PHE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA KERR,
Grievant,

v. **Docket No. 2019-1896-CONS**

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

DECISION

Lisa Kerr, Grievant, is employed by Respondent, Department of Health and Human Resources ("DHHR") in the Bureau for Children and Families ("BCF"). Her position is classified as a Social Worker 2 in Adult Protective Services. Ms. Kerr filed a level one grievance form dated March 26, 2019, alleging:

> Violation of Title VII of the Civil Rights Act, via discrimination based on gender stereotypes and sexual orientation. Worker's CSM[1] routinely criticizes and retaliates against her, because worker's mannerisms and appearance are not traditionally feminine.

As relief Grievant seeks:

> Retraining CSM Shannon McKay. Removal of all references to "too aggressive" from worker's file because they are based on nothing more than gender non-conformity. Restoration of AL[2] worker was compelled to use when McKay retaliated for the discrimination complaint by sending worker home.

Ms. Kerr filed a second grievance directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). This grievance was dated August 30, 2019, and alleged the following:

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[1] Community Service Manager.
[2] Annual Leave.

> CSM Shannon McKay has made an ongoing pattern of false accusations against me, creating a hostile environment. Her supervisor, Lance Whaley, used the false accusations and his claim about an EEO report to suspend me without pay for two weeks. Lance falsely claims, based on the report he won't show me, that everyone in my workplace and community hates working with me and calls me violent. Shannon and Lance are doing this solely because I am a lesbian.[3]

Grievant specifically alleges that Respondent violated Title VII of the Civil Rights Act, the US Constitution Equal Protection and Due Process clause Common Chapters Manual Section 330, West Virginia Personnel Rules, 143 CSR 1 section 12.3.a and the WV EEO Policy. As relief Grievant seeks:

> Prejudgment relief: stay of the suspension until resolution of this proceeding; disclosure of EEO report that is being used s secret evidence against me. Final relief: reversal of suspension and any back pay; retraining of Shannon and Lance in federal, state and DHHR anti-bias policy and proper management skills (e.g., to refrain from spreading bias-inspired falsehoods in an effort to make my workplace hostile and threatening and impair my ability to do my job.

A level three hearing was conducted over the course of four days: November 16, 2020, and March 15, 16, and 17, 2021. The hearing was conducted from the Grievance Board's Charleston office via the Zoom video conferencing platform. Grievant appeared *pro se* and Respondent was represented by Mindy Parsley, Assistant Attorney General.

This matter became mature for decision on April 21, 2021, upon receipt of the final Proposed Findings of Fact and Conclusion of Law submitted by the parties.

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[3] This is a summary of the grievance which Ms. Kerr placed on the grievance form. She attached a six-page statement of her grievance to the form with several attachments, all of which is incorporated herein by reference.

Synopsis

Grievant was suspended for ten days without pay for violating DHHR Policy Memorandum 2106 – *Employee Conduct* through unprofessional conduct including being confrontational with co-workers, disrespectful with her supervisors and outside contacts as well as disrupting a training program.

Grievant argues that her behavior was not in violation of the policy, that the discipline was actually based upon her sexual orientation, that she was not sufficiently warned of the consequences of her behavior, and that the penalty of suspension was disproportionate to any misconduct she may have committed.

Respondent proved that Grievant violated the identified policy, had warned Grievant about her conduct on several occasions, and that there were legitimate reasons for the suspension unrelated to any discrimination or retaliation. The penalty was not clearly disproportionate to the misconduct which was proven.

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. Lisa Kerr, Grievant, is employed by Respondent DHHR as an Adult Protective Service Worker. She has been employed by Respondent in the Lincoln County BCF office for more than two years.

2. To perform Grievant's job she needed to hold a Social Worker license. When Grievant was originally employed by Respondent she did not have a license and had to go to a specific process to obtain a Restricted Social Worker license that allows an employee to work toward the license while employed at DHHR, without paying for college

credits. The Community Service Manager ("CSM") for the county office must submit a Notice of Employment to the Social Work Board for the employee to qualify. Shannon McKay is the CSM for the Lincoln County office. Grievant took steps to start that process shortly after becoming employed.

3. For some reason CSM McKay had not provided the notice of employment to the Social Work Board for more than four months. Grievant asked CSM McKay to remedy that situation and was assured that she would. When it did not happen Grievant took the following three steps:

- First, she asked her direct supervisor, Theresa Perry, to speak with CSM McKay about sending the notice.
- Next, she reached out to Genevieve Wiley, a senior administrator who conducted the required training that Grievant attended.
- Finally, she felt it was necessary to email the Social Work Board indicating that she was employed by the DHHR. She copied CSM McKay on the email.

4. After receiving this email, CSM McKay called and chided Grievant for going over the CSM's head to the Social Work Board. CSM McKay was in her office on the second floor and Grievant was in her office on the first floor.

5. This discussion became very heated with both parties raising their voice. Grievant could be heard yelling at CSM McKay by all the other employees on the first floor. Many employees were concerned when they heard Grievant yelling into the phone.

6. To work under her Restricted Social Work license, it was mandatory for Grievant to be supervised by a Licensed Supervisor. During this heated call, CSM McKay told Grievant that she could no longer work with her assigned License Supervisor, Shaa

Marcum.[4] Grievant searched other districts and regions, to find a License Supervisor who would agree to oversee her work. After some time, Grievant found a License Supervisor at Cabell DHHR to accept her. Any work Grievant had performed without a License Supervisor did not qualify toward receiving her Restricted Social Work license. Her work toward receiving the license was delayed by the search for a supervisor.

7. When Grievant was notified by the Social Work Board that she had been issued a license number she contacted her direct supervisor, Theresa Perry, who initially congratulated her. Shortly thereafter, Supervisor Perry informed Grievant that she would need to meet with her and CSM McKay the next day.

8. At the meeting, Ms. Kerr was given an Employee Performance Appraisal ("EPA-2") form for the rating period of January 2, 2018, through February 2, 2018. The form noted that Grievant had been in her position for five months. Grievant's performance was rated "Does Not Meet Expectations." The following reason was given for this rating:

> Lisa has completed her Adult Service trainings but has not been able to perform in full capacity due to her needing to obtain her social work license. Lisa was hired on 8/21/17. She should have had her social work by 10/21/17. She completed her competency test on 12/21/17, but due to her not having a social work license, she is unable to have a workload at this time. Therefore, is not meeting expectations at this time.

The EPA-2, signed by Theresa Perry and Lisa Kerr was dated February 27, 2018.[5]

9. Grievant proved that she did in fact have her license, by showing CSM McKay her license number. Ms. McKay responded that social workers are required to display a paper license on their wall at all times, and that Grievant still did not display her

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[4] Grievant's testimony. No evidence was provided by any party as to why this occurred.
[5] Exhibit number 0080. All the exhibits in this grievance were agreed to by the party and were sequentially numbered by the undersigned as 0001 through 0468 inclusively.

paper license. After some discussion CSM McKay agreed to wait a few days for Grievant to receive the hard copy of her license and hang it on her wall.[6]

10. In early January 2019, Grievant advised Adult Protective Service Supervisor Morton, that a social worker at CAMC wanted to speak with her supervisor. Central Intake also called Supervisor Morton and requested that she call CAMC because a social worker there refused to talk with Grievant. When Supervisor Morton called, the CAMC social worker stated that Grievant threatened to come down to the hospital because she did not have the documents that Grievant requested. Ms. Morton apologized and worked with the CAMC social worker to complete necessary documentation. Supervisor Morton was advised that the social worker from the night before stated that Grievant was very rude and the social worker refused to work with Grievant. Grievant explained that she had stated her willingness to come to the hospital to sign documents but could not because the client had not been admitted to the floor of the hospital at that time. (Exhibit Number 0116)

11. On October 2, 2018, Supervisor Morton made a note to her file that she had spoken to CSM McKay concerning Grievant and that two co-workers reported to Ms. Morton about Grievant yelling at them about travel expenses. They stated that they no longer wanted to work with Grievant. (Exhibit Number 0101)

12. An EPA-3 was issued to Grievant dated November 5, 2018. This was the final evaluation for the period of August 13, 2017 and September 1, 2018. Grievant

[6] Grievant felt that she was going to be dismissed at that time for not having her license. However, there was nothing in the EPA-2 indicating that was the case nor were there any documents indicating that she was going to be dismissed.

received an overall rating of "Meets Expectations." In the Summary Comments section, it was written:

> Lisa is a dependable worker, but lets her temper get the best of her. She is working on handling situations with coworkers with more tact. Lisa is currently holding a caseload in Logan as well as her home county.

(Exhibit Number 0104).

13. Ms. McKay received a call from one of the same workers on January 25, 2018. She reported that Grievant had been on the telephone with an employee of the DHHR Office of Technology (OT). Grievant was allegedly rude to the worker from the Office of Technology (OT) and hung up on him.[7]

14. Supervisor Morton received a complaint from the Lincoln County Circuit Court Judge's paralegal stating that Grievant had been rude and yelled at a Circuit Clerk employee because she did not have an order Grievant wanted to pick up. Supervisor Morton also received another complaint from CAMC alleging that Grievant was "very defensive" when the worker was trying to explain a client's discharge situation. (Exhibit Number 0119).

15. It is more likely than not that the complaints about Grievant's behavior from hospital and courthouse staff resulted from Grievant's zeal in pursuing help for her clients in a forceful way. When Supervisor Morton intervened with the complainers, she was able to accomplish the goals in a more conciliatory way.

16. Supervisor Morton met with Grievant on February 22, 2019, to go over numerous cases. Ms. Morton made several notes to her files concerning this meeting.

[7] The OT employee was identified as "Teddy."

She first noticed that Grievant appeared to have a handle on her cases and had a good plan. She then discussed with Grievant the complaints she had received about Grievant's conduct. Supervisor Morton told Grievant that the work she completes on the computer is great but her tact with the public needs to improve Grievant agreed and said that she would work on it. (Exhibit Number 0120)[8]

17. Grievant had ongoing difficulties with co-worker Celeste Ruby. They disagreed about the way the cases should be handled as well as other issues. It was not unusual for them to raise their voices during these discussions. Supervisor Morton coached both Grievant and Ms. Ruby that their arguments were disruptive and needed to be worked out.[9]

18. On March 25, 2019, Grievant had signed out a vehicle to transport one of her clients the following day. When Grievant arrived to work on the morning of March 26, 2019 she encountered two co-workers who were preparing to leave in the vehicle. The co-workers had also placed their names on the sign-up sheet to use the vehicle.

19. Grievant confronted the other employees regarding them taking the vehicle that she had signed out. She questioned the purpose of their use of the vehicle as well as who had authorized them to take it. The co-workers initially refused to answer Grievant's questions. The three employees reentered the offices and continued the confrontation.

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[8] Supervisor Morton testified concerning the notes that she had placed in her file related to her supervision of Grievant.

[9] Grievant testified that Ms. Ruby was constantly trying to undermine her with her supervisors and the rest of the staff. She also stated that Ms. Ruby received favored treatment from the supervisors.

20. At approximately 8:30 a.m. that morning, CSM McKay was meeting with Child Protective Service ("CPS") Supervisor Jana Rooney in McKay's office to discuss cases. They heard loud shouting from the office area below that they believe might be a fight.

21. Shortly after, a page came over the intercom calling for a supervisor to report to the CPS pool area. CSM McKay and CPS Supervisor Rooney went down to the pool area. Crystal Adkins and Darlene Henderson also responded to the page.

22. When CSM McKay reached the CPS pool area, she saw Ms. Adkins standing between Grievant and one of the coworkers, attempting to calm them down. Grievant was shouting that the coworker had stolen her car, and they were sneaking away with it. Grievant's voice was loud, and she was visibly shaking.

23. Grievant moved toward Ms. McKay. She continued complaining and shaking her finger at CSM McKay. CSM McKay attempted to de-escalate the situation by asking Grievant to calm down and please take her hand away from McKay's face. The other employees in the office were gathering around and Ms. McKay did not want the situation to escalate further.

24. CSM McKay directed Grievant to go upstairs to McKay's office. Grievant did not lower voice nor comply with the directive. She kept insisting that the other employees were trying to take the vehicle that she had reserved.

25. Eventually CSM McKay, Supervisor Rooney and Grievant went upstairs to Ms. McKay's office. Ms. McKay was seated behind her desk. Grievant and Ms. Rooney were seated opposite each other at a table in front of and to the side the desk. Grievant was on the side of the table which was closest to the desk.

26. Grievant continued loudly insisting that the other workers had stolen her car and were sneaking off with it. Supervisor Rooney told Grievant that she did not believe the other workers were sneaking off with the vehicle. She asked Grievant to calm down. Grievant insisted that CSM McKay needed to do something with the other workers and that they would not answer Grievant when asked about them taking the vehicle she had signed out.

27. CSM McKay did not believe that Grievant had reserved the vehicle because she had seen on the sign-out sheet that the other two workers had requested it. Grievant loudly insisted that she had reserved the vehicle.

28. It is customary practice to notify someone who has reserved a vehicle that another worker needed to use it before taking the vehicle. The sign-out calendar showed that both Grievant and her coworkers had signed out of vehicle for March 26, 2019.

29. CSM McKay acknowledged that there was a legitimate issue regarding who signed out the vehicle. However, she stated that even if this practice had not been followed, she was more concerned with Grievant's reaction to the problem. She told Grievant that there was a better way of dealing with her coworkers than escalating the situation and screaming at them.

30. Grievant inquired how she should have handled the situation and CSM McKay modeled examples of how to be a less confrontational. CSM McKay believes she demonstrated a common reasonable way to approach the coworkers. Grievant believed that Ms. McKay demonstrated hyper-feminine behaviors for dealing with the situation. Grievant continued to be upset, interrupted Ms. McKay, and repeatedly talked over her.

31. Grievant's face was very red and she was clenching her fists while sitting in the chair. She turned from side to side to address both CSM McKay and Supervisor Rooney.[10] Ms. Rooney and Ms. McKay were concerned that Grievant might escalate to a physical confrontation.

32. Grievant admitted that she was closing her fists and stated that it was a method that she used to help get her emotions under control.

33. CSM McKay then addressed prior behavior complaints that Supervisor Morton had brought to her attention. These included the complaints from CAMC, St. Mary's Hospital, and the Lincoln County Courthouse. Grievant continued to be confrontational. She stated that CSM McKay was singling her out because she is a lesbian. Ms. McKay responded that it had nothing to do with her sexual orientation. The criticism was solely related to Grievant's unprofessional behavior in the workplace.

34. CSM McKay had to attend the meeting in Huntington regarding a federal audit so she ended the meeting. To avoid further confrontations, she sent Grievant home for the remainder of the day on annual leave. Grievant insisted that she would not leave because she had to transport a client. CSM McKay informed Grievant that she would contact Grievant's supervisor to take care of any transport that needed to be done.

35. Ms. Rooney and Ms. McKay escorted Grievant downstairs and waited in the office pool area while Grievant went into her office to get what she needed, before going home. Grievant filed her initial grievance on that day.

[10] Both CSM McKay and Ms. Rooney testified that Grievant was bobbing up and down in her chair.

36. Grievant filed an EEO complaint against CSM McKay alleging that she had violated her federal rights by requiring her to take seven hours of annual leave as a result of her being a lesbian. She alleged that Ms. McKay discriminated against her based upon her sexual orientation. The EEO complaint was assigned to Carlotta Gee to investigate. Ms. Gee is an EEO/Civil Rights Investigator in the DHHR Office of Human Resource Management.

37. Ms. Gee performed a thorough investigation of the complaint, interviewing all employees who were present and witnessed the events of March 6, 2019. She ultimately interviewed fifteen witnesses including Grievant and Ms. McKay. The interview views were conducted between the period of April 4, and April 10, 2019.

38. Ms. Gee sent separate letters to Grievant and CSM McKay dated June 6, 2019. She informed both parties that the allegations were not substantiated. Each letter also contained the following paragraph:

> It is important to note that the West Virginia Department of Health and Human Resources considers all complaints a serious matter and are committed to the fair and equitable treatment of all employees. Retaliation directed toward you because of filing this complaint will not be tolerated and is considered a prohibited conduct by the Agency's EEO policies.[11]

39. Grievant was issued an EPA-2 dated April 2, 2019. She received a rating of "Fair, But Needs Improvement." The following was written in the section titled Performance Development Needs:

> Lisa's performance in the public needs to improve. She has received numerous complaints about her behavior. Two different hospitals called Central Intake requesting a supervisor. Lisa and Social Service Supervisor have talked

[11] Exhibits Numbers 0276 and 0277.

> regarding the complaints. She has also had arguments with other co-workers regarding travel and state cars.
>
> Lisa's documentation is very well written and complete. Lisa is an advocate for her client's [sic] so they receive the best care possible. Lisa has helped with other counties [sic] back log, and covered a caseload for another county when they were shorthanded.

In the General Comments section Supervisor Morton wrote:

> Lisa and Social Service Supervisor have spoken numerous times about her tact, and she agreed to work on it when dealing with the public and coworkers. Lisa's case management skills, and documentation, are fantastic and up to date.

Exhibit Number 0146.

40. On April 9, 2019, Supervisor Morton issued a revised EPA-2 stating that "Lisa asked for the EPA to be more detailed." In the "Performance Development Needs" section Supervisor Morton wrote:

> Complaints filed on: 10-2-19 Lincoln Operations 1-2-19 CAMC Central Intake Logged 1-25-19, complaint from Office of Technology Darleen Henderson, Operations Supervisor reported the complaint to Social Services Supervisor. Complaint from St. Mary's Hospital logged by central intake 1-28-19 Logged by central intake 1-28-19 complaint from the Lincoln County Courthouse.[12]
>
> Each complaint was reported to Social Service Supervisor above, explains when and how they were reported. Both hospitals called Central intake and requested the Adult Protective Services Supervisor to call the social worker back and refused to talk to Lisa. (1/28/19) CAMC's social worker stated that she felt, "threatened" when the social worker tried to explain that the emergency room could not complete an evaluation, she reported that Lisa said, "fine I need to staff my with my supervisor." (1/28/19) St. Mary's Social worker stated

[12] The statement is set out herein as it appeared on the EPA-2 form.

> the doctor wanted the social worker to call the supervisor of the lady who didn't identify herself and hung up the phone.[13]

41. Grievant was given a written notice that a predetermination conference was to be held on April 10, 2019. The reason for the conference was the allegation that in the rental car dispute dated March 26, 2019, Grievant had been "confrontational and threatening to the point that staff were fearful that [she] may become physically violent toward them." The notice stated that the purpose of the predetermination meeting was to give Grievant an opportunity to respond to those allegations and provide input for Respondent's consideration regarding disciplinary action. The meeting was held as scheduled. (Exhibit Number 0149)

42. Lance Whaley is the Regional Director for the DHHR region which contains both Lincoln and Boone counties. He is responsible for deciding if any discipline would be imposed regarding Grievant's conduct. Director Whaley decided that he would delay any determination of discipline until the investigation into the EEO complaint was complete.

43. On May 29, 2019, a West Virginia State Trooper was presenting an "active shooter" training for the staff at the Lincoln County DHHR office. Grievant entered the training a few minutes late and believed she heard the Trooper stating that the media lied about the use of automatic weapons in these events. She also believed that the Trooper was alleging that events such as the Sandy Hook shooting did not actually occur.

[13] Exhibit Number 0187. It was later determined that the caller was Grievant. There was apparently more detail provided on the EPA-2 form in this section, but it was cut off on the exhibit and cannot be read.

44. Grievant raised her hand and when acknowledged by the Trooper she asked if he was telling the staff that these types of events do not occur with the use of AR-15 automatic weapons. The Trooper responded that he was reporting that according to the national statistics, in the majority of incidents, AR 15s are not used. Grievant then stated that the trooper was wrong and that she could provide information on the statistics.

45. Grievant set down momentarily and was quiet. Grievant then stood up and told the Trooper that he was giving the staff inaccurate information and she was not going to stay for the training. At this time Grievant's face was red, she was shaking, and she had her fists balled up. Grievant then left the training.

46. Regional Program Manager, Jennifer Beckett, attended training. That afternoon she sent an email to Regional Director Lance Whaley and Deputy Commissioner Tina Mitchell describing the incident. She described Grievant's behavior as "very bizarre and out of nowhere."

47. Grievant suffered from significant physical and emotional trauma when she was young. A significant portion of the emotional trauma was caused by the fact that her family did not believe the incidents had occurred. Since that time, she sometime suffers from secondary trauma when she becomes upset. When Grievant arrived at the training, she was already upset from a prior telephone call regarding a client and the fact that she was running late. When she heard the Trooper say that the media often incorrectly reported these incidents, she believed that he was denying that they occurred which triggered her secondary trauma.[14] The symptoms of her red face, shaking, and clenched

[14] Grievant thought the Trooper was espousing the views of a conspiracy group identified as the Sandy Hook Deniers.

fists are related to secondary trauma condition. Realizing that the secondary trauma had been triggered she left the meeting.[15]

48. Grievant had not shared this diagnosis with any agent of her employer prior to her testimony at the level 3 hearing, nor had she asked for any accommodation related to the condition.

49. Following the training the Trooper stated that he had never been treated so disrespectfully at a training. He was upset that Grievant had disrupted the training and made a brief hand-written complaint.

50. Grievant was provided with a predetermination conference notice dated May 31, 2019, indicating a conference would be held on June 67, 2019. The reason for the conference was to address the following charge:

> On 5/29/19, an active shooter class was held at the Lincoln office. You were said to be rude and disruptive to the classroom setting. When the CSM attempted to address the situation, you acted contentious and threatened to add to the grievance.[16]

Grievant attended the predetermination conference without representation.

51. Grievant was issued an EPA-3 signed August 28, 2019. The evaluation covered the period of September 1, 2018 through August 31, 2019. She received an overall rating of "Meets Expectations." Many of the comments on the evaluation were complimentary, including but not limited to the following:

- Lisa is always willing to accept a variety of responsibilities. She is very resourceful in seeking work process improvements such as, Mental hygiene applications have been denied numerous times and she found a way for our organization to seek help with

[15] Testimony of Grievant Kerr.
[16] Exhibit Number 0274

the circuit court judge. This is a huge breakthrough for Adult Protective Services.

- Lisa is very respectful to our clients and addresses their conflicts and problems with patience and tact. Lisa is very prompt on returning phone calls and addressing client's needs.
- Lisa's work is very well organized and completed in a timely manner. Lisa has cleared back log and helped others' case management and investigations.[17]

52. The following critical comments were written on the evaluation form.

- Lisa continues to work on improving working relationships within and outside our department. After numerous complaints, cases had to be transferred to other staff, due to the agencies refusing to work with Lisa. Lisa and I have met many times to discuss the complaints and how she can improve those relationships.
- Lisa will continue to work on getting along with others. She will work on relationships with outside agencies. Lisa will come to her supervisor if she has any other issues concerning trainings, co-workers, or other problems occur.[18]

Overall, this was a positive appraisal of Grievant's performance as a Social Worker.

53. Grievant wrote the following in the "Employee Response" section:

> The worker strongly disagrees that she has problems dealing with outside agencies. The source of the problem is my biased CSM, Shannon McKay, against whom I have been forced to file a grievance. Last week Shannon falsely & baselessly told the grievance hearing officer that I was a violent person who was "chasing women around the parking lot screaming," & that I was swinging my fists at her. None of the witnesses who Shannon claimed made the accusations supported Shannon's false portrayal of me. She is a liar.
>
> Shannon McKay, as my CSM, has used her power & influence to cause these negative and baseless, accusations to be placed in my file. She is biased against LGBT people like me & is trying to create false pretexts to get me fired, despite my

[17] This comment was the only entry in the "Summary Comments" section.
[18] This comment in the only entry in the "Improvement and/or Development Plan" section.

> exemplary performance both inside and outside this office. I deny that I have ever done anything to cause a case to require being transferred from me. The only case transfer [name excluded] was because I REQUESTED IT MYSELF. (emphasis in original)

54. By letter dated August 29, 2019, Grievant was suspended for ten working days without pay.[19] The reasons cited for the suspension were:

- The March 26, 2019, rental car incident.
- The May 29, 2019, active shooter training incident.
- Complaints received from outside agencies including; CAMC, St. Mary's Hospital, Lincoln County Courthouse, West Hamlin Police Department and co-workers.[20]

The letter stated that Grievant's actions violated DHHR Policy 2106 - *Employee Conduct* which provides that employees are to refrain from disrupting normal operations of the Agency.[21] Grievant was also accused of violation Policy 2123 – *Hostile Work Environment.*[22]

55. DHHR Policy Memorandum 2106 – *Employee Conduct,* contains the following provisions which were cited in the suspension letter:

> Employees are expected to: Comply with all Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all applicable Federal and State Regulations governing their field of employment; follow directives of their supervisors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public. . . avoid physical abuse, harassment, or intimidation of residents/patients/clients, fellow employees and the public; exercise safety precautions; and be ethical, alert, polite, sober and attentive to the responsibilities associated with their job. Employee are expected to refrain from disrupting the normal operations of

[19] Exhibit Number 0364.
[20] It was noted that the outside complaints all had a common complaint that "you were rude and aggressive, and they have requested not to work with you."
[21] This alleged violation was related to the active shooter training.
[22] These violations related to the rental car incident and co-worker complaint that they were afraid of Grievant.

> the Agency; refrain from profane, threatening or abusive language toward others.

56. Policy Memorandum 2123 – *Hostile Work Environment* contains the following provisions:

> All employees, independent contractors, and volunteers are expected to refrain from disrupting the normal operations of the Department, refrain from profane, threatening or abusive language or violent physical acts toward others. The Management Personnel are expected to affirmatively address violations of this policy.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

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

Respondent suspended Grievant without pay for ten working days based upon the allegation the Grievant violated DHHR Policy Memorandum 2106 – *Employee Conduct* and DHHR Policy Memorandum 2123 – *Hostile Workplace Environment*. Policy 2106 required employees to:

> . . . [F]ollow directives of their supervisors; conduct themselves professionally in the presence residents/patients/clients, fellow employees and the public. . . avoid physical abuse, harassment, or intimidation of residents/patients/clients, fellow employees; exercise safety precautions; and be ethical, alert, polite, sober and attentive to the responsibilities associated with their job. Employee are expected to refrain from disrupting the normal operations of the Agency; refrain from profane, threatening or abusive language toward others.

Respondent argues that Grievant failed to conduct herself professionally by shouting at her co-workers and supervisors. Respondent claims her overreaction during the rental car incident frightened her co-workers and significantly interrupted the operation of the department. Respondent also allege that, at times, Grievant was not professional or polite in her dealings with outside agencies which led to a number of complaints. Respondent contends that in addition to being unprofessional in her interactions with the State Trooper during the active shooter training, her behavior disrupted the training which was part of the normal operation of the Agency.

Policy 2123 provides in part:

> All employees, . . .are expected to refrain from disrupting the normal operations of the Department, [and] refrain from profane, threatening or abusive language or violent physical acts toward others.

Once again, Respondent argues that Grievant violated this policy by disrupting the normal operations of the department. They also allege that Grievant's loud protestations frightened other employees creating a hostile work environment.

Grievant counters that Respondent's allegations are overblown, and she did not violate the identified policies. Moreover, Grievant argues that that her suspension was not based upon her alleged misconduct. She alleges that the discipline is because she is a lesbian and does not display stereotypical female behavior of being compliant and demur. Specifically, Grievant alleges that Respondent has violated Title VII of the Civil Rights Act discriminating against her due to her sexual orientation.

Respondent proved that Grievant shouted at her supervisor during a license dispute so loudly that she could be heard throughout the office. She became so loud and disruptive during the rental car dispute that supervisors were paged for assistance to intervene. She would not calmly discuss the situation and became so agitated that her face was red, she was physically shaking, and her fists were clinched. The same physical manifestations were observed during the active shooter training, where her behavior was described by people in attendance from rude and disruptive to "very bizarre and out of nowhere." Additionally, Respondent proved that several complaints had been lodged by hospital social workers and courthouse staff regarding Grievant's rude and threatening behavior. Grievant was coached several times about moderating her tone and handling disagreements with tact and professionalism. In fact, it was noted it her first EPA-3 that:

> Lisa is a dependable worker, but lets her temper get the best of her. She is working on handling situations with coworkers with more tact.

This observation and comment was dated November 5, 2018, long before the two incidents which ultimately led to Grievant's suspension.

Grievant notes that all the complaints from the hospital staff were the result of misunderstandings or her efforts to protect the health and safety of her clients. While such zeal is laudable, her supervisor was able to obtain the same goals with the same hospital staff by taking a more calm and reasoned approach. Grievant also notes that the physical behaviors noted by staff and management were not signs of threats or aggression, but symptoms of secondary trauma related to continuing effects of childhood abuse. Unfortunately, Grievant did not explain this difficulty when confronted with her behavior so that it could have been taken into consideration. Respondent proved the violations of Policy 2106 by a preponderance of the evidence.

On the other hand, Respondent did not prove that Grievant's behavior was profane, or threatening. Or that she exhibited abusive language or violent physical acts toward others. Certainly there were times when she was disruptive, loud, and impolite, but there was no proof that Grievant was ever profane, nor threatening.

This Board has generally follows 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).

While some employees expressed that they were afraid of Grievant, their fear seems to be based upon one or two occasions when Grievant lost her temper and shouted at coworkers. This conduct was not so pervasive or threatening as to create hostile workplace in violation of Policy Memorandum 2123.

Grievant argues that her behavior was not so severe as Respondent alleges. She avers that Respondent disciplined her because she was assertive. She argues that her behavior did not comport with the CSM's view of stereotypical feminine behavior and that was the basis of her discipline. Grievant accuses Respondent of violating Title VII of the Civil Rights Act by suspending her because she is a lesbian.

The Grievance Board has no jurisdiction to determine liability under the Civil Rights Act nor the Federal and State Human Rights Acts. There are remedies and procedures specifically set out in those acts for alleged violations. *See generally Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). However, the West Virginia Supreme Court of Appeals has held that the Grievance Board does have jurisdiction to address claims of discrimination and reprisal as defined by in W. VA. CODE §§ 6C-2-1 *et seq.* Additionally, failure to find discrimination under the grievance statute does not preclude a finding of unlawful discrimination under the West Virginia Human Rights Act. *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

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." "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating:

> [T]he burden is upon the complainant to prove by a preponderance of the evidence:
>
> (1) that the complainant engaged in protected activity,
>
> (2) that complainant's employer was aware of the protected activities,

> (3) that complainant subsequently suffered negative employment consequences and (absent other evidence tending to establish a retaliatory motivation),
>
> (4) that complainant's negative employment consequences followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

The critical question is whether the grievant has established by a preponderance of the evidence that her 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 the motivation for the adverse personnel action. *Freeman, supra.* After *Freeman,* the Court has reiterated that 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).

Respondent's agents were certainly aware of Grievant's sexual orientation and that she made little or no attempt to follow stereotypical female behaviors. Certainly, she may not be punished based being a lesbian or for behaviors which would be acceptable for someone of a different gender. Respondent presented legitimate non-discriminatory reasons for suspending Grievant based upon violations of specific policy provisions. Grievant argues that those reasons are mere pretext for retaliation against her based upon her sexual orientation.

Grievant points to difficulties she encountered with CSM McKay early in her employment related to achieving her license. She also notes that she was constantly being criticized for being "aggressive" which she attributes to mean "not feminine." There is evidence that Grievant did have a difficult time at the beginning of her employment. However, all her EPAs indicate that she is considered to be a very good social worker. The only problems with her performance centers around her lack of tact and losing her temper with staff, management, and outside contacts.

Ultimately, Respondent was able to show that Grievant was excessively loud and disruptive during the rental car incident and refused to calm down and follow directives. Her behavior was equally unprofessional and disruptive during the active shooter training. Respondent proved by a preponderance of the evidence that there existed valid reasons for the disciplinary action which were not a pretext for discrimination or retaliation.

Finally, Grievant argues that the penalty of suspension was disproportionate to any misconduct she may have committed and should be mitigated. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31,

1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant demonstrated that there was no history of other employees being suspended for the same behavior she exhibited. She argues that she was not given a written reprimand or warning that such sever discipline was being contemplated.

Respondent demonstrated that Grievant's misconduct was extremely disruptive, and unprofessional on occasion. The conduct was improper regardless of one's gender or sexual orientation. More importantly, there was ample evidence that Grievant had been counseled, advised, and warned that she had to use more tact and avoid losing her temper with her supervisors, co-workers, and outside contacts. Despite those warnings Grievant had two major disruptive incidents of losing her temper and disrupting normal operations of the department. Given this history and the nature of the misconduct the penalty was not clearly disproportionate to the offense proven. Accordingly, the grievance is DENIED.

Conclusion of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent proved by a preponderance of the evidence that Grievant violated Policy Memorandum 2106 – *Employee Conduct.*

3. "'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).

4. Respondent did not prove by a preponderance of the evidence that Grievant violated Policy Memorandum 2123 – *Hostile Work Environment.*

5. The Grievance Board has no jurisdiction to determine liability under the Civil Rights Act nor the Federal and State Human Rights Acts. There are remedies and procedures specifically set out in those acts for alleged violations. *See generally, Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

6. The Grievance Board does have jurisdiction to address claims of discrimination and reprisal as defined by in W. VA. CODE §§ 6C-2-1 *et seq.* Additionally, failure to find discrimination under the grievance statute does not preclude a finding of unlawful discrimination under the West Virginia Human Rights Act. *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

7. 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."

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). To prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating:

> [T]he burden is upon the complainant to prove by a preponderance of the evidence:
>
> (1) that the complainant engaged in protected activity,
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> (2) that complainant's employer was aware of the protected activities,
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> (3) that complainant subsequently suffered negative employment consequences and (absent other evidence tending to establish a retaliatory motivation),
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Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

8. The critical question is whether the grievant has established by a preponderance of the evidence that her 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 the motivation for the adverse personnel action. *Freeman, supra.*

9. 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).

10. Respondent demonstrated legitimate non-discriminatory reasons for suspending Grievant based upon violations of specific policy provisions. Grievant did not prove that those reasons are mere pretext for discrimination or retaliation against her based upon her sexual orientation.

11. "Mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel

evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

12. Grievant did not prove by a preponderance of the evidence that the penalty of suspension was clearly disproportionate to the offense proven.

Accordingly, the Grievance is **DENIED**.

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

DATE: June 3, 2021

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE