WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBRA HUNDLEY,
Grievant,

Docket No. 2011-1334-DHHR

v.

WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES
/BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant, Debra Hundley, was a probationary employee with the West Virginia Department of Health and Human Resources/Bureau for Child Support Enforcement ("DHHR/BCSE or the Department"). Grievant was denied permanent status as a Child Support Specialist 1 ("CSS 1") with the Bureau for Child Support Enforcement. Ms. Hundley filed a grievance against Respondents alleging that she received insufficient training and was subjected to harassment and a hostile work environment. Ms. Hundley filed a grievance dated March 23, 2011. The statement of grievance reads: wrongly terminated. Insufficient training, harassment, hostile work environment. As relief, Grievant sought:

I want changes to be made in the way employees are treated. There is a very high turnover there and I believe it has to do with how management treats employees. One employee even threw her name badge at the supervisor when she quit.

Grievant filed an amended Statement of Grievance on April 13, 2011 which reads: "[t]erminated March 14, 2011. Had no representation during this period have a disability was provided no accommodation-discrimination, hostile work environment. As relief

Grievant seeks "compensation for loss of income."[1] Grievant filed a Motion to Originate at Level III on August 12, 2011. On September 15, 2011, the DHHR Grievance Management Unit waived the grievance directly to level three, by agreement of the parties, based upon W. Va. Code Section 6C-2-4(a)(4), which states that “An employee may proceed directly to level three upon the agreement of the parties or when the grievant has been discharged.”

A level three hearing was held before Administrative Law Judge Jennifer Stollings-Parr on March 2, 2012, at the Raleigh County Commission on Aging in Beckley, West Virginia. A second day of hearing was held before the undersigned Administrative Law Judge at the Raleigh County Commission on Aging in Beckley, WV on October 9, 2012. Grievant personally appeared with her representative, Gordon Simmons at said hearings. Respondent DHHS was represented by Michael E. Bevers, Esquire, Assistant Attorney General. Both parties submitted written Proposed Findings of Fact and Conclusions of Law, both of which were received at the Grievance Board on December 10, 2012. This matter became mature for decision on that date.

Synopsis

Grievant was a probationary employee who was dismissed due to unsatisfactory performance. Grievant asserts that she was wrongfully terminated because she was inadequately trained, discriminated against due to a hearing deficit and denied reasonable accommodation. She further alleges that she has been subjected to harassment and a hostile work environment.

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[1] No "tort-like" damages can or will be awarded in this grievance.

Respondent maintains that Grievant's training and supervision were adequate. Respondent counters that Grievant's training was at least as comprehensive as the training of another CSS 1 employee who was successfully trained with Grievant. Respondent argues that that Grievant's work was unsatisfactory, justifying her discharge. Grievant failed to demonstrate that her training was inadequate or that her performance was satisfactory.

Respondent denies any knowledge of Grievant's hearing loss and responds that Grievant's work environment was not hostile or harassing based upon either discriminatory or nondiscriminatory conduct by BCSE management. Grievant proved that Respondent was aware of her hearing deficit. However, Grievant did not meet her obligation to advise Respondent that her hearing problem was a disability that may have required accommodation. Though Grievant's immediate supervisor was sometimes overbearing and intimidating to Grievant and her coworkers, Grievant did not prove that her supervisor's conduct was hostile or harassing.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Debra Hundley, was employed by DHHR as a probationary Child Support Specialist 1 at the BCSE in Raleigh County, West Virginia. Grievant began working for the Department in May of 2010.

2. When BCSE higher hires an employee as a CSS 1, the employee has a probationary period of 12 months during which he/she is trained to become a CSS 2. New probationary employees begin training in the Establishment Unit ("Establishment")

at BCSE as case management workers. After the 12 month training period, the employee is expected to perform at the level of a CSS 2 with limited supervision. If the employee meets expectations, he/she is promoted to CSS 2.

3. The responsibilities for the CSS 1 employees are as follows:

"Under close supervision, performs full-performance level case management work in child support enforcement. By the end of the first 12 months of employment in this position should be able to manage a full caseload in providing services of the Bureau for Child Support Enforcement. Interacts with a variety of professional practitioners in the legal community, as well as other agencies."[2]

4. Additionally, The Performance Standards and EXPECTATIONS for a CSS 1 state that:

Child Support Specialist 1 is expected to meet or exceed set goals and objectives. Performance standards and expectations are, establish paternity on 90% or greater of cases. Establish court orders on a minimum of 85% of cases and maintain on 85% compliance with policy. New cases are to be assessed and appropriate action taken within 20 of creation of the case in Oscar. All new applications shall be entered within two days of receipt. Worker will make detailed narrative about the status of the case and the action needed. Goal of Child Support Specialist 1 functioning as an Establishment worker is to refer establishment case for legal action within 15 days of review and determine that paternity and/or establishment of child and/or medical support is needed. All court orders are to be entered and necessary subsequent action taken within two days. Income withholdings are to be sent within 48 hours of becoming aware of new employment data. Child Support Specialist [sic] are expected to have a minimum of 10 legal referrals per month… [3]

5. Grievant was provided with these expectations in her first EPA dated May 21, 2010.

6. Ms. Ginger Marshall is a Supervisor 2 for the BCSE in the Raleigh County office. She has been in this position since April, 2006. Ms. Marshall supervises between eight and fourteen employees in that office.

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[2] Respondent's Exhibit 1- Employee Performance Appraisal for Grievant, signed by Grievant and Ms. Ginger Marshall and dated May 21, 2010. ("EPA").
[3] Id.

7. Ms. Marshall, who was Grievant's immediate supervisor, reviewed her work. "Lead workers" assist in the training of the probationary employees in the Establishment Unit. In evaluating Grievant's performance, Ms. Marshall also relied upon input from "lead worker," Mr. Mark Shepherd, who assisted in Grievant's training.

8. There are four levels of formal training for a CSS 1. Grievant began her training in July of 2010, after spending over a month reviewing her training manual and completed the four levels of training in September of 2010.

9. Grievant received classroom instruction from July 19, 2010, through July 22, 2010, and was evaluated following that training. She was graded in five categories at that evaluation, with her scores ranging from 90% through 100%. The minimum passing score was 80%. It was noted that "She was an excellent student with a good attitude and willingness to learn," but that, "she was a little slow to access screening, but her speed will increase as she gains more confidence."

10. Grievant attended three additional classroom training sessions in 2010: in August-September; October, and November. Her scores, on average, dropped slightly, however they were well above the 80% required for passing. It was noted in the August-September session that, "Debra is quiet in class, but appears to be retaining the majority of what she's learning. She is still a little slow at times accessing screens, but that will improve, in the future… review of the items she missed on the test is encouraged." It was noted in the October 2010, session that "she seems to be a little quicker this time around. She did, however, get confused on liens and writs during the final review.… review is warranted." It was noted in the November 2010, session that

Grievant "had some problems with adding the needed information on the Trans I. she may need to have a mentor with the interstate cases for a while."

11. Grievant's EPA for the period of May 16, 2010, through August 15, 2010, revealed deficits in her performance. It was noted by Ms. Marshall that,

> " I am not seeing any contact with the CSS's in the ENF[4] unit as she is working in the locate mail, I've spoken to her about this and will encourage her as she is processing the locate to review the case to see if an action is pending the information and to forward an email to the unit instructing that it has been received.… Seems to be learning the job at a slower pace. She generally does not ask me questions … CSS III indicates that she does not ask him a lot of questions but has to be probed to step out… Does not have a lot of initiative to seek new opportunities to learn her job."

In addition, Respondent found that Grievant "needed improvement" in many areas of her work, as evidenced on the "RATING SCORE SHEET FOR DOP FORM EPA – 3" portion of her evaluation, resulting in a low performance rating of 1.43 out of 3.

12. Grievant's next EPA dated August 16, 2010, through October 31, 2010, indicated further deficiencies in her performance and growing concern over whether Grievant was mastering the skills required of her. That EPA noted that "she moves at a slower pace and you cannot tell what she is processing and retaining. She doesn't ask me questions at all, she does ask for lead worker and others that are available to answer for her." The EPA further stated:

> "Deborah is still very insecure about the establishment process and still needs a lot of guidance. When she is in an appointment she still has to call her lead in establishment for assistance. Once her [sic] and the other CSS 1 that is in training with her return from level 4 they will be expected to begin to work the daily schedule without the lead instructing them on how and what to proceed on. I have concerns because I have noticed when she doesn't have something to do she tends to go towards working locate mail… and not looking for another case to establish on her own. She does work at a slower pace and in reviewing her legal she is missing details on the referral despite the pace she processes… She will remain in the establishment unit until she has become more solid in the process."

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[4] Enforcement Unit.

13. Grievant's EPA for the period of November 1, 2010, through January 31, 2011, showed continued deterioration in her progress. Grievant "did not meet expectations." Under PERFORMANCE DEVELOPMENT NEEDS, it was noted that:

"she may have some problems with adding the needed information on the Tran… She may need to have a mentor with the interstate cases for a while.… She is only averaging the minimum of 10.5 illegal referrals which the CSS 1 is expected to complete in a month.… I notified her on December [illegible] about increasing her legal referrals and the need to see closures and case reviews.… I have requested Debra to check her emails regularly but have found that it takes hours before she reads them… Though it is time to place Debra into the enforcement unit, I do not feel that she has a grasp on the establishment unit.… Will complete a coaching improvement plan for Debra to reevaluate at the end of the 60 days to see if she is ready to move to the enforcement unit."

The "General Comments" section stated "The lead establishment worker indicates that she does ask him questions and at times has to be shown something multiple times before she grasps it."

14. On February 8, 2011, Ms. Marshall met with Grievant to discuss her November-January EPA results and to provide Grievant with expectations and performance goals for the 30 day period from February 8, 2011, through March 7, 2011, detailed on the EPA and coaching EPA of February 8, 2011. Testimony of Ms. Marshall and Respondent's Exhibit No. 5).

15. Grievant's EPA for the period of approximately February 1, 2011 through February 28, 2011, documented continuing serious problems with Grievant's work, as follows:

"deficiencies in the quality and quantity of work production. … Though you are averaging around 10 legal referrals per month… There were only two case reviews completed out of the 20 that was [sic] due for the time period of November and December. You completed no closures during the rating period… I notified you… that I needed for you to work on closing cases and completing case reviews.,. Resulting in no case reviews are closures for December and the majority of January."

16. Respondent kept a Legal Referral Log. Ms. Marshall explained that the log tracks which cases have been sent to attorneys and where they are in terms of processing. A review of Grievant's log showed significant errors: codes were incorrect, address screen and pleadings were incorrect, a case which was referred when a noncustodial parent's rights were terminated contained no notes on the referral and would have affected that referral. Grievant had formal and on-the-job training concerning legal referrals. The log revealed that Grievant was failing to complete and follow up on numerous matters and showed a lack of attention to detail. Ms. Marshall noted, for example, that in several cases, Grievant failed to read the narrative/case notes and, as a consequence, duplicated work others had already completed.[5]

17. At the end of the approximate 30 day improvement period in February of 2011, Grievant had not demonstrated the significant improvement required.

18. Ms. Marshall prepared the "Case Processing Deficiencies Noted And Draft and Reprimand Submitted To BCSE Personnel Coordinator," which revealed Grievant's errors on a number of cases she handled and recommended Grievant's discharge.

19. Child Support Regional Administrative Manager, Ms. Deborah Bland, supervises Region Seven of the BCSE, which includes the Beckley, WV office. Ms. Bland is Ms. Marshall's supervisor. Throughout the course of Grievant's training, Ms. Marshall told Ms. Bland about some of the problems Grievant was having. After considering Ms. Marshall's input and Grievant's performance record, Ms. Bland ultimately determined that Grievant should be dismissed.

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[5] Respondent's Exhibit No. 7.

20. By letter dated March 14, 2011, Respondent terminated Grievant's employment for unsatisfactory work performance, with dismissal effective on March 30, 2011. In the dismissal letter, Respondent identified the numerous deficiencies in Grievant's work, citing that she had been unable to successfully manage the required 200 Establishment cases.

21. After Grievant's dismissal, Ms. Bland and Ms. Marshall reviewed Grievant's cases to determine their status. They took three boxes from her desk to review. Ms. Bland found a massive amount of work that had accumulated on Grievant's desk that was "overwhelming." It was evident to Ms. Bland that Grievant and was unable to "keep her head above water," i.e, keep up with the messages and with getting court orders entered in the system timely, within 48 hours. Ms. Bland and Ms. Marshall prepared a summary detailing the status of the cases Grievant had been "working," which documented serious deficiencies.

22. Ms. Marshall explained that the CSS position was "not for everybody," that it took a special person to succeed; those who are detail-oriented, accurate, good in dealing with quantities of information, very driven and quick. She emphasized that those in training must ask questions. These skills and attributes are necessary because A CSS 1 deals with a high of cases and information. It is critical that CSS 1 employees can handle a minimum of 200 cases, because upon promotion to CSS 2, employees must handle 900 or more cases.

23. Ms. Marshall encouraged Grievant to come to her with questions. Grievant did not often do so. Ms. Marshall admitted that on one occasion she was

"flabbergasted" and frustrated when Grievant's questioned her about something she should have already known.

24. Ms. Marshall testified that she told Grievant she did not think Grievant was a "good fit" during her coaching EPA in February 2011.[6]

25. In six years of training supervising probationary employees, Grievant was the only employee who was not hired in a permanent position by Ms. Marshall. The other employees either left or "continued on."

26. Ms. Marshall denied discussing the performance of employees in her department with other workers. [7]

27. Mr. Patrick McGee was a Child Support Technician at the BCSE in Raleigh County. He worked under Ms. Marshall's supervision at BCSE for approximately 3-4 years. He was employed in the Raleigh County office of the BCSE from June 2002, through February 2010. Mr. McGee never worked with the Grievant.

28. Mr. McGee's work performance was always satisfactory until he began working on statute of limitation audits. When working on audits, Mr. McGee was criticized by Ms. Marshall for failure to complete one audit per day. Though he explained to Ms. Marshall that some of the audits were too complex to permit completion within a day, Ms. Marshall nonetheless insisted that he fulfill this requirement.

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[6] Her testimony conflicted with Grievant's on this issue, addressed more fully below.

[7] Her testimony conflicted with Grievant's on this issue, addressed more fully below.

29. Mr. McGee testified that Ms. Marshall was a "good counselor." But, he added that Marshall was like two different people, seemingly sympathetic when he approached her about his health problems, and then targeting him over his medical issues.

30. Mr. McGee felt that he could not do anything right; that Ms. Marshall would find fault with everything he did, that she was, "breathing down my neck every time I turned around." Mr. McGee further testified that Ms. Marshall was a very difficult and unpredictable. He felt Ms. Marshall was always trying to find fault with him and made him a target. Mr. McGee asserted that Ms. Marshall had a pattern of targeting employees until they transferred, resigned or were terminated.

31. Mr. McGee said that the working conditions under Ms. Marshall's supervision were a factor in his retirement, in addition to some health issues that he was experiencing.

32. Mr. McGee never worked with Grievant because he retired before she was hired.

33. Mr. Vijay Saddiah was hired as a CCS 1 at the same time as Grievant, in May 2010. He received the same training that Grievant received, which was adequate in his opinion. However, Mr. Saddiah would have liked additional and practice-oriented training.

34. Mr. Saddiah thought that the BCSE office was a hostile work environment because of the way in which Ms. Marshall interacted with the employees. Mr. Saddiah testified that if "you" were in Ms. Marshall's "bad books," you would resign, get fired or hate to go to work, or you would resign from your position, or you would be fired. If she

likes you, are good, If not you would have a really bad time. Ms. Marshall's demeanor varied from person to person.

35. Mr. Siddiah and Grievant testified that soon after they started working at BCSE, Ms. Marshall called them into her office and asked them to watch fellow employee, Ms. Tammy Kearns, in the office and report her actions to Ms. Marshall. Ms. Marshall said that she did not recruit or interview Ms. Kearns and did not think that she was a good employee.[8] Neither Mr. Siddiah nor Grievant reported anything on this employee's actions to Ms. Marshall.

36. Mr. Siddiah was promoted to CSS 2 and was never disciplined for poor job performance.

37. Mr. Siddiah testified that Marshall humiliated employees in front of others. Mr. Siddiah recounted an incident when Ms. Marshall "openly confronted" him and Grievant in front of coworkers about being behind schedule in scanning documents. Mr. Siddiah was embarrassed by this confrontation. Mr. Siddiah thought that those who forcefully defended themselves were "better off" in dealing with Ms. Marshall as she could be aggressive with those who could not defend themselves. [9]

38. Grievant tended to be soft-spoken in general and with Ms. Marshall as well. She was admittedly shy and quiet.[10]

39. Ms. Marshall made reference to Grievant's alleged poor work performance during his evaluations. [11]

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[8] This employee was transferred to the Raleigh County BCSE from another office.
[9] Level Three Testimony of Mr. Siddiah and Grievant.

[10] Level Three Testimony of Mr. Siddiah, Ms. Marshall and Grievant.
[11] Level Three Testimony of Mr. Siddiah.

40. Mr. Siddiah took approved annual leave which he had accrued. Though under no obligation to do so, Mr. Saddiah informed Ms. Marshall that he was using his leave time to obtain food stamps. He also interviewed for a job elsewhere. Ms. Marshall became aware of this.[12] Ms. Marshall and her supervisor, Debbie Bland, criticized Mr. Siddiah and accused him of lying concerning use of his leave time because he did not use his leave time exclusively to obtain food stamps. After that incident, Ms. Marshall demanded that Mr. Siddiah produce documentation for any and all leave use.[13]

41. Mr. Siddiah left the BCSE because Ms. Marshall was difficult to work for and because he was making preparations to take the bar exam.[14]

42. Grievant had a hearing loss that she discussed with Mr. Siddiah. Grievant maintained that she informed Ms. Marshall of her hearing loss early in her training and told her at least five times of this issue. Mr. Siddiah heard Grievant tell Ms. Marshall of her hearing loss.

43. Grievant asked for more time to do her work, but Ms. Marshall denied this request. Ms. Marshall testified to the contrary. Ms. Marshall said that Grievant asked her for more time to complete her work only in her final meeting with Grievant.

44. Grievant denied having a disability on her application for the position of CSS 1. She did not give Respondent any proof or explanation of her hearing loss from a physician or medical care provider.

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[12] Ms. Marshall was apparently informed of this by an overly inquisitive individual who saw Mr. Siddiah in the office where he interviewed.

[13] It is noted that Respondent has no policy which would support this action.

[14] Mr. Siddiah graduated from North Western University in Chicago with a Masters degree in law and had to complete additional course work before he would be eligible to take the bar exam.

45. Grievant often had to ask others to repeat what they said. [15]

46. Grievant was reluctant to ask questions and preferred to use her training manual/materials for instruction, in part, because of her hearing loss. When Grievant did ask questions of Ms. Marshall, she would reply "We have been through this before" or "I already told you that." When Grievant asked Mr. Shephard to repeat answers to her questions, he appeared annoyed and avoided her. Grievant admitted that when she had questions for Ms. Marshall, Ms. Marshall told her "this is something you should know by now."

47. Ms. Kathy Houchins, Office Assistant II at the Raleigh County BCSE, testified that Ms. Marshall told her that she would be selected as an Office Assistant III at BCSE, after learning that Ms. Houchins had applied for another position with the Division of Rehabilitation Services and was considering leaving. Based upon Ms. Marshall's representations, Ms. Houchins turned down an offer with the Division of Rehabilitation Services. Afterward, Ms. Marshall told Ms. Houchins that she did not know if she could get her the job. Ms. Houchins was not promoted, as she had hoped.

48. Grievant testified that Ms. Marshall told her, before she began her training, that Ms. Marshall was unsure that Grievant a “good fit” for the job. Grievant was bothered by the fact that Ms. Marshall prematurely made such a remark. Ms. Marshall testified to the contrary, saying that she told Grievant she might not be a "good fit" in February 2011.

[15] Level Three Testimony of Mr. Siddiah and Grievant.

49. Ms. Marshall stated that she "had no idea" that Grievant had a hearing loss. However, Ms. Marshall testified that when Grievant was discharged she informed Ms. Marshall that she was dyslexic and that Grievant learned of this disability in college.

50. Ms. Marshall testified that she could not ascertain what Grievant was processing and instructed Grievant to ask questions. Late in Grievant's training, Ms. Marshall instructed Grievant to ask questions only of Mr. Shepherd and her, so they could determine in which areas Grievant needed help.

51. Grievant testified that others were allowed to make mistakes and correct them with no problem, but that Ms. Marshall would not allow mistakes from her.

52. Grievant took no action during her employment to complain about Ms. Marshall's treatment of her, nor did Mr. McGee or Mr. Siddiah.

53. Ms. Marshall called Grievant and other employees into her office when they had used sick leave time and encouraged employees to "bank" 40 hours of leave because employees might eventually need that time if they became ill.[16] Because of this, Grievant was reluctant to take time off to get treatment for her hearing loss and did not do so, which she believed effected her work experience. Grievant did see a physician after leaving BCSE and had "tubes" put in her ears to remedy her conductive hearing loss.

54. Ms. Marshall was "aggressive," and unpleasant with some of her employees.

Discussion

[16] It is noted that, in fact, Respondent does not have a policy mandating that an employee should "bank" sick leave.

Grievant was a probationary employee with BCSE. She first alleges that she received insufficient training for the CCS 1 position and was improperly discharged. The probationary period of employment, as described by the Division of Personnel's Administrative Rules, 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.

The rule further provides that the employer:

> shall use the probationary period for the most effective adjustment of a new employee and a elimination of those employees who do not meet the required standards of work.

143 C.S.R. 1 § 10.1(a). The Division of Personnel's Rules ("DOP") establish a low threshold to justify termination of a probationary employee. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his/her services were satisfactory. *Bonnell v. W. Va. Dep't of Corr.,* Docket No. 89-CORR-163 (Mar. 8 1990).

Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her performance was satisfactory by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 §3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.,* Docket No. 89-DHS-72 (Nov. 29, 1990). Grievant's right to maintain her employment was limited as a probationary employee. A probationary employee is:

> not entitled to the usual protections enjoyed by a state employee. The probationary period is use by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hackman v. Dep't of Transp., Docket No. 01-DMV-582 (Feb. 20, 2002);

The preponderance standard generally requires proof that a reasonable person would accept is 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant avers that her training was insufficient to allow her to succeed and master the work required. The record shows that Respondent gave, at least, the same training to Grievant and Mr. Siddiah. His training was adequate to allow him to be retained and promoted. Grievant was trained on some procedures/matters multiple times. It is not clear from the record whether Mr. Siddiah, also, had re-training. Grievant was assigned and expected to manage the same number of referrals and cases that Mr. Siddiah successfully managed.[17] Based upon their conversations, Mr. Siddiah believed that Grievant completed her work as expected. However, he was not in a position to accurately assess this.

Both Ms. Marshall and Mr. Shepard trained Grievant and monitored her performance. Many of the comments and observations on Grievant's EPAs were attributable to Mr. Shepard.[18] Grievant attended four classroom training sessions and was given on-the-job training with Mr. Shepard. Her classroom training scores were good, but comments from Mr. Shepard showed that Grievant was slow at times in

[17] There was conflicting testimony concerning whether Grievant was assigned more work than Mr. Siddiah, but the record showed that they were both expected to handle the same number of referrals and cases.

[18] Unfortunately, Mr. Shepard did not testify

accessing screens and needed to gain speed. In fact, observations about her slow pace were strikingly consistent throughout her evaluations. Grievant's first EPA ending in August of 2010, stated that Grievant "had to be probed to step out" and "did not take initiative … to learn her job." This first substantive appraisal found that Grievant needed improvement. As the appraisals continued, there was documented concern that Grievant was not processing and retaining what she was learning, due to her slower pace. Additionally, several of her EPAs discussed that she should be given additional training to master various procedures. Finally, the review of Grievant's legal referrals and work log revealed that she was failing to complete and follow up on numerous matters and showed a lack of attention to detail. While Grievant apparently scored well on her classroom tests and mastered the basic mechanics of her duties, she failed to demonstrate that she could handle her caseload of approximately 200 Establishment cases. Her performance continued to deteriorate as more demands were placed on her, as evidenced by her EPAs.

As a probationary employee, Grievant is not entitled to the usual protections enjoyed by regular state employee. A probationary employee may be dismissed at any point during the probationary period that the employer determines her services are unsatisfactory. 143 C.S.R. 1 § 10.5(a). Grievant failed to prove that her training was inadequate or that she performed her assigned duties satisfactorily. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope 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). The Respondent complied with the

applicable provisions of DOP rules governing dismissal of probationary employees in discharging Grievant.

Grievant avers that she was discriminated against and ultimately discharged because Ms. Marshall had a predisposition against her because of her hearing loss. Grievant asserted that her hearing deficit constituted a disability. The Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act ("WVHRA" W. VA. CODE §§5-11-1, et. seq.), including a claim of a disability, or the Federal Americans with Disabilities Act ("ADA" 42 U.S.C. §§ 12111, et. seq.) *Bowman v. W. Va. Educational Broadcasting Auth.,* Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue,* Docket No. 96-T&R-536 (June 23, 1997).

The fact that a grievance may also state a claim under the West Virginia Human Rights Act does not deprive the Grievance Board of jurisdiction. However, for the Grievance Board to possess jurisdiction, the grievance must state a claim under the grievance statutes at W. VA. CODE § 29-6A-2-2(d) which states that 'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." To establish a claim of discrimination, 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'n, 221 W. Va. 306, 655 S.E.2d 52, (2007).

The testimony of the witnesses in this grievance conflicts on material issues of fact concerning Grievant's assertion of disability based upon discrimination. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.,* Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W.Va. State College,* Docket No. 99-BOD-216 (Dec. 28, 1999) *Perdue, supra.*

Respondent asserts that it did not even know of Grievant's hearing loss, let alone a request for an accommodation. Grievant maintains that she told Ms. Marshall at least five times that she had a hearing problem. She also asked for more time to do her work as an accommodation. Mr. Siddiah was a very perceptive, serious and forthright witness who affirmed that Grievant told Ms. Marshall of her hearing issue. He did not

testify that he heard Grievant explain that she was unable to perform her work because of it. The undersigned finds his testimony to be credible. Mr. Siddiah had no apparent motivation to be untruthful about this matter. However, though Grievant demonstrated that she told Respondent that she had an issue with her hearing, she did not clearly communicate to Respondent that this hearing problem amounted to a disability which required accommodation. This Grievance Board has held that if an employee has an affliction, which might entitle him/her to an accommodation, the employee has an obligation to advise the employer of such a situation unless she is prevented from meaningfully doing so by either the employer, the condition or circumstances beyond her control. *Lewis v. Mason County Bd. of Educ.,* Docket No. 94-26-175 (Dec. 12, 1994); *Howell v. W. Va. Dept. of Health and Human Res.*, Docket No. 90-H-484 (Sept. 27, 1991); *Cordray v. Wood County Bd. of Educ.,* Docket No. 90-54-267 (Jan. 31, 1991).

The undersigned simply does not find it credible that Ms. Marshall would ignore a clear statement from Grievant that she needed help, because of a hearing loss, to master the tasks necessary to manage her caseload and perform as expected. Ms. Marshall had an obvious, vested interest in training her probationary employees to be competent in their work. Grievant did not act reasonably to inform Respondent of her hearing loss. For example, Grievant asserts that her hearing loss was acute enough to impede her ability to train and perform her work, yet she did not request an accommodation that was necessarily related to a hearing loss, such as an amplification device(s).[19] The undersigned finds it peculiar that Grievant would not ask for any such

[19] There was no testimony that Grievant even wore a hearing aid device.

device, but that she merely turned her phone to full volume. Grievant denied having any disability on her employment application. Assuming the hearing problem developed after she began working at BCSE, she did not provide Respondent with evidence from a physician or medical care provider of her hearing deficit. Given all of these facts, the undersigned finds that Respondent had no way of knowing that Grievant had anything other than a minor hearing loss, which did not interfere with her performance of her work, let alone the acute loss Grievant believes she had.

Moreover, Respondent was under no obligation to research the extent or seriousness of Grievant's hearing issues. "It is not the employer's duty or burden to research its employees' medical conditions to determine whether they rise to the level of a disability." *Myers v. W. Va. Dept. of Transp.,* Docket No. 96-DMV-304 (Feb. 10, 1997); *Lewis v. Mason County Bd. of Educ.,* Docket No. 94-26-175 (Dec. 12, 1994); *Howell v. W. Va. Dept. of Health and Human Res.,* Docket No. 90-H-44 (Sept. 27, 1991); *Cordray v. Wood County Bd. of Educ.,* Docket No. 90-54-267 (Jan. 31, 1991). In *Bowman v. W. Va. Educational Broadcasting Authority,* Docket No. 96-EBA-464 (July 3, 1997), Grievant referred to a "female problem" that she had, but never told her employer that it was a handicap or that she was disabled. Grievant in *Bowman* had a doctor's excuse to explain her absence from work, which also did not describe her condition as a disability. The Grievance Board in *Bowman* found that Grievant had not informed Respondent of a disability that required accommodation. Likewise, in the present grievance, Grievant's reference to a problem with her hearing and a request for more time to do her work, without more, did not adequately inform Respondent that Grievant

had a disability that required accommodation.[20] Grievant has not been discriminated against on the basis of her hearing loss.

Given the foregoing, Grievant and Mr. Siddiah were "similarly situated," probationary employees who had the same training and carried the same workload. To the extent that Grievant was treated differently, e.g., given additional training and the directed to ask questions only of Ms. Marshall and Mr. Shepard, it was because of her job performance and management's efforts to improve her work. Grievant has not met her burden of proof and demonstrated she was treated differently from similarly-situated employees, or that her treatment was unrelated to her actual job responsibilities. *See Keatley v. Mingo County Bd. of Educ.,* Docket No. 95-29- 257 (Sept. 25, 1995

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Grievant further asserts that Respondent unlawfully targeted her and created a hostile and harassing work environment which prevented her from reasonably performing her work. "Nondiscriminatory Hostile Workplace Harassment" is defined in the Division of Personnel's Prohibited Workplace Harassment Interpretive Bulletin as:

Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed 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.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. The point at which a work

[20] It seems probable that any employee who was struggling to master the skills of a new position, irrespective of whether he/she had a disability, would be likely to request more time to complete his/her work.

environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993).

"Whether an environment is 'hostile' or 'abusive' can only be determined by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

Harris, supra. at p. 23.

Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all of the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris*, supra.) "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs. v. W. Va Human Rights Comm'n,* 206 W.Va. 86, 522 S.E.2d 180 (1999), *citing Kinzey v. Wal-mart Stores, Inc.,* 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.* Docket No. 02-ADMN-165 (Mar. 31, 2006). "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of employee's employment. *See Hanlon v Chamber,* 195 W. Va. 99, 464 S.E.2d 741 (1995)."

"Harrassment" is defined at WEST VIRGINIA CODE § 6C-2-2(l) as:

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); *Breck v. Putnam County Bd. of Educ.,* 2011-1541-PutED (Sept. 25, 2012).

The record of this case established that Ms. Marshall is intimidating to various members of her staff because of her tone of voice, manner of interacting with them and her expressed interest in their use of annual and sick leave. They detailed the conduct or incidents that they found to be hostile or harassing. For example, at some point, Grievant was instructed to ask questions of only Mr. Shepherd and Ms. Marshall. Grievant apparently felt this was hostile and that she was being "targeted" by Ms. Marshall when given this instruction. However, Respondent only made this request after repeated problems and inaccuracies in Grievant's work were noted. This was a reasonable way to monitor what Grievant was having difficulty with and to help her to improve. There is not a record of "constant criticism or unreasonable work performance expectations," *Moreland* and *Pauley*, supra, which would have prohibited the Grievant from performing her duties. Grievant asked questions concerning procedures with which she should already have been familiar. This was documented in Grievant's EPAs and in the testimony. That Ms. Marshall and Mr. Shepard were admittedly annoyed or frustrated by these questions on occasion may have been unpleasant for Grievant, but it was not threatening or demeaning to a reasonable person.

Additionally, Grievant and her coworkers were under scrutiny by Ms. Marshall concerning their use of personal and sick leave time. Ms. Marshall stressed that employees should "bank" sick leave. An employer has an understandable interest in regular attendance by its employees and can certainly encourage it. However, Grievant apparently found Ms. Marshall's practice of calling employees into her office to encourage the "banking" of sick leave to be hostile or harassing.[21] Grievant maintained that because of Ms. Marshall's counseling to bank sick leave, she was reluctant to take time off to see a physician concerning her problems with hearing loss. However, the record reflects that she did take some sick leave. In addition, after learning of Mr. Siddiah's job interview during his annual leave, Ms. Marshall put restrictions on his subsequent leave. Mr. Siddiah was understandably upset about this.

In addition, Mr. Siddiah and Grievant felt that Ms. Marshall's request to "watch" their fellow employee and to report back to Ms. Marshall was consistent with a hostile or harassing workplace. Mr. Siddiah was also bothered that Ms. Marshall complained to him about Grievant's work performance. Though Ms. Marshall denied both of these conversations, the undersigned finds the testimony of Grievant and Mr. Siddiah to be credible. It was not particularly professional of Ms. Marshall to make such remarks or requests, which undoubtedly made Grievant and Mr. Siddiah very uncomfortable. However, the cumulative effect of these incidents was not "pervasive or severe" enough to create a hostile work environment. *Fairmont Specialty Servs., citing Kinsey, supra*.

Ms. Houchin's testimony did not aid in establishing a hostile work environment. Ms. Marshall may reasonably have believed that she could secure the Office Assistant

[21] In fact, Respondent has no policy dictating that an employee must maintain a minimum sick leave "balance."

III position for Ms. Houchins and failed despite her attempts. No hostile intent can be derived from this event.

Mr. McGee did not work with Grievant and, therefore, did not see Ms. Marshall interact with Grievant. He could not attest to the workplace environment during her tenure there, only his own. Mr. McGee asserted that he left, in part, due to Ms. Marshall's excessively critical supervision of him. However, he did not file any formal action against Ms. Marshall. His experience of Ms. Marshall does, however, corroborate the testimony of Grievant and Mr. Siddiah that she was overbearing and intimidating at times.

As stated, the primary complaint the BCSE employees had was that Ms. Marshall had an aggressive and intimidating demeanor. "In characterizing the negative workplace environment, courts have drawn a continuum between rudeness and ostracism, on one side of the spectrum, and severe or pervasive harassment on the other side, generally finding that 'rudeness or ostracism, standing alone' is insufficient to support a hostile work environment claim[.]" *Figueroa Reyes v. Hospital San Pablo del Este,* 389 F. Supp. 2d 205, 213 (D.P.R. 2005); *Johnson v. Killmer,* 219 W. Va. 320, 325,633 S.E.2d 265, 269 (2006). Clearly, Ms. Marshall's management style did not suit some of her employees very well, in particular Grievant. The environment at the BCSE was undoubtedly, at times, unpleasant; especially to a soft-spoken person such as Grievant. The allegedly hostile conduct must be judged by "the perspective of a reasonable person." *Oncale, supra*. However, though Ms. Marshall's interactions with her employees were sometimes unpleasant, her demeanor and conduct were not "verbal, non-verbal or physical conduct … that [is] so atrocious, intolerable, and so extreme and

outrageous as to exceed bounds of decency." DOP's Prohibited Workplace Harassment Interpretive Bulletin, supra. Her conduct and actions did not rise to a level that created a hostile work environment. Ms. Marshall's conduct did not preclude Grievant from "reasonably performing her work." *Id.* 24. Moreover, Grievant did not prove by a preponderance of the evidence that she was subjected to harassment by her supervisor, as "harassment" is defined by W.VA. CODE §6C-2-2(l). Consequently, the Grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears 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); *Howell v. W. Va. Dep't of Health & Human Res.,* Docket No. 89-DHS-72 (Nov. 29, 1990). 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 o fHealth & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

2. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). To establish a claim of discrimination, an employee must prove: (a) that he 3.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'n, 655

S.E.2d 52, 221 W. Va. 306 (2007); Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant failed to demonstrate that she was discriminated against on the basis of a disability or was treated differently than any other similarly situated employee.

4. It is not the employer's duty or burden to research its employees' medical conditions to determine whether they rise to the level of a disability." *Myers v. W. Va. Dept. of Transp.,* Docket No. 96-DMV-304 (Feb. 10, 1997); *Lewis v. Mason County Bd. of Educ.,* Docket No. 94-26-175 (Dec. 12, 1994); *Howell v. W. Va. Dept. of Health and Human Res.,* Docket No. 90-H-44 (Sept. 27, 1991); *Cordray v. Wood County Bd. of Educ.,* Docket No. 90-54-267 (Jan. 31, 1991). The fact that Grievant had some hearing loss does not necessarily render her disabled and she did not demonstrate to Respondent that she was a qualified person with a disability. *See Bowman v. W. Va. Educational Broadcasting Auth.,* Docket No. 96-EBA-464 (July 3, 1997).

5. 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); Breck v. Putnam County Bd. of Educ., 2011-1541-PutED (Sept. 25, 2012).

6. Grievant did not prove by a preponderance of the evidence that she was subjected to harassment by her supervisor, as “harassment” is defined by W.VA. CODE §6C-2-2(l).

7. The Grievance Board generally follows the analysis of the federal and state courts in determining what constitutes a hostile work environment. See Lanehart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13,1997).

8. [W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . includ[ing] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993).

9. "In characterizing the negative workplace environment, courts have drawn a continuum between rudeness and ostracism, on one side of the spectrum, and severe or pervasive harassment on the other side, generally finding that 'rudeness or ostracism, standing alone' is insufficient to support a hostile work environment claim[.]" Figueroa Reyes v. Hospital San Pablo del Este, 389 F. Supp. 2d 205, 213 (D.P.R. 2005); Johnson v. Killmer, 219 W. Va. 320, 325, 633 S.E.2d 265, (2006).

10. Grievant did not prove by a preponderance of the evidence that she was subjected to a hostile work environment.

11. The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "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." 143 C.S.R. 1 § 10.1(a). The same provision goes on to state that the employer "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." *Id.* A probationary employee may be dismissed at any point during the probationary period that the employer determines her services are unsatisfactory. 143 C.S.R. 1 §10.5(a).

12. Grievant did not demonstrate that her performance was satisfactory during her probationary period.

Accordingly, the 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 14 - § 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 W. VA CODE 156 § C.S.R. 156-1-6.20 (2008).

DATE: January 28, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE