

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBIN R. PERDUE
Grievant,

v.

Docket No. 2018-0421-DOT

DIVISION OF MOTOR VEHICLES,
Respondent.

DECISION

Robin R. Perdue, Grievant filed this grievance against her employer the West Virginia Division of Motor Vehicles (“DMV”), Respondent on September 15, 2017, protesting her working conditions. In her September 15, 2017, statement of grievance, Grievant asserted, “Functional demotion. Harassment.” This statement was later amended to “Functional demotion/harassment by Mike Maggard, Kim Harrison, Zoe Bender and persons unknown.”¹ As relief, Grievant sought “[t]o be made whole in every way including restoration of job duties & end of harassment.”

A conference was held at level one on March 27, 2018, where Grievant had the opportunity to present facts underlying the grievance. The grievance was denied at that level on April 25, 2018. Grievant appealed to level two on April 27, 2018, and a mediation session was held on June 26, 2018. Grievant appealed to level three on June 30, 2018. A level three hearing was held before the undersigned Administrative Law Judge on November 14, 2018, at the Grievance Board’s Charleston office. Grievant appeared in person and through representative Gordon Simmons, UE Local 170, West

¹ Among other communications there was a January 5, 2018, phone conference, conducted by an assigned ALJ with this Board, requesting more distinct information be provided regarding the statement of grievance.

Virginia Public Workers Union. Respondent appeared by Adam Holly and was represented by legal counsel, Cassandra L. Means, Assistant Attorney General. At the level three hearing, Grievant relied heavily on her own testimony, a select number of exhibits and the underlying case record. Respondent presented two (2) witnesses including Linda Ellis (Deputy Commissioner & Director of Investigations, Security, and Support Services) and Mike Maggard (Director of Vehicle Services). This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 14, 2018, the assigned mailing date for the submission of the parties' fact/law proposals. Both parties submitted proposals.

Synopsis

Grievant is employed by Respondent as an Administrative Services Assistant I. Grievant asserts she was functionally demoted and harassed by agents of Respondent. Grievant seeks restoration of job duties and the end of harassment. Grievant's alleged functional demotion claim is lacking in substantive merit. Grievant did not demonstrate that she had been harassed by the persons named in her statement of grievance or any other persons employed by Respondent. Grievant failed to meet her burden of proving her claims by a preponderance of the evidence. Accordingly, 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 has been employed by the Division of Motor Vehicles (“DMV”) since March 1, 2013, and has been classified as an Administrative Services Assistant I since October 1, 2014.

2. As an Administrative Services Assistant, Grievant’s primary duties involve data entry for online renewal transactions, duplicate registration requests, stuffing envelopes with registration and decals, answering emails and phone calls for problems with online renewal issues, send backs (problems with titles) and National Motor Vehicle Title Information Service (NMVTIS – nationwide access to titles and any problems or corrections with title information).

3. At the time of the grievance filing, Grievant worked in the Vehicles Service Unit (“VSU”) under the direction of Michael Maggard. Grievant currently works in the Investigations, Security and Support Services Section under the direction of Linda Ellis. The Support Services division contains several subdivisions including send backs (for error correction on titles), NMVTIS (National Motor Title Information System), and online renewals.

4. Michael Maggard is a Transportation Systems Director 2 and has been employed by Respondent for 25 years. He was previously Grievant’s supervisor but maintains no current supervisory control over Grievant.

5. Linda Ellis is the Investigations, Security and Support Services Director. Ms. Ellis assumed responsibility of the Support Services Section on January 28, 2018. All employees of the Support Services Division report directly to Ms. Ellis or her assistant, Arlene Moore. Ms. Ellis is also the Acting Deputy Commissioner. Ms. Ellis has been employed by Respondent for 26 years and is Grievant’s current supervisor.

6. Kim Harrison is an administrative secretary working in the VSU and has been in that position since May 16, 2015. Ms. Harrison is Mr. Maggard's secretary and does not currently work with Grievant.

7. Zoe Bender is classified as a Transportation Systems Director 1 for the DMV and has been employed since December 18, 1995. Ms. Bender reports directly to Director Maggard. Ms. Bender does not currently work with Grievant.

8. When the online renewal project was inceptioned in 2014, Grievant was the only full-time employee assigned to the unit. Staffing resources for the online renewal unit varied and reflected the evolving nature of the unit. At times, Grievant worked alone. At other times, the unit had temporary and seasonal employees to assist with heavy work flow.² More recently, the unit housed up to three full-time employees.

9. In June 2017, Jennifer Foster was hired as a permanent employee for online renewals. The record reflects discord between Grievant and Ms. Foster. Specifically, Grievant testified that she was unhappy with Ms. Foster's work performance following Foster's obtainment of permanent employee status.

10. There were personality conflicts with Grievant and others working in online renewals. Maggard L-3 testimony. Director Maggard engaged in several conversations

² Grievant was initially the only employee assigned to the unit. Grievant testified, "*I problem-solved my way through it ...there was no formal training ...I was just put in place to basically make it work.*" The volume of work increased in 2015 and Grievant was assigned occasional help from staff in other units as well as temporary employees, although she frequently worked over-time hours in order to keep up with the renewals. In late 2015, a full-time employee was assigned for the on-line unit, Regina Ballard, who remained under Grievant until 2017. "*Most of the time, how it operated until ... when Regina came in as a permanent temporary employee there in that unit, was that I was doing a majority of the (online unit's) work, both the administrative and the data entry end, and they would periodically assign people to me ...*" L-3 Grievant testimony; also see Grievant's fact/law proposals.

in an attempt to rectify conflicts. Specifically, on July 24, 2017, Maggard met with Ms. Foster and Grievant regarding their discord. Maggard L-3 testimony; G Ex 7

11. Director Maggard testified at the level three hearing.

12. Grievant is classified as an Administrative Services Assistant I. Per the West Virginia Division of Personnel classification, the nature of the work for an Administrative Services Assistant I is as follows:

Under general supervision, performs administrative or procurement in a small division or equivalent organization level. May function in an assist role or in a specialized capacity in a large agency or department. Develops or assists in developing and implements plans/procedures for resolving operational problems and in improving administrative services. Work is typically varied and includes inter- and intra-governmental and public contact. Performs related work as needed.

G Ex 1

13. Grievant's primary duties involve data entry for online renewal transactions, duplicate registration requests, stuffing envelopes with registration and decals and answering emails and phone calls for problems with online renewal issues.

14. Grievant's job duties have experienced a state of flux (ebb and flow) for substantial periods of time. Grievant testified that she was responsible for various supervisory and administrative job duties that have seemingly eroded away. Her testimony involved events taking place during the breath of her employment from 2014 to the present. The information was not always presented in a sequential manner.

15. Grievant's job classification was never altered during the years of her employment with Respondent. During some identified period(s), Grievant had a degree

of administrative authority.³ This authority, official and/or positional, was not constant. Grievant's duties fluctuated over time with the development of the department.

16. Grievant's recollection of identified events was established during her testimony but her ability to correlate specific events and/or duties on a coherent time line was not demonstrated.

17. In September 2017, Jennifer Foster was transferred physically to another unit but remained assigned to online renewals. Grievant and Foster were experiencing conflict during the time of the relocation.

18. In January 2018, (subsequent to filing of this grievance) the entire Support Services Division (including send backs, NMVTIS, and online renewals) was transferred from the VSU to the Investigations, Security and Support Services Section. This resulted in the transfer of Grievant plus nine additional employees.

19. Once Support Services was transferred, all applicable employees reported directly to Linda Ellis or her assistant Arlene Moore. None of the transferred employees retained supervisory duties.

20. Further, Grievant provided Respondent with a physician statement, in January 2018, indicating that Grievant cannot perform some essential job duties. These medical limitations are ongoing. Respondent put forth effort to maintain a position with job duties that Grievant can complete consistent with her medical limitations.

Discussion

³ Director Maggard testified that Grievant was supervisor for the staff of the online unit while it was under his purview.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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 No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant asserts that she was functionally demoted and harassed by her supervisor and those in her chain of command. Grievant alleges that she has been functionally demoted as Respondent has removed or negatively altered her job duties. Respondent denies that Grievant was functionally demoted or harassed, asserting that the removal of certain supervisory and administrative duties were management decisions for legitimate and permissible reasons. Respondent further asserts that in accordance with organizational restructuring at the DMV and Grievant's inability to perform certain job duties, (ongoing medical limitations), a substantial portion of Grievant's claim is unwarranted, misplaced and/or moot.

The issue here is whether DMV's decision to alter the Grievant's job duties in September 2017 and/or again in January 2018 constitutes a violation of an applicable law, rule or policy. Further, it is alleged that Grievant is or has been, in the

circumstance(s) of the instant matter harassed. 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).

Grievant perceives the removal of supervisory duties as a “functional demotion.”⁴ She believes these duties have been removed unduly. Grievant attributes the change in duties as harassment by Director Maggard and other responsible agents of Respondent. Grievant filed her grievance in September 2017; however, due to many delays the grievance conference was not held until April 2018. This time lag may or may not be seen as a hinderance to truly determining the working environment in September 2017. Many of the circumstances surrounding the grievance filed in September have changed. Grievant testified that the incident that prompted the assertion of harassment came when a subordinate, yelled at her and management did not support her. The fact of this September 2017 event was only briefly noted in cross examination testimony. Grievant’s allegation(s) of harassment tend to correlate with her dissatisfaction or disagreement with management’s personnel actions.

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. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). In the circumstances of this case, it is deemed prudent to address the reliability

⁴ Supervisory duties are not specified as duties of Grievant’s job classification, Administrative Services Assistant 1. G Ex 1

and due weight that is most readily applicable to one or more of the witnesses, who testified and provided information within the course of this matter. This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider 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 *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The undersigned had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony and the duration of the level three hearing.⁵ Utilizing the noted factors, credibility assessments were made, herein, from direct observations, as well as review of the record.

Grievant testified at the level three hearing in this matter. Grievant appeared calm and otherwise demonstrated the demeanor anticipated at the grievance hearing. Nevertheless, much of Grievant's testimony was disjointed information, lacking in coherent context of job duties and relevant time periods. Grievant has distinct beliefs but did not persuasively convey the concept to this trier of fact. Grievant offered inconsistent testimony regarding her administrative duties. A number of Grievant's exhibits were

⁵ In assessing the trustworthiness of the information provided by Grievant, and various administrative personnel, the undersigned was mindful of the potential for bias, and the possibility of agency interest, while considering the consistency of statements and the plausibility of the witness's information.

presented in less than demonstrative form. Grievant has presented a convoluted concept of Respondent's ability to assign and revise duty assignments. The testimony that Grievant offered in support of her functional demotion claim was disjointed and, at times, conflicting. Specifically, Grievant asserted that she was responsible for conducting employment performance appraisals, but later conceded that was not the case. Grievant testified that she had staff taken away from her control, but testimony indicated that staffing for the online renewal unit often ebbed and flowed due to work flow. Grievant's perspective is biased and provides little room for any intent other than some unidentified vendetta. Grievant's testimony did not persuasively establish Respondent was orchestrating any organized plan designed to facilitate her demise. Grievant was employed in a developing unit of DMV, Grievant's job duties have been in a state of flux for substantial periods of time. Seemingly, Grievant is upset by what she perceives as a dismissive, non-appreciative attitude from Respondent.

Acting Deputy Commissioner & Director of Investigations, Security, and Support Services, Linda Ellis testified at the level three hearing. During her questioning, she appeared calm, professional, and direct. Acting Deputy Commissioner Ellis provided information regarding the operation of various aspects of several sections of DMV. Further, it is noted that Acting Deputy Commissioner Ellis provided and explained to some degree that there has been restructuring of identified sections, divisions and job duties. Identified in the course of this information, it was specifically highlighted that Grievant's requested relief of restoration of her identified job duties is not a viable option in that pursuant to the new structuring, the entire Vehicle Services Unit was moved under the leadership of Ms. Ellis (January 2018). Acting Deputy Commissioner Ellis has made

sweeping changes. See R Ex 1-4. Approximately ten employees' duties were changed during the restructuring. Not just Grievant's obligations. Of the approximately ten employees that previously may have had supervisory duties, all were relieved of those responsibilities. The duties were assumed by Ms. Ellis and/or her assistant in an ongoing effort to continue the assessment of the unit. Grievant has not identified an alteration of authority that was isolated to her alone. Acting Deputy Commissioner Ellis' testimony has probative value and is thought to be reliable. Grievant has not been formally demoted as her job classification, title, or pay have not been reduced or changed.

Director of Vehicle Services Unit, Mike Maggard testified at the level three hearing. Mr. Maggard is a Transportation Systems Director 2 and has been employed by Respondent for 25 years. He was previously Grievant's supervisor but maintains no current supervisory control over Grievant. While being questioned, Director Maggard seemed calm and professional. He demonstrated the demeanor typically exhibited during a grievance hearing. Director Maggard testified that Grievant "did a very good job at what she did as far as the online system. She was very conscientious at what she did." Director Maggard testified that Grievant was not at any time responsible for conducting employee performance evaluations for employees assigned to the online renewal unit. All such EPAs were conducted by Mr. Maggard who Grievant conceded observed the applicable employees' daily work performances. It is uncontested that during a portion of 2017 Grievant was responsible for approving annual and sick leave for Regina Ballard and Jennifer Foster. These timekeeping duties were removed at the request of Respondent's Human Resources Department following numerous errors that had to be

corrected. Grievant conceded to making these errors. It is contended that several of the personnel decisions Director Maggard made in September 2017 stem from extensive complaints from co-workers and other management pertaining to Grievant's conduct. It is unclear what duties Director Maggard assigned Grievant and what duties Grievant assimilated because there was a void to be filled. Grievant was a conscientious employee who enjoyed the validation received for performing tasks in a developing unit. Grievant was instrumental in the progression of the Vehicles Service Unit under the direction of Director Maggard. Not all of Grievant's efforts were viewed positively. Director Maggard's testimony is perceived to be reliable and found to be plausible in the circumstances of this matter.

Demotions are addressed by the Division of Personnel's administrative rules. "There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or a change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity." W. Va. Code St. R. § 143-1-11.4. There are strict requirements for how an employer may demote an employee under the rule. *Id.*

Overall the instant conflict is not a dispute of a factual event but a difference in the interpretation, intent and analysis of situations. Grievant's job classification, title, or pay have not been reduced or changed. The dissension may be based on workplace expectations. "It has been recognized by this Grievance Board that a 'functional

demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement.' *Dudley v. Bureau of Senior Serv.*, Docket No. 01-BSS-092 (July 16, 2001) (citing *Gillispie v. Dep't of Corrections*, [Docket No.] 89-CORR-105 (Aug. 29, 1989))." *Morris v. Workforce West Virginia*, Docket No. 2012-0943-CONS (Aug. 20, 2013). Functional demotion is a wrongful act, and it is not one of the types of demotions addressed by DOP Administrative Rule 11.4.

Grievant introduced into the record an "email" from herself to Administrative Secretary Kim Harrison in which she listed her job duties. Characterized by Grievant as an email, the document contained little of the characteristics common to an email including a header, sender information, recipient information, subject, and date. G Ex 3 As noted at the level three hearing, this trier of fact gives little probative value to this exhibit. This document is not reliable evidence. Grievant's testimony was less persuasive than needed for several reasons. Many of Grievant's administrative duties remain including maintaining plate inventory, answering Commissioner e-mails, and accessing the DMV database. Grievant's allegations that Respondent acted inappropriately in physically relocating Jennifer Foster and Regina Ballard is unavailing.

It is not found that Grievant's situation rises to the level of other cases in which the Grievance Board has found a functional demotion occurred. See *Koblinsky v. Putnam County Health Dep't.*, Docket No. 2011-1772-CONS (Oct. 23, 2012) (Registered Sanitarian, who previously performed inspections in the field, confined to desk to perform only clerical tasks not ordinarily done by Registered Sanitarians); *Watson v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hospital*, Docket No.

2009-0558-DHHR (Dec. 31, 2009) (Security Guard reassigned to perform the duties of a Food Service Worker); *Lilly v. Dep't of Transportation/Division of Highways*, Docket No. 07-DOH-387 (June 30, 2008) (As part of a written reprimand all managerial duties of Highway Administrator removed). In these cases, while the Grievants' classifications did not technically change, the Grievants were assigned to perform work clearly below the skill level of their classification. Essentially, the Grievants were working in their classification in name only. Those are not the circumstances at play in this matter. Grievant did not assert she will no longer be performing duties encompassed in the Administrative Services Assistant I classification. Grievant takes issue with a lack of supervisory duties, which is not a required task for an Administrative Services Assistant I classification. See G Ex 1. Grievant has not established she was functionally demoted.

Based upon the foregoing, while it is clear that Grievant's duties have changed over the years, yet they are still duties of an Administrative Services Assistant 1. Further, Grievant presented little to no evidence to persuasively establish that any of the changes violated law, rules, or policies, or that they impacted her ability to obtain future job advancement. Accordingly, the undersigned cannot conclude that Grievant proved her functional demotion claim by a preponderance of the evidence.

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. "In order to establish a harassment or discrimination claim asserted under the grievance statutes, a Grievant must prove that Respondent engaged in harassment or discrimination under the legal test provided pursuant to W. Va. Code §6C-2-2. *Frymier v. Higher Education Policy Comm.*, 655 S.E.2d

52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The first criterion that Grievant must prove is that she has received different treatment from other employees in similar situations. Grievant did not provide any evidence to establish that similarly situated employees involved in the restructuring of the unit were treated differently or that a policy violation occurred by the DMV. Grievant's commitment to the allegation of harassment is dubious.⁶ Respondent's management made personnel decisions after a review of the issues of the Unit and held many discussions about how to end employee conflicts and to ensure the Support Services Unit was operating efficiently and effectively. Grievant did not agree with some management decisions. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.*, Docket No. 99-39-271 (Nov. 30, 1999).

Grievant failed to prove that the decision to change her duties was contrary to law or flawed by impermissible intent. Management makes personnel decisions. Managerial decisions are generally discretionary determinations by the authorized employer unless contrary to applicable regulation. The decision(s) to structure or restructure Grievant's unit and ultimately the division, removing some of Grievant's and

⁶ The amount of evidence and/or testimony presented in support of this allegation in Grievant's case in chief was negligible.

others' duties, was not established to be arbitrary and capricious or illegal. Respondent demonstrated to a reasonable degree of certainty that it followed Administrative Procedures in its operation of the Vehicles Service Unit. Grievant has not established an unlawful action (functionally demoted or harassed) as a result of those decisions.

Further, many of the circumstances surrounding this grievance have changed dramatically. For example, in January 2018 and continuing today, Grievant provided a work excuse from her physician indicating Grievant is limited to what she can do with her hands due to an injury. The doctor's excuse provided to her supervisor, R Ex 6, specifically said very little data entry and no stuffing envelopes. DMV had an employee that was scanning, filing and pulling matches for send backs which consisted of very little data entry and no stuffing envelopes, so the job duties were temporarily reassigned between these two employees to meet the restrictions of the doctor's excuse and allow Grievant to continue to work safely and productively. Respondent put forth effort to maintain a position with job duties that Grievant can complete consistent with her medical limitations.

Grievant did not establish, by a preponderance of the evidence, that during the time period relevant to this grievance that she was a victim of a hostile work environment. Respondent has offered legitimate, non-retaliatory reasons for its actions. Grievant has failed to prove by a preponderance of the evidence that the reasons offered by the employer were merely a pretext for a retaliatory motive. Grievant failed to prove that the changes to her duties were contrary to law, rule or any applicable policy. Grievant failed to establish that she was unlawfully (functionally) demoted.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Demotion(s) are addressed the Division of Personnel's administrative rules. There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or a change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity. W. VA. CODE ST. R. § 143-1-11.4 (2012).

3. "It has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement.' *Dudley v. Bureau of Senior Serv.*, Docket No. 01-BSS-092 (July 16, 2001) (citing *Gillispie v. Dep't of Corrections*, [Docket

No.] 89-CORR-105 (Aug. 29, 1989)).” *Morris v. Workforce West Virginia*, Docket No. 2012-0943-CONS (Aug. 20, 2013).

4. Of the relatively few cases in which this Board has reviewed allegations of functional demotion, the ones granted show a very clear change in duties. *Koblinsky v. Putnam County Health Dep’t.*, Docket No. 2011-1772-CONS (Oct. 23, 2012) (Registered Sanitarian, who previously performed inspections in the field, confined to desk to perform only clerical tasks not ordinarily done by Registered Sanitarians); *Watson v. Dep’t of Health and Human Resources/Mildred Mitchell-Bateman Hospital*, Docket No. 2009-0558-DHHR (Dec. 31, 2009) (Security Guard reassigned to perform the duties of a Food Service Worker); *Lilly v. Dep’t of Transportation/Division of Highways*, Docket No. 07-DOH-387 (June 30, 2008) (As part of a written reprimand all managerial duties of Highway Administrator removed). *Morris v. Workforce West Virginia*, Docket No. 2012-0943-CONS (Aug. 20, 2013) also see *Shirk v. Division of Highways*, Docket No. 2018-0938-CONS (Nov. 14, 2018).

5. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.*, Docket No. 99-39-271 (Nov. 30, 1999). The Grievance Board may not substitute its management philosophy for that of an employer. *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997).

6. "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. VCa. Schools for the Deaf and 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). 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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp 670 (E.D. Va. 1982)).

7. 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 his judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

8. Grievant failed to prove by a preponderance of the evidence that Respondent's actions as detailed herein violated any law, rule, or policy.

9. Further Grievant failed to prove by a preponderance of the evidence that she was functionally demoted or that Respondent's actions were arbitrary and capricious.

10. 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. In order to establish a harassment or discrimination claim asserted under the grievance statutes, a Grievant must prove that Respondent engaged in harassment or discrimination under the legal test pursuant to W. Va. Code §6C-2-2. *Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007); See *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

11. 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).

12. “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).

13. Grievant did not establish that she was being harassed.

14. Grievant did not establish by a preponderance of the evidence that she was a victim of a hostile work 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 (2018).

Date: January 30, 2019

Landon R. Brown
Deputy Chief Administrative Law Judge