THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LEISA BOSTIC,

Grievant,

v. **Docket No. 07-INS-091**

INSURANCE COMMISSION,

Respondent.

D E C I S I O N

Grievant, Leisa Bostic, is currently employed by the Insurance Commission ("Commission") as a Systems Specialist 2. She filed this grievance over her disciplinary demotion on March 6, 2007. Prior to her demotion, she was classified as a Credit Analyst Supervisor. Her Statement of Grievance indicates she was not on notice of unsatisfactory work performance, she had received satisfactory evaluations, and she had not received any prior discipline or counseling. For relief, Grievant initially sought to be reinstated to her prior position. At Level IV, Grievant amended her relief sought and asked that she remain in her current position, but requested her salary to be returned to its prior level, as it was within her current pay grade.

This grievance was filed directly to Level IV on March 20, 2007, and a Level IV hearing was conducted in the Grievance Board's Charleston office on August 27 and 28, September 24, and October 16, 2007. Grievant was represented by Gordon Simmons, Steward, West Virginia Public Employee Workers Union, UE Local 170, and the Insurance Commission was represented by its counsel, Gregory Elam, Esq. This matter became mature on November 14, 2007, following the submission of the parties' proposed Findings of Facts and Conclusions of Law.

Synopsis

Respondent asserts Grievant was incompetent in her position, her work performance was unsatisfactory, and she harassed her employees and created a hostile work environment. Respondent avers it had no option but to demote Grievant from her supervisory position and decrease her salary.

Grievant maintains she was placed in an untenable work situation and assigned a task that could not be performed with the limited personnel and resources she was given. She notes she had half the employees to perform double the work, and some tasks that had been routinely processed by the computer, now had to be done manually. She asserts she repeatedly asked for help and made numerous suggestions, but was not included in planning and her requests for assistance were ignored. She agrees that she did curse from time to time and was very frustrated by the lack of help and the failure of the Commission to give her a private office space. She also points out the foul language decreased substantially after December 2006.

For the reasons listed below, the undersigned Administrative Law Judge finds this grievance must be Granted. Grievant's demotion is decreased to a written reprimand. Pursuant to her request, Grievant will continue in her current position with no decrease in her compensation from the prior position. (See footnote 1)

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

Findings of Fact

1. Grievant began her employment with the state in approximately 1984 and had 13 years of supervisory experience at the time of her demotion. Grievant was employed by Workers' Compensation as a supervisor in charge of the Revenue Recovery Division.

2. In 2005, Workers' Compensation was privatized, and Grievant was transferred to the Commission to perform duties similar to those she had performed while she was an employee with Workers' Compensation. Her classification at that time was Workers' Compensation Credit Analyst Supervisor at Pay Grade 18. The pay range for Pay Grade 18 is $2,923 to $5,407 a month.

3. Grievant was the supervisor of the Revenue Recovery Division at the Commission.

She had two supervisors under her, who each supervised approximately four to five employees. These employees were classified as Credit Analysts.

4. The Revenue Recovery Division is in charge of obtaining the Workers' Compensation revenue owed to the state by employers. When workers' compensation was privatized and BrickStreet was formed, this corporation took the "paying customers/employers," those employers who were in compliance, and the employers who had not paid, who were in arrears, and those who owed the State money were transferred to the Commission.

5. Grievant's Division has been moved several times over the space of three years. The Revenue Recovery Division was on MacCorkle Avenue until December of 2005, at the Players' Club from December of 2005 to August of 2006, and moved to its current address on Smith Street in August of 2006. At Smith Street, Grievant, a supervisor of supervisors, did not have an office, but was placed in a cubicle like all her supervisees. She requested an office several times, stating she did not have a place to meet with her employees or employers.

6. The transition from Workers' Compensation to the Commission was very rocky for the Revenue Recovery Division, and there are still difficulties. Grievant and her supervisees were told everything would be set up for them, and they would have their Revenue Recovery Division computer systems and programs to utilize. This was not true. During peak times, such as when postings were done, the Revenue Recovery Division's phones were always busy, and often an employer calling in was not able to reach the Revenue Recovery Division to make a payment or request information.

7. The Credit Analysts are required to document all calls on a "Notepad." Quite a few of the employers were not in the data base, and Notepad comments could not be documented.

8. The Revenue Recovery Division had half the employees it had at Workers' Compensation, but twice the work. The computer system could not perform certain tasks, and what had been routinely done by the computer, now had to be done manually. Test. Grievant, Parsons, Cologrosso, Ledbetter, Lepp. Additionally, Grievant expected she would have investigators under her supervision to perform the postings and complete other tasks, but these investigators were assigned to another division and would do postings as needed. Grievant had communication difficulties with other supervisors at the Commission, and some of these supervisors believed Grievant was non-responsive to their concerns.

9. In January 17, 2007, one of Grievant's supervisees, Diana Ledbetter, complained Grievant had created a hostile work environment. Ms. Ledbetter had notes she had taken in 2005 and 2006 about Grievant's behavior, but her last notation was fromAugust of 2006. Some of these complaints were before the transfer to the Commission. Ms. Ledbetter complained Grievant had harassed her when Grievant sent a memo to Ms. Ledbetter's supervisor noting she should have accepted a payment from an employer as this was a top priority. Later, Grievant told Ms. Ledbetter that the Commission would not be pleased about this failure. Ms. Ledbetter believed these actions constituted harassment.

10. Ms. Ledbetter's complaint precipitated a lengthy investigation. Kathy Damron, Director of the Commission's Human Resources Department, interviewed the people suggested by Ms. Ledbetter, and asked them to comment on Grievant's behavior. Other employees who may have had a more favorable opinion of Grievant were not interviewed. Later, Ms. Damron's investigation was expanded to include Grievant's work performance. (See footnote 2) **When certain individuals did not have time for a face-to-face discussion with Ms. Damron, they were asked to write down their opinions and complaints about Grievant and her work performance.** (See footnote 3) **Grievant was not informed of this "investigation," nor was she given a chance to respond until the afternoon before her demotion. 11. Grievant occasionally used foul language at work, was curt with some of her employees, and was occasionally upset and voiced her frustration with management for its failure to provide support, direction, and a private office. This foul language was never directed toward another employee, and witnesses agreed this behavior decreased since the move to the Smith Street offices in August of 2006.**

12. Meetings were held to discuss the work of the Revenue Recovery Division, and Grievant was not included.

13. Priorities for the numerous tasks to be performed by the Revenue Recovery Division were frequently changed. For example, at different times Grievant was informed the priority was liens, then defaults, then postings, and then Rule 11 letters. Many of the tasks assigned to the Revenue Recovery Division are important, time-sensitive, and require detailed documentation.

14. Grievant was aware her unit was not functioning well and sent numerous letters to

her supervisors and others in authority outlining the "roadblocks" as she saw them and identifying possible solutions. She received little to no response from these emails and letters. For example, on September 19, 2006, Grievant wrote her supervisor, Mary Jane Pickens, and identified what she saw as the "obstacles" to the success of the Revenue Recovery Division, and indicated her solutions to the issues. Grievant never received a response to this memo. Grievant's Exh. 14.

15. On March 5, 2007, at 3:40 p.m., Grievant was directed to attend a 4:00 p.m. meeting. A pre-disciplinary conference was held, and Grievant was informed that because of her poor performance and because she had created a hostile work environment, she would be demoted, effective immediately. She was given until March 6, 2007 at 10:30 a.m. to respond to the charges, and she did so. At 1:00 p.m., Grievant was given a ten-pagedisciplinary letter and demoted for "neglect of duty" and "unacceptable and unprofessional behavior." Grievant's salary was decreased from $3,726 a month to $3,541.

16. Grievant never received a counseling session, a verbal reprimand, a written reprimand, or any other type of disciplinary action prior to this time. Her evaluations had been satisfactory, and she had never been placed on a Corrective Action Plan. (See footnote 4)

17. In the demotion letter, the Commission referred to its "Conduct Policy" and noted Grievant had violated the Section dealing with "Workplace Behavior," as she had engaged in intimidating and/or threatening behavior; used foul or abusive language; made disrespectful, humiliating, insulting, or degrading comment about others; and engaged in behavior that was disruptive to orderly operations. Resp. Exh. 2 at 11. No penalty was identified for these behaviors.

18. The Commission's "Conduct Policy" states,

> When employees do not perform at an acceptable standard or when their behavior is an interference, embarrassment, or detriment to the operation of the Commission, supervisors are responsible for seeing that the problem is corrected. Corrective action may include training, counseling, verbal or written reprimands, suspensions without pay, or dismissal. Generally, each case must be judged on its own merits according to the principles of progressive discipline and like penalties for like offenses.

Resp. Exh. 2 at 2.

Discussion

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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 apreponderance of the evidence. W. Va. Code § 29-6A-6 (See footnote 5) ; *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*.

I. Standard for disciplinary action with a long-term state employee

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal 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." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Syl. Pt. 1, Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *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). While this is not a termination, demotion is considered a severe disciplinary action, especially when removing a long-term employee from a supervisory position, decreasing her pay grade four steps, and decreasing her salary by 5%. *Maxwell v. Dep't of Admin.*, Docket No. 02-ADMIN-389 (Feb. 26, 2003). Accordingly, the undersigned Administrative Law Judge will utilize the standard outlined above in assessing the reasonableness of the actions taken by Respondent in this case.

II. Unsatisfactory performance and progressive discipline

Grievant agrees that the Revenue Recovery Division was not functioning efficiently and had many problems. This knowledge is demonstrated by the September 2006 memo, to which she received no response. It also appears Grievant may have wanted to hold on to the "old ways" of completing certain tasks and did not clearly see her role in the ineffective process.

But it is also clear, Grievant was not the one and only cause of the failure of the Revenue Recovery Division to perform satisfactorily. For example, it was noted by many witnesses that they had half the people to perform twice the work, and work previously done automatically by the computer now had to be accomplished manually.

When a permanent state employee is performing unsatisfactorily, the most frequently used actions of a state employer to correct these problems are to engage in counseling, note the deficiencies on performance evaluations, send the employee to training, and/or give the employee a verbal reprimand. As Grievant correctly pointed out, progressive discipline is usually followed. *See Barnhart v. Dep't of Educ.*, Docket No. 03- DOE-027 (Dec. 17, 2004); *Maxwell, supra; Markey v. Div. of Rehab. Servs.*, Docket No. 01-RS-087 (Sept. 24, 2001). Indeed, Respondent's own Conduct Policy states, "[c]orrective action may include training, counseling, verbal or written reprimands, suspensions without pay, or dismissal. Generally, each case must be judged on its ownmerits according to the principles of progressive discipline. . . ." Demotion is not even listed. Here, Respondent did not engage in any progressive discipline. A secret investigation was conducted, the decision was made to demote Grievant, and a cursory, pre-disciplinary meeting was conducted.

The *Maxwell* case, *supra*, discusses unsatisfactory performance and is on point here. In that case, the grievant was terminated after failing to perform her assigned task. The administrative law judge found the respondent did not understand the time involved in completing the assignment, and did not assess the reasons for the grievant's failure. The administrative law judge held the grievant's supervisors, "placed unreasonable demands upon Grievant, were not clear in their directions to Grievant, and frankly were not fair." That statement sounds like a fair assessment of what happened here. While the undersigned Administrative Law Judge finds Grievant is not blameless in this situation, she also finds that demotion of one employee for all the woes in the Revenue Recovery Division was too severe a penalty.

II. Hostile work environment and harassment

Respondent asserted Grievant created a hostile work environment. The Commission utilized the following definition for harassment, which requires the conduct to be "so atrocious, intolerable and so extreme and outrageous as to exceed the bounds of decency

and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee(s) from reasonably performing her or his work." The Grievance Board has long stated that "[t]o 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). *SeeHanlon 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).

Respondent's examples to support their assertion of harassment and the creation of a hostile work environment are rather limited. The main thrust of these allegations is the occasional use of foul language and curt or abrupt behavior.

During the hearing, Respondent's counsel routinely asked his questions about Grievant's behavior and work performance by asking numerous, "Did you ever" questions,such as, "Did you ever hear Grievant use curse words?," "Did Grievant ever not follow the policies?," and "Did Grievant ever shut the door to her office?" It is an unusual person who could stand up to

this type of scrutiny. Many of the charges against Grievant listed in the demotion letter do not rise to the level of harassment or the creation of a hostile work environment, and some of them are very petty. **(See footnote 6)** **See note 3, *supra.***

While Grievant did at times use curse words, and this behavior is incorrect, witnesses agreed this behavior had decreased. Further, it is clear these outbursts were caused by stress, and it is also clear the proper remedy for this behavior is a Corrective Action Plan, and some less severe from of discipline. Respondent did not demonstrate Grievant treated her supervisees in such a "severe or pervasive" manner that it "alter[ed] the conditions of [their] employment." *Napier, supra*. Additionally, telling a supervisee that his or her work was unsatisfactory does not create a hostile work environment; it is an expectation of a supervisory position. As already stated, Grievant's performance evaluations did not reveal an employee who created a hostile work environment. Accordingly, Respondent has proven Grievant did use foul language in the work place and at times was abrupt with her employees, but this finding is insufficient to support a finding of harassment and hostile work environment that would justify a four pay grade demotion.

III. Mitigation

Grievant has argued that demotion was an unduly harsh discipline. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense andthe personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket

No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Here, the action taken was "clearly disproportionate to the offense proven," especially when considering Grievant's work history, personnel evaluations, and "the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips*, *supra*.

IV. Relief

Given that Respondent was unable to prove the majority of its assertions, the demotion is clearly excessive, and the undersigned Administrative Law Judge must fashion an appropriate remedy. The actions an administrative law judge may take to fashion an equitable remedy are discussed in W. Va. Code § 29-6A-5(b), and this *Code* Section states:

> (b) Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one [§§ 29A-5- 1], article five, chapter twenty-nine-a of this code, provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.

(Emphasis added.)

From the testimony at the Level IV hearing it is clear Respondent does not want Grievant returned to her former position. At the Level IV hearing, Grievant amended her relief sought and requested to remain in her current position and only sought the return of the 5% salary

decrease. This relief is GRANTED.

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).

2. The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal 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." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Syl. Pt. 1, Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *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).

3. Respondent proved only that Grievant's job performance needed some improvement, and that she occasionally cursed and was rude to employees.

4. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). 5. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket

No. 95-54-041 (May 18, 1995) (citations omitted). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

6. Grievant demonstrated the penalty imposed was clearly excessive, given only a portion of the charges were proven, she had satisfactory evaluations, and she had no prior disciplinary action taken against her.

Accordingly, this grievance is GRANTED IN PART, AND DENIED IN PART. Respondent is ORDERED to reinstate Grievant's former salary, but pursuant to Grievant's request she will remain in her current position. Respondent is also to pay Grievant all back pay to which she is entitled, plus interest. The disciplinary demotion is reduced to a writtenreprimand for unsatisfactory performance and the use of foul language in the work place, and this document is to be placed in Grievant's personnel file.

Any party 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 (2006) (repealed, *see* note 5 *supra*). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code §§ 29A-5-4(b) (2006) 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

Dated: June 3, 2008

Footnote: 1

The undersigned Administrative Law Judge notes Grievant's former salary is within her current pay grade.

Footnote: 2

It was unclear who directed Ms. Damron to expand the scope of this investigation.

Footnote: 3

The complaints lodged by these various employees were repetitious. Some of these complaints will not be addressed in the body of this decision as they are not examples of harassment and would not be considered to create a hostile work environment. Examples of these type of complaints are "Leisa rolled her eyes at me," "She told me I had completed my work incorrectly," "You can tell she is upset by the look on her face," and "Leisa is sometimes in a bad mood." Additionally, one employee was quoted as being afraid of losing her job. When questioned at the Level IV hearing, this witness stated this was because she had lost another job in the past, and her fear was not caused by any of Grievant's actions. Additionally, the Commission alleged at hearing that Grievant had failed to follow overtime/compensatory time rules. As this issue was not addressed in the ten page demotion letter, it cannot be raised now.

Footnote: 4

While these performance evaluations were not placed into evidence, Respondent did not rebut this testimony in anyway, and Grievant's assertions are accepted as true.

Footnote: 5

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 6

This would have been when Grievant had an office.