**PATRICIA WILLIAMS,**

**Grievant,**

**v. DOCKET NO. 05-DMV-174**

**DEPARTMENT OF TRANSPORTATION/**

**DIVISION OF MOTOR VEHICLES,**

**Respondent.**

# D E C I S I O N

Grievant, Patricia Williams, filed this grievance against her employer, the Division of Motor Vehicles ("DMV") on May 26, 2005, following her dismissal for unsatisfactory performance. Her Statement of Grievance reads:

> State wrongfully discharged; permitted racial discrimination; failed to provide reasonable accommodation for the handicapped; and created a hostile work environment. Employee was forced to relocate and work out of classification. Employee classified as a Transportation Services Manager I and placed into a DUI docketing clerical position for which she had no background. Additionally, she has a medical condition which prevents her from performing well the type of work involved in docketing. Employee is not classified as an at will employee.
>
> Relief Sought: To be reinstated of (sic) her full time position classification with all of her benefits and be provided time to obtain another position more suitable to her background and experiences.

A level four hearing was held in the Grievance Board's Charleston office on March 9, 2006. Grievant was represented by Geoffrey Ekenasi, and Respondent was represented by Janet James and Benjamin Yancey, Assistant Attorney Generals. This matter became mature for decision on that date, as the parties elected not to file proposed findings of fact and conclusions of law.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. DMV hired Grievant as a Transportation Services Manager 1 on November 15, 2002, to serve as the regional manager of the Franklin office.

2. Grievant performed these duties satisfactorily as demonstrated by a commendation letter dated September 25, 2003, and her performance evaluation dated February 25, 2004. This evaluation found Grievant to meet expectations, and she received exceeds expectations for "Treats all customers with respect" and "Monitors, documents and evaluates employee conduct and performance." This performance evaluation also noted the morale in her office was very good. Grievant received a needs improvement under, "Employee consistently meets deadlines." Grievant had not completed the Certified Driver Examiner program, and this was an expectation for her. Her supervisor at the time considered this notation to be an oral reprimand. Grt. Exhs. 1 & 2; Test. Haynes.

3. Grievant experienced some personal problems in the Franklin office, and these may have been related to her race. Grievant is an African American.

4. Jill Dunn, General Counsel for DMV and Director of Legal Serivces, was asked to investigate the situation. She found Grievant had trouble finding a place to rent, and there had been a snake in her office that could have been intentionally placed there. (The snake could also have come in the building because of a flood.)

5. Grievant asked the commissioner for a transfer, stating she wanted a place where she could be hidden and not be in the public spotlight. (Grievant now asserts this request was a joke which she did not expect to be taken seriously.) This request was granted, and Ms. Dunn was assigned the task of finding a position for Grievant.

6. By letter incorrectly dated April 7, 2005, Commissioner Douglas Stump transferred Grievant effective May 3, 2004, from her duties in the Franklin office to theLegal Services Section in Charleston. Grievant's title and salary were unchanged. Commissioner Stump's letter stated that if Grievant had "questions or concerns, please do not hesitate to contact me." Resp. No. 10. Grievant did not contact Commissioner Stump about her transfer.

7. Grievant did not grieve this transfer.

8. Ms. Dunn assigned Grievant the tasks of: 1) writing a legal procedure manual and 2) performing the duties of a docket clerk. Ms. Dunn planned to change Grievant's classification to an Administrative Services Manager, but this action was never taken. The Division of Personnel

classification for DMV's docket clerks is that of Office Assistant 3.

9. Grievant never did any work on the legal procedure manual.

10. Grievant's supervisor for her docketing clerk duties was Mary Jane Barr.

11. A docket clerk is to schedule and continue hearings, for all DMV issues, such as DUI's, insurance, student attendance, and license revocation. Key duties of the docket clerks are to ensure a request for an administrative hearing on these issues results in a stay of the motorist's drivers license revocation and to schedule a hearing within two weeks of the request.

12. As was the norm, the lead docket clerk trained Grievant how to perform the duties of the position. Grievant was also given written guidelines to follow. Grievant had difficulty performing the duties of the position, and consistently did not meet the required deadlines.

13. On August 9, 2004, Ms. Barr sent a memo to all docket clerks about various problems with their work. The docket clerks were reminded to schedule or reschedule allfiles within two weeks, to assist in answering the phone, and to not ask the other sections to obtain information for them. Resp. No. 1.

14. On October 22, 2004, Ms. Barr asked Ms. Dunn if Grievant could work four, ten hour days. Before Ms. Dunn would approve this change she asked if Grievant's work was caught up. Ms. Barr replied she had informed Grievant nothing should be on her desk for longer than two weeks, gave her another copy of the August memo, and noted Grievant had stated she was "working on it." Resp. Ex. 2.

15. On November 10, 2004, DMV was informed a driver was being processed at the regional jail for driving on a revoked license, when he had timely requested a revocation hearing. Grievant's failure to put the required information in DMV's computer system had resulted in this arrest. Resp. Ex. 4.

16. On November 23, 2004, Ms. Dunn sent Grievant a letter commemorating Grievant's oral reprimand for her unsatisfactory performance described in Finding of Fact 15. This letter noted Grievant had received the file on or about October 9, 2004, and because she never took any action, the computer automatically revoked the driver's license on November 3, 2004. Ms. Dunn noted Grievant was to receive a written reprimand for this event, but because Grievant finally admitted she was at fault instead of continuing to blame others, the disciplinary action was decreased to an oral reprimand. Grievant was cautioned further negligence of her job duties would result in progressive

disciplinary action. Grievant was notified of her right to file a grievance about the disciplinary action, but she chose not to do this. Resp. Ex. 11.

17. On November 30, 2004, Ms. Barr became aware of two problems with one of Grievant's files. First, Grievant was unable to locate a file so the hearing had to becontinued, but Grievant had failed to notify the driver or his attorney of this continuance. Second, the reason the file was misplaced was because Grievant had sent the file to the wrong Hearing Examiner.

18. On December 20, 2005, Ms. Barr wrote Ms. Dunn recommending disciplinary action for Grievant because of continuing unsatisfactory performance. Ms. Barr noted that during the week of November 29, 2004, "at least 18 driver's license revocations had to be corrected." Ms. Barr noted she had given Grievant an oral reprimand about another driver's license that was wrongly revoked, and this action had no effect on Grievant's performance. Ms. Barr asked Ms. Dunn to transfer Grievant to another section where the deadlines were not as critical. Resp. Ex. 6. Ms. Dunn then wrote Stephens Edens, then the Director of Human Resources, requesting disciplinary action, and noting Grievant was exposing DMV to liability. It is unclear from the record what happened to this request. Resp. Ex. 13.

19. During December 2004, Ms. Barr retrained Grievant. It is unclear whether Grievant requested this retraining, or if this retraining was Ms. Barr's decision. During the retraining, Grievant acted as if she already knew what the job duties of a docket clerk were. Test. Barr.

20. On December 29, 2004, Grievant received an oral counseling session for her failure to put the correct address on a notice of hearing. Resp. Ex. 7.

21. On February 10, 2005, Grievant denied a request for an administrative hearing, incorrectly stating the request for hearing was untimely. The request for a hearing was received by Grievant on January 25, 2005, but she did not send the denial letter until February 10, 2005. Additionally, because Grievant did not count the request as timely, the driver's license was revoked. Ms. Barr corrected this error after she found it in March 2005. Resp. Ex. 5.

22. On March 2, 2005, Ms. Barr informed Ms. Dunn that Grievant was again behind in her work, and she wished to renew her request for disciplinary action. On March 3, 2005, Ms. Dunn again wrote Mr. Edens recommending and requesting disciplinary action for Grievant, identifying reasons for these recommendations, and noting her prior recommendation for disciplinary action. The recommended actions were demotion and transfer. Ms. Dunn noted she had deferred disciplinary

action over the holidays at Grievant's request, and because Grievant stated she was looking for a new job. Commissioner Stump had also requested Ms. Dunn hold off on disciplinary action for these same reasons. Ms. Dunn also noted Grievant, who still retained the classification of a Transportation Services Manager 1, had been unable to perform the duties of an Office Assistant 3, thus demotion would be appropriate. Resp. Ex. 14.

23. On May 6, 2005, Ms. Barr checked Grievant's desk and found numerous hearing requests had not been processed. These requests were from February and March of 2005. Resp. Ex. 8

24. On May 10, 2005, Ms. Barr noted that three files received by Grievant in late February were not processed until May 10, 2005. Resp. Ex. 9.

25. On, or about, May 10, 2005, Ms. Dunn went through Grievant's files on her desk. She found documents lying about, misfiled, and mixed in with catalogues and menus. Additionally, she found forty-two files that needed hearings scheduled, and numerous cases that had been 99'd. Cases are 99'd on the computer, as a quick way tokeep the computer from revoking a license, when a hearing is requested by the driver at the last minute. Cases should not be routinely 99'd. Resp. Ex.12. Test. Barr & Dunn.

26. On May 11, 2005, Ms. Dunn wrote Commissioner Stump recommending Grievant's dismissal for unsatisfactory performance. Ms. Dunn noted the multiple problems with Grievant's work performance, the ongoing nature of Grievant's failure to comply with her work requirements, and the severity and effect of Grievant's unsatisfactory performance. Ms. Dunn noted Grievant had asked in December for time to find a new position and to improve her work performance, and this time was given. Ms. Dunn noted Grievant's work had not improved, and she continued to make numerous errors, even to the point where one of her Hearing Examiners asked to be assigned to another docket clerk. Resp. Ex. 15.

27. On May 11, 2005, Grievant was dismissed from her employment with DMV effective May 26, 2005, for unsatisfactory work performance. The dismissal letter recounted numerous problems with Grievant's work. The counseling sessions and retraining with Ms. Barr were noted.

28. By letter dated May 12, 2005, Ms. Dunn denied Grievant's request for an extension and/or transfer.

29. During the time Grievant worked in the Legal Services Section, an employee was rude to her. It is unclear if Grievant complained about this behavior, but a co-worker, Kathy Bowser, did

report the behavior to Ms. Dunn. Ms. Dunn checked into the situation, and counseled the offending worker. Ms. Dunn then talked to Ms. Bowser and told her come back to see her if there were continued problems. Ms. Dunn heard no further complaints about the issue. 30. Sometime in November or December of 2004, Grievant was diagnosed with Attention Deficit Disorder ("ADD"). Grievant informed Ms. Dunn that this disorder made it difficult for her to do the work of a docket clerk. She also informed Ms. Dunn she was taking medication to help with the problem, and it would take some time to adjust the dosage. Grievant asked for time to regulate her medication. No other accommodation was requested, and Grievant was not dismissed until May of 2005 for her continued failure to perform her duties. Test. Grievant. No improvement was seen in Grievant's work performance after the start of the medication.

31. DMV did not receive any information from Grievant's doctor, and none was presented at hearing to clarify Grievant's assertions that ADD made it very difficult for her to perform the duties of a docket clerk. (See footnote 1)

## Issues and Arguments

Respondent asserts Grievant's work performance continued to be unsatisfactory despite counselings, warnings, and retraining. Grievant's failure to follow the required guidelines and deadlines subjected DMV to potential liability, and drivers to the possibility of being arrested for driving on a suspended license when they had properly requested an administrative hearing. After many months of attempting to work with Grievant, including counseling session, oral reprimands, and granting requested delays so Grievant could find other employment, DMV dismissed Grievant because she could not or would not performthe duties of the position, and there was no other position to which they wished to transfer her.

Grievant first asserts she did not request and did not want to be transferred to the Charleston office. Grievant did not grieve this transfer which occurred in May of 2004, and did not raise it as an issue until she was terminated. Grievant also asserted DMV created a hostile work environment, permitted racial discrimination, and did not provide reasonable accommodation for her disabilities. Interestingly, although Grievant alleged wrongful termination, Grievant did not assert her overall performance was satisfactory, but only responded to a few of the many errors identified by DMV.

## Discussion

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 and 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.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." Division of Personnel Administrative Rule 143 C.S.R. 1 § 12.2. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a meretechnical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980). (See footnote 2)

**I. Credibility**

An issue to address is credibility, as Grievant asserted she was transferred against her will, and DMV maintains Grievant was transferred at her request. 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 & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. (See footnote 3) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The conflict between Grievant's assertion she did not want to be transferred and only stated this request as a joke, and DMV's contention Grievant requested the transfer is unusual. Since Grievant did not grieve the transfer, and there is no evidence she even complained to anyone about this matter, the undersigned Administrative Law Judge finds it difficult to believe Grievant's assertion. Indeed, if this transfer came about as the result of some type of confusion on DMV's part, Grievant needed to notify DMV as directed to do so in Commissioner Stump's letter and put the agency on notice as soon as possible that this change was not what she wished.

**II. Unsatisfactory performance and progressive discipline issues**

Grievant basically did not respond to the key issue and reason for her dismissal - continuing unsatisfactory work performance. Respondent has clearly demonstrated Grievant failed to perform the essential duties of her position, did not follow DMVguidelines, and frequently placed DMV in difficult positions. Legally requested and required hearings were routinely not scheduled or rescheduled in a timely manner. Grievant received training both from the lead Office Assistant and from her supervisor without any change in her performance. See Markey v. Div. of Rehab. Servs., Docket No. 01-RS-087 (Sept. 24, 2001). Accordingly, this allegation is proven.

Grievant also asserts she did not receive required progressive discipline as she only received oral reprimands and no other disciplinary action prior to her termination. Grievant did not place a progressive discipline policy into evidence, but the undersigned Administrative Law Judge obtained this policy from the Department of Transportation's web site on March 28, 2006. This policy states an employee may be dismissed for a repeated offense if previous disciplinary action has not been effective in solving the problem. Grievant received numerous counselings and at least two oral reprimands. These actions did not correct the problems, and the errors Grievant continued to make were not trivial in nature. (See footnote 4) Accordingly, any progressive discipline requirements were met.

**III. Hostile Work Environment**

Grievant also asserts DMV created a hostile work environment and this assertion appears to be

based on the co-worker who was rude to Grievant. "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). It is unclear whether Grievant complained about this co-worker, but Ms. Bowser did report theproblem to Ms. Dunn because the behavior upset her. Ms. Dunn assessed the situation, called the rude co-worker in, told her stop the negative behavior, and heard no more about the issue. Grievant presented no evidence the behavior continued after Ms. Dunn's intervention.

The undersigned Administrative Law Judge notes that if the rude conduct was so "severe" and "pervasive" as to create a hostile work environment, it was incumbent upon Grievant to clearly report this problem at the time it occurred, so management could resolve these concerns. If the conduct affected Grievant's ability to perform her job duties it was essential for her to inform DMV of the problem, and if the actions taken by Ms. Dunn had no effect, to let Ms. Dunn know. There was no evidence the behavior of this co-worker was so severe as to affect her job performance other than Grievant's self-serving complaints at Level IV hearing. Additionally, after Ms. Dunn was apprised of the problem, she took action. She talked to the offending employee and clearly informed her this behavior would not be tolerated. The raising of this issue in retrospect cannot be used to overturn Grievant's dismissal.

**IV. Discrimination**

Grievant asserted she was treated differently than other employees. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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." Administrative notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814,818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 5)

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant did not meet her burden of proof and demonstrate she was treated differently than other similarly situated employees, as she did not identify any other similarly situated employees who had continued unsatisfactory performance and were not dismissed.

**V. Accommodations**

Other than Grievant's brief testimony on this issue, there is little in the way of proof about any alleged disability, its severity, or how it affected Grievant's ability to perform the duties of a docket clerk. Grievant argues DMV was aware of her ADD and failed toaccommodate this disability. There is no evidence Grievant requested any specific accommodation other than time for her medication to reach a therapeutic level. She made this request in December 2004, and she was not termination until May of 2005. Clearly, this request was accommodated. There is no evidence any other accommodations were requested and refused. Ms. Dunn testified she did think about whether additional accommodations could be made, but as the duties of the docket clerk are time sensitive, she did not believe there was anything else that could be done.

The above-discussion will be supplemented by the following Conclusions of Law.

## 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 and 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. Division of Personnel Administrative Rule 143 C.S.R. 1 § 12.2. provides that an employee in

the classified service may be dismissed for "cause." "Good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579(1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. Respondent has met its burden of proof and demonstrated Grievant's work performance was unsatisfactory. See Markey v. Div. of Rehab. Servs., Docket No. 01-RS- 087 (Sept. 24, 2001).

4. While not all steps of the progressive discipline were utilized, Grievant did not demonstrate a violation of this policy.

5. "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, 513 S.E.2d 463, 467 (1998). See Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995).

6. Grievant did not prove she was subjected to a hostile work environment or that Respondent did not respond to complaints about a rude co-worker.

7. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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."

8. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

9. Grievant did not meet her burden of proof and demonstrate she was treated differently than other similarly situated employees.

10. Grievant did not meet her burden of proof and establish her request for more time for her

ADD medication to reach a therapeutic level was not met.

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." Any 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.

**JANIS I. REYNOLDS**

**ADMINISTRATIVE LAW JUDGE**

**Date: March 31, 2006**

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*Footnote: 1*

*Grievant also asserted at the Level IV hearing that the parking provided by DMV did not accommodate her other health issues. Since it was unclear from the testimony when and if Grievant reported these problems to Ms. Dunn, and whether DMV was given an opportunity to resolve them, these issues will not be addressed further. Additionally, it was unclear what effect this parking issue had to do with Grievant's inability to perform her assigned duties.*

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*Footnote: 2*

*The West Virginia Supreme Court of Appeals has also stated "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra (emphasis added). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982). Since Grievant was employed for less than three years, this factor need not be considered. Alaeddini v. Div. of Envtl. Protect., Docket Nos. 95-DEP-450/580 (Jan. 28, 1998).*

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*Footnote: 3*

*The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).*

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*Footnote: 4*

*It is unclear from the record whether Grievant received the required written notice and opportunity to respond, but as this issue was not raised by Grievant, this issue will not be addressed further.*

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*Footnote: 5*

*In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).*