THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TAMELA S. CROSS,
Grievant,

v. **Docket No. 2012-0214-DEA**

DIVISION OF REHABILITATION SERVICES,
Respondent.

DECISION

Grievant, Tamela S. Cross, filed this grievance on August 23, 2011, against her employer, Division of Rehabilitation Services, alleging the following:

> Unfortunately, it has become necessary to request a Level 1 Grievance Hearing for relief from behavior generated within the Sistersville Branch Office by Robert Kinnick, District Manager, and Beth Lipscomb, Rehabilitation Counselor. Behavior included is the encouragement of negative reporting of activities within the Sistersville Branch Office as this is sanctioned by the District Manager.
>
> District Manager, Robert J. Kinnick has encouraged Ms. Lipscomb to negatively report and document our activities to him. She has attempted this subterfuge by reporting misleading and false accusations against myself and Ms. Jennifer Surface, the other affected employee. He consistently supports Ms. Lipscomb's position on any contested issues and, in doing so, disregards issues and concerns expressed by Ms. Surface and me. By pitting branch office employees against each other, a tactic he has utilized at least as long as I have been with the division, i.e. "dividing and conquering the employees", Mr. Kinnick has made the working conditions at the Sistersville Branch Office a hostile and less-productive working environment.
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> My relationship with the District Manager has been well documented in the past. Please refer to my prior employee evaluations. The numerous attempts I have made in the past to "better myself" have routinely been thwarted, rather than supported, by Mr. Kinnick. I have been with this agency for (in two weeks) 10 years. During that time, he has attempted to keep me under his complete control and has not encouraged me to grow or allowed me to make appropriate professional decisions. On the other hand,

> Ms. Lipscomb has been with the agency for 1.5 years and has been asked to assume additional duties, for which I have been passed over and wonder if this discriminatory action might be a reward for her adversarial performance in this office.
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> The District Manager has repeatedly threatened to close the Sistersville Branch Office if the three of us do not "talk and converse" with each other. Given the false accusations and out-right lies Ms. Lipscomb has shared with the District Manager, we have behaved in a far more professional manner toward her than she has displayed toward us.
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> The District Manager has habitually displayed a negative attitude toward me, including disrespectful phone conversations and e-mails that would go on and on to the point of flogging a dead horse. He will say one thing to my face while asking leading (negative) questions of my peers and professional contacts about my behavior and performance behind my back. My performance is scrutinized to a much higher degree than that of other counselors' and I am required to document all actions in an exhaustive level. His unprofessional, degrading behavior and attitude have consumed an incredible amount of this office's and the Division of Rehabilitation Services' resources to defend against his steady stream of negativity. This time and effort could and should be better spent serving our clients and the community. They deserve nothing less and the environment he has established is a misappropriation of time, energy and funds.
>
> In closing, I respectfully request immediate and permanent assistance to develop and implement a plan to eliminate the hostile work environment, bullying, and harassment that is occurring in the Sistersville Branch Office at the hands of Ms. Lipscomb and under the direction of Robert Kinnick. I further request that no retaliation be permitted against us by the District Manager, Robert Kinnick, Counselor Beth Lipscomb, or any other affiliated parties as these issues are addressed and at any time in the future.
>
> Relief Sought: Immediate relief from workplace harassment and deflamation of character by supervisor, Robert J. Kinnick and Rehabilitation Counselor, Beth Lipscomb

This grievance was denied at level one, following a hearing, by letter dated September 19, 2011, and authored by Deborah Lovely, Director, Division of Rehabilitation Services. A level two mediation session was conducted on March 5, 2012. Thereafter, the case was placed in abeyance until June 26, 2012. Grievant perfected her appeal to level

three on July 6, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on August 27, 2013. Grievant appeared in person and by her representative, Greg N. Cross. Respondent appeared by its counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed finding of facts and conclusions of law on October 10, 2013.

Synopsis

Grievant alleges workplace harassment, retaliation, and a hostile work environment concerning her employment in the Sistersville Branch Office of the Division of Rehabilitation Services. Grievant also makes a claim of favoritism in regard to treatment by Respondent toward a fellow employee. The record did not establish Grievant's claim of a hostile work environment. In addition, Grievant did not prove that she was the victim of reprisal, favoritism, or harassment. This grievance is denied.

The following findings of fact are based upon the record established at level one and level three.

Findings of Fact

1. Grievant has been employed by the West Virginia Division of Rehabilitation Services as a Rehabilitation Counselor in the Sistersville Branch Office since September 2001.

2. Grievant alleges that Robert Kinnick, District Manager, and Beth Lipscomp, Rehabilitation Counselor, harassed her and created a hostile work environment during her

tenure at the branch office. Grievant also claims Respondent displayed favoritism toward Ms. Lipscomb.

3. David Valentine, Employment Specialist, is familiar with Grievant, and serves the Sistersville office. Mr. Valentine has had no issues when interacting with the staff at the office, including the Grievant, Ms. Lipscomb, and Mr. Kinnick. Mr. Valentine regularly meets with the office staff in order to work with the counselors on client placements and referrals.

4. Patricia Shingleton, Quality Assurance Specialist, provides training on all policies, along with conducting case reviews to ensure the cases are being properly handled by the counselors. Ms. Shingleton serves the area for which Grievant is based, and is familiar with the Grievant.

5. Ms. Shingleton indicated that Grievant had been unreceptive to any training opportunities with her. Ms. Shingleton is readily available to all counselors for questions whether it be by telephone, e-mail, or in person. Grievant never expressed any dissatisfaction with any training given by Ms. Shingleton or any issues in general with her services as Quality Assurance Specialist.

6. Marijane Waldron, Assistant Director of Field Services and Senior Manager for Quality Assurance, can request a case review of a counselor without that counselor being aware of the review. Ms. Shingleton indicated that in order to receive a promotion, a case review would first need to be conducted.

7. Robert Kinnick, District Manager, had previously requested a review of the Grievant's work product. The questions Mr. Kinnick asks are the typical questions that any district manager would ask regarding counselors that they supervise.

8. Grievant receives her client plan approval from Mr. Kinnick. Rehabilitation counselors at the Sistersville office do not have plan approval. Prior to any plan being instituted by Respondent for a client, the plan must be approved by the appropriate supervisor.

9. There are three levels of classification for rehabilitation counselors. The first is a Rehabilitation Counselor, next is a Senior Rehabilitation Counselor, and the third is a Certified Rehabilitation Counselor.

10. Grievant is currently in training to obtain the necessary qualifications to become a Certified Rehabilitation Counselor.

11. Federal funding received by Respondent is based upon the number of clients that they serve. The number of clients served is used by Respondent as a way to evaluate a counselor's work performance.

12. Beth Lipscomb, Rehabilitation Counselor, worked with Grievant at the Sistersville office. Ms. Lipscomb left her employment at that office after two years due to the treatment that she received from Grievant. Ms. Lipscomb bid upon and was offered a position with Respondent working with the hearing impaired. It is undisputed that Grievant did not apply for this position following its posting.

13. After one year on the job, Ms. Lipscomb reported her on-going issues with Grievant to Mr. Kinnick, such as how she was being treated by the Grievant. Ms. Lipscomb indicated that there was never a team atmosphere in the Sistersville office.

14. Grievant and the only other office employee, an office assistant, would leave Ms. Lipscomb alone in the office with a mental health client at times. There were also times during which Grievant and the office assistant would shut down all the office

equipment and turn off all lights without checking with Ms. Lipscomb before leaving the office.

15. Grievant and the office assistant would also leave Ms. Lipscomb in the office alone while she was meeting with a client or vendor forcing her to be interrupted in order to answer the telephone or meet with walk-ins.

16. Mr. Kinnick meets with the staff at the Sistersville office at least once a month. Mr. Kinnick acknowledged that he had considered closing the Sistersville office due to staffing issues. Mr. Kinnick had received reports from clients, as well as vendors, that they felt that the staff did not care about their cases or needs. There was little enthusiasm from the staff in performing their jobs, and the staff was unreceptive in serving the needs of Respondent's clients.

17. Mr. Kinnick indicated that from time to time he received complaints regarding Grievant's work, and that he would discuss those complaints with Grievant in the hope of resolving them.

18. Grievant's performance appraisals meet expectations, and she has never received any discipline by the Respondent.

19. Grievant feels as if she gets the pits, and others, such as Ms. Lipscomb, got the cherries when it came to cases and numbers. However, the record reflected that it is the client's choice as to where within the state they obtain services from the Respondent. Accordingly, an individual seeking the services of the Respondent need not stay within their home county, but instead may seek services at any state branch office that they choose.

Discussion

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant alleges harassment, a hostile work environment concerning her employment in the Sistersville Branch Office, that she was the victim of retaliation, and that Respondent displayed favoritism. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee

cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

Grievant introduced no evidence that she suffered any repeated disturbance, irritation or annoyance that is contrary to law, policy or profession. Grievant failed to offer any evidence which would support the charge of harassment.

Turning to Grievant's claim of a hostile work environment, 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). *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. 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. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

Grievant has failed to meet her burden of proving that she suffered under a hostile work environment. Grievant failed to demonstrate any type of harassment or hostile acts to which she was subjected during her employment with the Respondent. Grievant was hired as a Rehabilitation Counselor for Respondent in the Sistersville area, a position she

continues to hold. Grievant failed to demonstrate, in any probative way, that Mr. Kinnick or Ms. Lipscomb harassed her or created a hostile working environment.

Grievant also claims to be, or anticipates that she will be, the victim of reprisal. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in protected activity (i.e., filing a grievance);
>
> (2) that she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Based upon the facts of this case, Grievant has failed to establish a *prima facie* showing of reprisal. Grievant failed to identify any actions by Respondent that she characterized as acts of reprisal. Mr. Kinnick indicated that Grievant's work product meets expectations which demonstrates her ability to perform her job as a counselor. While Mr.

Kinnick acknowledged that he had not recommended Grievant for a promotion, this does not demonstrate retaliation. No reprisal has been proven in this grievance.

Finally, Grievant makes a claim of favoritism regarding Ms. Lipscomb. Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h).

In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

The record of this case did not demonstrate that Respondent engaged in any type of favoritism as it relates to Ms. Lipscomb. Grievant did not provide any evidence that Respondent treated Ms. Lipscomb any differently than the Grievant. The record established that Ms. Lipscomb applied for a position working with the hearing impaired after this position was posted by the Respondent. It is undisputed that Grievant did not apply for this posted position.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. W. VA. CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

3. Grievant has not demonstrated she was subjected to harassment under the facts of this grievance.

4. 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). *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. 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. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

5. Grievant did not meet her burden of proving that she was subjected to a hostile work environment.

6. To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in protected activity (i.e., filing a grievance);
>
> (2) that she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. Grievant failed to demonstrate that she has suffered any retaliation or reprisal.

8. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, 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); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

9. Grievant did not meet her burden of proving that she was the victim of favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: November 13, 2013

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Ronald L. Reece
Administrative Law Judge