THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RUBEN C. WRIGHT,
Grievant,

v. **Docket No. 2019-0877-McdED**

MCDOWELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Ruben C. Wright, is employed by Respondent, McDowell County Board of Education. On February 7, 2019, Grievant filed this grievance against Respondent attaching a lengthy statement alleging a hostile work environment. For relief, Grievant sought "[t]o not be terminated from my coaching position. If terminated to be reinstalled."

Following the March 1, 2019 level one hearing, a level one decision was rendered on an unspecified date denying the grievance. The certificate of service on the decision certifies the decision was mailed on March 18, 2019. Grievant appealed to level two on March 22, 2019. Following mediation, Grievant appealed to level three of the grievance process on May 23, 2019. In his level three appeal, Grievant changed his statement of grievance to include an allegation of discrimination and changed his requested relief to the following: "1. All discriminatory acts towards the grievant cease and desist. 2. All false and misleading statements be changed and redacted from the grievant['s] file. 3. Formal apology be written to the grievant and put in file. 4. A Conflict resolution advisor be hired by the state and assigned to resolve the matter." On October 10, 2019, Respondent, by counsel, filed a *Motion to Dismiss* alleging that Grievant had already received a portion of the relief requested by Respondent's

agreement and that the remaining relief requested was unavailable. As the motion was filed three business days before the scheduled hearing, the motion could not be formally addressed prior to the scheduled level three hearing.

A level three hearing was held on October 15, 2019, before the undersigned at the offices of the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person and *pro se*[1] and was assisted by his representative, Kenneth Orr. Respondent appeared by Superintendent Carolyn Falin and was represented by counsel, Howard Seufer, Bowles Rice LLP. At the beginning of the hearing, the undersigned denied the motion to dismiss as Grievant would be entitled to relief beyond the removal of the negative observations and evaluations if he could successfully prove that discrimination or a hostile work environment had occurred. At the conclusion of the hearing, the record was left open for Grievant to submit a copy of an email chain that he referenced during his testimony after the undersigned and Respondent's counsel reviewed the electronic copy on Grievant's laptop computer during the hearing. In ruling that the record remain open, the undersigned also provided Respondent the opportunity to present further evidence if necessary, in response to the document. Grievant provided a copy of the email chain on October 17, 2019. On October 22, 2019, Respondent, by counsel, filed its *Motion in Response to Hard Copy Emails submitted Post-Hearing by the Grievant* objecting to the same as the recipient of the emails had testified that she had not received the emails. Respondent's objection is overruled and the email chain has been marked and entered as Grievant Exhibit 9.

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Respondent provided additional documentary evidence by motion filed on October 22, 2019. That evidence has been marked and entered as Respondent Exhibit 3.

This matter became mature for decision on November 22, 2019, after an extension of time was granted for good cause shown at the request of Respondent and upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant is employed by Respondent in an extra-curricular assignment as an Assistant Coach. Grievant alleges hostile work environment and discrimination by the head coach and the principal of the school. Respondent argued that Grievant failed to prove the underlying facts or that discrimination or a hostile work environment had occurred. While there has been a breakdown of the working relationship between Grievant and the head coach, the breakdown was caused by Grievant, who consistently worked to undermine the head coach's authority and was repeatedly disrespectful and insubordinate, presumably because he believed he should have been selected as the head coach instead. While the head coach's management of Grievant was ineffective and he was discourteous at times, the head coach did not discriminate against Grievant or create a hostile work environment. The principal did take appropriate action in response to the situation and Grievant failed to prove that she discriminated against him or created a hostile work environment. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent in an extra-curricular assignment as an Assistant Coach of the Mount View High School girls' varsity basketball team and has been so employed for three years.

2. During the first year, Grievant served as Assistant Coach to Head Coach Harold Smith. Coach Smith resigned after the 2016 – 2017 season.

3. Grievant applied for the head coach position for the 2017 – 2018 school year but Kenneth Brown was selected instead. Grievant remained employed as an assistant coach under Coach Brown.

4. Coaches at the school are directly supervised by the Athletic Director, Larry Barber, and their ultimate supervisor is the principal of the school, Debra Hall.

5. Grievant did not attend the first practice of the 2017 – 2018 season and did not inform Coach Brown he would be absent.

6. Grievant appeared late to the second practice, again without notifying Coach Brown. Grievant did not attempt to join the practice but instead sat on the sidelines. Grievant was offended that Coach Brown did not stop practice to acknowledge or introduce Grievant. Again, at the next practice, neither acknowledged the other.

7.

8. Grievant's tardiness to practice would continue for the next two years. For unspecified reasons, although practice was from 3:00 p.m. to 4:30 p.m., Grievant did not usually report to practice until 3:45 p.m.

9. At the beginning of the fourth practice, Coach Brown acknowledged Grievant and apologized for not recognizing him before. Coach Brown stated that he wanted Grievant to be part of the team but that things were going to be done the way Coach Brown wanted them to be done. Grievant stated they would have to talk about that.

10. Coach Brown chose the team's players without input from Grievant. Grievant disagreed with Coach Brown's decision not to include two specific players. Grievant called the grandfather of one of the girls who was not selected. The grandfather was a previous assistant basketball coach.

11. Grievant talked to Coach Brown to insist he allow the two girls on the team. Coach Brown refused.

12. During practice a player became upset during an interaction with Coach Brown and threatened to quit the team. Grievant confronted Coach Brown in front of the other players and insisted that Coach Brown talk with him immediately despite Coach Brown' stating that he did not wish to discuss the matter with Grievant at that time. Grievant insisted the two talk and demanded that Coach Brown apologize to the student. Coach Brown later had a discussion with the student and she remained on the team.

13. Grievant consistently disagreed with Coach Brown's decisions about team strategy and told him so, often in front of the players. Grievant gave conflicting instructions to players causing dissention and confusion within the team. Grievant and Coach Brown frequently argued in front of the students.

14. During a game, a second student became upset and went to the locker room. Grievant told the student she should "not let Coach Brown get to her."

15. Sometime at the beginning of December 2017, Grievant asked for and received a meeting with Principal Hall. Principal Hall urged Grievant to get along with Coach Brown and stated that, if the two could not get along, it would affect their evaluations at the end of the season.

16. By email dated December 18, 2017, Grievant complained to Principal Hall and Director Barber that he had not been informed of changes to the schedule and that Coach Brown had not told him about someone volunteering to help coach. Grievant stated, "If the BOE wants to pay me for just standing there and the Head Coach is not going to accept any input by me. That is fine. But I will not let this affect my evaluation." The email asked for a meeting with himself, Coach Brown, Director Barber and Principal Hall and stated that Grievant was "documenting all the things that I discussed with Mrs. Hall for record."

17. Although Grievant complained to others about not being notified of schedule changes, at no time did Grievant discuss this issue with Coach Brown, who asserts that he sent notification of changes to Grievant at the number Grievant had provided. Instead Grievant sought information about scheduling from the bus garage secretary and parents rather than from Coach Brown.

18. By email of the same date, Principal Hall requested Grievant's documentation and stated she would schedule a meeting.

19. By letter dated December 18, 2017, which was given to Grievant at the next practice, Coach Brown and Director Barber listed three specific practice times

during which Grievant would be responsible for clock administration while Coach Brown would lead skill development and one date during which Coach Brown and Grievant would complete game set up. Although the letter only listed the responsibilities for these specific dates, the letter states the responsibilities were "until further notice."

20. The other head coaches with which Grievant had worked had not required assistant coaches to run the time clock.

21. When Coach Brown instructed Grievant to run the clock, Grievant refused and instead instructed one of the team managers to run the clock.

22. On December 20, 2017, just after midnight, Grievant sent an email to Principal Hall, then Superintendent Nelson Spencer, Athletic Director Barber, and Tonya White with two attachments. The email had no subject line or message in the body of the email.

23. Later that morning Grievant sent a new email to the same stating that he "had to send revised documentation." There was no attachment to the email, which Principal Hall and Ms. White both brought to Grievant's attention in emailed replies. Grievant replied to Principal Hall that he was trying to send a picture but that he would "just make a copy of it and send it to you." Grievant provided no further emails.

24. Principal Hall denies receiving the attachments. Given the standard spam filters government agencies typically apply to email, it is more likely than not that Grievant's email with only attachments, no subject line, and no message, which was sent in the middle of the night, was caught by the spam filter.

25. In the second season under Coach Brown, the conflict between the two continued.

26. Although Grievant states that he followed the advice of a trusted advisor to comply with Coach Brown's directives for the second season, it is unclear from the testimony in what way Grievant believes he complied. Contrary to Grievant's assertion that he was attempting to comply, Grievant admitted that during the second season he sat at the end of the bench "in protest" and did not participate in the games.

27. At the beginning of the season, Coach Brown recruited a volunteer coach, Anthony Baker. Mr. Baker was permitted to help Coach Brown run the offensive and defensive plays but Grievant was not permitted to do so.

28. During several practices, without asking Coach Brown, Grievant asked the head coach of the middle school boys basketball team to bring the team over to practice with the girl's team. Coach Brown did not want the girls to practice with the boys and told the boys' coach so.

29. At some point, Grievant decided to start sitting at the end of the bench during games "in protest," although he did not inform anyone that was what he was doing. Grievant believed someone in administration should have asked him why he was sitting at the end of the bench.

30. At a game on January 18, 2019, Principal Hall observed Grievant sitting at the end of the bench with his iPad during the game and then observed Grievant did not go to the locker room with the team at half time. Principal Hall instructed Grievant to go to the locker room with the team. Grievant argued with Principal Hall but eventually complied.

31. On January 24, 2019, Principal Hall met with Grievant briefly. Principal Hall gave Grievant a written list of expectations for him to follow as an assistant coach.

Grievant insisted on recording the meeting and when Principal Hall refused to allow Grievant to record the meeting the meeting ended with no further discussion.

32. By letter dated January 24, 2019, Grievant requested a meeting with Superintendent Falin. Superintendent Falin discussed the matter with Principal Hall but had not scheduled any meeting before the grievance was filed a little over a week later.

33. On two occasions in February 2019, Grievant, rather than discussing travel arrangements for away games with Coach Brown, discussed the same with the bus garage secretary. This resulted in Grievant missing an away game in Virginia as Coach Brown took another route to get to the game than Grievant thought would be taken and the bus did not stop to pick Grievant up where he told the bus garage secretary he would be waiting.

34. On February 13, 2019, at an away game at Montcalm, Grievant told Coach Brown that they must meet regarding the route to the Virginia game that Grievant had missed. Coach Brown insisted that he took the route he took because that was the route with which he was familiar. A loud argument ensued between Grievant, Coach Brown, and the volunteer coach, which parents tried to stop.

35. Principal Hall received complaints about the argument and informally investigated the Montcalm incident by talking to witnesses including the parents who attempted to stop the argument and students. Principal Hall did not interview any of the coaches, intending to discuss the matter with Grievant and Coach Brown during their season-end evaluations.

36. The season ended on February 21, 2019.

37. Grievant received negative comments on his year-end evaluation and also received two negative observations. Neither the evaluation nor the negative observations were introduced as evidence. The dates of those documents or when Grievant and Principal Hall met regarding the evaluation and the observations are unclear.

38. Principal Hall did meet with Grievant for his year-end evaluation within a few weeks of the Montcalm incident. Grievant refused to sign the evaluation and stated he wanted to file written addendums to the evaluation and the meeting was to be rescheduled. Due to the level one grievance proceedings, the final meeting regarding the evaluation appears to have occurred sometime in late March 2019 following the level one grievance conference.

39. As a result of the grievance process and at the request of Grievant, prior to the level three hearing in this matter Principal Hall removed the observations and negative evaluation comments from his file.

40. During the ongoing conflict between Grievant and Coach Brown, Principal Hall met with Coach Brown, Grievant, and the volunteer coach individually on multiple occasions. She did not believe that a joint meeting would be productive.

41. Coach Brown was placed on an improvement plan and, at the time of hearing, remained on the plan.

42. The job duties for Head Coach and Assistant Coach are set by Respondent's *Job Description* for each position.

43. The *Job Description* for Head Coach lists the following relevant "Essential Duties and Responsibilities":

- Assume responsibility for all matters relating to the organization and administration of the team under his/her direction.
- Plan, organize, and schedule a regular program of practices during the season. . .
- Develop high caliber and quality instruction by teaching the necessary fundamental skills necessary for the athlete to achieve personal and team success.
- Delegate responsibilities to his/her coaching staff and their assigned duties with the approval of the athletic administrator and principal.
- Supervise assistant coaches, managers, and other support personnel in cooperation with the principal and athletic administrator.
- Motivate staff and players toward desired goals.
- Command respect by example in appearance, manners, behavior, and language.

44. The *Job Description* for Assistant Coach lists the following relevant "Essential Duties and Responsibilities":

- Support the head coach in the development of his/her particular sport and the overall total athletic program.
- Fulfill all responsibilities assigned by the head coach with the approval of the athletic administrator and principal.
- Motivate staff and players toward desired goals.
- Command respect by example in appearance, manners, behavior, and language.
- Implement fundamental sports skills and sports management system, as directed by head coach.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where

the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant asserts he has been subjected to discrimination and a hostile work environment by Principal Hall and Coach Brown. In Grievant's PFFCL, for the first time in the grievance process, Grievant asserted that the alleged discrimination by Principal Hall was racially motivated because Principal Hall had failed to interview Coach Brown and Grievant, who are both African American. Respondent asserts Grievant failed to prove the allegations and that it has already provided the majority of the relief sought by removing the disputed observations and evaluation.

"'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). 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, 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) (citing *Harris*, 510 U.S.

at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*).

Grievant's own evidence shows that he, from the very beginning, consistently worked to undermine Coach Brown's authority and was repeatedly disrespectful and insubordinate, presumably because he believed he should have been selected as the head coach instead. The conflict Grievant has experienced is a direct result of Grievant's own refusal to accept that he is, in fact, under Coach Brown's authority and that his role as an assistant coach is essentially to do what Coach Brown tells him to do.

Grievant mistakenly believes he has the right to determine his job duties and is offended that he has not been permitted to perform the job duties he believes are his. On the contrary, Grievant is not the coach of the team; he is the assistant coach and he has refused to assist his head coach. The job description for assistant coach makes clear that the only job duties of that position are what the head coach assigns. Grievant was originally permitted to participate more actively in coaching the team but Grievant's continual contradiction of Coach Brown created confusion and dissention within the team. As a result, Coach Brown restricted Grievant's duties to game set up and running the time clock, which are duties that fit within Grievant's job description. Grievant

insubordinately refused to perform the duties. Thereafter, it appears Grievant refused to perform any duties, instead sitting at the end of the bench during games "in protest."

None of this amounts to a hostile work environment. Coach Brown is not required to accept Grievant's suggestions on coaching style and strategy. His refusal to do so was not improper, although it appears Coach Brown was not always courteous in his refusal. Coach Brown is not required to assign Grievant particular duties as long as the duties assigned do not fall outside of Grievant's job description. While Grievant does make specific allegations of other instances in which he asserts Coach Brown interfered with his work performance, such as failing to notify Grievant of changes to the schedule and an incident where Grievant was not picked up by the bus for an away game, these incidents do not constitute hostile work environment. Again, these incidents stem from Grievant's refusal to communicate with Coach Brown and not from Coach Brown targeting Grievant for harassment. Coach Brown's response as a manager was certainly lacking, as, of course, he should have clearly communicated with Grievant thereafter and should not have participated in loud arguments with Grievant but that does not constitute a hostile work environment.

Grievant has also failed to prove Coach Brown discriminated against him. It appears Grievant asserts Coach Brown discriminated against him by allowing the volunteer coach to usurp Grievant's duties. While it is clear that the volunteer coach was allowed greater participation in coaching than Grievant that does not constitute discrimination. The volunteer coach not similarly situated to Grievant as the two positions are not the same. Grievant's position is defined by a job description and the volunteer coach position is not. Grievant is paid and the volunteer is not. Even if it

could be said that the two are similarly situated, the difference in treatment was related to the job responsibilities of the two. Coach Brown could not rely on Grievant to coach the team with the strategies and methods Coach Brown wished to use. Grievant fundamentally disagreed with the way Coach Brown had chosen to coach the team and, by his own admission, was telling the girls to do the opposite of what Coach Brown was telling them to do. While it appears Grievant may have had justified concerns with the volunteer coach's behavior towards a student, that situation was separate from Grievant's allegations of discriminatory treatment towards himself. Grievant's duties were limited because he refused to perform them as directed and was causing confusion in the players by contradicting Coach Brown's directions whereas the volunteer coach implemented Coach Brown's strategies as instructed.

Grievant asserts that Principal Hall abused her authority when she threatened and attempted to intimidate Grievant during a confrontation, that she failed to interview Grievant regarding the Montcalm High School argument between he and Coach Brown, and that her observations and evaluation of Grievant were "misleading and false." Grievant asserts that, as Principal Hall refused to meet with them as a group as Grievant demanded, she did "nothing" to remedy the situation between him and Coach Brown. Grievant also references a prior conflict between he and Principal Hall that resulted in her refusal to allow him to substitute at the school. As this incident occurred years ago and is not a part of this grievance, it appears Grievant offered this evidence to show Principal Hall's motivation to discriminate against him.

Grievant failed to prove Principal Hall threatened or attempted to intimidate Grievant during the alleged incident. Grievant, continuing the inappropriate behavior he

had displayed all season, had refused to go into the locker room with the team. Principal Hall instructed Grievant to do so and he initially refused her valid instruction. Principal Hall reiterated that was his job and insisted he go to the locker room and Grievant eventually complied. While Principal Hall and Grievant may have raised their voices during this incident, it was halftime and noisy so some elevation of volume is normal. Principal Hall denies telling Grievant "if he wanted to keep his job, he had to go into the locker room with the coaches and the players." However, even if she did, that was not a threat or intimidation but was an undiplomatic response to Grievant's insubordinate behavior. Principal Hall, in her position of authority over Grievant, gave him a valid and reasonable instruction. Grievant refused to comply. Disciplinary action is proper to remedy insubordination so Principal Hall telling Grievant there could be consequences for his refusal is not a threat or intimidation.

Grievant failed to prove that the observations and evaluation of Grievant were misleading or false. Grievant did not submit those documents as evidence. Further, based on the testimony and Grievant's written statements about the situation, Grievant was repeatedly disrespectful and insubordinate to Coach Brown and Principal Hall and had repeatedly refused to perform his duties as instructed. Therefore, observations and negative ratings or comments on his evaluation would have been justified.

Grievant asserted that Principal Hall's failure to interview him and Coach Brown during the "investigation" of the Montcalm incident was racial discrimination. Grievant raised this claim for the first time in his PFFCL. Grievant cannot add allegations to his grievance without notice. Respondent has had no opportunity to respond to these allegations. Further, the Grievance Board has no authority to adjudicate allegations of

racial discrimination, which is reserved for the Human Rights Commission. "The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act." Syl. Pt 1, *Vest v. Bd. of Educ.,* 193 W. Va. 222, 223, 455 S.E.2d 781, 782 (1995). The Grievance Board's authority to remedy discrimination stems only from the grievance statute and accompanying definition as stated above. Therefore, the allegations of specifically racial discrimination will not be further addressed.

As to the grievance procedure's definition of discrimination, Grievant has failed to present any evidence Principal Hall treated Grievant differently than any other similarly-situated employee. Grievant identified no other employee he asserts was treated differently than he. Grievant also failed to prove that Principal Hall acted improperly at all regarding the Montcalm argument between he and Coach Brown. Principal Hall interviewed the witnesses to the incident first. That is not improper. As the incident occurred only a few weeks before their meeting regarding his evaluation, it was not improper for Principal Hall to delay the interview with Grievant about the incident to that meeting.

Grievant asserts Principal Hall created a hostile work environment because she did "nothing" to remedy the situation between he and Coach Hall. This is simply untrue. Principal Hall made multiple attempts to remedy the situation but because Principal Hall

was not addressing the situation exactly how Grievant wanted her to do, Grievant insisted that she did "nothing." In fact, she met with all involved parties at various times, conferenced with the athletic director regarding the situation, and placed Coach Brown on an improvement plan.

Coach Brown does share responsibility for the complete breakdown of the working relationship between he and Grievant because of his occasional discourteous behavior towards Grievant and for his inability to constructively confront Grievant's behavior. However, Coach Brown has not discriminated against Grievant or created a hostile work environment. While Principal Hall's chosen interventions in the situation were not effective in resolving the same, Principal Hall's actions were not improper nor were they discriminatory or indicative of a hostile work environment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities

of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

3. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). 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, 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) (citing *Harris*, 510 U.S. at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*).

4. “The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for ‘discrimination,’ ‘favoritism,’ and ‘harassment,’ as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.” Syl. Pt 1, *Vest v. Bd. of Educ.,* 193 W. Va. 222, 223, 455 S.E.2d 781, 782 (1995).

5. Grievant failed to prove he was the victim of either discrimination or hostile work environment.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 10, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge