THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KAREN DYER,
Grievant,

v. **DOCKET NO. 2013-0548-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/OFFICE OF ADMINISTRATIVE HEARINGS,
Respondent.

DECISION

This grievance was filed directly at Level Three of the grievance procedure by Grievant, Karen Dyer, on September 24, 2012, challenging the merits of a five-day disciplinary suspension imposed on her by Respondent, West Virginia Department of Transportation, Office of Administrative Hearings. As relief, Grievant seeks to be made whole, including but not limited to, reinstatement of lost pay with benefits and interest, and an end to the non-discriminatory hostile workplace harassment which she is alleging as the cause for this unwarranted suspension.

A Level Three hearing was held before the undersigned Administrative Law Judge on December 19, 2012, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Steve Thompson and Kris Mallory with AFSCME Council 77, and Respondent was represented by Doren Burrell, Senior Assistant Attorney General. This matter became mature for decision on January 28, 2013, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for insubordination arising from her conduct during a work-related meeting with her immediate supervisor, Stacey Fragile, and the Deputy Director of the Office of Administrative Hearings, James McClain, wherein Grievant allegedly "became uncooperative and left the room . . . effectively refusing to communicate with [her] supervisor regarding work matters." J Ex 4. Although Ms. Fragile, and to a lesser extent, Mr. McClain, described a scenario in their testimony which supported these allegations, Grievant produced a tape recording of at least part of the conversation that took place during this meeting. The recording demonstrated that, in fact, Grievant did cooperate, providing responsive answers to Ms. Fragile's questions, and stating specific information when asked for an explanation. Therefore, the charge of insubordination was not proven.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant is employed by the Respondent Department of Transportation in the Legal Section of its Office of Administrative Hearings as an Office Assistant III.

2. Stacey Fragile is employed in Respondent's Office of Administrative Hearings as an Attorney II, and serves as Supervisor over the Legal Section. Thus, Ms. Fragile is Grievant's immediate supervisor. Ms. Fragile began her employment with Respondent in June 2012.

3. The Legal Section works with the agency's Hearing Examiners to process various orders, maintain files, and respond to requests for records pertaining to appeals from hearing determinations, and for use in criminal proceedings involving parties who appear before the agency.

4. John Hackney is the Chief Hearing Examiner for the Office of Administrative Hearings, and also serves in the dual role of Director for the agency.

5. James W. McClain, III, is the Deputy Director of the Office of Administrative Hearings.

6. On July 10, 2012, Ms. Fragile sent an e-mail to Grievant requesting certain information: (1) the number of audio requests you filed from July 1, 2011 to June 30, 2012; (2) number of files on your station on June 30, 2012; and (3) number of transcripts you prepared from July 1, 2011 to June 30, 2012. J Ex 5.

7. Mr. Hackney had directed that this information be gathered and provided to one of the paralegals in the Legal Division, Melissa Carte, who was responsible for assembling it in the proper format to be reported outside the agency.

8. Between July 25 and August 13, 2012, Grievant was issued four verbal warnings and two written reprimands as follows:

a. On July 25, 2012, Grievant received a verbal warning alleging the following conduct:

> One of your job duties is to prepare and file Statement of Matters with the Circuit Courts prior to the expiration of 60 days when an administrative appeal is filed. Further, another of your job duties is to respond to audio requests from parties to OAH hearings. On numerous occasions over the past six weeks, you have been told that time is of the essence for these matters. During the week of 7/16/2012 you were specifically told to file a Statement of Matters because OAH had all

> necessary parts. On 7/23/2012 you provided a chart (EX 1) showing all outstanding Statement of Matters and on said Chart, it was shown that the file was not submitted to the Circuit Court as you had previously been directed to do. Further, on 7/23/2012 you were informed that you were no longer to wait until day 59 or 60 to file a Statement of Matters with the Circuit Court. On July 24, 2012 you presented three separate Statement of Matters to Stacey Fragile and Tilah Moore for approval. All three Statements had due dates of July 24, 2012. When questioned regarding the delay you stated that you had been directed to work on previous projects the previous week but had no explanation for the remander (*sic.*) of the time. These matters should be filed with the Circuit Court within 7 days of OAH's receipt of the certified transcript from the contracted transcriptionist. Additionally, it is taking too long for you to respond to audio file requests. There are several requests where it has taken you upwards of three weeks to respond to a request for an audio recording. These requests should be completed within 7 days of your receipt of the same.

G Ex 1.

b. On July 25, 2012, Grievant received a verbal warning alleging the following conduct:

> On 7/23/12, after being off on 7/20/12, you notified your Supervisor, Stacey Fragile, that you would be late for work due to you "not feeling well." (Ex 1) You arrived at work at 10 am (Ex2) and informed Ms. Fragile that you would need to leave work early at 3:30 pm for a doctor's appointment and that you would return after the appointment to work until 7 pm. (Ex 3) You were informed via email that you would need to submit Leave Slips for the time off and that you were not approved to work until 7 pm. (Ex4) Following Ms. Fragile's email denying your request to work until 7 pm, [you] then contacted every member of your department to discuss the directive and then you copied said employees on your email back to Ms. Fragile wherein you disputed her statement that you were not approved to work until 7 pm. (Ex5). You then sent an email to Ms. Fragile stating that you would actually be leaving work at 2:30 pm and not 3:30 pm. (Ex6) Ms. Fragile then sent you a (*sic*.) email reaffirming that you were not permitted to work until 7 pm and that if you chose to return to work following your appointment to finish your regular shift you would be permitted to do so. (Ex7) You then sent an email back to Ms. Fragile and again copied the entire Legal Section stating that you disagreed and demanding clarification on why a supervisor would need to be present for you to work overtime. (Ex8) Following the receipt of the last email a Formal Counseling Session was held between yourself, Ms. Fragile, Wanda F. Casto and James W. McClain. At said session you were informed that your conduct of discussing the matter with the Legal Section

> employees and copying said employees on your email communications was not appropriate and constituted insubordination and a breach of confidentiality. You stated that when you spoke with the other Legal Section employees you were merely seeking to "clarify" the directive given to you by your Supervisor and that you did not see it as a problem. You were again informed that it was an inappropriate action and that the proper procedure was to contact either your Supervisor, Mr. McClain, Ms. Casto or John G. Hackney Jr., (Director/Chief Hearing Examiner) with questions concerning directives you are given.

G Ex 5.

c. On August 6, 2012, Grievant received a written reprimand alleging the following conduct:

> On 7/24/2012 you filed with the Circuit Court of Kanawha County a Statement of Matters in the [JP], File No. [redacted] Matter.[1] On July 25, 2012 a (*sic*.) email was received from one of the parties to the matter informing the office transcript was missing. Upon review of the file by Stacey Fragile, James W. McClain and Tilah Moore the following facts were discovered:
> 1. The Final Order issued by Hearing Examiner Amy Humen of the OAH, as well as the Hearing Introduction Sheet, clearly stated that there were two hearings held in the matter. One on October 12, 2011 and one on October 26, 2011. (Ex 1)
> 2. The Order to Produce was received by this office on May 25, 2012. (Ex2)
> 3. On June 15, 2012, you sent a request to Billanti & Associates asking that the transcript be prepared. You attached one audio file and one intro sheet to the email request. (Ex3)
> 4. On July 24, 2012, you filed the Statement of Matters with the Circuit Court of Kanawha County which contained only the October 26, 2011 Transcript and not the October 12, 2011 Transcript. (Ex4)
> 5. On July 25, 2012, an email was received requesting the transcript from the October 12, 2011 hearing. (Ex5)
> 6. On July 25, 2012, when questioned about the issue, the only response you stated was that there was only one audio file in the "S-Drive".
> 7. Further discussions with you regarding this matter were not held because you had previously stated that you were uncomfortable with having disciplinary discussions without a representative be present with you.

G Ex 3.

[1] The names and numerical identifiers pertaining to individuals whose actions are not germane to the merits of this grievance have been redacted to protect their individual privacy in these circumstances.

d. On August 6, 2012, Grievant received a verbal warning alleging the following conduct:

> One of your job duties is to prepare and file Statement of Matters with the Circuit Courts prior to the expiraion (*sic*.) of 60 days when an administrative appeal is filed. On numerous occasions over the past two months, you have been told that time is of the essence for these matters. On 7/23/2012 you were informed that you were no longer to wait until day 59 or 60 to file a Statement of Matters with the Circuit Court.
>
> In the [EM] Matter (Case No. [redacted]) the OAH received an Order to Produce Record on 6/1/2012 with a deadline of sixty (60) days from the receipt of the Order for the filing of the Statement of Matters. (Ex1) On or about 6/24/2012 the certified transcript was completed by the contracted transcript (*sic.*). (Ex2) On July 30, 2012 you filed the Statement of Matters with the Circuit Court (Ex 3) and copied the parties via email (Ex 4). Thus, based upon these dates, you waited until day fifty-nine (59) to file the [EM] Statement of Matters. This Verbal Warning is to remind you that these matters should be filed with the Circuit Court within 7 days of OAH's receipt of the certified transcript from the contracted transcriptionist.

G Ex 4.

e. On August 6, 2012, Grievant received a verbal warning alleging the following conduct:

> One of your job duties is to prepare and file Statement of Matters with the Circuit Courts prior to the expiraion (*sic*.) of 60 days when an administrative appeal is filed. On numerous occasions over the past two months, you have been told that time is of the essence for these matters. On 7/23/2012 you were informed that you were no longer to wait until day 59 or 60 to file a Statement of Matters with the Circuit Court.
>
> In the [NE] Matter (Case No. [redacted]) the OAH received an Order to Produce Record on 6/1/2012 with a deadline of sixty (60) days from the receipt of the Order for the filing of the Statement of Matters. (Ex 1) On or about 6/28/2012 the certified transcript was completed by the contracted transcript (*sic*.). (Ex 2) On July 30, 2012 you filed the Statement of Matters with the Circuit Court (Ex 3) and copied the parties via email (Ex4). Thus, based upon these dates, you waited until day fifty-nine (59) to file the [NE] Statement of Matters. This Verbal Warning is to remind you that these matters should be filed with the Circuit Court within 7 days of OAH's receipt of the certified transcript from the contracted transcriptionist.

G Ex 6.

f. On August 28, 2012, Grievant received a written reprimand alleging the following conduct:

> One of your job duties involves the preparation and filing of Statement of Matters when a case is appealed to the Circuit Courts of West Virginia. In the [EL] (Case No. [redacted]) matter you filed a Statement of Matters with the Circuit Clerk of Pocahontas County, West Virginia on July 27, 2012 via certified mail (Ex 1). On July 31, 2012 you emailed the Statement of Matters to [JDW] and [JEJ]. (Ex 2) On August 9, 2012 OAH received and after hours telephone message from Mr. [W] regarding the status of the [EL] Statement of Matters. Upon investigation on August 9, 2012 it was discovered that on July 31, 2012 you received an email notification that the July 31, 2012 email you sent to Mr. [W] was undeliverable due to the size of the attachment. This email was unopened in your email box and was found by Tilah M. Moore as she was in your office on August 9, 2012. (Ex 3) Mr. [W's] hearing before the Circuit Court of Pocahontas County was held on August 9, 2012 and he did not have the Statement of Matters due to your failure to open a system notification email.
>
> This office cannot and will not allow this behavior to continue. You must open all emails you receive and respond to said emails in a prompt and efficient manner.

G Ex 9.

9. On September 18, 2012, at 11:33 AM, Ms. Fragile sent an E-mail to Grievant following up on the request for information described in Finding of Fact Number 6, above. Ms. Fragile asked Grievant if she had provided the information requested in her July 10, 2012 e-mail, further requesting completion dates, if the information had previously been provided, or a current status of each task that had not yet been completed. Ms. Fragile directed Grievant to provide this information by 9:00 AM on Wednesday, September 19, 2012. J Ex 1.

10. Subsequent to sending the e-mail described above in Finding of Fact Number 9, on the afternoon of September 18, 2012, Ms. Fragile called Grievant on the

office phone system, and asked her to come to her office. After approximately fifteen minutes elapsed, and Grievant had not reported, Ms. Fragile called Grievant a second time, and again requested that Grievant come to her office. At this time, Grievant declined, stating that her representative was not then available, but she would meet with Ms. Fragile tomorrow when her representative could attend the meeting.

11. Ms. Fragile proceeded to explain to Grievant that this was to be a strictly work-related meeting which had nothing to do with any grievances which Grievant had pending. Grievant again insisted that she would meet with Ms. Fragile only if she could have her representative present. Immediately following this conversation, Ms. Fragile sought assistance from Deputy Director McClain, who came to Ms. Fragile's office. Subsequently, in Mr. McClain's presence, Ms. Fragile called the Department of Transportation's Director of Human Resources, Jeff Black, for guidance.

12. Ms. Fragile explained to Mr. Black what had transpired up to that point, as described above in Findings of Fact Numbers 10 and 11. Mr. Black told Ms. Fragile to advise Grievant that she had no right to representation at a meeting that was only about work assignments, and refusal to participate in a proper work-related meeting could result in her being disciplined, up to and including termination.

13. After speaking with Mr. Black, Ms. Fragile asked Mr. McClain to speak to Grievant. Ms. Fragile also related to Mr. McClain what Mr. Black had advised her as described above in Finding of Fact Number 12.

14. Mr. McClain and Ms. Fragile then proceeded to Grievant's office where Mr. McClain explained to Grievant that she had no right to representation at a discussion that

was purely related to work assignments, and she could be charged with insubordination and disciplined, if she continued to refuse to meet with Ms. Fragile. At that point, Grievant indicated that she would participate in a meeting with Mr. McClain and Ms. Fragile.

15. Grievant returned to Ms. Fragile's office with Mr. McClain and Ms. Fragile. After Grievant sat down, Ms. Fragile testified that she asked Grievant some questions about work assignments, including whether Grievant had received her e-mail, and when the information requested would be ready, and the only responses she received were "okay," "okay," and "fine," before Grievant left her office. According to Ms. Fragile, Grievant was uncooperative, provided no useful information at all during the meeting, nor did Grievant provide a time frame when she would produce the requested records.

16. After their meeting with Grievant concluded, Ms. Fragile and Mr. McClain went to Wanda Casto's office. Ms. Casto is the agency's point of contact for human resource matters. Ms. Casto then placed another call to Mr. Black using a speaker phone wherein Ms. Fragile and Mr. McClain provided the same description of their conversation with Grievant as described above in Finding of Fact Number 15. Based upon these representations, Mr. Black advised them that Grievant's actions involved insubordination, and Grievant should be suspended for five days.

17. At the time Grievant participated in the meeting described above in Findings of Fact Numbers 14 and 15, Grievant had a voice-activated recording device concealed in her clothing, and that device recorded at least part of the conversation between Grievant, Mr. McClain, and Ms. Fragile.

18. A digital copy of this recording was authenticated and introduced into evidence at the Level Three hearing. *See* G Ex 12.

19. The digital recording contains the latter portion of the September 18, 2012 meeting involving Grievant, Ms. Fragile and Mr. McClain.

20. The recording includes the following conversation between Ms. Fragile ("Fragile") and Grievant ("Grievant"):

> Fragile: It's more than you just having to listen to me, Karen. You have to participate in the conversation. It's about a task. I'm not getting into it though. What is the status of transferring the files to Sara?
>
> Grievant: I have like two more left.
>
> Fragile: And what is taking so long? All I needed you to do was to take them to Sara.
>
> Grievant: Because I've been scanning them. Wanda mentioned me scanning.
>
> Fragile: No, Wanda doesn't have you scanning anything. Wanda is the one who told me that you were at the copier all day. So what are we scanning?
>
> Grievant: I'm scanning the ones I haven't scanned before.
>
> Fragile: Everything has been scanned when you send them to people.
>
> Grievant: Not the old ones.
>
> Fragile: Okay, I need that done, because Sara needs to get those archived. The ones that are old. Please finish that.
>
> Grievant: Okay. [End of recording] (G Ex 12.)

21. Grievant responded to the e-mail described above in Finding of Fact Number 9, in an e-mail sent at 8:41 AM on September 19, 2012 (prior to the 9:00 AM deadline set by Ms. Fragile). That e-mail stated the following:

> Pursuant to your email dated 09/18/12, I am providing you with the following information:
>
> 1.a. Attached are the statistics you inquired about. I'm still in the process of going through the transcripts, but as of this date I can provide you with the following statistics.
>
> 1. b. All emails and correspondence related to all files have not been printed. I am still in the process of going through my emails.
>
> 1.c. All audio requests have not been filed as I have been trying to scan these documents since Wanda mentioned to me some time ago that we needed to start scanning the documents so when the files are archived, we would have a computerized filing system. There is a scanner on my desk which was purchased for this project some time ago, but I have never had any hands-on experience using this machine. Therefore, I have used the copier in lieu of.
>
> 2. It is hard to predict when the above tasks will be completed because there is such a large volume.
>
> As the above tasks were given to me without any indication of a timeframe to be completed, I have prioritized my work to enable me to keep up with my daily tasks of incoming requests. Therefore, while I have been steadily working on these projects which have been assigned no particular timeframe, in which I have made significant headway, they are not yet completed.

J Ex 2.

22. On September 19, 2012, John Hackney provided written notice to Grievant concerning her suspension as follows:

> This will confirm your suspension without pay from work for five working days beginning on September 25, 2012, as was orally communicated to you on September 18, 2012 by Wanda Casto, Stacey Fragile and James McClain.
>
> The reason for your suspension is insubordination. More specifically, on September 18, 2012 you refused an instruction from your supervisor, Ms. Fragile, to meet and speak with her regarding work matters related to your duties. Your response was that she could meet you the next day with a representative present. Mr. Fragile informed you a short time later that the conversation she wished to have with you was not related to a

> grievance you had pending, that you had an obligation to speak with her regarding work matters, and that if you refused, you would be subject to discipline for insubordination. You subsequently met with Ms. Fragile but became uncooperative and left the room, again, effectively refusing to communicate with your supervisor regarding work matters. When asked to return to meet with Ms. Fragile and Mr. McClain, you again refused.
>
> This suspension will result in the loss of five days of pay and seven days of tenure. You are to return to work at your regularly scheduled time on October 2, 2012. At that time you will be expected to perform your duties in a manner that meets the requirements of the Office of Administrative Hearings, which include but are not limited to the diligent performance of your duties and appropriate communication with management, co-workers and agency customers. Any further incidents of insubordination will result in your dismissal from employment.
>
> * * *

J Ex 4.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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 employer has not met its burden. *Leichliter, supra*.

Grievant was disciplined for insubordination. The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a)

an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*. at 213, 460. The general rule is that an employee must obey a supervisor's order when it is received, and thereafter take appropriate action to challenge the validity of the supervisor's order. *See Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). Thus, employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. *See Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988).

There are certain aspects of this grievance where the facts are in dispute. In those situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to

perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Massey*, *supra*.

A fair reading of the suspension letter (J Ex 4) indicates that Grievant was suspended due to her refusal to communicate with her supervisor regarding work matters. Grievant contends that she was not obligated to meet with her supervisor and discuss her work performance without a representative present, citing *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010). *Koblinsky* involved a disciplinary action where an employee was terminated for insubordination for attempting to exercise her right to representation under W. Va. Code § 6C-2-3(g)(1).

W. Va. Code § 6C-2-3(g)(1) provides: "An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting which is held with the employee for the purpose of discussing or considering disciplinary action." Grievant clearly communicated a request to her supervisors that she be allowed to have a representative present during the meeting at issue. Grievant based her request on the fact that she had been disciplined on multiple prior occasions for either not performing her work assignments properly, or not accomplishing her assigned duties in a timely manner. *See* G Exs 1, 3, 4, 5, 6 & 9. Based upon this prior pattern of disciplinary actions, Grievant contended that it was reasonable for her to believe that the

requested meeting with Ms. Fragile involved a discussion that would lead to disciplinary action. *See Koblinsky*, *supra*.

After Grievant requested a representative, Deputy Director McClain became involved. Once he and Ms. Fragile conferred with Mr. Black in Human Resources, Mr. McClain explained to Grievant that this was not to be a disciplinary-related meeting. Therefore, she did not have a right to representation at such a meeting. Thereafter, as will hereinafter be discussed, Grievant relented and participated in the meeting. As a consequence of actively participating in the meeting, Grievant was not alleged to be insubordinate for refusing to meet with her supervisors without a representative present. Rather, Grievant was alleged to have attended a work-related meeting without her representative, and refused to meaningfully participate in the discussion.[2] Therefore, there is no basis for ruling whether the prohibition in W. Va. Code § 6C-2-3(g)(1) was violated in the circumstances presented.[3] Grievant effectively waived any right to representation by participating in the meeting.

Turning now to the charge of insubordination, the outcome of this matter hinges strictly on credibility. The scenario which Ms. Fragile related to the Department's Human Resources Director described a deliberate and intentional refusal to participate in a work-related meeting. This was the basis for Grievant's suspension as stated in the

[2] Grievant offered a subsequent 15-day suspension (G Ex 10 – not admitted) which allegedly included some reference to one or more of the work projects discussed between Ms. Fragile, Mr. McClain and Grievant on September 18, 2012. Whether Respondent violated W. Va. Code § 6C-2-3(g)(1) in regard to that disciplinary action represents a collateral matter to this grievance, and should be addressed in a grievance challenging that suspension. That issue was not properly developed by the record in this grievance.

[3] This Grievance Board does not render opinions where there is no controversy because the issue is moot. *See Pritt, et al., v. Dep't of Human Res*., Docket No. 2008-0812-CONS (May 30, 2008); *Bragg v. Dep't of Health & Human Res*., Docket No. 03-HHR-348 (May 28, 2004).

notice she was given, and as explained to her by Ms. Casto. This scenario clearly depicted the defiance of supervisory authority which constitutes insubordinate conduct.

However, Grievant presented compelling evidence to demonstrate that the scene did not play out as described by her supervisors. Grievant's audio recording represented the best evidence of what took place during her meeting with Ms. Fragile and Mr. McClain on the afternoon of September 18. After being told that she needed to participate in the meeting, not simply listen to what her supervisors had to say, Grievant participated. She responded to each question with an informative answer, explaining what she had done and why she had done it. She did not merely say "okay, okay and fine" as Ms. Fragile recalled in her testimony. When Ms. Fragile gave Grievant a specific directive to proceed, Grievant responded "okay." That is certainly not insubordinate. *See Stamper v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Grueser v. W. Va. State Bd. of Rehabilitation*, Docket No. 95-RS-084 (June 29, 1995); *Sexton*, *supra*. Accordingly, the recording is found to be more credible than the testimony of Ms. Fragile and Mr. McClain, based upon their recollections of what took place during the meeting with Grievant.

In its post-hearing brief and a separate motion accompanying its brief, Respondent sought to exclude this recording on the basis that it was admitted in violation of the following prohibition in W. Va. Code § 62-1D-6:

> Evidence obtained, directly or indirectly, by the interception of any wire, oral or electronic communication shall be received only in grand jury proceedings and criminal proceedings in magistrate court and circuit court….

It is questionable whether this provision applies to an administrative proceeding before the Grievance Board, an entity which is not a court of record, and is not statutorily mandated to follow the rules of evidence, particularly considering that this Code provision is contained in an article governing "criminal procedure." In any event, this provision must be applied *in para materia* with other provisions in Article 1D.

W. Va. Code § 62-1D-3(e) provides:

> It is lawful under this article for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state[.]

Grievant was a party to the oral communication at issue, making this a lawful "interception." There was no credible evidence that this recording was made for the purposes of committing any criminal or tortious act.

However, the definitions in W. Va. Code § 62-1D-2 indicate that this recording may not be covered by the restriction. Subsection (d) of that article defines an "electronic, mechanical or other device" to include "any device or apparatus . . . which can be used to intercept any wire, oral or electronic communication . . . ." This provision proceeds to provide certain specific exemptions from this definition, including "any device used in a lawful consensual monitoring, including, but not limited to, tape recorders . . . ." Because this was a lawful consensual monitoring as described in subsection 3(e), and considering the provisions in W. Va. Code § 62-1D as a whole, the undersigned Administrative Law Judge concludes that this recording is not subject to the statutory limitation relied upon by Respondent.

Even without the recording, this meeting, as described by the employer, was problematic. Ms. Fragile offered no explanation as to why she sent an e-mail shortly before noon giving grievant a deadline to respond with a status report by 9:00 AM on the following morning, and then suddenly found it necessary to call Grievant in for an immediate response later that same afternoon. There was no indication that anyone had made an inquiry about the status of this project. In fact, the agency's Director, who had requested the information, was not even in the office that day.

Ms. Fragile's e-mail to Grievant represents a reasonable management inquiry regarding the status of a critical project. However, her abrupt request for a face-to-face meeting on the same subject suggests impatience, and a tendency toward micro-management, generating an unnecessarily confrontational situation. In any event, the discussion which actually took place during this meeting between Ms. Fragile, Mr. McClain and Grievant, as described in the Findings of Fact made in this matter, did not involve insubordinate conduct by Grievant.

Grievant alleged in her grievance that she has been subjected to "non-discriminatory hostile workplace harassment" in regard to this disciplinary action. She renewed this allegation in her written post-hearing argument. Non-discriminatory 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.

Hall v. Div. of Juvenile Serv., Docket No. 2011-0100-MAPS (June 23, 2011).

This Board has generally followed 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). The point at which a 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). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "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," but are by no means limited to them, and "no single factor is required." *Harris, supra* at 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "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. 30, 2006).

Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley v. Workforce W. Va.,* Docket No. 06-BEP-079 (Nov. 30, 2006). Grievant has established that in this one instance she was inappropriately disciplined for alleged insubordination. This is not sufficient to establish the presence of non-discriminatory hostile workplace harassment as defined by this Grievance Board and the West Virginia Division of Personnel. Grievant failed to establish that any of the previous disciplinary actions she was administered were unwarranted. Evidence of those actions was principally admitted to support the proposition that it was reasonable for Grievant to believe that the meeting requested by her supervisor on September 18 would involve a disciplinary investigation, thereby triggering her right to have a representative present during the meeting.

Respondent failed to establish by a preponderance of the evidence that Grievant was insubordinate on September 18, 2012. Accordingly, this Grievance must be GRANTED, and Grievant is entitled to back pay with statutory interest, reinstatement of

all seniority, tenure, and benefits, and any reference to this suspension shall be expunged from any and all personnel records maintained by Respondent.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination involves "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ*., Docket No. 26-89-004 (May 1, 1989).

3. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional as to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995).

4. Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. *Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear

instructions. *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

5. To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998); *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995). "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. 30, 2006).

6. Grievant failed to prove by a preponderance of the evidence that she was subjected to a hostile work environment created by Respondent.

7. Respondent failed to establish the insubordination charge against Grievant by a preponderance of the evidence, and her suspension for insubordination was not based upon just cause.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to pay Grievant back pay, with statutory interest, for the five days she was suspended, to reinstate Grievant's seniority and tenure, and any benefits lost due to this suspension,

and to expunge any reference to this suspension from any and all personnel records maintained on Grievant.

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 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. *See also* 156 C.S.R. 1 § 6.20 (2008).

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LEWIS G. BREWER
Administrative Law Judge

Date: February 12, 2013