SERENA MARTY,

Grievant,

v. **DOCKET NO. 02-ADMN-165**

DEPARTMENT OF ADMINISTRATION/

DIVISION OF PERSONNEL,

Respondent.

DECISION

Grievant filed this grievance on June 12, 2002, stating:

> The abuses of position power against me by Evelyn Davis as well as her predecessors are legion, and with a continued investigation I know that the criminal malfeasance implemented against me will be exposed. Ms. Davis' actions against me are blatantly arbitrary, retaliatory, and I think that since being placed in the position of Assistant Director of the Organization and Human Resource Development section in June 2001, that Ms. Davis with malicious intent set out to craft a series of events to formulate a constructive discharge against me.

Her stated relief sought is “that the demotion as outlined in Nichelle Perkins' letter of May 22, 2002, be overturned and that a suitable transfer be implemented posthaste.”

A level four hearing was held in the Grievance Board's Charleston office on November 19, 2003, (See footnote 1) January 13, May 19, October 12, and October 14, 2004, February 22, May 11, and June 3, 2005. Grievant appeared *pro se*, and Respondent was represented by Heather Connolly, Deputy Director and Assistant General Counsel and by William B. Hicks,Assistant Attorney General. The matter became mature for decision on February 17, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant resigned her position with Respondent after filing this claim alleging constructive discharge. Prior to her resignation, Grievant had been subjected to a series of disciplinary actions, culminating with an involuntary demotion. She claims these actions, as well as her supervisors' demeanor and treatment of her created a hostile work environment. Respondent contends all of its actions were justified by Grievant's work performance, and that her voluntary resignation was not an

inevitable result of its attempts to correct Grievant's performance and behavior.

Although not stated clearly, the timing of the grievance and its general timbre indicate it was a challenge to the disciplinary demotion that preceded it. Although it mentions the term “constructive discharge,” Grievant was employed at the time the grievance was filed and so that claim was premature. Although her resignation during the pendency of the grievance made the claim somewhat of a self-fulfilling prophecy, over Respondent's objections, Grievant was permitted to present evidence relating to the proof of that charge, and the grievance was effectively amended to state that cause of action. Respondent bore the burden of proving the demotion was justified, and Grievant bore the burden of proving she was subjected to a hostile work environment that led to a constructive discharge. Based on a preponderance of the evidence, (See footnote 3) I find the following material facts have been proven:

Findings of Fact

1. At the time of her resignation on August 14, 2002, Grievant was employed by the Division of Personnel (DOP) in its Staffing Services section as an Office Assistant 1. She had been demoted to the position on May 22, 2002 (effective June 16, 2002), and transferred from an Office Assistant 2 position within the Organization and Human Resource Development (OHRD) section. In her new position, Grievant was no longer supervised by her former supervisor, Evelyn Davis, and had different job duties.

2. In a seventeen-page letter dated May 22, 2002, then-DOP director Nichelle Perkins advised Grievant of the demotion mentioned above, and described in detail the reasons for the action. Deficiencies noted in the letter related to performance, attendance, behavior, and conduct after a meeting held to address those issues on May 2, 2002. The letter included a summary of infractions since Grievant's prior suspension, upon which the demotion was based. At the level four hearing, Respondent provided ample, credible evidence to support the following infractions:

a. On March 27, 2002, Ms. Davis met with Grievant to discuss work deficiencies such as improper preparation of training materials, unauthorized adjustments of her work schedule, tardiness for meetings, unavailability and tardiness for work. At the meeting, Grievant became argumentative and refused to discuss the issues, requiring Ms. Davis to reschedule the meeting. At the first rescheduled meeting, Grievant was still unprepared or refused to discuss the issues, requiring an additional meeting.

b. Grievant did not provide lists of her daily work tasks as required by her supervisor. When Ms. Davis went to Grievant's desk to see what she was working on,

Grievant rudely and sarcastically replied, “Work.” After a repeated request and a direct order, Grievant replied, twice, that she did not have to tell her supervisor what she was working on.

c. On the same occasion, Grievant's supervisor noticed Grievant was using shorthand to record work-related notes, in contravention of express instructions by Ms. Davis. When asked why, Grievant replied she did not have to tell Ms. Davis what she was writing.

d. After Grievant sent her daily work task list to Ms. Davis almost two hours after it was requested, Ms. Davis scheduled a meeting at the end of the day to review the work completed. Grievant arrived late for the meeting, and argued with her supervisor about having to provide an accounting for the work she was doing. Grievant again asserted she did not have to tell her supervisor what she was working on that morning, and stated she understood her refusal was insubordinate.

e. Grievant failed to comply with Respondent's established policies for calling off work and for adjusting her work schedule outside normal hours. Grievant was repeatedly counseled and instructed concerning unauthorized work schedule adjustments, but continued to rearrange her hours to her own convenience without authorization, and failed to report to work on several occasions with no prior notice.

f. Grievant was repeatedly late for work and late for scheduled meetings.

g. Grievant had failed to timely prepare materials required by an adjunct to teach a class on April 22 & 23, 2002. When the instructor learned the materials were not prepared on April 20, Grievant immediately worked to get them ready and had them prepared by the end of the day. Grievant knew or should have known, well ahead of time, that the class was scheduled and what materials were needed. She had already prepared the materials for an identical class taught by a different adjunct on the same day.

h. Grievant was disruptive, unprofessional, and disrespectful to her coworkers during a staff meeting held on May 3, 2002, to the point that one coworker was unable top finish her presentation at the meeting.

I. Grievant met with Ms. Davis on May 6, 2002, regarding completion of her work assignments, and was disrespectful and unprofessional. It was determined Grievant had not completed the work assigned to her, and the work she did complete was not on her task list.

j. Grievant refused to participate in a meeting with Ms. Davis on May 7, 2002, to discuss Grievant's tasks for the day.

k. Grievant's coworkers reported that she was unprofessional and disruptive, and disrespectful, insulting, and confrontational with Ms. Davis, often in front of or within hearing of her other subordinates. Grievant was also argumentative, loud and confrontational with her fellow workers.

l. On an almost daily basis between May 2 and the date of the demotion, Grievant failed to complete work assigned, lied about work completed, and had disrespectful and insubordinate interactions with her supervisor and coworkers.

m. On a daily basis, Grievant's coworkers had to compensate for Grievant's failure to complete her work by adding to their own work loads.

n. Grievant was placed on an improvement plan in January 2002, and failed to comply with the terms of the plan or to improve her performance and behavior.

3. Grievant had filed a prior grievance, (See footnote 4) in which she unsuccessfully challenged

a disciplinary suspension for insubordination and poor work performance in 2001.

4. Following Grievant's suspension, which occurred in January 2002, she was placed on a corrective action plan designed to assist in tracking her completion of assigned tasks and work efficiency. During this time period, Grievant also met with Ms. Davis and Ms. Perkins, on several occasions where the Grievant received assistance, coaching and instruction with regard to improving her job performance and interpersonal behavior with co-workers and superiors. 5. Grievant failed to comply with her corrective action plan, and her problems with tardiness, behavior and job performance continued, resulting in Grievant's aforementioned demotion and transfer.

6. After the effective date of her demotion and transfer to the Staffing Services Section of the Division of Personnel, Grievant nearly exhausted her annual and sick leave, continued with her argumentative and insubordinate behavior, and failed to perform her job duties with Staffing Services.

7. Ms. Perkins frequently had to intervene and “mediate” problems between Ms. Davis and Grievant, particularly when Grievant resisted her supervisor's directions.

8. Ms. Davis had worked in OHRD for several years prior to her promotion to assistant director, and already had a contentious history with Grievant prior to her becoming supervisor. After Ms. Davis was promoted, Grievant repeatedly expressed to her that she was not happy about having Ms. Davis as a supervisor and wished another employee had gotten the job. She actually told Ms. Davis she might be able to do the job later, after she matured.

9. Grievant expressed a desire to be reallocated to a new position under different supervision, and Ms. Davis attempted to help her to do so, but Grievant never followed up on required paperwork.

10. After Grievant received her demotion letter, she requested and was granted annual leave. While she was away, Ms. Davis reorganized her former office and moved many of the materials stored there to another room, although the effective date of the demotion was still in the future. When Grievant returned, she found she had no office towork from, so Ms. Perkins arranged for her to use an empty office to go through her email and complete some tasks related to her former position.

Discussion

I. Demotion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet

that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Respondent therefore must prove that the demotion complained of was justified, and the factual basis for the demotion was true. In her letter to Grievant implementing the demotion and transfer, Ms. Perkins described Grievant's conduct since her last valid disciplinary action, upon which the decision to discipline Grievant was based. Grievant contends these assertions are fallacious and manufactured in order to support a campaign designed to cause Grievant to quit.

Critical to the resolution of this case is an assessment of the credibility of the allegations. To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and fourth explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors which will be considered in more detail below, must be considered in making and explaining a credibility determination. These include:

> (1) The witness' opportunity and capacity to observe the event or act in question;
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> (2) the witness' character;
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> (3) any prior inconsistent statement by the witness;
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> (4) a witness' bias or lack of bias;
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> (5) the contradiction of the witness' version of events by other evidence or its consistency with other evidence;
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> (6) the inherent improbability of the witness' version of events; and
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> (7) the witness' demeanor. (See footnote 5)

Here, Grievant bases her claims and the characterization of her treatment on her perception of events and the treatment she has received. Rather than limiting her testimony to strictly factual statements, she interposed her own evaluations, perceived motives and characterizations with her recounting of events. Therefore, her ability to clearly perceive and accurately characterize must be determined before evaluating her testimony. Coupled with an objective evaluation of the other evidence surrounding the same events, the likelihood that the environment in which Grievant worked would be intensely offensive to a reasonable person may be determined.

Grievant's character certainly subtracts from her credibility, in that her behavior typifies a person

inherently unable to perceive or admit any negative aspect of her own behavior, and therefore automatically attributes anyone else's reaction to her conduct to the other person's failings. While Ms. Davis' character would equally impact her comments about Grievant, her character has not been impeached in the same way. Grievant repeatedly and continuously during the course of the level four hearing demonstrated to the undersigned the exact type of behavior complained of by Ms. Davis and Ms. Perkins: she was disrespectful (although she was careful to couch all her statements in the most saccharine, eloquently over-formal language), disruptive, and failed to follow the most basic rules of procedure even after repeated explanations and instructions. Although isolated manifestations of her feelings were improper, Ms. Davis's frustration and lack of respect forGrievant, were justified. Grievant would try the patience of Job, and her supervisors could not be expected to live up to that character under the constant assault of Grievant's misconduct.

Grievant also demonstrated an inability to characterize events accurately, as demonstrated by the comment quoted below in which she noted Ms. Davis was unprofessional. When provided greater detail related to a particular event that Grievant cites as indicative of her employer's misconduct, it does not seem unreasonable that Grievant's interpretation is painted by the same brush. For example, the demotion letter cites an incident in which Grievant was alleged to have called Ms. Davis “Hitler.” Grievant denies she said this, and assuming the veracity of her denial, she is correct. However, Grievant defends herself against that accusation by claiming it is false, since the actual term she used was “Hitlerian, because [Ms. Davis] was being demagogic.” Technically, she did not call her supervisor “Hitler.” It is a distinction without a difference, however, as were most of Grievant's explanations and deviations from more reliable accounts.

Grievant claims repeatedly that she was never loud, disruptive or disrespectful. These claims are in direct contradiction from every other witness and her behavior at the hearing, and are not believed. These other witnesses, according to Grievant, are not credible because “the young people in the office had a bad upbringing and so were easily influenced by their supervisor's attitude toward Grievant.”

Grievant's demeanor throughout the level four hearing was consistent with that alleged by Respondent as typical of her employment tenure. She was obstructive and disruptive, and ignored clear direction. Being of obvious intelligence, it is not likely Grievant did not understand what was expected or the advice and instructions she wasgiven. Instead, she acted as she felt was in her own

interests and as she wanted to rather than as how she should. The record is replete with discussions, advice, sustained objections, and clear orders or directions that were entirely ignored by Grievant simply because it did not suit her to follow them. In fact, her behavior during the pendency of this action provided the clearest and most credible evidence in support of Respondent's allegations than any witness' testimony could have.

Given that Grievant's account of her daily work interactions, performance or environment does not rise to a level of inherent believability, it is insufficient to constitute a rebuttal of Respondent's evidence.

Grievant did raise complaints about Ms. Davis' veracity, at one point claiming her testimony comprised “complete falsehoods,” but produced no evidence other than her own differing, skewed versions of events to contradict the factual assertions. Coworker witnesses did establish that Grievant and Ms. Davis did not get along and that Ms. Davis was frustrated with Grievant. There is credible evidence in the record that Ms. Davis referred to Grievant to another employee (outside of Grievant's hearing) as “one of the stupidest people I know.” Obviously, Grievant is not stupid, but this statement was apparently reactionary _ in response to Grievant having failed to properly set up a room for a seminar _ and not made as an assertion of fact. This does raise the question of whether Ms. Davis has a competing or self-serving interest in the matter that would influence her to falsify her testimony, but again, Grievant's conduct during the hearing was highly consistent with Respondent's allegations, and Respondent's witnesses were consistent with each other. Respondent's credible evidence shows a clear picture of Grievant's workplace behavior. Respondent had tried to correct Grievant's behavior through less drastic alternative disciplinary actions, such as reprimand and suspension. Respondent had attempted to change her behavior through a corrective action plan. After she returned from her suspension, she was increasingly rude and aggressive, and it is apparent that she was attempting to build a case for her belief that she was being “driven out.” Grievant ignored the mandates of her performance improvement plan, was openly and willfully insubordinate to her supervisor, and simply did the work she wanted to do, on her own schedule, if she did any at all. She was unproductive and insubordinate, and there was no likelihood that her conduct could be changed through less punishing means, given that Grievant was not compliant with her prior corrective action plans. In all, Respondent's evidence, even with the evident personality conflict between Grievant and Ms. Davis, supports the reasonableness and necessity of the demotion and

transfer.

II. Constructive Discharge

Grievant, on the first day of the hearing, stated that the performance improvement plan was the beginning of Ms. Davis' constructive discharge efforts. As pointed out earlier, her claim of constructive discharge was premature _ at the time it was made, she was still employed. Later, she made her claim a truism by resigning, despite being told directly from Director Perkins that she could pursue her grievance without resigning. "A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship." (See footnote 6) As a general rule, an employee may be bound by herverbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel matters. (See footnote 7) The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." (See footnote 8) To "determine whether an employee's act of resignation was the result of coercion, rather than a voluntary act, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice." (See footnote 9) "Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign." (See footnote 10)

Over Respondent's objections, Grievant was nevertheless permitted to present evidence related to the constructive discharge claim. The “reasonable person standard” also comes into play when assessing this allegation. "In order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.” (See footnote 11)

In this particular case, the “reasonable person” is entirely hypothetical, because Grievant abundantly demonstrated her inability to be reasonable. While the record iscomplete with credible evidence of her own conduct, her comportment during the hearing pellucidly illustrates Respondent's contention that it was Grievant who created any intolerable environment, and Respondent took appropriate measures to ameliorate that state of affairs. This observation is best exemplified by an example from Grievant's own hyperbolic written responses to the demotion letter and her notes of daily affairs within the office, which date back to 2001:

> Evie: “Everybody put their little 'thingees' [sic] out. . . .” She was referring to magnets that we used to indicate from our names when were *in* or *out* of the office. She made that statement as she and Mark Isabella were leaving for lunch at 12:22 PM[sic].
>
> **Personal note**: She is extremely unprofessional and immature.

Grievant's Exhibit No. 39 (emphasis in original). In the same set of notes, Grievant repeatedly opines that Ms. Davis stressed the need for quality and accuracy to the rest of the staff in order to make it possible to force Grievant out, since she saw herself as the only bastion of perfection in the office. Grievant even testified that Ms. Davis told Matt Hill not to make mistakes, and that she did so in order to make Grievant's job unnecessary.

The level four decision in Grievant's prior suspension grievance observed: “Grievant's failure to take responsibility for her mistakes, and insistence on blaming others, only serves to exacerbate her situation, and prohibits her from reflecting on her work habits in a constructive way in order to improve them to her supervisor's satisfaction.” (See footnote 12) The statement bears repeating here, as it is equally applicable. Grievant created her own non- productive and contentious work environment, and it was not unreasonable for Respondent to try and change it. In fact, Respondent would likely have been entirely justified in actuallydischarging Grievant. Instead, Respondent went to great lengths in its attempts to find an alternate and less severe method of changing Grievant's behavior and of retaining her in its employ. Grievant rewarded this consideration with continued obstreperous behavior and more outlandish allegations.

The following conclusions of law support this discussion:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. In assessing the credibility of witnesses, some factors to be considered . . . are the

witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). 3. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. *See Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

4. Respondent has met its burden of proving the charges upon which it based Grievant's demotion, and of proving the reasonableness of the demotion with respect to those charges.

5. Grievant's testimony regarding her own behavior and treatment is not credible, in that it is implausible, inconsistent, and entirely pervaded by her bias against Ms. Davis. In addition, Grievant's resignation after her premature constructive discharge claim, contrary to the advice of her employer, evidences a tendency to mould the outcome of Grievant's version of events to her own biased portrayal.

6. "In order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit." *Syl. Pt. 6, Slack v. Kanawha County Hous. and Redevelopment Auth.*, 188 W. Va.144, 423 S.E.2d 547 (1992); *Love v. Georgia-Pacific Corp.*, 209 W. Va. 515, 550 S.E.2d 51 (2001).

7. “[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These 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. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). *See also Fairmont Specialty Servs. v. West Virginia Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999).

8. "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). 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.*, *supra, citing Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997).

9. "A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. *Smith v. W. Va. Dep't of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995). See *Welch v. W. Va. Dep't of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996). As a general rule, an employee may be bound by her verbal representations that she is resigning when they are made to a person or personswith the authority to address such personnel matters. *See Welch, supra*; *Copley v. Logan County Health Dep't*, Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." *Jenkins v. Dep't of Health and Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002); *Hale-Smith v. Mingo County Bd. of Educ.*, Docket No. 98-29-075 (Sept. 30, 1998).

10. To "determine whether an employee's act of resignation was the result of coercion, rather than a voluntary act, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice." *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989); *See Adkins v. Civil Serv. Comm'n*, 171 W. Va. 132, 298 S.E.2d 105 (1982). "Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985). *See J.P. Stevens &*

Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); *McKinney v. K-Mart Corp.*, 649 F. Supp. 1217 (S.D. W. Va. 1986)." *Dooley v. Dep't of Transp.*, Docket No. 98-DOH-312D (Aug. 3, 1999). *Jenkins, supra; Dingess v. Dep't of Health and Human Res.*, Docket No. 03-HHR-341 (May 19, 2004).

11. Abusive language and abusive, inappropriate and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Graley v. W. Va. Parkways and Economic Dev. Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Hubble v. Dep't of Justice*, 6 MSPR 553 (1981). 12. Grievant must prove all of her claims supporting her affirmative defenses by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra.*

13. Grievant did not meet her burden of proving she was constructively discharged, or that Ms. Davis created a hostile work environment of such pervasive and offensive character as would cause a reasonable person to resign.

For the foregoing reasons, this grievance is hereby **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County, and such appeal must be filed within thirty 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.

March 31, 2006

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The first hearing was presided over by Administrative Law Judge Mary Jo Swartz, and the file was subsequently

reassigned to the undersigned.

Footnote: 2

This matter was originally set to be mature for decision on August 5, 2005. After extending the briefing deadline several times at the request of both the Grievant and Respondent, the undersigned issued an order denying Grievant's most recent request for further extension, and ordered proposals to be filed no later than February 17, 2005. The same order stated that further requests would be neither considered nor responded to, regardless of cause.

Footnote: 3

On March 28, 2006, more than nine months after the end of the hearing and the record was closed, and after having vehemently argued that any proposed findings submitted by Grievant after the final maturity date should not be considered, Respondent's counsel attempted to file as additional evidence a copy of a Kanawha County Circuit Court decision, dated January 16, 2004. in which the Court affirmed a Bureau of Employment Programs decision that denied a similar constructive discharge claim made by Grievant for unemployment compensation purposes. Respondent claimed the order made Grievant's current claim res judicata. Despite the facts that present counsel for Respondent never appeared at the hearing of this matter, and that the record has been closed for months, he claims he would have presented the information as additional evidence had he known about it. As with Respondent's prior correspondence that attempted to influence the outcome of this case procedurally, this entirely inappropriate late filing was entirely disregarded and was given no consideration whatsoever.

Footnote: 4

Marty v. Dep't of Admin./Div. of Personnel, Docket No. 02-ADMN-055, (July 1, 2003).

Footnote: 5

See Hillen v. Dep't of the Army, 35 MSPR 453 458 (1987).

Footnote: 6

Smith v. W. Va. Dep't of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995).

Footnote: 7

Copley v. Logan County Health Dep't, Docket No. 90-LCHD-531 (May 22, 1991).

Footnote: 8

Jenkins v. Dep't of Health and Human Res., Docket No. 02-HHR-214 (Oct. 22, 2002).

Footnote: 9

McClung v. W. Va. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989).

Footnote: 10

Dooley v. Dep't of Transp., Docket No. 98-DOH-312D (Aug. 3, 1999).

Footnote: 11

Love v. Georgia-Pacific Corp., 209 W. Va. 515, 550 S.E.2d 51 (2001).

Footnote: 12

Marty, supra.