

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**ROBERT TRIBBIE,  
Grievant,**

**v.**

**Docket No. 2018-0861-MasED**

**MASON COUNTY BOARD OF EDUCATION,  
Respondent.**

## **DECISION**

Robert Tribbie, Grievant, filed this grievance against his employer Mason County Board of Education ("MCBE"), Respondent, protesting observation reports and work place environment. The original grievance was filed on January 8, 2018, provides:

On December 27, 2017, Grievant received three observations concerning three incidents. Grievant was falsely accused of insubordination. In reality, Grievant was reacting to inappropriate behavior/harassment including, but not limited to, assignment to nonurgent outdoor jobs during extreme cold weather and being berated in front of coworkers by his supervisor. Grievant contends that his supervisor's behavior constitutes harassment and creates a hostile work environment. Grievant contends that the observations are inaccurate, misleading, arbitrary and capricious. (W. Va. Code 6C-2-2 & 18A-2-12a).

The relief sought states:

Grievant seeks cessation of all harassment, creation of a reasonable work environment, removal of the observations received on December 27, 2017 from his personnel file & any other records maintained by the Respondent or its agents, and any other relief that would make Grievant whole.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.<sup>1</sup> A level three hearing was held before the undersigned Administrative Law Judge on June 26, 2018, at the Grievance Board's

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

Charleston office. Grievant appeared in person and was represented by legal counsel John Everett Roush, Legal Services, American Federation of Teachers-WV, AFL-CIO. Respondent was represented by its legal counsel, Leslie Tyree. This matter became mature for decision on or about July 30, 2018, upon receipt of the last of the parties' proposed findings of fact and conclusions of law. Both parties submitted post hearing fact/law proposals.

### **Synopsis**

This grievance concerns "Service Personnel Observation" forms issued to Grievant by his supervisor, which documented workplace conduct of Grievant. Grievant contends that the observations are inaccurate, misleading, arbitrary and capricious. Grievant alleges his supervisor's behavior constitutes harassment and created a hostile work environment. (W. Va. Code 6C-2-2 & 18A-2-12a).

The "Observation" are not recognized as disciplinary in nature. Observations of service personnel by his or her supervisor is not abnormal work behavior. Grievant failed to establish that the Observations as written were the result of some misinterpretation or misapplication of established policies or rules governing the county's service personnel evaluation process. Grievant did not establish by a preponderance of the evidence that he was harassed and subject to a hostile work environment. This Grievance is DENIED.

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

### **Findings of Fact**

1. Grievant is multi-classified as an Electrician II/Groundsman employed by Respondent in the maintenance department.
2. Respondent is a quasi-public corporation created by statute for the management and control of the public schools in Mason County, West Virginia.
3. Cameron Moffett is the Director of Maintenance for the Mason County Board of Education. Director Moffett is Grievant's supervisor.
4. On December 27, 2017, Grievant's supervisor, Director Moffett, met with Grievant and his representative to present three "Service Personnel Observation" forms ("Observation"). Two of the observations are dated December 14, 2017, and the other December 20, 2017.
5. Director Moffett utilized the county observation form to note identified conduct of Grievant. The number of distinct incidents worthy of conduct observation is challenged by Grievant.<sup>2</sup>
6. On December 14, 2017, Grievant went to the Mason County Board of Education's central office (board office) prior to reporting to his assignment. Grievant's assignment was to perform outside work, cutting brush and clearing debris from a fence. Grievant was of the belief that the assignment was not urgent and had been assigned to him on that particular day because it was cold and as a way of punishing him.

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<sup>2</sup> Grievant suggests that the occurrences as provided on observation form dated December 14 and December 20, 2017, are the same incident. He contends that Director Moffett, intentionally or unintentionally, has expanded one incident into two separate episodes.

7. The Mason County Board of Education's central office does not assign maintenance jobs or make determinations as to where individual maintenance employees will be required to work.

8. Grievant met with administrators at Respondent's central office and sought relief from his assignment.<sup>3</sup> The School Board Superintendent was of the opinion that the weather was not too severe to bar outside work.

9. After the administrator(s) declined to redirect or recede Grievant's work assignment, Grievant reported to the work site and performed the work as directed.

10. The Observation dated December 14, 2017, recounts that Grievant did not immediately go to the work site to which he was assigned that day. Instead, Grievant went first to the board office.<sup>4</sup> G Ex 1 Director Moffett supposes this conduct is insubordination. *Id*

11. The second observation also dated December 14, 2017, G Ex 2, recounts the events that occurred at the maintenance building at the end of the work shift that day. Director Moffett accuses Grievant of refusing to return the original copy of a work order and refusing to respond to Director Moffett's request or engage him in conversation.

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<sup>3</sup> Grievant had a pattern of going to Mason County Board of Education's central office when he questioned and/or was dissatisfied with a work assignment. {there was a period of time when Grievant went to the board office numerous times a week} Testimony of Human Resource Manager Tonya Martin.

<sup>4</sup> Testimony regarding Director Moffett and Grievant's conversation is tortuous. Whether the two had a direct discussion regarding Grievant's need to go to the central office is convoluted. Director Moffett was of the opinion that Grievant needed to report to his work assignment.

12. On December 14, 2017, Grievant provided Director Moffett with a copy of the day's work order, not the original. The Director specifically requested the original from Grievant more than once.<sup>5</sup>

13. Grievant walked away from Director Moffett and limited his responses, to Director Moffett's verbal statements. Grievant was of the opinion that avoiding direct communication with Director Moffett was reasonable and less combative.

14. The third observation dated December 20, 2017, G Ex 3, recounts a situation reminiscent of the events of the morning of December 14, 2017, i.e., Grievant assigned to Wahama High School but went first to the board office.<sup>6</sup>

15. The observations reports were a way of expressing and documenting Director Moffett's dissatisfaction with Grievant. The observations at issue in this grievance were not scheduled before hand as part of a regular evaluation process.

### **Discussion**

This grievance concerns "Service Personnel Observation" forms ("Observation") issued to Grievant by his supervisor on December 27, 2017. Grievant contends that the observations are inaccurate, misleading, arbitrary and capricious. Grievant alleged that his supervisor's behavior constitutes harassment and creates a hostile work environment (W. Va. Code 6C-2-2 & 18A-2-12a).

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<sup>5</sup> Grievant testified that he decided to keep the original, it was written with red ink and he believed the use of red ink demonstrated harassment.

<sup>6</sup> Grievant testifies he does not recall anything of the sort described in the observation dated December 20, 2017 occurring. He tends to infer that Director Moffett, has expanded one incident into two separate occurrences to compound the severity of trumped up accusations.

Additionally, Grievant asserts that the Observations relevant to this matter are disciplinary in nature.<sup>7</sup> Grievant contends that the documents are really letters of reprimand. The “Observations” at issue in the current case clearly allege misconduct on the part of Grievant. There is no specific threat or warning of further action if the conduct is repeated, but Grievant is clearly put on notice (a warning is implied). Respondent retorts that the Observations are not disciplinary. Such written “Observation Reports” can be used for many things, including as a manner to improve work performance and/ or memorialize notable employee conduct.

What constitutes an “Observation” for school service personnel is not defined in the West Virginia Code or the policies of the West Virginia Department of Education. For obvious reasons the instant parties have suggested diverse conclusions regarding the documents of this matter. There is no identified statutory or regulatory definition of letters of reprimand, but the subject has been addressed by the Grievance Board. This Grievance Board has held that a letter that alleges misconduct by an employee and *states that it constitutes a warning*, is a letter of warning or reprimand and is considered a disciplinary action. (Emphasis added). *Risk v. Hancock County Bd. of Ed.*, Docket No. 07-15-048 (Oct. 3, 1996). Assuming *arguendo*, that the Observations describe employee “misconduct,” as Grievant urges, rather than documenting areas that need improvement as Respondent asserts, the Observations do not state that they constitute a “warning” to

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<sup>7</sup> The grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C. S. R. 1 § 3 (2008).

the employees or state that disciplinary action may be taken against Grievants based upon the Observation. A persuasive argument could be made that these written observations are the ground work or the building blocks of a potential disciplinary action. Grievant would be wise to govern his actions with this in mind. However, the issuance of the observations in and of themselves are not disciplinary.<sup>8</sup> The “Observations” issued by Respondent in this grievance are not letters of reprimand but are written documentation of behavior. When dealing with the evaluation and employee disciplinary process, the label assigned by the employer is not as important as the nature of the object or conduct.

The “observations” issued in the instant matter are not found to be letters of reprimand or disciplinary correspondence therefore leaving the burden of proof with the Grievant to show that the observations were arbitrary or capricious. Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). In other words, “[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket

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<sup>8</sup> Observations of service personnel may occur at any time with or without notice. *Tribbie and Sayre v. Mason County Bd. of Ed.*, Docket No. 2018-0548-CONS (April 26, 2018).

No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Director Moffett documented Grievant's conduct, the documents are labeled as Observations and are on the forms used for observations. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See *Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

Both Grievant and Director Moffett testified at the level three hearing. It is evident that Grievant and Director Moffett have a history. Director Moffett testified they were once friends, socialized outside of work, gathering for holidays and other events. Grievant refrained from expounding on this aspect of their prior interactions. An Administrative Law Judge is charged with assessing the credibility of the witnesses.<sup>9</sup>

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<sup>9</sup> The Grievance Board has applied the following factors to assess a witness's testimony:



*See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Grievant's responses to several questions asked involved a stream of consciousness, which include a narrative that went outside the scope of the question, dredging up various alleged slights and/or disagreements that took place between him and Respondent. Grievant's testimony was not overly persuasive on the instant issue. To this trier of fact his demeanor seemed contrived, it did not generate a sense of trustworthiness. Grievant has a firm belief regarding the treatment he received from Director Moffett. He did not effectively establish the basis for his conviction. It would have been useful to be informed from Grievant's perspective when and why the alleged harassment started. Grievant has a dismissive attitude. He demonstrated a mannerism which Director Moffett struggled to articulate. Grievant did not do himself a favor, being dismissive with Respondent's counsel. Grievant tended to demonstrate an "*I know better than you*" attitude, an attitude he surely can't put forth to a supervisor. It is disingenuous to highlight his supervisor as being overaggressive and neglecting to provide his contribution to antagonize the situation. Grievant's testimony was provided

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1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

with unnecessary spin. The bias undermines the trustworthiness of the testimony. The credibility of Grievant's testimony must be discounted.

Grievant readily highlights, the Director's language but fails to accurately relay his active contribution to the situation. Grievant contends to be intimidated, embarrassed and scared of Director Moffett. Grievant's testimony is inconsistent with his repeated actions of challenging Director Moffett's directions. The sincerity of Grievant's contentions is doubtful. Grievant's recollection of selective event(s) and random facts is not sufficiently convincing to establish alleged harassment. This trier of fact is not persuaded by Grievant's testimony.

Director Moffett has been the director of maintenance for six years. His responsibilities involve, among other duties, the assignment of crew and individual work orders. Prioritizing the workforces task is not Grievant's purview. Grievant was not satisfied with his job assignment on more than one occasion.<sup>10</sup> Mere annoyance or disagreement with management's decision to discipline does not constitute harassment without more. *Whiting v. Fairmont State University*, Docket No. 02-HEPC-335 (Mar. 3, 2003).

Director Moffett allowed himself, to some degree, to be manipulated by Grievant. This was unwise. However, it is not apparent that Director Moffett holds any animus toward Grievant. With due acknowledgment to his role in this matter, the witness

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<sup>10</sup> It is alleged that Director Moffett discussed with Grievant that he did not need to go to the central office on December 14, 2017, but rather needed to report to his work assignment. It is not clear whether the discussion of this issue transpired on December 14 or 20 or some other date. Grievant had a pattern of going to Mason County Board of Education's central office when he questioned or was dissatisfied with a work assignment.

responded to queries posed and attempted to explain conduct and analysis of events that transpired throughout the course of relevant events. Director Moffett testified in a manner demonstrating due deference to the issues in contention.

Director Moffett reacted to Grievant's shenanigans. As a supervisor Director Moffett needs to be more conscious of his language and the manner in which he interacts with a subordinate.<sup>11</sup> Director Moffett acknowledged his behavior. Grievant's contrary behavior was not just this one isolated incident.<sup>12</sup> It is established fact that Grievant has no problem going behind and over Director Moffett's directives.<sup>13</sup> Director Moffett's testimony is found to be credible. It is inferred that Grievant Tribbie often questioned and/or failed to accurately follow directives from his supervisor.

Grievant questions the accuracy of the Observations provided by Director Moffett. Grievant provides that the situation noted as December 20, 2017, is the same as the assignment of December 14 (same location). Grievant acknowledges he did not complete the December 14 work assignment in one shift, it is possible that the December 20, Observation was of the same location but on a different day. This ALJ is not

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<sup>11</sup> At some point during the bantering that took place between the two men, Director Moffett informed Grievant that he could "kiss his ass."

<sup>12</sup> Director Moffett provided that principals were hesitant to speak to him regarding concerns about Grievant Tribbie's work and conduct in their school. This resulted in Director Moffett choosing to end their personal friendship and simply maintain a working relationship with Grievant. L-3 Testimony

<sup>13</sup> Grievant had a propensity of going to Mason County Board of Education's central office when he questioned or was dissatisfied with a work assignment. There was a period of time when Grievant went to Board office numerous times a week. See L-3 Testimony Human Resource Manager Tonya Martin. The testimony of Human Resource Manager Tonya Martin is deemed substantiated and credible.

persuaded either way. Grievant and Director Moffett differ in the interpretation, intent and analysis of situations.

Grievant maintains that his conduct was reasonable, at all times. Director Moffett, who has repeatedly been met with resistance from Grievant suggests that Grievant's conduct was insubordination. G Ex 1 and 3. Grievant's supervisor is not thrilled with Grievant's conduct or attitude; however, Grievant was not sanctioned or officially charged with being insubordinate. Grievant Tribbie refused to answer direct questions from Director Moffett simply walking off without response. Grievant failed to follow direct orders from his supervisor.<sup>14</sup> Grievant believes this conduct is reasonable. Respondent's counsel suggests Grievant's conduct on the whole lacks a basic understanding of the supervisor/employee relationship. The facts are the facts, interpretation and analysis of the information produces conclusions. There is no need for this ALJ to rule on a non-charged disciplinary issue. If and when Grievant is charged with such an offense, then that assigned Administrative Law Judge will need to analyze the relevant criteria.

Director Moffett utilized the county observation form to note Grievant's behavior. Grievant alleges hostile work environment. "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.*,

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<sup>14</sup> Grievant was asked on several occasions to return the original work order to Director Moffett and he blatantly refused.

*v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. See *Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR-130 (Jan. 29, 1999). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

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), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 09-AA-92 (Dec. 8, 2010).

Director Moffett was experiencing less than cooperative behavior from Grievant. Director Moffett chose to utilize the county observation form to note difficulties with Grievant. This seems reasonable. The identified isolated verbal bantering was unproductive and unwise behavior. "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006), *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 06-AA-65 (Jan. 4, 2007).

The totality of the circumstances in this case do not amount to a hostile work environment. There is no evidence that Director Moffett's actions were motivated by anything other than Grievant's own personality. While Grievant may harbor a diverse opinion, maintenance employees, as part of their jobs, work outside all the time taking care of buildings and property. Being assigned an outside duty in and of itself does not constitute harassment. The "safety exception" is an affirmative defense and Grievant has the burden of establishing such a defense by a preponderance of the evidence. Grievant did not establish the weather was so extreme on December 14, 2017, that a basic coat and gloves were not sufficient to provide reasonable protection.

Grievant did not establish, by a preponderance of the evidence, that Director Moffett's action of issuing written Observations was improper. Nor was it established

that the Observations were arbitrary and capricious.<sup>15</sup> Grievant failed to prove by a preponderance of the evidence that the Observations as written were the result of some misinterpretation or misapplication of established policies or rules governing the county's service personnel evaluation process. The undersigned concludes that Grievant did not demonstrate that he has been subjected to harassment or a hostile work environment.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. In the circumstances of this grievance matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). In other words, "[t]he preponderance standard generally

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<sup>15</sup> 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 is 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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

3. 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), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 09-AA-92 (Dec. 8, 2010).

4. Observations of service personnel may occur at any time with or without notice. *Tribbie and Sayre v. Mason County Bd. of Ed.*, Docket No. 2018-0548-CONS (April 26, 2018).

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), *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 06-AA-65 (Jan. 4, 2007).

6. "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).

7. Grievant failed to establish by a preponderance of the evidence that the Observations as written were the result of some misinterpretation or misapplication of established policies or rules governing the county's service personnel evaluation process. Grievant failed to prove the written observations were improper.

8. Grievant did not demonstrate that the action (written observations) complained of constituted harassment or created what is recognized as a hostile working environment.

Accordingly, this grievance is **DENIED**.

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

**Date:** August 10, 2018

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**Landon R. Brown**  
**Administrative Law Judge**