WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DELLA MURPHY,

Grievant,

v. **Docket No. 07-PSC-350**

PUBLIC SERVICE COMMISSION

OF WEST VIRGINIA,

Respondent.

D E C I S I O N

Grievant, Della Murphy, a probationary employee, filed this grievance against her employer, the Public Service Commission of West Virginia ("PSC"), directly to Grievance Level IV on June 26, 2007, protesting her dismissal for unsatisfactory performance. Grievant alleges her work performance was affected by the Respondent PSC's discrimination against her on the basis of a disability. Grievant seeks reinstatement to a "State of WV position with work accommodations" and repayment of various expenses and damages incurred as a result of the discharge.

This grievance was initially scheduled for hearing on October 23, 2007. Respondent by counsel was present with witnesses. Grievant did not arrive nor had she properly requested a continuance in this matter. The undersigned Administrative Law Judge was made aware that Grievant wished to present documents in absentia, to which Respondent promptly objected. Respondent's Counsel orally requested that the grievance be dismissed for Grievant's failure to attend the hearing, and for failure to properly pursue the grievance. A Show Cause Order was issued directing Grievant to provide explanation, in writing, why this matter should not be considered abandoned and dismissed for failure to pursue. Written response was provided by Grievant on or about November 7,

2007. Ultimately, a Level IV hearing was convened in the West Virginia Public Employees Grievance Board's Charleston office on February 4, 2008. Grievant appeared pro se and testified on her own behalf. Respondent was represented by Belinda B. Jackson, Esquire. This case became mature for decision on February 26, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Respondent discharged Grievant during the prescribed probationary period for the employed position. Grievant challenges her discharge and alleges that her work performance was affected by discrimination and Respondent's retaliatory actions toward her stemming from her request for disability accommodations. Respondent identified specific work performance deficiencies of Grievant to substantiate its determination that Grievant's job performance was reasonably determined to be unsatisfactory. Identified shortcomings of Grievant during her probationary period included; (a) an inability to complete her work in a reasonable amount of time; (b) an inability to follow instructions; (c) failure to properly keep her supervisor informed when work was not going to be timely completed; and (d) failure to adequately demonstrate the skills necessary to perform the job.

Respondent elected not to retain Grievant's services, choosing to terminate during her probationary period of employment, citing unsatisfactory job performance. Grievant alleges discrimination and appears to argue Respondent conspired against her. Grievant did not meet her burden of proof to demonstrate that her job performance was satisfactory, nor did she establish a claim of discrimination. Grievant failed to prove violation of any applicable statute, policy, rule, or regulation. Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. Many examples of Grievant's behavior were given in evidence, and not all of these will be addressed individually in this decision.

Findings of Fact

1 1. Grievant commenced employment with the Respondent, the Public Service Commission of West Virginia (“PSC”) on April 23, 2007. Grievant was employed as a Utility Analyst II.

2 2. There is a six month probationary period of employment for the position of Utility Analyst

II.

3 3. By letter dated June 11, 2007, Respondent informed Grievant that her employment was being terminated for unsatisfactory work performance. The termination letter specified that Grievant's last day of employment would be June 26, 2007.

4 4. Grievant was employed by Respondent from April 23, 2007 to June 26, 2007 (approximately two months). The notice and subsequent termination of her employment was during Grievant's probationary period of employment.

5 5. Respondent identified specific examples of work performance activity (deficiencies) of Grievant to substantiate their determination that Grievant's job performance was justifiably perceived as unsatisfactory. Grievant's shortcomings during her probationary period included (a) an inability to complete her work in a reasonable amount of time, which created additional work for other employees; (b) an inability to follow instructions; (c) failure to inform her supervisor when work was not going to be completedby the deadline; and (d) failure to adequately demonstrate the skills necessary to perform the job.

6 6. Dixie Kellmeyer, Grievant's former immediate supervisor and various other agency employees testified at the Level IV Hearing.

7 7. At the Level IV Hearing Respondent presented evidence corroborating the information contained in the June 11, 2007, discharge letter, and further provided additional details regarding Grievant's performance deficiencies.

8 8. Other than an “ergonomic workstation,” Grievant did not identify for Respondent any specific accommodation that she needed.

9 9. Respondent scheduled and completed an ergonomics assessment for Grievant less than a month after she began work.

10 10. For Grievant's use, Respondent purchased a rolling laptop case, gel wrist rests, two adjustable foot rests, an adjustable computer monitor, and a wireless computer keyboard. Further, Respondent made arrangements for the Grievant to choose and purchase an adjustable office chair.

11 11. Other than her own representation Grievant did not put forth any evidence to demonstrate the work she performed while employed at the PSC was satisfactory nor did she put forth evidence that there were similarly-situated non-disabled employees who were treated differently.

Discussion

Burdens of Proof

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, andthe employer carries no burden of proof in a grievance proceeding. The employee has the burden of establishing by a preponderance of the evidence that her services were satisfactory. *Bonnell v. W. Va. Div. of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990). *See Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Walker v. W. Va. Public Serv. Comm'n*, Docket No. 91-PSC-422 (Mar. 11, 1992); *See also, Simmons v. Bureau of Employment Programs*, Docket No. 97-BEP-531 (Nov. 25, 1998). As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 156-1-3 (2007); (See footnote 1) *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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was dismissed for unsatisfactory performance of job duties during her probationary employment period. The six-page June 11, 2007, letter of discharge, which was a part of the record, specified that Grievant's shortcomings included (a) an inability to complete her work in a reasonable amount of time; (b) an inability to follow instructions; (c) failure to inform her supervisor when work was not going to be completed by the deadline; and (d) failure to demonstrate the skills necessary to perform the job (see selective excerpts, infra). Grievant has the burden of proof in this grievance to establish that her services were satisfactory or that her dismissal was unlawful by some other rationale.

As employees in the classified service of the state, Public Service Commission employees are subject to the provisions of the West Virginia Division of Personnel's Administrative Rule. The Division of Personnel (DOP) defines a “probationary period” in Section 3.72 of its Administrative Rule

as follows: “A specified trial work period prescribed by the State Personnel Board designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received.” The Division of Personnel's Rule 10.1 discusses the "Nature, Purpose, and Duration" of the probationary period;

> The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

Section 10.5 Dismissal during Probation

> If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with Section 12.2 of this rule.

Section 12.2 Dismissals

> An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his designee shall:meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal; give the employee oral notice confirmed in writing, or written notice of the specific reason or reasons for the dismissal; and given the employee a minimum of fifteen calendar days advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee.

The June 11, 2007, letter of discharge, provided numerous illustrations of Grievant's work performance, in relevant part Respondent Exhibit 1 provided;

> 1. Inability to complete work in a reasonable amount of time creating additional work for others utility analysts.
>
> Examples:

a. You have been working on a bill analysis for a utility with approximately 400 customers from May 10, 2007 to June 8, 2007, and that bill analysis is still incomplete. This bill analysis is one of the simplest tasks among utility analyst's duties and should not take more than 5 working days to complete for such a small company [.]

b. You were asked to copy and paste 12 columns of data in a spreadsheet. You started the task at

about 4:00pm on June 5, 2007, and completed this task at approximately 1:25pm on June 8, 2007. . . . To illustrate the simplicity of this task, Dixie Kellmeyer completed this task in 15 minutes.

* * *

d. Because you were so far behind in the preparation of the bill analysis mentioned above, Dixie Kellmeyer assigned another employee to assist with data entry. In the time the other employee completed over nine months of the data entry, you were only able to complete part of one month.

2. Inability to follow instructions.

Examples:

a. On May 25 (Friday) and again on May 29 (Monday), Dixie Kellmeyer informed you that it was imperative to speed up the bill analysis process because less than 2 months were complete. Dixie Kellmeyer explained to you that entering data other than Mcf, calculating bills and trying to explain differences was not necessary at this point. Those other things had been done for testing purposes and insuring that you understood bill calculation. {On June 6, 2007} . . . You were instructed (for at least the fourth time) to ignore such calculations and simply copy and paste Mcf's. At 1:22pm on June 8, 2007, you reported that January through October of the copying and pasting was complete but you had some calculation errors in December and was wondering if you should correct such errors before copying and pasting December. For at least the fifth time you were instructed to ignore the calculated bill.

3. Failure to inform supervisor that assignment was not going to be ready when expected.

Example:a. Concerning the memo referred . . . you had repeatedly assured your supervisor the memo would be ready on time. You did not inform your supervisor of any problem with the memo nor that you were not going to complete the memo on time. Dixie Kellmeyer told you at least two times on the morning of May 11, 2007, (plus other times in the preceding days) that she was leaving at noon and needed the memo before that time. You said it would be ready and did not mention any problems, but the memo was not complete for approval at noon.

4. Failure to demonstrate the skills necessary to satisfactorily perform the job.

Examples:

a. When Dixie Kellmeyer first realized that you were having difficultly with a bill analysis, she asked you what the problem was. You replied that calculated bill amounts did not agree with actual billed amounts. You seemed to be at a complete loss as to even determine where the difference might be. You were unable to independently determine the amount of individual or total differences, look for formula errors, and isolate differences for trends or common differences.

* * *

c. An auditor with your experience should have the ability to proceed to another task or different portion of the same task if there is a reason that that task or portion of a task cannot be finished at that time. It appears you simply cannot do this.

* * *

> On each of these occasions, you have offered excuses and attempted to shift blame for your failure to perform up to expectations. This is representative of your unsatisfactory level of performance. While any one issue would not necessarily constitute failure to meet expectations when viewed singularly, the cumulative effect is, however, one of unacceptable performance. Unfortunately, you have demonstrated no progress towards improving your work performance; therefore, I have no reason to believe that additional management intervention would bring your performance to an acceptable standard.

June 11, 2007, letter of discharge, Respondent's Exhibit 1.

Other than her own representations, oral and written, Grievant did not put forth any evidence to demonstrate the work she performed while employed at the PSC was satisfactory. Grievant testified that she was unable to meet a deadline for her first assignment because there were items pending that prevented the assignment from being completed. Regarding her second assignment, Grievant testified that she was unable to complete the project because her supervisor, Dixie Kellmeyer, had set up a spreadsheet formula incorrectly, causing the results to be wrong. She testified that another(unidentified) employee realized what was wrong and corrected it. Ms. Kellmeyer, testified that Grievant was not required to wait for “pending” information to complete her first assignment, that it could and should have been completed without the pending information as the assignment, called for an “initial memo”, was preliminary in nature and any pending information could be added when the “final memo” was filed. Further, supervisor Kellmeyer testified that the second assignment was essentially a data entry assignment and Grievant was initially required only to “cut and paste”

columns of numbers (See footnote 2) . Respondent qualified that this second assignment should not have taken more than a week to complete, but that Grievant was unable to complete it in four weeks.

At the Level IV Hearing, Respondent presented evidence and testimony to corroborate the information contained in the June 11, 2007, discharge letter. Further, the relevance of this information was explained with regard to Grievant and the determination that her job performance was unsatisfactory. Respondent did not act arbitrarily and capriciously or lack a rational basis for dismissing Grievant from her probationary employment. *Goard v. W. Va. Div. of Corrections*, Docket No. 95-CORR-068 (Mar. 20, 1995).

Grievant failed to demonstrate that she performed her assigned duties satisfactorily. Respondent did establish that it dismissed Grievant during a duly recognized probationary period of employment for job performance it deemed unsatisfactory. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, thescope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). Respondent dismissed Grievant from probationary employment because she had not met the required performance standards or shown the proficiency and ability to meet the required standards. In dismissing Grievant during a probationary period of employment Respondent complied with applicable provisions of the Division of Personnel Administrative Rules governing such failure to hire.

Discrimination Claim

"'Discrimination' means 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." W. Va. Code § 29-6A-2(d) (2006). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h) (2006). The West Virginia Supreme Court of Appeals has recently clarified that the elements of claims of discrimination and favoritism under the grievance statutes are essentially identical, as this Board has long held. To establish either type of claim, an employee must prove:

(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. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004). *See Chaddock v. Div. of Corr*., Docket No.04-CORR-278 (2005). *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ*., Docket No. 90-50-281 (Jan. 28, 1990).

The fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. Va. Code §§ 29-6A-1 to 29-6A-12 (2006). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits. (See footnote 3)

Among Grievant's various points of contention with Respondent's decision not to retain her services, Grievant avers that she was discharged because she asked for workplace accommodations and/or a predisposition against her because of a disability. The question presented by Grievant's contention (this record) is whether the Grievant hasbeen discriminated against compared with non-disabled workers. (See footnote 4)

Grievant testified that she had communicated her need for workplace accommodations. However, she did not identify any specific accommodations that she needed, other than an “ergonomic workstation,” testifying that the PSC should know what that meant and what was needed. Respondent presented evidence through its managers and purchasing representatives that it (a) scheduled and completed an ergonomics assessment for the grievant less than a month after she

began work; (b) purchased a rolling laptop case, gel wrist rests, two adjustable foot rests, an adjustable computer monitor, and a wireless computer keyboard; and (c) made arrangements for the Grievant to choose and purchase an adjustable office chair. Respondent's Utilities Division Director Cheryl Ranson testified that she had no problem with Grievant's request for workplace accommodations.

It is the undersigned's determination that Respondent made reasonable efforts to assist and accommodate Grievant. Further, it is not logical, in the circumstance of this case, that Respondent would have made the identified workplace expenditures if its intent, all along, was to discharge Grievant because of her disability. There is no credible evidence of record that indicates Respondent was predisposed to not hiring Grievant.

In order to prove a claim of discrimination based upon the legal standard set forth above, Grievant would need to demonstrate that another probationary, non-disabled employee whose performance was similar to her own was treated in a more favorablemanner. Grievant put forth no evidence that would meet this standard. The facts established in the record do not make the showing of discrimination and favoritism required under *White, supra,* and the other cases cited above, by a preponderance of the evidence. Grievant has therefore failed to prevail on her claim of discrimination and favoritism.

Grievant has not met her burden to establish that she performed the duties of her position in a satisfactory manner or that the decision to discharge her from her employment was arbitrary or capricious. Lastly, Grievant has not demonstrated that she was discriminated against on the basis of her disability. Accordingly, this Grievance must be DENIED.

Conclusions of Law

1 1. Dismissal of a probationary employee for unsatisfactory performance is not disciplinary in nature. Therefore, the dismissed probationary employee bears the burden of proof. *Carpenter v. W.Va. Dept. Of Transportation/Division of Highways,* Docket No. 02- DOH-427 (July 30, 2003); In a grievance proceeding that challenges the discharge of a probationary employee for unsatisfactory performance, it is the Grievant's burden to show that his or her services were satisfactory. *Brown v. W.Va. D.H.H.R.,* Docket No. 99-HHR- 026 (Oct. 28, 1999); *Bonnell v. W.Va. Dep't of Corrections*,

Docket No. 89-CORR-163 (Mar. 8, 1990).

2 2. The West Virginia Division of Personnel defines a “probationary period” in Section 3.72 of its Administrative Rule as follows: “A specified trial work period prescribed by the State Personnel Board designed to test the fitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received.”

3 3. DOP's Administrative Rule further describes the nature of a probationary period as follows: “The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.” DOP Administrative Rule § 10.1(a).

4 4. Administrative Rule also provides for discharge of an employee during the employee's probationary period under the following terms: “If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with Section 12.2 of this rule....” DOP Administrative Rule § 10.5.

5 5. Section 12.2 of the Administrative Rule provides as follows: “An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his designee shall: meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal; give the employee oral notice confirmed in writing, or written notice of the specific reason or reasons for the dismissal; and given the employee a minimum of fifteen calendar days advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee.” 6 6. Grievant has failed to prove, by a preponderance of the evidence, that her performance was satisfactory, and Respondent's decision to dismiss her was arbitrary and capricious. *Carpenter v. W. Va. Div. of Transportation,* Docket No. 02DOH-437 (July 30, 2003); *Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Smith v. W. Va. Div. of Labor*, Docket No. 93-LABOR-347 (Oct. 29, 1993); *Walker v. W. Va. Pub. Serv. Comm'n*, Docket No. 91-PSC-422 (Mar. 11, 1992); *Bonnell, supra.*

7 7. Respondent did not act arbitrarily and capriciously or lack a rational basis for dismissing Grievant from her probationary employment. *Goard v. W. Va. Div. of Corrections*, Docket No. 95-CORR-068 (Mar. 20, 1995). Respondent established that it dismissed Grievant for job performance it deemed unsatisfactory.

8 8. In dismissing Grievant during a probationary period of employment Respondent complied with applicable provisions of the Division of Personnel Administrative Rules governing such failure to hire.

9 9. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d) (2006). For a grievant to establish a claim of discrimination under W.Va. Code §29-6A-2(d) (which Code section applies to this grievance, which was filed before the new grievance statute, codified at W.Va. Code §6C-2-1 *et seq.*, became effective), an employee must establish:

> (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. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004). *See Chaddock v. Div. of Corr*., Docket No. 04-CORR-278 (2005). *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ*., Docket No. 90-50-281 (Jan. 28, 1990).

10 10. The facts established in the record of this grievance do not make a showing of discrimination.

11 11. The Grievant has not met her burden to show that she performed the duties of her position in a satisfactory manner or that the decision to discharge her from her employment was arbitrary or capricious. Moreover, Grievant has not demonstrated that she was discriminated against on the basis of a disability.

12 12. The fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. Va. Code §§ 29-6A-1 to 29-6A-12 (2006). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits.

13 13. Grievant failed to prove Respondent violated any statute, policy, rule, or regulation in dismissing her from employment. *Goard v. W. Va. Div. of Corr.*, Docket No. 95-CORR-068 (Mar. 20, 1995).

Accordingly, this grievance is **DENIED**.

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the Decision. This Decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5 (2007). Neither the West Virginia Public 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 the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board at . 6.19 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County.

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Landon R. Brown

Administrative Law Judge

Date: May 16, 2008

Footnote: 1

In 2007, the Legislature 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: 2

Supervisor Kellermeyer testified that she had not set up the formula incorrectly, but even if she had, this should not have prevented the Grievant from performing her assignment.

Footnote: 3

Provisions of the grievance statutes other than those prohibiting discrimination and retaliation have also been interpreted in the past to support a disability-based grievance. See, e.g., Belcher v. Department of Transportation, Docket No. 94-DOH-341 (April 27, 1995) (although it deals with the Fair Labor Standards Act) and Rodak v. Department of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997); but see, e.g., Ruckle v. Department of Health and Human Resources, Docket No. 04-HHR-367 (June 23, 1997) (interpreting Vest to permit consideration of Human Rights Act-based grievances only on discrimination grounds). Because the Grievant in this case based the non- disciplinary part of her case on a claim of discrimination, legal theories not presented by the record will not be considered.

Footnote: 4

Cases such as this can also raise the question whether one employee with a disability has been discriminated against when compared with other workers with disabilities. No such evidence was presented in this case, however, and that analysis is not called for here.