt filed an expedited grievance¹ contesting a three-day suspension without pay which she alleges was imposed "without good cause." As relief, Grievant asks that the suspension be rescinded with back pay and restoration of all benefits.

A level three hearing was conducted in Beckley, West Virginia on January 10, 2017. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on February 21, 2017, with receipt of the last of the Proposed Findings of Fact and Conclusions of law submitted by the parties.

¹ See W. VA. CODE § 6C-2-4(a)(4) for circumstances allowing a grievance to be filed directly to level three.

Synopsis

Respondent imposed a three-day suspension upon Grievant as part of a pattern of progressive discipline for Grievant's failure to meet performance expectations for her position. Grievant argues that she is not the only employee who is not meeting these expectations and it is unfair to discipline her for failing to keep up with her caseload this early in her career. Ultimately, Respondent proved that a suspension was not unreasonable under the circumstances of this case.

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

Findings of Fact

1. Grievant, Joni Whitt, was employed by the DHHR as a Child Support Specialist on June 16, 2015, and completed a one-year probationary period. She works in the Fayette County office of the DHHR Bureau for Child Support Enforcement.

2. During the probationary period a Child Support Specialist receives a smaller caseload and is expected to work up to a full case load after the end of the probationary period. Grievant carried a caseload of 250 cases until February 2016.

3. The caseload that a full-time Child Support Specialist is expected to carry in the Fayette County office is 550 cases when the office is fully staffed.² This is a large caseload and it is challenging for the workers to keep current. Once a worker falls behind it is very hard to get caught up. (Testimony of Melissa Sexton, Child Support Supervisor).

² Testimony of Melissa Sexton, Child Support Supervisor. It was not determined if the office is fully staffed, how often it is not fully staffed, nor the caseload per worker when the office is understaffed.

4. Deborah Bradley, is the Regional Area Manager (“RAM”) for the region which contains Fayette County. She was involved in the interview when Grievant applied for the Child Support Specialist position. When Ms. Bradley called Grievant to offer her the job Grievant told Ms. Bradley that she had a visual impairment which rendered her legally blind. Grievant told Ms. Bradley that she would understand if she wanted to reconsider her offer. Ms. Bradley noted that Grievant had been a paralegal and she felt if Grievant could do that work she could do the DHHR job.

5. Grievant performed very well in her child support training.

6. Manager Bradley urged Grievant to submit medical documentation regarding her visual impairment to the DHHR Office of Human Resource Management (OHRM) so that she might receive assistance in vocational rehabilitation and accommodations to help her perform her duties.

7. In late September 2015, pursuant to Ms. Bradley’s recommendation, Grievant submitted documentation to the OHRM³ and was provided with a larger monitor for her computer which had touch screen capabilities.⁴ Unfortunately, not all of the programs Grievant is required to use can be enlarged using the touch-screen monitor.

8. For some time, Grievant had a friendly relationship with her direct supervisor, Melissa Sexton. They talked and joked around informally and had some contact outside working hours. In mid-February Ms. Sexton was passing through the cubicle area and some of the other employees were present. Grievant pointed out to Ms.

³ Grievant Exhibit 1, a letter from her doctor explaining her medical condition and providing contact information for details.

⁴ These were apparently among the original recommendations made by Grievant’s doctor as indicated by a second letter sent some months later. (Grievant’s Exhibit 2).

Sexton that she had not answered Grievant's texts from the previous night. Ms. Sexton ignored her and Grievant responded by raising her middle finger to her in front of the other staff.

9. A meeting was held at the Fayette County DHHR office to discuss this incident and performance issues. Present at the meeting were Supervisor Sexton, RAM Bradley, and Grievant. A memorandum dated February 22, 2016, was issued as a result of this meeting, with the subject: Performance Improvement Plan and Verbal Reprimand. The reprimand was related to Grievant's alleged failure to meet established performance expectations, as well as the finger gesture incident which was characterized as disrespectful and insubordination. The memorandum indicated that some of Grievant's difficulty in meeting performance goals was caused by spending too much time away from her desk engaging in idle chatter. Grievant was placed on a Performance Improvement Plan ("PIP") and told she was expected to show substantial improvement by the next meeting date (March 21, 2016) "otherwise we may proceed with further disciplinary action such as written reprimand, suspension, [or] termination." The memorandum was dated and signed on February 23, 2016, by Joni Whitt, Grievant, and Melissa Sexton, her supervisor. (Respondent Exhibit 1).

10. Additionally, Grievant was issued an Employment Performance Appraisal, Form EPA-2, ("EPA-2") dated and signed by Grievant and Supervisor Sexton on February 22, 2016. The rating period was January 17, 2016, through February 16, 2016, and it noted that Grievant was a probationary employee. Grievant received an overall rating of "Does not meet expectations." In the area entitled, "Performance Development Needs" the following comments were written:

. . . For this rating, Joni completed 13 case reviews (62%). 10 collection calls (50%) and 7 legal referrals (100%). Joni completed level IV training this rating. And as of 2/16/2016 Joni has a full caseload of approximately 569 cases. Joni needs to improve in the area of working her mail within the 10-day time frame. On 06/03/2016 I met with Joni regarding an incident on 01/28/2016 in which she gave me the middle finger in front of coworkers. We also discussed an incident on 02/02/2016 when Joni expressed her dislike for the CSS backup 9-5 scheduled for February 2016. This happened in the Bay Area. Joni stated she was not asking any coworkers to cover her shift and that she would have to cancel her scheduled appointment.

In the area entitled "General Comments," the following was written:

I discussed with Joni her problem with staying on task and spending too much time in another CSS' pod that is not her mentor. I witnessed Joni in this same caseworker's pod on the same day after our conversation. Joni needs to improve in the area of time management. Joni needs to improve in the area of organization, and I have sat with her to help with emails and Joni at that point had not even read her emails prior to me sitting down with her to determine which emails she actually needed help with.

(Respondent Exhibit 2). In each of her monthly EPS-2 forms prior to February 2016, Grievant was given a rating of "Meets Expectations."

11. Finally, on February 22, 2016, Grievant was given a PIP which was signed on that day by her and her supervisor. The plan had three columns across the top with the headings; "Performance Needing Improvement," "Expectations," and "Deficiency/Improvements." Under the "Performance Needing Improvement" heading the PIP states:

Employee's case processing skills and work performance is substandard and she is not meeting expectations as stated in Employee Performance Evaluation.

(Respondent's Exhibit 3).

12. The “Expectations” column lists fifteen areas of duties and sets standards which Grievant must meet in each. The “Deficiency/Improvement” tracks Grievant’s progress toward meeting those standards.⁵ Together the columns appeared as follows:

EXPECTATIONS Employee will comply with the following	DEFICIENCY/IMPROVEMENT
1. CASE REVIEWS Complete 100% of current case reviews due within each month. Complete Case Review form.	Joni needs to increase case review to 100% of case reviews due for the month . . . October 2015 = 16 November 2015 = 27 December 2015 = 10 January 2016 = 13
2. LEGAL REFERRALS Refer minimum of 5 cases each month for legal action.	Joni needs to increase or number of legal referrals to 5 per month and strive toward CSS II of 8 per month. October 2015 = 6 November 2015 = 5 December 2015 = 3 Avg of 5.25 per month for the four-month period.
3. EMAILS Take requested action and respond promptly and completely to all inquiries from CSU and PEU you as well as other BCSE inquiries within 3 days. Action Response time shall not exceed 5 working days and tickler needs set up for any needed follow-up.	Joni responds quickly and take necessary action but the action taken involves greater contribution from the monitoring CSS III than it should at this point.
1. COURT ORDERS ⁶ Are to be entered within 2 business days.	
2. REPORTS Work assigned data reports: 18yr old, HELD Money Reports, Lean, Establishment, Enforcement, as well as any additional reports provided by supervisor . . . Reports are due to Supervisor last working day of the month with their timesheets unless otherwise assigned a deadline or upon further directive of the Supervisor.	Joan does not give HELD Money priority. Held alerts should be worked within two days. There have been instances where the held issue has not been addressed within a 10-day period.

⁵ While this document is characterized as a Performance Improvement Plan there is nothing in the plan which indicates strategies Grievant might implement or assistance she might receive to facilitate improvement in her performance. Rather, it simply tracks whether Grievant is making any progress toward set goals. As such, it appears to be more of a tracking system than a plan for improvement.

⁶ The repeat of number three was in the original of all of the improvement plans and is therefore repeated here.

3. NARR's Enter complete, concise, professional and informative narratives any time you take action on a case.	
4. APPLICATIONS/INTAKE Thoroughly assess and complete intake process on all new cases. Application should be complete and all information on applications entered into the OSCAR on appropriate screens or detailed in narrative.	Joni needs to improve in the area of follow-up; setting/following through with ticklers in order to process new cases within the appropriate timeframe.
5. CORRECTIONS TO DATA/INFO take all necessary corrective action on cases brought to your attention by your supervisor's review... These corrective actions should be taken within 10 days and email should be sent to supervisor advising actions taken.	
6. CASE MESSAGES/ALRTS DLP RS Thoroughly and completely working wage alert messages, interstate messages, and all priority alert messages. Daily work: ENFS, ENFR and ENFE (worked within two working days of receipt.) Daily work: Alert HELD shall be worked daily to resolving those issues prior to receipt of HELD report if possible. Weekly: ALRT message "T's", RPUD, RPCH's	Joni needs to work her ALRT, H, ENFS, ENFR & ENFR messages daily. Joni needs to focus on her ALRT T messages weekly. Joni works her ENFs, ENFR, and ENFE inconsistently. These messages need to be worked within two days of receipt of the message.
7. AUDIT REFERRALS Make thorough and complete audit referrals following standard office procedures... Any follow up a requested information needed by the financial Should be provided within timelines established by office procedure. FINANCIAL FOLLOW UP's Ensure it is completed and any follow-up action needed is taken...	Joni needs to work on her financial follow-ups, taking any needed actions once the audit is complete without prompting from her supervisor.
8. COLLECTION CALLS Expectation: Five collection calls per week. 20 total collection calls per month	Joni needs to complete 20 collection calls per month. October 2015 = 5 November 2015 = 7 December 2015 = 5 January 2016 = 10
9. CASE CLOSURE Cases need to be reviewed for closure and accurately closed with the correct code.	Joni needs to become more familiar with case closure policy.

10. MOVING CHILD Time frames must be followed and tickler set to assure that obligations are moved and money issued to the correct custodial caretaker.	Joni needs to be sure to follow up with moving shout ticklers and become familiar with moving child policy.
11. PHONE CALLS return phone messages within 2 business days.	
12. MAIL Incoming scanned/mail shall be worked within 10 days.	Joni needs to work on keeping her mail caught up within the 10-day time frame.
13. Following Policies and directives of Supervisor and miscellaneous areas	Joni needs to stay on task, follow policy of 2 / 15 minute breaks, spend less time loitering in chatting. She needs to become more independent of her mentor and keep up with her work volume because she now has a full caseload.

(Respondent Exhibit 3). The PIP was signed by Grievant and Supervisor Sexton on February 22, 2016.

13. Grievant carried a caseload of 205 cases starting on August 15, 2015, and her caseload was increased to 359 cases from November 23, 2015 through February 16, 2016. On that day, Grievant was given what has been described as a full caseload of approximately 569 cases. (Respondent Exhibit 3).

14. Grievant received another EPA-2 on March 9, 2016, which was written for the period of September 1, 2015, to February 29, 2016. The rating was marked "interim" rather than "probationary." Grievant's overall rating was "Does Not Meet Standards." In the area marked Performance Development Needs. The following comments were noted:

Joni needs to increase the number of her collection calls, she needed to make 120 calls Joni made 50. She needs to increase her percentage of cases under order to 90%, Joni is currently at 88.53%. She needs to increase her percentage of paying current support cases to 67% by September 2016. Joni is currently at 51.6%. Joni needs to improve on working her mail within 10-days timeframe. Joni needs to work HELD alerts within (2) days. Joni needs to improve in any area of follow-up (setting and following through with ticklers). Joni needs to work her ALRT H, ENFS, ENFR & ENFE messages daily. She needs to focus on her ALRT T messages weekly.

Joni needs to work on her financial follow-ups taking any needed action. Joni needs to follow up with moving children ticklers and becoming more familiar with moving child policy. Joni needs to stay on task & follow policy of (2) 15 minute breaks. Joni has a habit of spending too much time chatting in coworker's cubicles...

In the area of "General Comments" the following comments were made:

Joni is exceeding expectations in her percentage of paternity cases (93.35%), legal referrals (she needed to referred 30 and Joni referred 34), and case reviews (Joni needed to complete 80 case reviews, she completed 107). Though provided with a mentor, Joni over utilizes and depends on mentoring CSS III excessively at this point. She seems to struggle with keeping up with volume of work which is especially important given that until 2/16/16 she is not had a full caseload.

(Respondent Exhibit 4).

15. Grievant received a second PIP progress report dated and signed by Grievant and Ms. Sexton on March 22, 2016.⁷ Ms. Sexton noted some improvement in "Case Reviews" (1) Grievant completed twenty-five in February plus ten that were past due. Grievant also improved in "Legal Referrals" (2) meeting the CSS II standard of eight in that month. Ms. Sexton noted that Grievant responded quickly to emails (3) and took necessary actions, but felt Grievant continued to rely too heavily on her mentor. In the area of "Reports" (4) it was noted that Grievant was not meeting the two-day limit for working HELD money reports with some taking more than ten days. The area of "Application/Intake" (6) showed little improvement, but Ms. Sexton noted that Grievant showed some improvement on "Corrections to Data/Info." (7) No change was reported in the areas of "Case Management" (8) or "Audit Referrals (9), however, Grievant met the

⁷ All the PIPs followed the same format set out in FOF 7, *supra*.

twenty-call goal for collection calls in February. The comments in goal areas 11 through 15 remained the same. Finally, it was noted that Grievant Whitt's collections were at 60.3% with the goal remaining 67%.

16. The federal agency requires the office to have an average collection rate of 67% to maintain funding levels. No data was given as to the collection rates of other workers but Grievant's failure to meet the 67% goal did not cause the office to dip below the 67% average. (Respondent Exhibit 5).

17. Grievant's next EPA-2 was dated and signed on April 1, 2016, marked "probationary," and covered the period of February 17, 2016, through March 16, 2016. In the Performance Development Needs" are the following comments were noted:

... For the rating period, Joni completed 25 (15 & 10 past due) case reviews (100%), 20 collection calls (100%) and eight legal referrals (100%)....

Areas listed as needing additional improvement were: working her mail within the 10-day time frame; response time for email; working reports in a timely manner; application/intake follow-up; working ALRT H, T, ENFS, ENFR, ENFE messages; financial follow-ups; becoming familiar with case closure policy; becoming familiar with the "moving child" policy and establishing ticklers; and staying on task by avoiding socialization. In the "General Comments" section it was noted that Grievant needs to improve her time management and focus on her casework. (Respondent Exhibit 6). This evaluation demonstrated significant improvement in three categories.

18. Grievant received and sign a "probationary" EPA-2 on April 22, 2016, which covered the period of March 17, 2016, through April 16, 2016. This document noted that Grievant completed twenty-three case reviews, twenty-three collection calls and eight

legal referrals indicating that she maintained her performance levels in these areas. It was noted that she still needed to improve her emails and working her reports in a timely manner. (Respondent Exhibit 7).

19. On the same day, she received her third PIP monitoring report. The report noted that Grievant had improved her “Case Reviews” (1), and met her goals for “Legal Referrals” (2) and “Collection Calls” (10) during the months of February and March, 2016. It was also noted that Grievant showed some improvement in the areas of: Corrections to Data/Info (7), Case Closures (11), Moving Child (12), and Following Procedures (15). Continuing problems were noted in the areas of: Emails (3), Reports⁸ (4), Application/Intake (6), Case Messages/ALRTS DLPRS (8), Audit Referrals follow-ups (9), and Mail (14). Grievant’s Collections were at 63%, an increase of 2.7% from the previous report but still short of the 67% goal. (Respondent Exhibit 8).

20. The fourth PIP progress report was given to Grievant and signed on May 26, 2016. In this report, Supervisor Sexton noted Grievant only completed 66% of her case reviews compared to 79% the previous month. The goal is 100%. Other problem areas noted were: Emails (3); Reports, (4) particularly the HELD money report; Applications/Intakes (6), a review of Grievant’s cases found 5 of 7 that were 60 days old lacked necessary follow-up; Corrections to Data/Info (7); Case Messages/ALRTS DLPRS (8). Supervisor Sexton wrote that Grievant was making consistent effort to keep up in this area but was still falling short of the goals.

Areas where Grievant’s performance was satisfactory were: Legal Referrals (2); Court Orders (3); NARRS (5), Ms. Sexton wrote that this is an area where Grievant

⁸ HELD reports were of particular concern.

normally does well by providing concise narratives, but there was one problem with an unusual case during the reporting period. Audit Referrals (9); Collection Calls (10). Improvement was noted in the following areas: of Case Closures (11); Moving Child (12), which is where Grievant had made the most improvement; and Mail (14): however Grievant was still struggling to meet deadlines.

The report was particularly critical of Grievant in the area of Following Policies (15), where it was noted that:

Overall, there have been several complaints within the office about Joni and a couple of other workers disrupting the office with loud chatter and grouped together in one pot. Given that Joni is not able to keep up with the volume of work, her being away from her desk indicates both an unwillingness to follow her supervisor's directive of only having a break in morning and a break in afternoon as well as the directive that she needs to be in her cubicle working and not be a disruption of the office.

Grievance collections increased from 63% to 63.5% but fell short of the 67% goal. (Respondent Exhibit 9).

21. Grievant received a form EPA – 2 covering the period of April 17, 2016 through May 16, 2016, which was marked “probationary.” The form was signed by Ms. Sexton and Grievant on June 9, 2016. (Respondent Exhibit 11). She received a similar form EPA – 2 for the period of May 17, 2016 through June 16, 2016, which was signed on June 21, 2016. (Respondent Exhibit 12). Both evaluations noted that Grievant failed to meet the goal of 50 case reviews per month. Grievant completed 33 in the first rating period and 21 in the second. Additionally, both evaluations noted the failure to return emails on time and meet goals for working certain reports. The later evaluation also mentioned Grievant's failure to work her mail within the ten-day time frame. It was noted

that Grievant had not met the goal of 67% in her collections and her collections had dropped by 2% in the later rating period. It was acknowledged in the earlier evaluation that Grievant was exceeding her goals in collection calls and legal referrals.

In both evaluations, the “General Comments” area criticized Grievant for spending too much time visiting with co-workers when she was not on her break and that she needed to stay in her own cubicle to get her work done. (Respondent’s Exhibits 11 & 12).

22. Grievant received a written reprimand from RAM Bradley dated July 7, 2016. The reason given for the reprimand was Grievant’s failure to meet established goals and expectations set out in her evaluations and PIPs. The reprimand discussed resources where Grievant could seek assistance if her performance problems were related to medical conditions or personal problems. Grievant was advised that continuing failure to meet performance goals could lead to more severe disciplinary action. (Respondent Exhibit 13). Grievant did not contest the written reprimand through the grievance procedure.

23. Grievant received two more PIP progress reports; one signed and dated July 7, 2016, and the other signed and dated August 10, 2016. (Respondent Exhibits 14 & 15). Deficiencies were found in the following areas: Case Review (1); instead of meeting the goal of 50 per month, Grievant completed 22 in June and 10 in July, a substantial decrease from earlier reports; Email responses (3); Reports (4) Applications/Intakes (6); Cases Messages/ALRTS (8); with some dating back two months; Audit Report follow-up (9); and Mail responses (14). In both reports, Supervisor Sexton continues to allege that Grievant spends more than the allotted break time socializing away from her desk. Additionally, Grievant was warned against coming to work

early or staying late to catch up on her work because the Agency had not approved overtime. Grievant's collections were at 60.9% for June and 61.6% for July. Grievant was meeting or exceeding standards in the remaining eight areas. (Respondent Exhibits 14 & 15).

24. Grievant generally responded at most meeting that she was sorry that she was not meeting the expectation, that she had not fully realized the volume of work involved in a full case load and that she would work hard to keep up but it might take her more time than the others to fully function in the position. Grievant rarely mentioned her visual disability but given the nature of the work it obviously presented challenges.

25. A predetermination conference was held on September 6, 2016. In attendance were, Larry LeFevre, BCSE Director of Field Operations, RAM Bradley and Supervisor Sexton. Grievant attended with her attorney Bill Wooten, Esquire, and Gordon Simmons, UE Local 170 attended by telephone. The issues related to Grievant's performance were discussed and Grievant was informed that further disciplinary action was being considered.

26. Grievant received a letter dated September 8, 2016, stating that she was issued a three-day suspension, without pay for the period on September 13, through 15, 2016. The performance deficiencies which were discussed at the predetermination conference were reiterated in the letter as follows:

...[Y]ou only completed 20% of your case reviews; you neglected to complete an attorney and necessary reports for the month of July; you failed to follow up on emails from your supervisor, CSU, PEU, and other sources and to take necessary action timely; and you failed to work alerts timely.

The letter reviewed the history of performance evaluations and PIP reports discussed above, and documented a decline of improvement after April 2016. (Respondent's Exhibit 18).

27. During the months when the supervisors noted a decline in Grievant's improvement, Grievant's best friend was suffering terminal cancer which affected her ability to concentrate and slowed her work. Grievant had shared this information with RAM Bradley who had told her to take a day off if she needed to.

28. Grievant had provided her employer with a memorandum from her treating physician dated June 1, 2016, noting that she had previously recommended that Grievant be provided with a touch screen monitor which resulted in some assistance. Dr. Whittington then noted that "there may be other visual aides to help Joni complete her daily visual task," that she is unaware of and recommended that Grievant be given access to any such aid which might help her meet her goal. This memorandum was forwarded to the DHHR Office of Human Resource Management like her original request for a larger monitor. Before the hearing, Grievant had contacted West Virginia Rehabilitative Services regarding such aides but had not heard back. (Grievant Exhibit 2).

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters,

the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

W. Va. Dep’t of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent argues that the three-day suspension was the next step in progressive discipline for Grievant’s failure to perform her job duties in a way that meets the minimum standards for her position. Grievant’s supervisors set out specific standards for Grievant to meet in her Employment Performance Assessments and subsequent evaluations indicated that she did not meet those standards. Management implemented an Performance Improvement Plan which included monthly meetings and a reporting document to track Grievant’s progress. Management also started a course of progressive discipline when the standards were not met which included a verbal reprimand issued February 22, 2016, and a written reprimand issued on July 7, 2016. Grievant did not contest either of the reprimands. Respondent felt these measures had not achieved the desired result so they implemented the next step on progressive discipline which was a short suspension.⁹

⁹ DHHR Policy Memorandum 2104, *Progressive Correction and Disciplinary Action* provided in pertinent part:

“*Disciplinary actions* include verbal and written reprimands, suspensions, demotions with prejudice, dismissal. . .

Grievant argues that she was working reasonably hard to meet the job expectation and the expectations set for her were unreasonable under all the circumstances. She was criticized for over reliance on her mentor in accomplishing her tasks at this point in her career. However, Grievant notes that there are no guidelines for how often one may consult with an assigned mentor and there is no record of her mentor ever telling Grievant that she needed to be self-reliant. Grievant is right in this regard. There was no evidence provided which specifically identified instances where Grievant was consulting with her mentor, let alone whether such discussions were occurring too often.¹⁰ Additionally, when Grievant is struggling to meet job expectations it seems counterproductive to limit her access to the main resource for her improvement. Accordingly, any evidence that Grievant was over-reliant on her mentor is given no weight toward proving that her performance did not meet standards.¹¹

Grievant also disputes that she was spending time socializing with her co-workers in excess of her break and lunch times. She testified that when she left her cubicle to see a coworker it was to ask a question or get advice. She was not wasting time with idle chatter as alleged by her supervisors. Supervisor Sexton admitted that the many times

[P]rogressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance.” (Emphasis in Original) *Id.*

¹⁰ Grievant’s assigned mentor did not testify.

¹¹ Significantly, DHHR Policy Memorandum 2104 defines an improvement plan as: “[A] formal process used by supervisors to help employees improve performance and/or behavioral issues. That need to be corrected and creates a plan of action to *guide the improvement* and/or corrective action.” (Emphasis Added) *Id.* The documents offered as the improvement plans for Grievant simply record her progress toward meeting certain goals. There is little or no guidance provided in the documents as to how she can accomplish improvement. Without the Mentor and monthly meeting components to the plans, it is questionable that they would meet the Policy Memorandum definition.

she observed Grievant at someone else's desk she did not hear the substance of Grievant's conversation. But she noted that Grievant had a mentor and a supervisor to seek answers from. Even if Grievant was seeking help from coworkers she was going to the wrong source and keeping that worker from getting his/her work done. After the first couple of evaluations it should have been clear to Grievant that such behavior was unacceptable.

Grievant argues that it is unreasonable to expect her to meet all the job expectations this early in her career. She points out that she had been told repeatedly that it takes about two years for someone to get a good handle on the job and that it will take her a little longer than others because she reads slower. Grievant testified that there is only one worker in the office who can keep up with her caseload and that person has been working there for twenty years. Her testimony implied that others were not being disciplined for missing similar goals, which is the issue of discrimination.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In this case, there is not sufficient evidence regarding the coworkers and their deficiencies to determination if they are similarly situated with Grievant. While her testimony that all case workers but one are behind on their cases is not disputed, without some data about how far behind they are and in how many areas it is not possible to determine if they are in the same situation as Grievant. Consequently, Grievant did not prove the elements of discrimination pursuant to the grievance statutes.¹²

Grievant stated that over time she will be able to meet expectations but candidly admitted that she will never be able to do the work as quickly as a person without visual impairments. Policy Memorandum 2104 states that:

[A]ny guidance to corrective actions must be specific enough to ensure technically correct action while permitting management reasonable latitude to consider mitigating and/or aggravating circumstances in utilizing constructive and progressive corrective and disciplinary action. *Id.*

Thus, it is within management's discretion to consider Grievant's special circumstances when deciding what actions are appropriate to help Grievant succeed.

Ultimately, Respondent proved by a preponderance of the evidence that Grievant failed to meet employment expectations over a period of several months. Respondent

¹² Grievant did not argue that Respondent violated the Americans With Disabilities Act (ADA). The Grievance Board has consistently held that it does not have authority to determine liability for claims arising under the ADA. (42 U.S.C. §§ 12111, et seq.). *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997). Relief may be provided for "discrimination" which might also violate the ADA but only to the extent that the discrimination meets the definition under the grievance statutes, and any relief is also limited by the grievance statutes. See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

brought the performance issues to Grievant's attention through evaluations, a performance improvement plan and progressive discipline but to a great extent, the problems persisted. Under those circumstances the Grievance Board has upheld that a suspension is proper. See *Gibson v. Dep't of Health & Human Res.*, Docket No. 2009-1475-DHHR (Dec. 2, 2009), *Poore v. Dep't of Health & Human Res.*, Docket No. 2010-0448-DHHR (Feb. 11, 2011), *Loflin v. Dep't of Health & Human Res.*, Docket No. 2012-1291-DHHR (Apr. 30, 2013). Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d).

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) That he or she has been treated differently from one or more similarly-situated employee(s);

(b) That the different treatment is not related to the actual job responsibilities of the employees; and,

(c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);
Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant did not provide sufficient evidence to prove that she was treated differently than similarly situated coworkers.

5. Respondent proved by a preponderance of the evidence that Grievant failed to meet employment expectations over a period of several months. Respondent brought the performance issues to Grievant's attention through evaluations, a performance improvement plan and progressive discipline but to a great extent, the problems persisted. Under those circumstances the Grievance Board has upheld that a suspension is proper. See *Gibson v. Dep't of Health & Human Res.*, Docket No. 2009-1475-DHHR (Dec. 2, 2009), *Poore v. Dep't of Health & Human Res.*, Docket No. 2010-004-DHHR (Feb. 11, 2011), *Loflin v. Dep't of Health & Human Res.*, Docket No. 2012-1291-DHHR (Apr. 30, 2013).

Accordingly, the grievance is DENIED.

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

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

DATE: April 11, 2017.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**