**MARY OILER,**

**Grievant,**

**v.** **Docket No. 02-HHR-074**

**DEPARTMENT OF HEALTH & HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT,**

**Respondent.**

## DECISION

___Mary Oiler ("Grievant") initiated this proceeding on January 8, 2002, challenging a written reprimand she received on December 28, 2001. She seeks as relief to have the reprimand rescinded and all references to it expunged from Respondent's records. The grievance was denied at level one on January 14, 2002, and at level two on January 29, 2002. A level three hearing was held on March 11, 2002, followed by a written decision, denying the grievance, dated March 14, 2002. Grievant appealed to level four on March 25, 2002, and a hearing was held in the Grievance Board's office in Elkins, West Virginia, on June 11, 2002. Grievant was represented by Kevin D. Church, AFSCME representative, and Respondent was represented by counsel, Darlene Ratliff-Thomas, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 1, 2002.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

## Findings of Fact

1. Grievant has been employed by the Bureau for Child Support Enforcement ("BCSE") as an Accounting Technician II for approximately four years. 2. Grievant's primary job duties involve auditing the financial aspects of child support cases, including determination of the amount of child support arrearages, and verification of receipt of child support payments. She is required to complete 35-40 audits per month to receive an acceptable evaluation, along with an error rate of no more than

five to ten percent. Below 35 audits per month and an error rate of over ten percent is considered by BCSE as “needing improvement” for evaluation purposes. (See footnote 1)

3. Grievant was advised of the standards set forth above at the beginning of the September, 2000, through September, 2001, evaluation period.

4. For the interim performance evaluation dated March 23, 2001, Grievant received an overall rating of “Fair, But Needs Improvement.” For the six-month period, Grievant had averaged 33 audits per month, with a total error rate of 8.5%. She was advised that she needed to try to reduce her error rate to 5% or below (See footnote 2) and increase the number of audits performed.

5. On her annual performance evaluation dated September 6, 2001, Grievant received an overall rating of “Meets Expectations.” However, she received “Needs Improvement” ratings in 12 of 23 categories, including all of the aspects of “Quantity of Work” and “Quality of Work.” Grievant was again advised on this evaluation that she needed to reduce her error rate and increase the number of referrals. 6. The September 2001 evaluation notes that Grievant had been sent to Charleston for training regarding audit procedures and that additional training would be requested for her.

7. Grievant refused to sign the 2001 evaluation. She attached a memorandum stating that she disagreed with the evaluation in the areas of “Maintains Flexibility” and “Demonstrates Credibility,” but she did not challenge the ratings she received for quality and quantity of work.

8. For the period of September through November, 2001, Grievant averaged 31.33 referrals per month, with an error rate of 25.9%.

9. Grievant's immediate supervisor is Carolyn Clifton, who evaluates Grievant's performance.

10. Ms. Clifton's supervisor is Regional Manager Marjorie Tierney.

11. At a meeting in November of 2001 involving the accounting technicians in Grievant's region, their supervisors, and Ms. Tierney, discussion occurred regarding assignments of specific types of audits to technicians. At a follow-up meeting, the supervisors were advised by one accounting technician, Debra Hamner, that another employee had been throwing referrals away to stay caught up. In response to this statement, Ms. Tierney made a comment to the effect that she was “so mad she could knock someone's head off” and asked “what all these grievances are about.” (See footnote 3) 12. At a later meeting on November 27, 2001, attended by the accounting technicians, supervisors, Ms. Tierney, and the assistant commissioner, Grievant informed the assistant commissioner about Ms. Tierney's comments at the previous meeting.

13. On December 28, 2001, Ms. Clifton issued a written reprimand to Grievant for failure to complete the necessary number of audits within the acceptable error rate. She placed Grievant on a corrective action period from January 1, 2002, through March 31, 2002.

14. Linda Knight is also employed in Region 8 as an Accounting Technician II, but is assigned to a different office and is supervised by Roger Harris. At her interim evaluation dated February 28, 2002, she was advised by Mr. Harris that her error rate was over 10% (13.1%) and that she needed to improve in that area. Ms. Knight and Mr. Harris discussed the issue, and Ms. Knight explained to him that her errors had increased due to recent changes in tax laws. Prior to fall of 2001, Ms. Knight had met all performance standards during her four years of employment. She was not reprimanded.

15. Ms. Hamner is also employed as an Accounting Technician II under Mr. Harris' supervision. Between September of 2000 and February of 2001, she failed to complete the required number of audits, averaging 29 audits per month. This was noted on her interim evaluation, and she was advised by Mr. Harris that she needed to increase the number of audits. It was also noted on that evaluation that she had exceeded expectations in her error rate. Ms. Hamner's error rate had been under 5% for the two years prior to this evaluation. She was not reprimanded.

## Discussion

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent contends that the reprimand issued to Grievant was justified by her failure to meet set performance standards over the course of a year, after having been informed on several occasions that she was not meeting those standards. Grievant argues that she has been discriminated against in that other employees have not been similarly disciplined for not meeting standards, the reprimand was issued in retaliation for the comments she made about Ms. Tierney to the assistant commissioner, and that Respondent has failed to follow its progressive discipline policy.

W. Va. Code § 29-6A-3(m) defines "discrimination" as "any differences in the treatment of

employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18,1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to establish a prima facie case of discrimination. While both Ms. Knight and Ms. Hamner failed to meet standards for a short period of time, they did not consistently fall below the set standards for an entire year. In addition, both of these employees, like Grievant, received a “Needs Improvement” evaluation during the period their productivity was low or their error rate was high, but improved their ratings after receiving the evaluation. Grievant did not, so she is not similarly situated to these employees. Moreover, Grievant was evaluated by a different supervisor, who had the discretion to set standards within the office, pursuant to agency guidelines.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent 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." A grievant alleging retaliation must first establish a prima facie case by demonstrating:

(1) that he engaged in activity protected by the statute;

(2) that his employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken against him by the

employer; and

(4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998). Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.

In the instant case, Grievant has failed to identify how her action of reporting Ms. Tierney's comments to the assistant commissioner was protected by the grievance statute. Accordingly, she has failed to establish a prima facie case of retaliation. Nevertheless, even if this were construed as a protected activity, a legitimate, non-discriminatory reason for the reprimand existed, i.e. Grievant's failure to meet standards for over a year.

Finally, Grievant contends that, since she had not received a verbal warning prior to issuance of the written reprimand, Respondent failed to follow the provisions of DHHR Policy Memorandum 2104, “Guide to Progressive Discipline.” However, prior decisions by this Grievance Board have noted that Policy Memorandum 2104 constitutes a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach. Ferrell v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-526 (Apr. 30, 1998); Artrip v. W. Va. Dep't of Health and Human Serv., Docket No. 94-HHR-146 (Sept. 13, 1994). Moreover, in this case, although Grievant did not receivea verbal warning documented as such, she was advised at least twice on her performance evaluations that her numbers were unacceptable.

For all of the foregoing reasons, the undersigned finds that Respondent has proven by a preponderance of the evidence that the written reprimand was justified, and Grievant has failed to establish discrimination, retaliation, or a violation of policy.

The following conclusions of law support the decision reached.

## Conclusions of Law

1. In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

2. In order to establish a prima facie case of discrimination, as defined by W. Va. Code § 29-6A-3(m), a grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18,1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

3. In order to establish a prima facie case of reprisal, as defined by W. Va. Code § 29-6A-2(p), a grievant must demonstrate: (1) that he engaged in activity protected by the statute;

(2) that his employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken against him by the employer; and

(4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998).

4. Grievant has failed to establish a prima facie case of discrimination or retaliation.

5. DHHR's Policy Memorandum 2104 constitutes a permissive, discretionary policy that does

not create a mandatory duty to follow a progressive disciplinary approach. Ferrell v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-526 (Apr. 30, 1998); Artrip v. W. Va. Dep't of Health and Human Serv., Docket No. 94-HHR-146 (Sept. 13, 1994).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**Date: August 28, 2002** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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*Footnote: 1*

*These numbers were previously higher for the region in which Grievant works, but were lowered after discussions with employees, and they are far below the state standard. The current standards were upheld by this Grievance Board in Oiler, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 01-HHR-336 (Nov. 8, 2001).*

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*Footnote: 2*

*Although the acceptable rate is 5-10%, employees are encouraged to try to keep the rate below 5%.*

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*Footnote: 3*

*Supposedly referring to the prior grievance filed by Grievant and the other accounting technicians regarding the productivity requirements.*