VONDA SPENCER,

Grievant,

v. Docket No. 97-BEP-139

BUREAU OF EMPLOYMENT PROGRAMS/

WORKERS' COMPENSATION DIVISION,

Respondent.

D E C I S I O N

Grievant, Vonda Spencer, grieves her termination stating:

> **I have been terminated from my position of Medical Claims Analyst I effective March 20, 1997. This action is unwarranted and violates WV Code & WV Code of Personnel Rules & Regulation. There (sic) reason given by management for my dismissal is my absence due to a medical leave. This medical leave is related to a hostile work environment which the Worker's Compensation Administration have (sic) refused to correct.**

The relief sought was:

1. Reinstate me to my position with full back pay and full benefits with interest.

2. Require management to protect me from the hostile work environment by what ever means necessary.

3. In any and all other ways to be made whole.

As this grievance was a termination, it was appealed directly to Level IV. The first day of hearing was held on April 4, 1997, and due to multiple continuances, granted for good cause at the behest of the parties, the second day of hearing was not held until November 10, 1998. This case became mature for decision on

January 14, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

This case presents several interesting issues. Respondent attempted to add further information and arguments to bolster its reasons for terminating Grievant. (See footnote 2) The undersigned Administrative Law Judge refused to allow this evidence, as Grievant's termination letter states her request for additional Personal Leave was denied "due to the substantial backlog of work to be done in your section and the obligation of this agency to provide quality service to the public . . .". Grievant was given the option of resigning or returning to work. Thus, Grievant was not on notice that Respondent planned to present this type of evidence.

Grievant states she did not return to work because Respondent failed to provide her with a safe place to work and points to the numerous threats made to her by a co-worker. Grievant argues she had placed the Bureau of Employment Programs ("BEP") on notice, and BEP refused to resolve the situation in a manner she found acceptable.

Respondent replies to this argument by asserting that the employee in question, KN, (See footnote 3) was not dangerous or threatening, but merely disruptive, and it was Grievant's method of interacting with KN that created the problems. Respondent also asserts that no one elsecomplained about KN, and Grievant's response to KN's statements was an over reaction. Respondent also attempted to argue that Grievant's complaints about KN were a ruse to enable her to work in another building without a direct supervisor to watch her. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was initially employed with BEP in 1992, as a Claims Manager I.

2. Her supervisor was Mr. Pete Grinstead, and, as he had both family and personal health problems, Grievant was directed to act as the supervisor of her area in his absence. Grievant was never officially promoted or upgraded during this time, but she did frequently assume Mr. Grinstead's duties. (See footnote 4)

3. KN was employed by BEP in approximately 1988.

4. KN was assigned as the Office Assistant in Grievant's Section, and as such, she was expected to assist Grievant, as well as other employees, in the completion of their paperwork.

5. KN had performed poorly her entire career with BEP. She did little work, did not complete assignments in a timely fashion, conducted personal calls at work, and frequently returned the work she was given stating, "This is your work; I'm not going to do it. Do it yourself." KN did not like Grievant to give her work to complete, did not like toanswer Grievant's phone, and did not like Grievant to correct her or disagree with her in any way.

6. KN had "pet names" for Grievant, such as "Little Church Girl", "Bird Lady", and "Voodoo Bitch." (See footnote 5)

7. When Grievant did something KN did not like she would never address Grievant by name or to her face, but would say things such as "Go screw yourself" or "You're not going to fuck me" in a loud voice that could be heard through out the office.

8. Sometimes when Grievant had given work to KN, KN would start ranting and raving, and say things like: 1) "Go screw your birds and let your birds have your babies for you"; 2) "I'll take care of you"; 3) "I don't see why the Bitch can't do her own work"; 4) "You are not going to have sex with me"; 5) "You're not going to put your thing up me"; 6) "I'll take care of you. You're not going to do that

voodoo on me or that witchcraft. I'm not putting up with your shit"; and 7) "You're not getting my uterus. You're not getting my ovaries."

9. KN would also frequently be upset when she got off the phone from talking to her children and would appear to continue this conversation with herself in a loud voice. She would say things like "You'll mind or I'll beat you" or "Take a bath."

10. At times, for no apparent reason, KN would start ranting and raving about sex and would have loud and profane conversations with herself.

11. These behaviors were frequently reported to Mr. Grinstead, KN's and Grievant's supervisor. Occasionally, he would come out and tell KN to be quiet or to gooutside for a break; that this behavior was not acceptable in the office. KN would be quiet for a while, but would frequently start up again, and then ask who snitched on her.

12. At some time during the course of these actions, in approximately 1995, Vickie Smoot was named as Grievant's direct Supervisor.

13. KN received multiple oral and written reprimands. Mr. Grinstead wrote to his supervisor, Mr. Burdette, and suggested that KN was in need of psychiatric help.

14. Grievant made frequent requests for intervention into KN's behavior, indicated KN needed help, and reported she was fearful KN could "go over the edge" and hurt someone.

15. Once while Grievant was on the phone with her husband, he heard the remarks KN made to Grievant and became very upset. He called Mr. Burdette and voiced his concerns.

16. After this complaint, Mr. Burdette asked Grievant to document her concerns, which she did.

17. An investigation ensued, and multiple employees were questioned. (See

footnote 6) **This investigation found KN was guilty of threatening co-workers and resulted in a thirty day suspension for KN because of her "poor work performance, leave abuse, rude and unprofessional behavior, use of foul and abusive language, and total disregard for yoursupervisor's instructions." Additionally, then-Commissioner Andrew Richardson stated KN's abuse of co-workers and the public at large could not be tolerated, noted the employer had the duty of "protecting its employees from the threat of physical injury", and stated KN's behavior had been threatening to co-workers. This letter also noted BEP had received numerous complaints from supervisors, claimants, providers, and the Department of Labor.**

18. The employee statements indicated many employees found KN disruptive and inappropriate and many believed KN to be mentally ill, but they did not want to see her terminated because she had children and needed the position. Only a few employees recalled hearing KN make threatening remarks, and they also noted that when KN made these remarks she never used a name. Mr. Grinstead's letter reported many behavior and work problems with KN.

19. In KN's suspension letter, Grievant was the only employee mentioned by name.

20. After the investigation referred to in Finding of Fact 17, KN was suspended. KN was in the office for several days prior to the suspension taking effect. During this time KN was especially hostile toward Grievant.

21. KN was not to come to the BEP office during her suspension, but she came to the office twice. One of these times KN placed her finger on the repeat key of the typewriter and held it down to produce a gun-like sound. KN told Grievant and co-worker Cindy Robinson that the noise sounded like a gun, that she had one, and she knew how to use it. 22. KN also started following Grievant home from work, and Grievant began to receive strange phone calls. She did not know if these calls came from KN, but believed they did.

23. Grievant obtained a restraining order and was told by a City Policeman, Sgt. Young, that KN had a history of violence and had a criminal record. He indicated KN had been charged with contributing to the delinquency of a minor and violence toward a neighbor.

24. In June 1996, while KN was on suspension, Grievant found a draft of a dismissal letter for KN on her seat at work. She did not know who placed it there. This letter stated the dismissal would be effective as of July 1, 1996, and noted KN's threatening behavior with the typewriter and her return to the building after being told she could not enter the building. This dismissal letter was never sent. (See footnote 7)

25. Grievant called on June 24, 1996, the day KN was to return from her suspension, and asked if KN was there. Upon learning of her presence, Grievant indicated she would not be in. Grievant used annual leave from June 24 - 28, 1996, to cover her absence.

26. Mr. Grinstead wrote and called Grievant on June 28, 1996, and indicated that if she failed to return on Monday, July 1, 1996, she would be placed on unauthorized leave and further disciplinary action may be taken.

27. Grievant did not return to work on July 1, 1996, and did not call Mr. Grinstead to explain her absence.

28. On July 2, 1996, Mr. Grinstead received the letter Grievant had written him on June 28, 1996. This letter stated Grievant was afraid to return to work in the same building as KN. Grievant requested to work at home, work in another building, transfer laterally to another position, or any other alternative that did not include placement on the same floor as KN.

29. Apparently, Grievant received no response from this letter until July 9, 1996, when Mr. Grinstead called Grievant to inform her she was being suspended for three days beginning July 10, 1996. (See footnote 8)

30. On July 10, 1996, Mr. Grinstead spoke with Grievant again and was informed Grievant had been under the care of a physician for work-related stress since June 24, 1996.

31. Grievant subsequently submitted a Physician's statement from Dr. Mahmood Partovi, indicting she had been under his care since June 28, 1996, and Grievant could not return to work at this time.

32. Dr. Partovi also wrote a letter on July 5, 1996, indicating Grievant was being treated for an Anxiety Disorder, and that she was scheduled to see a psychiatrist on July 23, 1996. 33. Grievant later was seen by Dr. Elma Bernardo, a psychiatrist, on July 23, 1996. She diagnosed Grievant as having an "acute distress disorder brought on by the problems of the job" and stated Grievant was unable to work at present.

34. Grievant served her three day suspension and then went on Family Medical Leave. During this absence she requested clarification from the Commissioner about where she would be placed upon her return to work in relation to KN. Grievant was informed she would be returned to the same floor and work space, and that KN would be moved to another cubicle and work section of that same room.

35. Grievant believed this was an insufficient accommodation.

36. Grievant received a Family Medical Leave of Absence from August 1, 1996 through October 1996; a Medical Leave of Absence from November 4, 1996, to January 24, 1997; and Personal Leave from January 28, 1997, to February 21, 1997. All these leaves were unpaid.

37. Grievant requested another Personal Leave at the end of February, 1997. Her supervisor recommended this leave not be granted due to the work load in her section.

38. On March 5, 1997, Commissioner William Vieweg wrote Grievant

informing her that her request for Personal Leave had been denied, and if she did not either submit her resignation or return to work immediately she would be dismissed as of March 20, 1997. Grievant did not return to work.

39. Section 15.08 of the West Virginia Administrative Rules allows the appointing authority sole discretion in granting a personal leave of absence. **(See footnote 9)** **40. Sometime after Grievant was terminated, KN was also terminated for verbal, racial abuse of a supervisor as well as a physical confrontative act against this supervisor.**

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988).

Although Grievant was terminated, this action was not disciplinary in nature. Thus, she was responsible for proving her case. Grievant does not disagree that she did not return to work when she was directed to by her supervisor. What she did argue was an

affirmative defense that the employer failed to provide her with a safe work environment, and she did not return because she was afraid to work in the same room with KN.

Generally, an employee asserting an affirmative defense to an employers's negative action must establish such a defense by a preponderance of the

evidence. Smith v. W. Va. Div. of Correction, Docket No. 95-CORR-547 (June 28, 1996); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995);Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Morris v. W. Va. Dep't of Health, Docket No. 91-DHS- 112 (June 25, 1991). See Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994) See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.

Thus, although it is clear the Commissioner had the authority and discretion to deny Grievant's request for a Personal Leave of Absence, the next questions become: 1) Whether Grievant was threatened; 2) Whether Grievant has proven that her refusal to return to work was valid and reasonable, and, if so, 3) Whether the accommodation offered to Grievant by BEP was sufficient to offer a reasonable degree of protection. These issues are close calls.

1. Whether Grievant was threatened

Is quite clear that KN's behavior was disruptive, hostile, profane, and completely inappropriate. It is also clear that, at times, KN was hostile and threatening. The issue is whether these threats were directed to Grievant?

BEP argues that since Grievant was never called by name, Grievant cannot demonstrate the threats from KN were directed at her. This argument is without merit. The fact that KN did not call Grievant by name does not mean that many of KN's hostile remarks were not directed toward Grievant. Many hostile or inappropriate remarks followed on the heels of Grievant assigning KN work.

Statements like "I'll kill that Bitch" often occurred after Grievant had given KN some work to do. The "pet names" KN used when she said many of these remarks reveal KN was talking about Grievant. Most importantly, BEP in its own suspension letter to KN, affirmed the threats were directed toward Grievant. The totality of the testimony reveals KN did not like to be told what to do, and she especially did not like Grievant giving her direction.

It must be noted that 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).

BEP's attempts to blame KN's responses on Grievant are somewhat odd. Testimony revealed that in order to gain KN's cooperation it was necessary to "approach her like a child" and to be very nice to her. Usually this approach gained more positive results, but not always. Witnesses stated Grievant caused KN to react negatively to her because Grievant was "not always nice to her", Grievant "talked down to her," and Grievant "at times, would be a little harsh with her." Grievant would tell KN to get to work and directed her to do things. Grievant's direct supervisor, Ms. Smoot, testified that she had told everyone in the office that they were to give her KN's work, and she would then give it to KN. Ms. Smoot stated it was insubordinate for Grievant to continue to assign KN work in the face of this directive and demonstrated Grievant was not afraid of KN. Grievant stated she was never given this directive by Ms. Smoot, but rather than accuse Ms. Smoot of lying, Grievant stated that maybe her supervisor

believed she had given her this directive when she had not. Grievant was never accused of insubordination or ever counseled concerning this behavior. It is also noted that several other people testified to giving KN work directly, and no mention was made of Ms. Smoot's directive, or of these employees being in trouble for the same insubordination of which Grievant was accused.

It is also clear from the testimony that KN's outbursts were not always directed toward Grievant, and that these outbursts continued after Grievant was on medical leave.

What the testimony reveals is that KN did not respond well to most people who were in a supervisory position. KN also responded negatively to another worker, Tammy Stamper, who would give her work to do, and then check to see if it was completed. Obviously, KN's difficulty with authority figures continued after Grievant's departure, as she was terminated for racial slurs and confrontative behavior with her supervisor.

BEP's own investigation proved Grievant was threatened and treated in a hostile and inappropriate manner by KN. This finding was one of the major reasons for KN's thirty day suspension. Given the extensive evidence of record, including BEP's investigation, the undersigned Administrative Law Judge finds that many of KN's hostile and threatening remarks were directed toward Grievant. This finding is made through the totality of the evidence. 2. Reasonableness of these fears

The next question is whether Grievant's fear was reasonable and sufficient to prevent her from returning to the workplace. In other words, would a reasonable prudent person perceive theses threats to be so threatening that they would refuse to come to work and would, in essence, abandon their position when her requests for accommodation were not met.

This question must be answered by looking at the interaction between Grievant

and KN as it progressed through the years. Grievant's response to KN's actions changed over time. Grievant first perceived KN as disruptive, inappropriate, and in need of help. When KN's house burned down, Grievant organized the office relief efforts. Grievant was one of the people who complained to Mr. Grinstead early on, explaining that KN did not complete her work, was insubordinate, rude to many people, including customers, and frequently inappropriate. Grievant documented KN's behavior over the years, and she requested that something be done to help KN and to make her more productive and cooperative.

Mr. Grinstead testified he was aware of these behaviors, and he noted he was frequently in trouble for KN's actions and found himself apologizing for KN's acts. He was not pleased with KN, but took no decisive action to correct the situation.

As no intervention was taken, KN's behavior continued unabated, and in fact appeared to escalate. Obviously, KN was severely disturbed. KN's hostile behavior toward Grievant continued and increased after the suspension letter named Grievant as the onlyindividual who had complained about KN's behavior. **(See footnote 10)** **It was after this letter that KN starting following Grievant home, and the harassing phone calls began. Grievant was very clear that she did not expect BEP to deal with the non-work situation, but that she did expect relief in the work situation. Grievant's fears for her safety were reasonable.**

3. Reasonableness of Grievant's refusal to return to work

Whether this behavior was so threatening that Grievant felt the need to stay home until BEP granted her requests for accommodation, will be examined next. The West Virginia Division of Personnel Workplace Security Policy became effective on May 1, 1995, and is some help in answering this question. "Threatening/Violent Behavior" is defined as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily

harm." §II. C., Workplace Security Policy (emphasis added.). The purpose of the Policy is "to protect the health, safety, and well-being of employees . . .". This Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated.

KN's continuous behavior of loud, profane, threatening talk in the workplace is outrageous and extreme. Constantly hearing another employee have imaginary conversations with people who are not present, or discussions of a sexual nature, that were at times perverse, is capable of causing severe emotional distress in someindividuals, and this type of talk has been found to also be a type of sexual harassment. See Worden v. Dep't of Health and Human Resources, Docket No. 98-HHR-282 (Jan. 29, 1999). Employees should not be subjected to this type of work environment. (See footnote 11) **Thus, KN's verbal behavior meets the requirements set out in the Policy. However, "talk" alone will not "result in bodily harm." See Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96- DOH-490 (June 30, 1997).**

In determining whether an individual poses a physical threat, the following factors outlined in the Workplace Security Policy are to be considered:

a. The perception that the threat was real;

b. The nature and severity of potential harm;

c. The likelihood that potential harm will occur;

d. Imminence of the potential harm;

e. Duration of risk, and/or

f. Past behavior of individual.

Examining these factors can be helpful in assessing the degree of risk KN presented to Grievant. First, "the perception that the threat was real." Grievant clearly perceived the threats as real and put her supervisor on notice that she was

upset and frightened by KN's behavior.

Second, "nature and severity of the potential harm." Prior to the sending of KN's suspension letter the potential for physical harm appeared low; but verbal abuse was present. It was after the letter was sent and identified Grievant as the primary complainant, that the risks for Grievant increased. After the suspension letter, KN told Grievant she hada gun and knew how to use it. She also started following Grievant home. Grievant discussed the situation with a police officer and found out KN had a history of violence and a criminal record; thus, the potential for severe harm was present.

The third factor, "likelihood that potential harm will occur" increased after the suspension letter. How great that likelihood was, cannot be determined by the record before this Administrative Law Judge. In any event, the threat need only be reasonably perceived, not actually present.

The fourth factor, "duration of risk", is unclear. KN had been making hostile and threatening remarks to Grievant for many years. The duration of the risk after the letter is unknown because Grievant removed herself from the situation; and thus, removed herself from the possibility of upsetting KN further.

The fifth factor is "past behavior", and it is somewhat difficult to assess. Prior to KN's confrontation with her supervisor at work after Grievant left, it appears that KN's hostile behavior at work was confined to verbal insults, bizarre remarks, and threats of violence. However, KN obviously had a history of past violent behavior as explained to Grievant by the police when she requested the restraining order. Additionally, after the physical confrontation between KN and her supervisor, BEP was on notice that KN could engage in violent actions. (See footnote 12)

After examining the factors, Grievant has proven that KN's behavior in the workplace was such as to present a real threat to her. See Kessler, supra. The undersigned Administrative Law Judge finds KN represented a threat to Grievant,

and that possibleviolent action could have occurred. The magnitude of this threat was actually increased by BEP's prominent placement of only Grievant's name in KN's suspension letter.

4. Was the accommodation afforded Grievant sufficient

The next issue to examine is whether the accommodation BEP afforded Grievant should have been acceptable to her and was sufficient "to protect [her] health, safety and well-being"; thus, was Grievant's refusal to return to work unreasonable. Workplace Security Policy.

BEP's accommodation was to keep Grievant and KN on the same floor, in the same large room that is arranged in cubicles of four, and to place KN in another cubicle farther away from Grievant, in another work section, and Grievant would not be expected to work with KN. Grievant would still be in the same building, same floor, same parking lot, and in constant view and earshot of KN. Given the state of affairs that existed at the time when KN returned from suspension, this accommodation is insufficient. This change may have been acceptable either earlier before the suspension letter was sent, or later after the situation had cooled off, but was insufficient at the time it was offered. (See footnote 13)

As indicated in the Findings of Fact, Grievant has demonstrated that a situation developed at BEP which directly impacted on her "conditions of employment", and BEPrefusal to act was an "action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employee." See W. Va. Code § 29-6A-2(i); Dooley v. W. Va. Dep't of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Ford Motor Co. v. NLRB, 441 U.S. 488 (1979). Not only did KN's misconduct make Grievant's job more difficult, it also created a health and safety concern for Grievant. Thus, Grievant has established that BEP's failure to take effective action regarding this pattern of conduct constituted a substantial detriment to or interference with her job performance and

her health and safety. See W. Va. Code § 29- 6A-2(i); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996). Therefore, the only controversy remaining to be resolved is what remedy, if any, may be granted based upon the situation described.

5. Relief

W. Va. Code § 29-6A-5(b) provides that "[h]earing examiners are hereby authorized and shall have the power to . . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article." See, e.g., Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Standifur v. Univ. of W. Va. Bd. of Trustees, Docket No. 92- BOT-017 (Oct. 30, 1992); Rexroat v. Boone County Bd. of Educ., Docket No. 91-03-233 (June 15, 1992).

This same provision on the education side was construed by the Supreme Court of Appeals of West Virginia in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), as follows:

> Clearly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.
>
> . . .
>
> The Legislature's purpose in establishing the entire Educational Employees Grievance Board was to provide a relatively quick, yet fair procedure to resolve disputes between state educational employees and the State's educational institutions so that "effective job performance may be enhanced and the citizens of the community may be better served." W. Va. Code 18- 29-1 [1992]. Furthermore, the grievance procedure was established "to provide a simple, expeditious and fair process for resolving problems ... and shall be

construed to effectuate that purpose." W. Va. Code 18-29-1 [1992].

> **The Legislature has made the determination that the state is better served by allowing hearing examiners to determine "fair and equitable" relief in a simple and quick setting. This system is designed to invest scarce government resources in solving problems rather than investing those resources in an army of lawyers to go to court to defend against every employee complaint.**

Id. at 220-21, 502-03. This same reasoning can be applied to state grievances.

Consistent with this authority, this Grievance Board recently directed a school board to schedule cleaning and maintenance of the air conditioning system and classroom at a grievant's school "consistent with industry standards." Guerin, supra. In another matter, a school board was directed to select an "appropriate employee," other than the grievant's principal, to render an independent evaluation of a grievant's performance. Burdette v. Summers County Bd. of Educ., Docket No. 45-86-280-4 (Dec. 16, 1986). This Board has also granted relief to an employee assigned to a position for which she was not qualified. Roth v. Ohio County Bd. of Educ., Docket No. 35-89-025 (Feb. 28, 1990). Likewise, relief has been extended to an employee who was improperly dissuaded from intervening in a grievance. Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995),appeal pending, Cir. Ct. of Mingo County (Civil Action No. 95-CAP-23). See generally York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr.23, 1996).

Equitable doctrines were cited in restoring sick leave to an employee whose misdiagnosis during an employer-directed medical examination had resulted in loss of 25 days' sick leave. Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987). Finally, this Board has denied the remedy being sought by a grievant (instatement to a coaching position), substituting an alternate remedy (reposting and re-evaluation). Giammerino v. Raleigh County Bd. of Educ.,

Docket No. 41-86-165-1 (Dec. 11, 1986).

As relief here, Grievant had suggested a number of alternatives to BEP in terms of placement. Apparently, BEP did not consider any of these requests or even talk to Grievant about the possibilty of a change in her or KN's work location other than placing them farther apart on the same floor and having Grievant no longer give work to KN. While it is not for an employee to direct how an employer is to organize and conduct their work and work areas, it is noted that other state employers have been more accommodating than BEP was here. Hull v. Div. of Culture and History, Docket No. 98- C&H-360 (Feb. 9,1999).

Accordingly, BEP is directed to place Grievant in a position comparable to the position she had when she was terminated and within the same pay grade. Since KN is no longer employed, it is possible that this placement could be the return of Grievant to her prior position. Respondent is directed to award Grievant backpay from the date of discharge. Further, pursuant to Grievant's request, interest must be paid on this backpay award. Grievant's seniority and other benefits should be treated as if she had not been dismissed. The above-discussion will be supplemented by the following Conclusions of Law.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant established by a preponderance of the evidence that BEP's failure

provide a safe environment away from a threatening, hostile employee with escalating behavior constituted "a substantial detriment to or interference with effective job perfor mance or the health and safety of employees", in this incidence, herself. See W. Va. Code § 29-6A-2(i)); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996). As such she is entitled to relief.

3. The West Virginia Education and State Employees Grievance Board has authority to "provide such relief as is deemed fair and equitable" in grievances arising under W. Va. Code § 29-6A-5(b); See Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992); Guerin v. Mineral County Bd. of Educ., Docket Nos. 92-28-422/459 (Jan. 31, 1996).

Accordingly, this grievance is GRANTED, IN PART. BEP is hereby ORDERED to reinstate Grievant to a comparable position in the same pay grade. Back pay with interestis ordered from the time of Grievant's termination, and she is to be made whole in all ways.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: February 26, 1999

Footnote: 1

Grievant was represented by Lynn Belcher of the AFSCME/WVSEU, and Respondent was represented by Assistant Attorney General Joy Cavallo.

Footnote: 2

Respondent wished to submit data to demonstrate Grievant had not been completing her work in a timely manner prior to her various leaves of absence. As this issue was not addressed in any way in Grievant's termination letter, it could not be addressed in this grievance. Further, Respondent wished to discuss Grievant request to be reclassified to demonstrate Grievant was unhappy at work. While it is true Grievant repeatedly requested to be reclassified, this issue was also not addressed in the termination letter as a cause for Grievant's dismissal, and, in fact, requests to be reclassified could not be a reason for dismissal. Additionally, it is clear that the environment at the workplace, as discussed by this decision, could have played a part in effecting Grievant's performance.

Footnote: 3

The employee's name was used during the hearing, but in keeping with prior decisions, only the initials will be used in this sensitive situation.

Footnote: 4

Respondent attempted to argue that Grievant was never placed in a supervisory position over KN. This argument was contradicted by Respondent in KN's suspension letter in which BEP stated Grievant was a "leadworker" and at times "acting supervisor" of her Section.

Footnote: 5

Grievant is the only person in her office who raises exotic birds, and, during part of the time in question, had been seeking treatment for her infertility.

Footnote: 6

Grievant made several requests to obtain the results of this investigation as she felt the documents and statements would support her contentions. Initially, BEP refused to turn over these statements saying they contained nothing to assist Grievant. Finally, BEP agreed to an in camera review by the undersigned Administrative Law Judge. After this review by the undersigned Administrative Law Judge, these documents were turned over to Grievant pursuant to a prior agreement, as they were clearly supportive of her position in this case.

Footnote: 7

It was unclear from the testimony why this letter was never sent, and why KN was not terminated at that time. A rumor circulated at the workplace indicating KN was protected by a powerful state senator, and BEP did not wish to anger this individual.

Footnote: 8

Grievant states she attempted to grieve this suspension and filed a grievance with her union representative. The representative did not file the grievance in a timely manner.

Footnote: 9

According to testimony, this decision is granted and denied based on the employee's service rating, and assurance that the employee's absence will not have adetrimental effect on the transactions of the agency's business as provided in the BEP Policy and Procedure Manual. As the Policy Manual was not provided to the undersigned Administrative Law Judge this statement could not be verified, but it is accepted as true.

Footnote: 10

It is unclear why BEP felt the need to place Grievant's name so prominently in KN's suspension letter. Grievant was not the only employee who had complained to Mr. Grinstead. Although Grievant apparently was the recipient of much of KN's hostility, she was not alone, pursuant to BEP's letter, in finding KN's behavior to be disquieting, disruptive, and threatening.

Footnote: 11

Although not pled by Grievant, KN's behavior could be viewed as harassment which is defined by W. Va. Code § 29-6A-2(l) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

Footnote: 12

It is unclear from the record exactly when KN was discharged, but it appears to have been in Winter or Spring of 1998.

Footnote: 13

BEP argued it had no grounds to terminate KN. That decision was within its discretion, but it is clear, according to Workplace Security Policy, that BEP had the right to suspend or terminate KN for her behavior, especially with her long history of reprimands for the same type of behavior. See Richmond v. W. Va. Bureau of Employment Programs/Workers' Compensation, Docket No. 93-BEP-144 (July 30, 1993). BEP decided not to impose the maximum disciplinary action, and this decision was within its discretion. Cummings v. W. Va. Dep't of Admin., Docket No. 92-ADMN-244 (Dec. 31, 1992). It is noted that threats effect an agency's obligation to maintain a safe work environment and have a negative effect on the efficiency and morale of employees. Peter Broida, A Guide to Protection Board Law and Practice, 1721 (1998).