THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

CATHY CORLEY, et al.,

Grievants,

v. **Docket No. 06-BEP-079**

Janis I. Reynolds

Senior Administrative Law Judge

WORKFORCE WEST VIRGINIA/

UNEMPLOYMENT COMPENSATION DIVISION,

Respondent.

D E C I S I O N

Grievants, Cathy Corley, David Shannon, and Elizabeth Peterson, filed this grievance against their employer WorkForce West Virginia ("WFWV") (See footnote 1) on December 3, 2004. Their Statement of Grievance reads:

> 1) Due to hostile work environment created by Peggy Imler. 2) Continual changes being made to our work environment which has (sic) no positive effect to increase efficiency or improve functionality due to management's failure to correct the real known problem.
>
> Relief sought: Source of hostile work environment be removed and the Grievant[s] be made whole in all ways.

This grievance was denied at Levels I and II. Grievants attempted to file at Level III, and after not

receiving a hearing, filed a Motion for Default on March 9, 2005. Mediation was attempted at the Grievance Board, and when that failed, a Level IV default hearing was held on July 21, 2005. The Motion for Default was denied on September 9,2005, and the case was remanded to Level III for hearing. Grievants changed the relief sought at Level III to request a 15% percent pay increase. After the grievance was denied at Level III, Grievants appealed to Level IV on March 2, 2006.

A Level IV hearing was held in the Grievance Board's office in Charleston on May 11, 2006 and July 18, 2006. Grievants were represented by Andrew Katz, Esq., and WFWV was represented by Jeffery Blaydes, Special Assistant Attorney General. This case became mature for decision on September 12, 2006, the date the parties' proposed Findings of Fact and Conclusions of Law were to be submitted.

Synopsis

Grievants assert they have been subjected to a hostile work environment created by co-worker Peggy Imler, and her behavior has caused other employees to quit, generated changes in procedures, and increased their work load. Grievants aver their employer is aware of this problem and has refused to resolve it. For relief, Grievants initially requested Ms. Imler be transferred to another division, but at the end of the Level III hearing, Grievant Peterson requested, for the first time, a 15% pay increase, because Grievants now have more work to do. Grievants tied this request for a pay increase to their belief that Ms. Imler had caused two employees to leave their unit, thus increasing their work load.

Respondent appropriately and timely asserted this grievance was untimely filed. In the alternative, Respondent avers Grievants have not met their burden of proof and did not establish a hostile work environment. Respondent notes Ms. Imler's supervisors did not document behavior by Ms. Imler that would demonstrate a hostile work environment, or prove the decrease in the number of employees in Grievants' section was due toanything but decreased funding. Respondent also points out Ms. Imler's behavior has improved.

The issues of failure to fill vacancies and filing complaints at magistrate court were untimely. Grievants did not meet their burden of proof and demonstrate they have been subjected to a hostile work environment. Since Grievants did not prove the increase in work load was caused by Ms. Imler, they did not demonstrate any reason why they should receive a 15% salary increase.

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

Findings of Fact

1. Grievants Shannon and Corley are employed by WFWV as Delinquency Control Specialists ("DSC") in the Unemployment Compensation Division. Grievant Peterson is employed as an Accounting Technician 4. Grievant Corley has been employed since 1997. Grievant Shannon has been employed as a DSC since January of 2001, but it is unclear from the record what position he held prior to that time. Grievant Peterson has been employed since February of 2001. Ms. Imler has been employed as a DSC for many years.

2. The major portion of a DCS's duties is to obtain delinquent reports and monies from employers who are doing business in the State of West Virginia. Grievant Peterson provides support services to DCS's. Although DSC's used to travel to collect these monies, they now do these collections by mail and phone calls, and, if necessary, by filing in magistrate court. This change in the method of collecting monies occurred for two reasons: 1) abuse by some employees of travel reimbursement; and 2) to increase theamount of time employees would have in the office to collect the required information and monies because a decrease in funding caused an increase in each DCS's case load.

3. There used to be two supervisors in the Unemployment Compensation Division, Brenda Goodall and Kathy Phillips, but Grievants are now supervised only by Ms. Phillips. Ms. Goodall has been moved to another unit to supervise for three reasons: 1) she was needed in that unit; 2) the number of employees did not support the need for two supervisors; and 3) she did not want to supervise Ms. Imler.

4. In August 2001, Grievant Shannon heard Ms. Imler tell another DCS, Sharon Jaggers-Green, that their supervisors had earned their positions through sexual favors at work. This conversation occurred at a training seminar during off-duty hours. Grievant Shannon did not report this event to anyone at the time it happened. He did tell Ms. Goodall sometime thereafter.

5. In September 2001, Ms. Imler, Ms. Jaggers-Green, Debbie Scalf, and another employee filed a sexual harassment lawsuit in Kanawha County Circuit Court. This suit named both a supervisor, Wade Wolfenbarger, and the agency as parties.

6. The administration called all the employees together and told them about the lawsuit, directed their employees not to treat the lawsuit employees any differently than they would anyone else, and put them on notice that EEO would be conducting an investigation. This investigation occurred shortly thereafter, and the employees found it stressful. Grievant Shannon received a written reprimand during this time which he did not grieve.

7. While the administration of the agency did not tell supervisors not to discipline the lawsuit employees, the administration did say to be careful not to do anything that couldbe construed as retaliation, and if there was the need to deal with any wrong doing, these occurrences should be well-documented.

8. In November 2001, Ms. Imler's supervisors filed a grievance alleging a hostile work environment had been created by Ms. Imler, Ms. Jaggers-Green, and Ms. Scalf. This grievance was denied at Level II, dismissed at Level III for failure to pursue, and currently on appeal at Level IV on the dismissal issue.

9. On January 11, 2002, Ms. Scalf, one of the lawsuit employees, was dismissed for absenteeism and being absent without authorization. Resp. No. 7 at Level IV.

10. On January 15, 2003, Ms. Jaggers-Green was terminated for well- documented gross misconduct, including abuse of the travel policy and receiving compensation for travel she did not complete. See Jaggers-Green v. Bureau of Employment Programs, Docket No. 03-BEP-026 (July 30, 2004). After this abuse was discovered, and because of the decrease of federal funding, the agency decided to curtail most travel and directed the DCS's to collect information and monies by phone, letter, and as-needed trips to the magistrate court.

11. The sexual harassment lawsuit was dismissed in December 2004 without a finding of any wrongdoing on the part of the agency.

12. Ms. Imler has always been an aggressive employee, easily excited, and likes to question her supervisors closely on any changes to the work process. This behavior irritates her co-workers and her supervisors. Grievants are upset by the way Ms. Imler treats her supervisors, Ms. Phillips and Ms. Goodall. Ms. Imler is also curt with co-workers and at times says rude things. These rude comments are not made on a daily basis. Ms.Imler is also a very competent, dependable employee who frequently assists her co- workers. Resp. Nos. 2, 3, & 4 at Level IV.

13. During the time Grievants have worked in the Unemployment Compensation Division there

has been a decrease in the amount of federal funding received by the agency and the number of DCS's. Instead of laying off employees, the agency has dealt with the decrease in funding by not replacing employees who quit or retire.

14. In July 2001, there were nine DCS's. In August 2001, two DCS's transferred to other units, partly because of the unpleasant work environment. By October 2002, there were again nine DCS's, and in January 2003, there were eight DCS's. In February 2003, there were eight DCS's divided into seven groups, and in June of 2005, there were seven DCS's. (See footnote 2)

15. The two employees who left in July of 2001 were replaced, but the agency did not replace Ms. Jaggers-Green after her termination or Ms. Harlow after she retired. The numbers also demonstrate Ms. Scalf was replaced as well as, even though the departure of this employee was not identified by Grievants. (Ms. Scalf was a member of the lawsuit with Ms. Imler.)

16. On January 28, 2003, the employees of the Unemployment Compensation Division were informed the vacant positions created by Ms. Jaggers-Green's terminationand Ms. Harlow's retirement would not be filled, and their case loads would increase. Grievants did not grieve this action.

17. While Ms. Imler's supervisors have complained about her to their supervisors, they have not presented the necessary documentation to support disciplinary action against her. Additionally, Ms. Imler's supervisors did write down actions by Ms. Imler they did not like, but they failed to discuss this behavior with her, and this interaction should occur before disciplinary action is taken.

18. Ms. Imler's performance evaluation for 2002 - 2003 was completed by Ms. Goodall. Out of 23 elements rated, Ms. Imler received fourteen "Meets Expectations" and nine "Exceeds Expectations." Ms. Imler was rated as "Exceeds Expectations" in the category of "Employee is a dependable team member" and "Shares information with others when appropriate." There was no indication on this performance evaluation that there was any problem with Ms. Imler's performance at work.

19. Ms. Imler's performance evaluation for 2003 - 2004 was completed by Ms. Phillips. Out of 23 elements rated, Ms. Imler received eighteen "Meets Expectations" and two "Exceeds Expectations," and three "Needs Improvement." Ms. Imler was still rated as "Exceeds Expectations" in the category of "Employee is a dependable team member." She received "Needs Improvement" in "Adapts to new situations in a positive manner," "Performs work according to current guidelines and

directives," and "Employee completes all assignments." This performance evaluation contained directions needed for improvement. (See footnote 3) 20. After this performance evaluation, Ms. Imler's performance improved. Test. Phillips, Level IV Hearing. Ms. Imler's performance evaluation for 2004 - 2005 was completed by Ms. Phillips. Out of 23 elements rated, Ms. Imler received twenty "Meets Expectations" and three "Exceeds Expectations," and no "Needs Improvement."

21. In approximately September of 2004, the agency found some employees were taking too much time to file a single complaint with the magistrate court. One of these employees was Ms. Imler, but she was not the only one. Grievants' supervisors dealt with this issue by telling all DCS's they needed to have five complaints to file before they went to magistrate court. The magistrate court judges complained because the agency was bringing too many complaints at one time, and the rule was revised. Now, DCS's must inform their supervisor when they are going to magistrate court, so there will not be too many employees taking complaints at the same time.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 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).

I. Timeliness

The first issue to address is whether this grievance is timely filed. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28,

1997); Parsley v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). Pursuant to W. Va. Code § 29-6A-3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." The Level II Decision raised the issue of timeliness, and it was raised again at the Level III hearing. Accordingly, the undersigned finds the timeliness defense was properly raised.

As to whether the grievance was timely filed, W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

It is clear many of the issues asserted by Grievants are untimely raised. Grievants were clearly informed in January 2003 that the vacancies created by the termination of Ms. Jaggers-Green and retirement of Ms. Harlow would not be filled, and their work loads would increase. They did not file this grievance until December 2004. This issue is untimely.

The issues dealing with management decisions are also untimely. The curtailing of travel occurred shortly after Ms. Jaggers-Green was found to have abused this system, in January 2003. The change in the number of complaints that could be taken to magistrate court occurred in September 2004. Again, this grievance was not filed until December 2004, and these issues are also untimely grieved.

As the alleged hostile work environment was ongoing, it will be considered timely.

II. Hostile Work Environment

Grievants asserted Ms. Imler has created a hostile work environment. "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). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. See Spencer v. Bureau of Employment Programs,Docket No. 98-HHR-130 (Jan. 29, 1999). Certainly any act might be construed by someone as harassing, hostile, disruptive, or offensive. The question is what standard is to be applied. See Hattman v. Bd. of Directors/West Liberty State College, Docket No. 95- BOD-265R (July 13, 1998). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. Accord Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. Redfearn v. Dep't of Labor, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." See Fonville v. DHHS, 30 MSPR 351 (1986)(citing Glover v. DHEW, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Hubble v. Dep't of Justice, 6 MSPR 659, 6 MSPR 553 (1981). See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000).

Grievants gave limited examples to support their assertion that Ms. Imler had created a hostile work environment for them. Grievants noted the sexual favors comment is made fairly regularly, and several times, some time ago, Ms. Imler wished harm would befall her supervisors. Recently, Ms. Corley believed she heard Ms. Imler call her a bitch while she was talking on the phone. She did not report this comment to Ms. Phillips. Grievants' complaints about decisions made by management, such as limiting travel, dictating how complaints should be taken to magistrate court, and not replacing employeeswhen federal funding had been decreased, do not establish a hostile work environment, but demonstrate Grievants disagreement with management decisions.

It should be noted Ms. Imler did not generate the need for the travel changes - Ms. Jaggers Green and a decrease in funding did. Ms. Imler was not cited as the reasons the last employees left employment - Ms. Jaggers Green was terminated and Ms. Harlow retired. Even Grievants admit Ms. Imler was not the only employee who management saw as gone too long when taking complaints to magistrate court. Additionally, while it is clear Ms. Imler is not especially nice to some of her co-

workers, Grievants did not demonstrate Ms. Imler treated them inappropriately in such a "severe or pervasive" manner that it "alter[ed] the conditions of [their] employment." Napier, supra.

Ms. Imler does appear to enjoy "nit-picking" with her supervisors, but any negative treatment of Grievants' supervisors by Ms. Imler should be dealt with by them. If her behavior is so out of line with them as to create a hostile work environment for the supervisors, the supervisors must document this behavior, make Ms. Imler aware of it, and address it through her evaluations and appropriate disciplinary action. After all, it is up to an employee's supervisor to oversee the climate and workplace relationships of the unit.

Grievants and their supervisors contend they were directed to take a "hands off" approach with the lawsuit employees. But this is not what they were told. They were told to treat these employees like all other employees, and to document problems. It is clear from the terminations of Ms. Scalf and Ms. Jaggers-Green that there was no "hands off" approach used with these employees when inappropriate behavior was clear and documented. Ms. Imler's performance evaluations do not demonstrate an employee who is creating a hostile work environment. In all of them she met expectations, and the performance evaluation reflected that Ms. Imler is a competent employee who helps others. Additionally, when issues relating to Ms. Imler's interaction with her supervisor were addressed on her performance evaluation, the next performance evaluation demonstrated improvement.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 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).

2. The employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No.96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). 3. W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

4. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. The issues of decreased travel, the method for taking complaints to magistrate court, and to failure to replace to employees who left were untimely filed.

6. "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). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. SeeSpencer v. Bureau of Employment Programs, Docket No. 98-HHR-130 (Jan. 29, 1999). 7. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. See Hattman v. Bd. of Directors/West Liberty State College,

Docket No. 95-BOD-265R (July 13, 1998). Accord Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

8. An employer is entitled to expect its employees to conform to certain standards of civil behavior. Redfearn v. Dep't of Labor, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." See Fonville v. DHHS, 30 MSPR 351 (1986)(citing Glover v. DHEW, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Hubble v. Dep't of Justice, 6 MSPR 659, 6 MSPR 553 (1981). See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000).

9. Grievants have failed to prove they personally have been subjected to a hostile work environment created by a co-worker Imler.

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 suchappeal 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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: November 30, 2006

Footnote: 1

At the time of filing, the agency was known as the Bureau of Employment Programs.

Footnote: 2

The numbers of employees working as DCS's cited by the parties do not match the number of employees listed in the exhibits introduced at Level III, but these documents do demonstrate that the two employees who left because of the

unpleasant working conditions were replaced. Additionally, while the parties discussed many of the DCS's and their reasons for leaving, they did not discuss Employee Fields who was employed in February of 2003, but not in June of 2005.

Footnote: 3

Ms. Imler grieved this evaluation, but it was unclear at hearing what the outcome of this grievance was.