THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBORA PIGMAN
Grievant,

v. **Docket No. 2018-1478-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Debora Pigman, is employed by Respondent, Department of Health and Human Resources ("DHHR"), in the Bureau for Children and Families ("BCF"). Ms. Pigman filed a level one grievance form dated February 5, 2018, alleging:

> I am filing due to hostile work environment and that I was not getting picked for [a] supervisor position when I was the most qualified. My previous supervisor clearly does not know CPS policy and was never available and retaliated when I complained. My previous supervisor Kelly White has lied or mislead others about case staffing. I believe this is one of the reasons I was not selected as a supervisor. . .

As relief, Grievant seeks a resolution to the hostile work environment claim and to be given the supervisor position for which she applied. A level one hearing was held on March 2, 2018, and a decision denying the grievance was issued on March 23, 2018. Grievant appealed to level two on April 5, 2018, and a mediation was conducted on June 8, 2018. Grievant filed an appeal to level three dated the same day.

By form dated August 12, 2018, Ms. Pigman filed a second grievance alleging that she had been subjected to retaliation for filing her initial grievance resulting in an inaccurate EPA 3 and further obstructions in the performance of her job. As relief Grievant

seeks cessation of the retaliation and a revision of EPA 3. After several continuances were sought and granted, an Order of Consolidation was entered on October 10, 2018, combining the two grievances.[1]

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on February 5, 2020. Grievant personally appeared and was represented by Trent Redman, Esquire. Respondent appeared in the person of Melanie Urquhart, Director of Social Services, and was represented by Mindy M. Parsley, Assistant Attorney General. The date for submission of Proposed Findings of Fact and Conclusions of Law was extended until April 10, 2020, and this matter became mature for decision on that date.

Synopsis

Grievant alleges in her consolidated claims that she has been subjected to a hostile work environment, was improperly passed over for a supervisor position, was subject to reprisal for filing a grievance and an inaccurate performance evaluation. Grievant did not prove that the actions of Supervisor White constituted a hostile work environment. Additionally, since Ms. White is no longer Grievant's supervisor that claim is largely moot. Grievant also did not prove that her non-selection for the supervisor position was improper or arbitrary and capricious. Grievant proved by a preponderance

[1] Ms. Pigman filed a third grievance on January 21, 2010, claiming untimely payment of travel expenses. That grievance was originally consolidated into this action. By agreement of the parties the third grievance was severed from this action by order dated February 26, 2020, and consolidated into Docket No. 2019-1226-CONS, a grievance where other DHHR employees were also grieving untimely payment of their travel expenses.

of the evidence that the poor evaluation she received was a reprisal and the reasons offered for the rating were a pretext.

Grievant did not prove that the hiring procedure was flawed or the decision regarding the successful applicant was arbitrary and capricious. Grievant did prove that she was subjected to reprisal which resulted in her receiving poor evaluations.

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, Debora Pigman, is employed by the Department of Health and Human Resources ("DHHR"), in the Bureau for Children and Families ("BCF"). Her position is within the Child Protective Services ("CPS") Worker classification and she is assigned to the BCF Crisis Response Team ("CRT").

2. Grievant was originally employed by Respondent in August 2011, in the Cabell County office. She has been working as a CRT member for approximately five years. Before being hired by Respondent, Grievant had worked in Kentucky as a supervisor for six years.

3. The BCF created the CRT because the Bureau was experiencing large backlogs of child protective services cases in several counties. Members of the CRT travel to assigned regions around the state and work to reduce the backlogs in those assigned offices. There was originally one CRT for the entire state.

4. The CRT members originally reported to the County Service Managers in the counties where they were assigned. Kelly White was selected to be the supervisor for the CRT on a state-wide basis. The CRT members all reported to her.

5. The goal of providing a supervisor specifically for the CRT members was to provide consistency in the operation of the team since they were charged with reducing case backlogs instead of the daily tasks of local CPS workers.

6. Grievant had conflicts with Supervisor White and felt that Ms. White did not properly follow DHHR policies. Ms. White was not as responsive to e-mails and staffing cases as Grievant felt she should be.

7. Supervisor White occasionally used coarse language which Grievant found objectionable, and she asked a CPS Worker to sign her in to an in-service training when Ms. White was running late.

8. Supervisor White told Grievant that it was counter to DHHR policy to move custody from one parent to another. However, in that instance, Circuit Judge Alsop had ordered Grievant to do so.

9. An investigation was conducted by Pam Holt, Director of Human Resources, into Grievant's complaint that she was being subjected to a hostile work environment by her supervisor, Kelly White. Director Holt and Director Urquhart, conducted interviews with seven CRT CPS Workers, including Grievant, and two CRT Supervisors; Kelly White and recently selected supervisor, Connie Roush.[2]

10. The interviews indicated that there was a lot of "drama" and "low morale" in the Kanawha County Office that needed to be addressed. The majority of employees

[2] Grievant unsuccessfully applied for the supervisor position now held by Connie Roush. Grievant alleges that her non-selection was further indication of the hostile work environment. The selection issue will be addressed separately herein.

found that Kelly White acted professionally and was a capable supervisor. They noted that Ms. White was trying to hold staff accountable which led to some pushback.[3]

11. The investigator made the following findings:

- Hostile Work Environment was not substantiated.
- Some of the employees do not want to take direction from their supervisor and think they know how to do it better.
- Debbie Pigman applied and was not Kanawha County Office. Space is the main concern with them housed there and a lot of gossiping with the Kanawha County Staff.
- Ms. White is working on holding the workers accountable and has some great ideas. She is getting push back from a couple of employees. *Id.*

12. The investigator made the following recommendations:

- All employees are held accountable for their productivity.
- Ms. White and her supervisor to meet with the Social Service Coordinator and Community Service Manager at Kanawha concerning the Crisis Team.
- Ms. White should sign up for some supervisory classes and Conflict Resolution class with Division of Personnel.
- Review the Employee Conduct policy with all employees.[4]

13. In the fall of 2017, position vacancy was posted for a CRT Supervisor. It had been decided to split the CRT into two units; a South Team and a North Team. Kelly White would continue to be the CRT Supervisor for the North Team and the successful applicant would be the CRT Supervisor for the South Team. Both supervisors would report to Director Urquhart.

14. Grievant Pigman and Connie Roush applied for the position of CRT Supervisor. Both were CRT CPS Workers, and both were found to meet the minimum

[3] Respondent Exhibit 1, Investigation Report.
[4] *Id.*

qualifications for the position. Since they both met the minimum qualifications, they were both interviewed for the position on December 15, 2017.

15. Three managers were appointed to the interview committee to recommend the successful applicant for the CRT Supervisor position: Director of Social Services, Urquhart; Director of BCF Region Two, Cheryl Salamacha; and Community Services Manager for Fayette County, Skip Jennings.

16. The committee utilized the process outlined in DHHR *Policy Memorandum 2106, Employee Selection,* to conduct the interviews and make the selection. (Grievant's Exhibit 1).

17. Both applicants were asked the same set of questions during the interviews and each committee member scored the responses independently without consultation with the others. Scores were assigned for rating factors set out in Policy 2106 including; oral expression, intelligence, judgement, tact, appearance, poise and leadership. The interview scores and the rating factor scores were combined to arrive at a total score for each applicant. All three committee members rated Connie Roush the highest and recommended that she be the successful applicant.

18. Grievant had significantly more supervisory experience than Ms. Roush. Grievant had been a supervisor in Kentucky for six years, while Ms. Roush had served as an interim supervisor in West Virginia for a couple of months. The remaining factors were close, but Ms. Roush had a cumulative score that was eleven points higher on the interview than Grievant's. The interview was the deciding factor.

19. Ms. Roush approached the interview by explaining what she felt she could contribute as supervisor to benefit the performance of her team. She took a positive tone toward staff leadership and demonstrated knowledge of CPS policies.

20. Grievant utilized the interview as an opportunity to criticize her manager, point out all the things she was doing wrong, and then state how she would be different. She criticized Ms. White and other employees throughout her interview responses. The interview committee felt that such a negative tone did not bode well for Grievant's success as a supervisor.

21. At the beginning of the interview, Ms. Urquhart told both applicants that the job might have to be reposted. At some point during the interview, Grievant told the committee that she was not sure she wanted the job.

22. Grievant contested her non-selection through the grievance procedure by form dated February 8, 2018.

23. Policy Memorandum 2106, when discussing the interview states:

> It should be utilized as a tool in the process of selecting a candidate; but it is not necessarily the deciding factor. Where appropriate, different factors may be weighed on the needs the job entails.

24. Supervisors are required to complete employee performance appraisals for all their subordinates. The appraisals are recorded on employee performance appraisal forms (EPA forms) and are completed utilizing a three-step process.[5]

[5] *See* Division of Personnel *Supervisor's Guide to the Performance and Appraisal Process.* ("EPA Guide")

25. The EPA-1 is completed within thirty days of the employee starting employment, or near the beginning of each annual rating period. The EPA-1 is used "to identify, define, and describe performance expectations."[6]

26. The EPA-2 is completed near the midpoint of the employee's rating period and is utilized "to provide feedback to the employee concerning the employee's strengths, weaknesses (if any), and performance" during the first half of performance period. The EPA-2 is intended to give the employee notice of any performance expectations which are not being achieved, as well as to provide time and guidance for the employee to correct any performance issues prior to the final appraisal.[7]

27. The EPA-3 is completed within thirty days of the end of the annual rating period and is utilized "to provide employees with a formal rating of their overall job performance throughout the entire rating period and to generate information to be used as the basis for future performance planning."[8] The employee is rated on a set of performance standards related to the duties set out in the EPA-1 and given a numeric score which is used to determine if the employees performance is rated as "Needs Improvement," "Meets Expectations" or "Exceeds Expectation." A rating of "Needs Improvement" is considered less that satisfactory and can lead to the implementation of a plan of improvement and/or disciplinary action.

28. Grievant received an EPA-3 for the period of September 1, 2016 through August 30, 2017. The EPA-3 was completed by her then supervisor, Kelly White, and dated November 11, 2017. Grievant received an overall score of 2.39 and a rating of

[6] *Id.*
[7] *Id.*
[8] *Id.*

"Meets Expectations." There were twenty-three individual indicators of performance. Grievant received a rating of "exceeds expectations" on nine of the indicators and a rating of "meets expectations" on fourteen of the indicators. Grievant did not receive a rating of "need improvement" for any indicator. During this evaluation period, Grievant was expected to address the backlog of cases in three counties including Kanawha. Additionally, she was assigned to participate in the Kanawha County CPS daily case rotation, including timely responding to new complaints, preparing safety plans and protection plans, filing petitions, as well as preparing family assessments. (Respondent Exhibit 3)

29. After Connie Roush was selected for the position of CRT Supervisor, she became Grievant's immediate supervisor. Grievant Pigman filed this grievance, in part to contest her non-selection for the supervisor position and was not reluctant to share her dissatisfaction with that decision.

30. Supervisor Roush completed an EPA-2 for Grievant dated April 17, 2018. This was the mid-term appraisal to advise Grievant of any deficiencies and give guidance for better performance. Supervisor Roush rated Grievant's performance as "Fair, But Needs Improvement." In the section for listing "Performance Development Needs" Supervisor Roush wrote:

> Debbie has had difficulty with completing the expectation of clearing 15-18 assessments per month. She has cleared low numbers during the months of September through February. Debbie has filed numerous petitions which has impacted her ability to be in the field. However, Debbie has used a significant amount of overtime each week. Debbie needs to work on putting her contacts in timely with the required information. Debbie needs to consistently request overtime. This supervisor has been working with this employee since January 29, 2018 and has repeatedly discuss[ed] with her the

need for getting prior approval for her over time and entering more information in her contacts.

31. Filing petitions is a regular and essential duty of CPS Workers. It is time consuming because it requires consultation with the prosecutor's office and appearances in Circuit Court.

32. CRT CPS Workers were initially assigned to work solely on clearing case backlogs and were not involved with working new cases or completing petition. Based upon these expectations, the State Personnel Board found that a goal of completing 18 assessments per month was reasonable. However, Grievant was in the regular CPS rotation in Kanawha County requiring her to perform the daily duties and responsibilities of other CPS Workers as well as clear back logged cases. The expected case clearance goal set for regular CPS Workers by the State Personnel Board is ten case assessments per month. *See* FOF 6, *McCumbers and Pigman v. Dep't of Health and Human Res.,* Docket No. 2019-1226-CONS (April 2, 2020).

33. CRT Supervisor Roush prepared an EPA-3 for Grievant dated October 10, 2018. The EPA-3 covered the rating period September 1, 2017 through August 31, 2018. This is the next rating period after the EPA-3 prepared by Supervisor Kelly White and was the first EPA-3 prepared by Ms. Roush for Grievant after Grievant's filing a grievance concerning Supervisor Roush's selection for the CRT Supervisor position.

34. In this performance evaluation, Grievant received an overall score of 1.48[9] and a rating of "Needs Improvement." There were twenty-three individual indicators of performance. Grievant did not receive a rating of "exceeds expectations" on any

[9] This cumulative score is .03 points below a score equivalent to an overall rating of "Meets Expectation,"

indicators. She received a rating of “meets expectations” for eleven of the indicators and a rating of “needs improvement” for twelve indicators. During this evaluation period Grievant was expected to address the backlog of cases in Kanawha. Additionally, she was assigned to participate in the Kanawha County CPS daily case rotation, including timely responding to new complaints, preparing safety plans and protection plans as well as preparing family assessments and filing petitions. (Respondent Exhibit 5)

35. In the EPA-3 Supervisor Roush stated that Grievant was “resistant to change in expectation set for the new unit.” This “resistance led to a rating of needs improvement in the indicators of: “Adapts to new situations in a positive manner.” Displays openness to learning and applying new skills.” “Works well with others to achieve organization’s goals,” and “Is resourceful and generally seeks work process improvements.” The resistance seemed to consist of Grievant’s criticism of her supervisors and the goal of 15 cases cleared per month.

36. Supervisor Roush noted that Grievant “shares information when appropriate and with appropriate people such as the APA[10],” and communicates often with her supervisor. Ms. Roush criticized Grievant for consulting with the APA regarding the filing of a petition before Grievant informed her supervisor and failing to properly enter data in the new format. This criticism led to a rating of “needs improvement” in three of five indicators in the section entitled “Demonstrated Credibility.”

37. Grievant was rated as “needs improvement” for the indicator of “Work output matches expectations established.” This rating was based upon not meeting the goal of clearing a minimum of 15 CPS referrals per month. Grievant met the standard in the

[10] Assistant Prosecuting Attorney

months of March and April only. Prior to February, Grievant's clearance rate had averaged 70%. Her clearance rate thereafter was lower.[11] Grievant was also criticized for having typos and misspelled words in her reports.

38. During this rating period, Grievant had a flare up of her rheumatoid arthritis in her hands which made typing very difficult and was the source of many typos as well as delays in completing her reports. She also worked with the APA in filing petitions which took more than the usual time and effort. CRT CPS Workers rarely meet the standard for completing 15 case assessments per month. Respondent provided Grievant with word-recognition software to assist her with her typing duties and Grievant was adjusting to that process.

39. Grievant rated as "needs improvement" for the criteria "Employee's attendance supports the expected level of work." In the comments section, Supervisor Roush wrote:

> Debbie's attendance is good in that she rarely calls off from work sick or on emergency annual leave. She schedules for leave appropriately and well in advance. She typically notifies her supervisor is she needs to adjust some time off. Debbie can readably be relied on and is it dependable team member in her attendance. Debbie is also willing to work overtime; however, she works a significant amount of overtime.

As justification for the "needs improvement" rating, Supervisor Roush wrote that "Debbie's number of completed assessments does not justify the amount of overtime worked."

40. In the summary comments area of the EPA-3, Supervisor Roush wrote the following:

[11] No specific data was provided regarding the number of cases Grievant was clearing during this period.

> Debbie has years of experience doing social work, but she is resistant to change. She does not want to change the way she does her work and does not take constructive criticism well or suggestions that would improve her assessments. She has demonstrated her ability to clear the expected number of assessments when she puts her mind to it as evidenced by her clearing 19 in March and 20 in April but then she reverted back to clearing low numbers. Whenever the supervisor talks or emails information related to supporting her impending dangers, she is argumentative and resorts to threatening her supervisor with filing a grievance.

41. After this grievance was filed, the supervision of Grievants work was shifted from Supervisor Roush to Melissa Shepherd, Kanawha County Social Services Coordinator. Director Urquhart completed an EPA-2 for Grievant for the rating period of September 1, 2018 to February 28, 2019. The EPA-2 was dated April 23, 2019, and Grievant received a rating of "Fair, But Needs Improvement." (Respondent Exhibit 2)

42. In the area titled "Performance Development Needs", Ms. Urquhart wrote the following:

> Debbie needs to work toward achieving the expectation of 18 referrals per month when working backlog. She needs to meet deadlines for administrative requests such as car reports without prompting and providing information in a clear, concise manner to keep down confusion and the need for repeated requests. Debbie needs to be mindful of her communication with staff and customers to ensure it is consistently positive and respectful.

43. In the "General Comments" area Director Urquhart wrote:

> Debbie is reported to work well with her current supervisor by staffing cases timely, keeping her informed, making changes to her work upon request, and requesting overtime appropriately. Debbie's experience and self-sufficiency is (sic) appreciated in Kanawha. (Responded Exhibit 2)

44. Melissa Shepherd is the Kanawha County Social Services Coordinator. In that position she has recently supervised Grievant. She characterized her as having a

good work ethic and that she took criticism well. She specifically noted that Grievant is not unprofessional, or lazy. She also noted that Grievant maintains professional appearance and does not frighten children.

45. Rocky Holmes is an Assistant Prosecuting Attorney for Kanawha and the former Prosecuting Attorney for Calhoun County. He is one of three APA's who process child abuse and neglect cases in Kanawha County. In this role APA Holmes has worked extensively with Grievant.

46. APA Holmes has worked with hundreds of CPS Workers and has found Grievant to be one of the best. Grievant has never had a petition rejected by a Circuit Judge and three of the Kanawha County Judges have been very complimentary toward Grievant.

47. APA Holmes was familiar with a case where Supervisor Roush complained that Grievant had gone to him before consulting her. In that case he believed that the mother might kill her child before the DHHR would act. He asked Grievant to file the petition and she complied.

Discussion

Grievant alleges in her consolidated claims that she has been subjected to a hostile work environment, was improperly passed over for a supervisor position, was subject to reprisal for filing a grievance and an inaccurate performance evaluation. These grievances do not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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 party bearing the burden has not met its burden. *Id.*

DOP *Prohibited Workplace Harassment Policy,* defines "Hostile Work Environment Harassment" not related to discrimination against an insular minority as:

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

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

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

Grievant's complaints related to the hostile workplace relate to her treatment by her prior supervisor Kelly White ending with her non-selection for the posted CRT Supervisor position. Ms. White is no longer Grievant's supervisor so any remedy that would be available related to her is no longer available which renders the matter moot. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board:

> A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

156 C.S.R. 1 § 6.11. In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).'

Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Moreover, the majority of Grievant's complaints were related to Ms. White's management methods and her general knowledge related to DHHR rules and regulations. A complete investigation was conducted into Grievant's allegation of a hostile work environment. The findings noted that there were problems in the workplace related to the conduct of staff and management, but these problems were insufficient to constitute inappropriate conduct sufficiently severe or to alter the conditions of an employee's employment. *See Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). Additionally, the incidents tended to be too few to constitute a pervasive nature of hostility. *See Fairmont Specialty Servs., v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999). The investigators made recommendations for both staff and management aimed at improving the situation and they were carried out. *See* FOF 12, *supra.* Ultimately, even if the allegations were not moot, Grievant did not prove by a preponderance of the evidence that she was subjected to a hostile work environment.

The issue of Grievant's non-selection for the CRT Supervisor remains. It is well established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board is not to engage in the selection process, but rather to conduct a "review of the legal sufficiency of the selection process." *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). *See also Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). "Selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be

overturned." *Jordan, supra*. Therefore, in a selection case, such as this, the Grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005).

Respondent assigned three managers conduct the selection process including interviews of both candidates. There was no indication nor evidence that any member of the interview team was biased toward or against either applicant. It is undisputed that both Grievant and Connie Roush met the minimum qualifications for the posted position.

The interview team followed the hiring procedure set out in DHHR *Policy Memorandum 2106, Employee Selection,* to conduct the interviews and make the selection. Grievant did not allege that the committee incorrectly applied the policy procedures. Each candidate was asked the same set of preselected questions in the interview. The committee members individually and separately scored the responses to each question without input from the remaining members. After the interview, each interviewer gave Connie Roush higher scores than Grievant and felt she was the best candidate for the CRT Supervisor position.

Grievant argues that she has more supervisory experience than Ms. Roush. She had six years of supervisory experience in another state as opposed to Ms. Roush who has a couple of months as an interim supervisor in West Virginia. Grievant also points out that Policy Memorandum 2106 states that the interview:

> should be utilized as a tool in the process of selecting a candidate; but it is not necessarily the deciding factor. Where appropriate, different factors may be weighed on the needs the job entails. *Id.*

Grievant argues that the committee relied too heavily on the interview and did not give enough weight to the relative difference in supervisory experience resulting in their decision being arbitrary and capricious.

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. *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)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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 her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Policy Memorandum 2106 says that the interview does not necessarily have to be the deciding factor, but it does not say that it cannot be the deciding factor. In fact, the interview often tips the scale in favor of one candidate. That is why the interviews are structured to give each candidate an equal opportunity to answer the same questions. Likewise, Policy Memorandum 2106 states that other specific factors may be weighed but does not required that specific factors be utilized beyond those set out in the procedure.

Director Urquhart noted that Grievant used the interview to vent her frustrations and criticisms of her supervisor, Kelly White. The only time she expressed how she would address the needs of the unit was in the context of doing things differently than Ms. Kelly. Additionally, Grievant did not strengthen her interview by telling the committee that she was not sure she would take the position of offered. The interview committee members were put off by this negativity and did not believe it indicated that Grievant would be an effective leader or capable of creating a consensus for the unit to move forward. It also indicated that Grievant would have difficulty being a cooperative member of the CRT management team. These were legitimate concerns.

Ms. Roush addressed the questions from a positive perspective explaining her approach to management and problem solving. She expressed ideas for increasing productivity in the unit. The committee members were impressed with her answers and overall demeanor.

Both candidates had been successful CPS Workers for a long time and had demonstrated competency in performing those duties. The committee members felt the interview performances outweighed and differences in supervisory experience. While reasonable people may differ as to those issues these conclusions were not

unreasonable. The committee based their decision upon reasonable criteria allowed in Policy Memorandum 2106. Grievant did not prove by a preponderance of the evidence that her non-selection for the CRT Supervisor position was arbitrary and capricious.

The final issue relates to the performance appraisals Supervisor Roush issued concerning Grievant's work after Ms. Roush became her supervisor. Grievant argues that the poor rating she received on the EPA-3 was an act of reprisal by Supervisor Roush for a grievance she filed contesting the selecting of Ms. Roush for the position instead of her.

WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical

question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). A retaliatory motive can be inferred due to the short passage of time between the injury and the adverse action. *Frost v. Bluefield State Coll*., No. 14-0841 (W. Va. Supreme Court, June 12, 2015) (memorandum decision).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See, Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant clearly participated in an activity protected under WEST VIRGINIA CODE § 6C-2-2(o) by filing a grievance on February 5, 2018, related to Ms. Roush's selection for the CRT Supervisor position. Grievant made it clear to all her colleagues that she had filed the grievance and Ms. Roush undoubtedly knew of Grievant's action. Grievant

received a negative interim EPA-2 rating her performance as needing improvement on April 17, 2018, and an overall "needs improvement" rating on an EPA-3 on October 10, 2018. Both evaluations were written by Supervisor Roush and the selection grievance was still pending when they were issued. Grievant's rating was substantially lower than the rating she received on her previous EPA-3 from Kelly White which rated Grievant's performance as "Meets Expectations" and was only 1.1 points from a rating of "Exceeds Expectations." While an evaluation is not considered disciplinary, a rating of "Needs Improvement" is considered less that satisfactory and can lead to the implementation of a plan of improvement and/or disciplinary action. Consequently, such a rating constitutes adverse treatment as an element of reprisal. Finally, the grievance contesting Grievant's non-selection was still pending when the adverse actions took place which creates an inference of a retaliatory motive. *Frost v. Bluefield State Coll*., No. 14-0841 (W. Va. Supreme Court, June 12, 2015) (memorandum decision). Grievant established a *prima facia* case of reprisal.

Respondent counters that it had non-retaliatory reasons for the adverse actions. The main issues raised by Supervisor Roush for the poor rating on Grievant's EPAs were: Grievant was not meeting the expectation of clearing "a minimum of 15 CPS referrals per month"[12]; she filed a petition after consulting with the APA prior to consulting with her supervisor; she had typing errors on her reports; and she did not always seek permission prior to utilizing overtime to complete her assignments.

[12] EPA-3, page 3 of 6, Respondent Exhibit 5.

Grievant demonstrates that these criticisms are not reasonable and are ultimately a pretext for retaliatory action by her supervisor. The criticism of not meeting the expectation of a minimum of 15 assessments per month is particularly problematic.

As noted in *McCumbers and Pigman v. Dep't of Health and Human Res.,* Docket No. 2019-1226-CONS (April 2, 2020), that expectation was approved by the State Personnel Board (SPB) based upon the assumption that CRT CPS Workers were assigned to clear backlogged cases and not participating in the numerous challenges of being in the daily rotation of other CPS Workers. In fact, the SPB, at the suggestion of Respondent, set the clearance expectation for regular CPS Workers of 10 assessments per month taking into account the additional responsibilities of meeting with clients, opening inquiries, preparing family and safety plans and filing petitions (which can be especially time intensive). In discussing the "Work output matches expectation established" in *McCumbers,* it was specifically noted that:

> Manager Urquhart testified that she and the supervisors for the Grievant and the CPS Crisis Response Team, view this standard more as a goal than an expectation, and flexibility is built into achieving the goals based upon the actual duties of the CRT CPS Worker for each month and the complexity of the cases. Notwithstanding the wording of the standard in Grievant's EPA-1 does not indicate flexibility, her actual EPA ratings indicate that the raters are interpreting the standard as Ms. Urquhart described. While Grievant [McCumbers] does not routinely close 15 cases per month, she received an overall numerical score of 2.6 which resulted in an Alpha Score of "Exceeds Expectations." For the criterion "work output matches expectation established" Grievant [McCumbers] was rated "Exceeds Expectations." The evidence produced at the hearing demonstrated that the problematic standard is viewed and scored as a flexible goal with consideration given for the workers actual duties, complexity of cases, and both sick and annual leave. As long as the standard is actually interpreted and applied in that fashion it is not arbitrary and capricious.

Id.

Such was not the case in the present matter. Grievant Pigman was not solely assigned to clear backlogged cases during her rating period. In addition to clearing the backlog, Grievant Pigman was also on the daily rotation for CPS Workers in Kanawha County. Supervisor Roush even noted on Grievant's EPA-2 that "Debbie has filed numerous petitions which has impacted her ability to be in the field." Even though the additional work of being in the daily rotation, as well as a flair-up of Grievants' rheumatoid arthritis in her hands greatly impacted her ability to type quickly and accurately, Grievant received a rating of "Needs Improvement" for the indicator related to work output. In this case, the standard was not applied as described by Director Urquhart in *McCumbers*, rendering the standard arbitrary and capricious because it was not based upon the factors identified by the SPB when the minimum standard was set.

Supervisor Roush also rated Grievant as "Needs Improvement" for the standard "Employee's attendance supports the expected level of work." Yet in the comments related to this standard Ms. Roush wrote:

> Debbie's attendance is good in that she rarely calls off from work sick or on emergency annual leave. She schedules for leave appropriately and well in advance. She typically notifies her supervisor is she needs to adjust some time off. Debbie can readably be relied on any is ia dependable team member in her attendance. Debbie is also willing to work overtime; however, she works a significant amount of overtime.

FOF 39 *supra.* Supervisor Roush's explanation for giving a low rating on this indicator was that she believes that "Debbie's number of completed assessments does not justify the amount of overtime worked." The amount of overtime utilized by Grievant is simply not relevant to the attendance standard. The use of excessive overtime as a reason to

give a poor rating in the attendance standard, even though the supervisor found attendance to be "good" is arbitrary and capricious.

APA Holmes testified that Grievant was one of the most effective and efficient CPS Workers he has worked with. He was familiar with the case where, at his request, Grievant filed an emergency petition to remove a child whom he believed was in mortal danger. This was the instance where Grievant filed the petition without first consulting with her supervisor. Grievant advised Supervisor Roush after the petition was filed. Because Grievant was acting at the behest of the APA in an emergency, Ms. Roush's criticism of Grievant for filing the petition without first discussing it with her supervisor seems unreasonable and petty.

In a subsequent EPA-2 Completed by Director Urquhart, she stated in the "General Comments" section that:

> Debbie is reported to work well with her current supervisor by staffing cases timely, keeping her informed, making changes to her work upon request, and requesting overtime appropriately. Debbie's experience and self-sufficiency is appreciated in Kanawha.[13]

Apparently, the supervisor was not experiencing many of the problems with Grievant's performance that were sighted by Supervisor Roush. It is not clear whether this is because Grievant's performance has improved dramatically, or this supervisor is not hyper-critical of Grievant's work. Likely it is a little of both.

[13] Respondent's Exhibit 2. Nonetheless Grievant receive a rating of "Fair, But Needs Improvement" for failing to meet "the expectation of 18 referrals per month when working backlog." For this rating period there was no evidence presented as to whether Grievant remained on the daily CPS rotation in Kanawha County.

Given the totality of the circumstances, particularly that some of the ratings given to Grievant were arbitrary and capricious, Grievant proved by a preponderance of the evidence that the low ratings on the EPA-2 and EPA-3 she received from Supervisor Roush were a result of reprisal for her participation in the grievance procedure. Grievant also proved that the reasons given for the poor ratings were a pretext for a retaliatory motive.

Ultimately, Grievant did not prove by a preponderance of the evidence that she was subjected to a hostile work environment. Grievant did not prove by a preponderance of the evidence that her non-selection for the CRT Supervisor position was arbitrary and capricious. However, Grievant proved by a preponderance of the evidence that the low ratings on the EPA-2 and EPA-3 she received from Supervisor Roush were a result of reprisal for her participation in the grievance procedure. Grievant also proved that the reasons given for the poor ratings were a pretext for a retaliatory motive. Accordingly, the consolidated grievances are **GRANTED in part, and DENIED in part**.

Conclusions of Law

1. These grievances do not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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 party bearing the burden has not met its burden. *Id.*

2. DOP *Prohibited Workplace Harassment Policy,* defines "Hostile Work Environment Harassment" not related to discrimination against an insular minority as:

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

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).

4. "'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).

5. Grievant did not prove by a preponderance of the evidence that she was subjected to a hostile work environment.

6. The grievance procedure is not intended to be a "super interview," meaning the Grievance Board is not to engage in the selection process, but rather to conduct a "review of the legal sufficiency of the selection process." *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). *See also Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005).

7. "Selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned." *Jordan, supra*. Therefore, in a selection case, such as this, the Grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005).

8. "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." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citation omitted). 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)).

9. Grievant did not prove by a preponderance of the evidence that her non-selection for the CRT Supervisor position was arbitrary and capricious.

10. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

11. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

12. “[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). A retaliatory motive can be inferred due to the short passage of time between the injury and the adverse action. *Frost v. Bluefield State Coll*., No. 14-0841 (W. Va. Supreme Court, June 12, 2015) (memorandum decision).

13. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm’n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). “Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.” *Carper v. Clay County Health Dep’t*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See, Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

14. Grievant proved by a preponderance of the evidence that the low ratings on the EPA-2 and EPA-3 she received from Supervisor Roush were a result of reprisal for her participation in the grievance procedure. Grievant also proved that the reasons given for the poor ratings were a pretext for a retaliatory motive.

Accordingly, the consolidated grievances are **GRANTED in part and DENIED in part.**

Respondent is **ORDERED** to revise the EPA-2 and EPA-3 prepared by Supervisor Roush concerning Grievant's performance in a manner consistent with this decision. All additional remedies are 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: June 3, 2020

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE