WILLIAM TURNER,

Grievant,

v. **Docket No. 00-20-300**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, William Turner, a teacher at Riverside High School, filed this grievance against his employer, the Kanawha County Board of Education ("KBOE"), after he was placed on an improvement plan. The statement of grievance reads:

> The school is attempting to impose a plan of improvement on me which was improperly and/or inappropriately developed.

Grievant sought as relief:

> The grievant is seeking to have his plan of improvement dismissed and all such documents removed from his personnel file.

Grievant clarified at the Level IV hearing that he was also contesting his evaluation dated March 21, 2000. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 2)

FINDINGS OF FACT

1. During the 1999-2000 school year, Grievant was employed by KBOE as a classroom teacher at Riverside High School, teaching one block of 12th grade American History, and two blocks of 10th grade World History. He has one 90 minute planning period each day. He has been a teacher since 1963.

2. During the 1999-2000 school year, Cindy Daniel was the Assistant Principal for Curriculum at Riverside High School, and was Grievant's supervisor. She has a Masters Degree in leadership studies from Marshall University Graduate College. She is a certified administrator, and she has attended the certification training in Policy 5310, offered by the Center for Professional Development, twice: during the 1996-97 school year and in August of 1999. She has been employed by KBOE for 17 years, and has been an administrator for 5 years.

3. On October 20, 1999, Ms. Daniel asked Grievant to meet with her on October 21, 1999, to discuss plans to allow a student who had been out of school for medical reasons, to make up work. Ms. Daniel asked Grievant to bring his lesson plans and thegrade print-out for this student so they could develop the make-up plan. When Ms. Daniel met with Grievant on October 21, 1999, he had no lesson plans for the semester, and was not recording student grades accurately. Ms. Daniel completed a “Teacher Observation/Data Collection” form (“observation form”) on October 21, 1999, on which she recorded that lesson plans were not available, student grades were not accurate or complete, grades were not recorded accurately, and one assignment was not labeled on the grade print-out. Ms. Daniel met with Grievant on October 21, 1999, to discuss these problems after she completed the observation form, and provided him with a copy of the form. The observation form has a place for the employee to sign it. Above the signature line the documents reads: “Signing this observation form indicates only that the employee has had an opportunity to confer with the evaluator regarding its contents.” Grievant refused to sign the form.

4. On November 15, 1999, Ms. Daniel sent Grievant an e-mail asking him to provide her with a copy of his grade print-out, so she could determine whether the problems noted on the October 21, 1999 observation form had been corrected. On November 19, 1999, she approached Grievant about this matter, as she had not received a response to her request. Grievant told her he had not received her e-mail, and he did not keep his grades on the computer. She explained to Grievant that he was required to maintain student grades on the computer. Ms. Daniel completed an observation form for Grievant on November 19, 1999, noting that Grievant was not maintaining student grades on the computer. Teachers at Riverside High School had been made aware that they would be expected to maintain student grades on the computer, and were provided a manual which included this as an expectation.

5. Ms. Daniel had a conference with Grievant on November 19, 1999, regarding this

observation form, and provided him with a copy of the form. While Ms. Daniel was speaking with Grievant he approached her desk and demanded in a raised voice, wavinga grade print-out, that she take care of a problem with his mid-term grades. He stated, “lady, I have two sons who are probably older than you.” Grievant would not let Ms. Daniel finish going over the observation form, walked out of her office, and refused to return when asked to do so. Ms. Daniel reported Grievant's insubordination to Riverside Principal Richard Clendenin immediately and asked to meet with him and Grievant. The record does not reflect whether Grievant was disciplined for his action.

6. On December 2, 1999, Ms. Daniel observed Grievant's classroom instruction and completed an observation form. Ms. Daniel noted that Grievant took attendance in a grade book, rather than following the proper procedure, which was to take attendance on the computer. Grievant then transferred this information to the computer at some point during the class. Ms. Daniel noted three students did not respond to role call; however, when she asked for Grievant's attendance records from the computer when she left the class, no students were noted as absent or tardy that day. She also asked Grievant for his grade print-out. He gave her grades for only one of his three classes. No grades were entered on the computer for his other two classes. In addition, no lesson plans were available for the day. Grievant told Ms. Daniel his lesson plans were at home on his computer. Teachers are to have a hard copy of their lesson plans for the class period in the classroom. She noted there was no sponge activity, (See footnote 3) which was an expectation for this class.

7. On December 6, 1999, Ms. Daniel asked Grievant for all his lesson plans for the year. She completed an observation form on December 7, 1999, which noted lesson plans were still not available for the period from September 1 through October 22, 1999, and there also were no lesson plans available for the period from November 1 through 5,1999. For those lesson plans which were available, she noted as deficiencies that no objectives were stated in the lesson plans for the week of October 25 through 29, 1999, and there were no sponge activities for that week or for the week of November 8 through 12, 1999. She also noted the same instructional goals and objectives (“IGO's”) were used in the lesson plans for the weeks October 25 through 29, and December 6 through 10, 1999. While some IGO's are repeated throughout a course, she began to see a pattern that the same couple of IGO's were being used, and she had spoken to Grievant about this before. Ms. Daniel met with Grievant on December 9, 1999, to discuss the observation forms she completed on December 2 and 7, 1999. Grievant refused to sign either observation form.

8. Ms. Daniel asked Paula Potter, an Assistant Principal at Riverside, to observe Grievant's class. Ms. Daniel had identified deficiencies based upon her own observations, and wanted another administrator's views of Grievant's instruction. Ms. Potter observed Grievant's classroom on January 13, 2000, and completed an observation form. She noted as deficiencies that only one instructional strategy (lecturing) was employed; many varied/unstructured activities were taking place; many students were carrying on conversations not based upon the lesson; the previous day's lesson was not reviewed; the daily objective was not stated; students were not on task, with approximately seven having no work; class began at 9:35, but Grievant did not begin the lecture until 10:10; pacing was not observed; and second block did not have grades entered past December 22, 1999. The observation form notes that Grievant indicated the reason the grades were not up to date was that the school technologist did something to erase three grades. The observation form is not signed by Grievant, and bears the statement, “Mr.Turner was present at meeting at 2:50 - 3:05 did not want to sign the observation. Teacher provided yellow copy.” (See footnote 4)

9. By e-mail dated January 27, 2000, Ms. Daniel asked Grievant to send her a print out of his attendance records and grades by the end of the day. On February 3, 2000, Ms. Daniel again e-mailed Grievant requesting this information. On February 4, 2000, Grievant sent Ms. Daniel the grade print outs and attendance records she requested. Grievant was maintaining grades on the computer; however, he had recorded only one grade for his fourth block class during the grading period, while his other two classes had two grades recorded. Ms. Daniel was concerned that fourth block had received only one graded assignment.

10. On February 16, 2000, Ms. Daniel observed Grievant's classroom instruction and completed an observation form. She noted as deficiencies that no lesson plans were available. Her notes on the observation form reflect that Grievant told her he did not have lesson plans for that week. She further noted as deficiencies that, although class began at 11:04, Grievant was still taking role at 11:16, and at that time he called the office to check on a student. He was still on the telephone at 11:20, and students were still waiting for Grievant's instructions at 11:24. She noted that objectives were improperly listed on the board as sponge activities, and they did not match the assignment. Ms. Daniel met with Grievant on February 22, 2000, to go over the observation form, and provided him a copy of the form. Grievant refused to sign the observation form.

11. On February 28, 2000, Ms. Daniel observed Grievant's classroom instruction and

completed an observation form. She noted as deficiencies that there was no variety of instructional strategies, the lesson plan did not match the activity, and the two IGO's listed in the lesson plans were not consistent with the work the students were doing. Shemet with Grievant to discuss this observation, she handed him a copy of the observation form, and he refused to sign the observation form.

12. On February 29, 2000, Ms. Daniel observed Grievant's classroom instruction and completed an observation form. She noted as deficiencies that instead of employing a variety of instructional strategies, Grievant lectured and had a question and answer session; the class was to end at 12:29, but at 12:20 most students stopped working, many students were talking in small groups, and several students walked around the room laughing and talking; students were working on section reviews for the second day; objectives were again being improperly used as sponges, and did not seem to relate to the IGO's; and there was no closure at the end of the class. Ms. Daniel met with Grievant to discuss this observation, she handed him a copy of the observation form, and he refused to sign the observation form.

13. On March 3, 2000, Ms. Daniel completed an observation form after reviewing Grievant's lesson plans. She noted as a deficiency that five days were spent on the same activity, which on a block schedule equates to ten instructional days. Other noted deficiencies were that lecture on one chapter was the assigned activity for three days, presenting no variety of instructional strategies; few IGO's were listed in the lesson plans, and the same three IGO's were listed for several days; she also listed student complaints which had been addressed at a February 28, 2000 conference with the parents of these students and Grievant. Ms. Daniel met with Grievant to discuss this observation form, and handed him a copy of the observation form. Grievant refused to sign the form.

14. Ms. Daniel completed a performance evaluation for Grievant on March 21, 2000. His performance was rated by Ms. Daniel as unsatisfactory in programs of study, instructional management systems, student progress, and professional work habits. Under programs of study, Ms. Daniel referred to the lack of and repetition of IGO's noted on March 3, 2000, and December 7, 1999; the lack of a variety of instructional strategies asobserved on several occasions; and the long period of time spent on one activity as noted in the March 3, 2000 observation. Under instructional management systems she noted the absence of lesson plans for various dates; improper use of objectives as sponges on January 13, and February 16, 28, and 29, 2000; that objectives did not

correlate to lessons on February 28 and 29, 2000; that IGO's listed were not consistent with class activity during the February 28 and 29, 2000 observations; that there was no evidence of higher level thinking skills being incorporated during any observation; and that students were not being directed to be on task. Under student progress, Ms. Daniel noted student grades were not accurate or complete during several observations; Grievant had not used the computer to maintain grades; the error in reporting student absences noted in the December 2, 1999 observation; and that there had been student complaints. Finally, under professional work habits, Ms. Daniel noted that during the conference on November 19, 1999, Grievant had exited the conference before she was finished and refused to return; and that grades and lesson plans were not completed in a timely manner on several occasions. The comments on the performance evaluation were based upon Ms. Daniel's observation forms.

15. On March 21, 2000, Ms. Daniel and Principal Clendenin met with Grievant regarding his performance evaluation. Grievant would not follow along on the evaluation form as Ms. Daniel asked him to do. Ms. Daniel read the evaluation aloud to him.

16. Grievant was provided with a draft of the improvement plan at a meeting on March 23, 2000. In attendance at the meeting were Grievant, his West Virginia Education Association representative, Perry Bryant, Principal Clendenin, and Ms. Daniel. Grievant was given the opportunity to review the draft improvement plan. Mr. Bryant asked for additional time to discuss this matter with Grievant, and Principal Clendenin agreed to this request. 17. A second meeting was held on March 27, 2000, to develop the improvement plan. In attendance were Grievant, Mr. Bryant, Ms. Daniel, Principal Clendenin, Dr. Tom Williams, KBOE's Assistant Superintendent for Curriculum and Instruction, and Patricia Petty, another KBOE Assistant Superintendent, who had expertise in improvement plans. At this meeting Grievant's deficiencies, as noted on the performance evaluation and repeated in the improvement plan, were reviewed. The meeting lasted two to three hours due to lengthy discussions about development of the plan. Changes to the draft plan were suggested by Grievant, and changes were made to the draft. Once the participants reached agreement, the participants took a break, and Ms. Daniel made revisions to the draft improvement plan. This final version of the improvement plan was provided to Grievant on March 27, 2000, at the conclusion of the meeting. Grievant refused to sign the improvement plan. (See footnote 5)

18. The improvement plan lists the deficiencies cited in Grievant's performance evaluation; it

identifies the members of the improvement team as Principal Clendenin, Ms. Daniel, and Margaret Miller, Kanawha County Schools Curriculum Specialist, SocialStudies; it identifies resources; and it identifies the corrective actions. The corrective actions relate to each of the identified deficiencies. Specifically, grievant is to develop daily lesson plans, and turn them in to the administration each morning, for all classes, using a lesson plan format provided to him, and the lesson plans are to include objectives, IGO's, sponge activities, direct and facilitated instructional activities, higher level thinking skills, materials, and assessment strategies. Objectives are to be directly related to lessons developed, they must specify which IGO is being addressed for that day, and Grievant is to refer to the West Virginia IGO's, and the Kanawha County Schools Curriculum Alignment Guides. Grievant is to develop a pacing guide for the nine week duration of the improvement plan, and it is to be used as lesson plans are prepared. Grievant is required to teach at least one lesson on Bloom's taxonomy, and develop a lesson plan for the activity. Grievant is to observe at least three teachers in his content area for at least 90 minutes each, and complete an observation form for each observation. Grievant is required to maintain accurate grades on the “Grade Quick” computer program, and all students are to receive individualized grade print outs at the mid-term. Grievant is to contact the parents of any student who is experiencing academic difficulty in his class, and keep a log of such contact, noting the date, time, and reason, and submit the log at his weekly conference with a school administrator.

19. An addendum to the improvement plan was developed on May 15, 2000, revising and extending the implementation dates of the plan, due to the fact that Grievant had been on sick leave nearly continuously since the improvement plan was finalized.

20. Grievant was on medical leave from March 28, 2000, through April 30, 2000, and from May 2, 2000, through the end of the school year. Grievant remains on medicalleave. (See footnote 6) Grievant requested an informal conference on May 12, 2000, and filed this grievance on June 30, 2000.

DISCUSSION

Several issues were presented by the parties. These issues addressed below are: (A) whether the grievance was timely filed; (B) whether the evaluation and improvement plan were completed and developed as required by law; (C) whether Ms. Daniel's observations and the subsequent improvement plan were in reprisal for Grievant filing a complaint with the Human Rights Commission;

and (D) whether Grievant was discriminated against.

A A.

Timeliness.

KBOE argued both at Levels II and IV, that this grievance was not timely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

As to when a grievance must be filed, W. Va. Code § 18-29-3 provides, in pertinent part:

> (a) A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant mayappeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. . . .

W. Va. Code § 18A-4-10 discusses the accrual and use of personal leave, which includes leave for medical reasons.

W. Va. Code § 18-29-4(a) provides, in pertinent part:

> (1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.

> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
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> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

Grievant did not request an informal conference or file his grievance within the time periods specified in W. Va. Code § 18-29-4(a). However, these time periods were tolled, as is provided in W. Va. Code §§ 18-29-3 and 18A-4-10, due to the fact that he was on leave for medical reasons for nearly the entire period of time after he became aware of his unsatisfactory evaluation and that he would be placed on an improvement plan, until (and after) he filed this grievance. The grievance as it relates to Grievant's evaluation and improvement plan was timely filed. **B B.**

The Evaluation and Improvement Plan.

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999).

A professional employee must be placed on an improvement plan when his performance is deemed unsatisfactory, so that he has the opportunity to correct his deficiencies. In this regard, W. Va. Code § 18A-2-12 states:

> A professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.
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> . . .
>
> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additionalrecommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight of this article.

Grievant's evaluation rated his performance unsatisfactory in several areas. Grievant challenged this evaluation.

An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State Department of Education Policies 5300 and 5310 and W. Va. Code §18A-2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

W. Va. Code § 18A-2-12(3) states that the purpose of an evaluation is to "serve as a basis for the improvement of the performance of the personnel in their assigned duties . . . and serve as a basis for programs to increase the professional growth and development of professional standards." Evaluations should contain the standards for "satisfactory performance and criteria to be used to determine whether the performance of each professional meets such standards . . .". Id.

State Department of Education Policy 5310 provides that the immediate supervisor is responsible for the employee's evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. 126 C.S.R. 142 §§ 10.4, 10.5, and10.6. Jones v. Braxton County Bd. of Educ., Docket No. 97-04-311 (Apr. 28, 1998).

Policy 5310 also addresses the requirements of an improvement plan, stating the,

> improvement plan shall designate how the employee shall meet the criteria. The improvement plan shall: identify the deficiency(ies), specify the corrective action to remediate the deficiencies, contain the time frame for monitoring and deadlines for meeting criteria, but in no case shall an improvement plan be for more than one (1) semester in length, and describe the resources and assistance available to assist in correcting the deficiency(ies)."

126 C.S.R. 142 §11 (subsection headings omitted).

Grievant's testimony is in conflict with Ms. Daniel's on several points, making it necessary to determine whose testimony is credible on these points. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). 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. Id; Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant was observed on many occasions during the school year by Ms. Daniel. One area she repeatedly noted as a deficiency was the absence of lesson plans. "Failure to complete lesson plans in an appropriate manner is a significant act and justifies some action on the part of the administrator assigned to evaluate the educator who does not perform this basic task. See Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29- 558 (Apr. 8, 1996)." Jones, supra.

Ms. Daniel first noted Grievant had no lesson plans from the beginning of the school year through October 22, 1999. Grievant's explanation for this was that the lesson plans had been lost on the school computer, through no fault of his own, and the hard copy he kept in a locked file drawer had been stolen. Grievant testified that near the beginning of the school year, sometime in September, all his lesson plans up to that point in the year were lost due to what he had concluded was a computer malfunction. Grievant did notbelieve it was possible that this could have occurred as a result of human error because he has a computer at home and has had training. He contacted Jonathan Link, Riverside's technologist. Mr. Link was unable to retrieve the lesson plans. He testified that a day or two later Ms. Daniel requested his lesson plans. He stated he explained to her that his lesson plans had been lost due to a computer malfunction, but she acted like she did not believe him.

Grievant further testified he had picked up a copy of Policy 5310 at an orientation meeting, and placed it in his lesson plan book, along with his lesson plans from the beginning of the school year. He stated he placed this lesson plan book in a file drawer and locked the file cabinet, but when he later looked for it, sometime near the beginning of the school year, it was missing. He stated there was no indication that the lock had been broken, and he did not know whether anyone else had a key to his file cabinet as he had not asked. He also explained this to Ms. Daniel when she asked for his lesson plans.

Grievant testified he decided he should turn in his lesson plans to Ms. Daniel everyday after this problem occurred, and he did so. He stated he had all his lesson plans and had turned them in, and questioned why Ms. Daniel did not have them. He pointed out that two years ago Ms. Daniel had not been able to find four lesson plans which he had turned in, and he had gone to an employee by the name of Ms. Bower, who kept track of who had turned in lesson plans, and proved he had turned them in. At the Level II hearing he went through his lesson plans which he had brought with him, but could not find lesson plans for the period before December 8, 1999. Grievant produced no lesson plans at the Level IV hearing.

The undersigned finds it difficult to believe that someone would be interested in stealing Grievant's lesson plans and his copy of Policy 5310. It seems more likely that Grievant simply misplaced them. Nonetheless, Grievant's explanation of these two mishaps with his lesson plans in September does not explain why he had no lesson plansfrom that point in September until October 21, 1999, or from November 1 through 5, 1999. Grievant is obviously mistaken about the timing of events, as there is no evidence that Ms. Daniel requested Grievant's lesson plans before October 21, 1999, yet his testimony was that she had asked for his lesson plans a couple of days after they were lost in September.

Grievant's testimony that he had turned his lesson plans in to Ms. Daniel each day after these two mishaps in September is not credible. Ms. Daniel noted on two separate occasions that no lesson plans were available for the period preceding October 22, 1999, yet there is no documentation that Grievant ever took a new copy of these lesson plans to Ms. Daniel or her supervisor. Grievant did not produce these lesson plans at hearing, even though he was certain that he had his copies and wondered aloud why Ms. Daniel did not have her copy.

Ms. Daniel further noted no lesson plans were available on December 2, 1999, or for the week of

February 16, 2000, when she observed Grievant's class on that date. Grievant did not explain the absence of lesson plans for December 2, 1999. His explanation for no lesson plans on February 16, 2000, was that they were at home on his computer, and he was having a problem printing them. He asked that a receipt be attached to the observation form, apparently as proof that he had made a purchase of the item he needed to fix his computer problem. The receipt is dated February 12, 2000, four days before Ms. Daniel checked for Grievant's lesson plans for the week. Grievant offered no reason why he had not been able to correct the problem with his computer in four days, or for not preparing lesson plans on the computer at work during that time period, either during his 90 minute planning period each day or after school. Obviously, Grievant was not turning his lesson plans in to Ms. Daniel on a daily basis at this point.

Throughout the school year, Grievant time and again failed to prepare lesson plans as was required. Grievant did not demonstrate that his performance in this area was satisfactory. Grievant's justification for his failure to maintain student grades on the computer as he was required to do, even after being specifically directed by Ms. Daniel to do so, was that he was protecting the students and himself. Grievant testified that on September 28, 1999, teachers were to send in their mid-term grades, which he did. He stated a couple of days later the students received their grade cards. One student in his third block class asked him about the “D” he had received. When Grievant printed his grades off his computer, the document showed this student should have received a “C.” He stated he had all the students bring him their grade cards, and, except for his honors class, a majority of the students had received grades which were incorrect. Only his honors class received the correct grades. One student received a “D” when he should have received an “A.” Grievant stated he tried to find out how this occurred, but “was sent around a vicious circle.” Grievant had concluded that the grades had been tampered with, as this could not have been his error. He believed this conclusion was supported by the fact that the grades for his honors class were correct, although he did not explain why someone would not tamper with the honors class grades. After this, Grievant began keeping his grades in a grade book, rather than entering them on the computer.

Grievant did not report this grade problem to Ms. Daniel when it occurred, nor did any student ever bring this problem to Ms. Daniel's attention. There was no testimony that Grievant ever took any action to correct the error at the time it occurred; rather, he used this situation as an example of Ms. Daniel and Principal Clendenin treating him poorly when they did not explain to him how this could

have happened, and did not report the “chain of possession” of his grades to him as he demanded. Ms. Daniel testified that by the time she became aware of the problem, too much time had passed to be able to attempt to determine the cause, and she thought Grievant had been made aware of this. She testified that the next time grades were due, Grievant had sent his in late, and if he had been late sending his mid-term grades also, this could have been the reason thestudents' grades were incorrect, and she thought Grievant had also been told this. She testified, however, with regard to Grievant's claim of tampering, that only Grievant and Mr. Link could access Grievant's grades on the computer.

Regardless of the reason the student mid-term grades were incorrect for two of Grievant's classes, this provides no justification for Grievant's failure to maintain student grades on the computer as he was required to do; particularly after he was specifically directed by Ms. Daniel to do so. The prudent action would have been to report the error at the time it occurred, and then let the school administrators decide whether Grievant should continue to maintain student grades on the computer. Grievant was not authorized to make this type of decision.

Grievant's explanation for student absences not being properly recorded on December 2, 1999, when Ms. Daniel observed his class, was that he sometimes tried to record an “A” for an absent student on the computer, but it would not accept this information. He testified he did not report this to anyone, nor did he try to determine why this was occurring, because the next class period it would work properly. Whether this was the result of human error or a computer malfunction need not be determined. Grievant had an obligation to do what was necessary to make sure this information was properly recorded.

Grievant testified that Ms. Daniel did not provide him with three of her observation forms until March 23, 2000. He did not believe this was fair. Had this actually happened, it would not be fair or in accordance with policy. After each 30 minute observation, the supervisor must conduct a post-observation conference with the employee within five working days, and a signed copy of the observation form must be given to the employee at that time. 126 C.S.R. 142 § 9.5.

Ms. Daniel agreed that she had handed Grievant three observation forms on March 23, 2000. She explained, however, that the reason she had done so was that when shemet with Grievant about these observations when they occurred, he placed the observation forms on her desk or in a chair, and did not take them with him. She testified that when she met with Grievant to discuss her

observations he made it apparent that he did not want to discuss the issues with her. She stated that on several occasions when she handed him his copy of the observation form he would place it on her desk or in a chair, and she would then ask him to refer to the observation form so they could discuss it and work on ways to improve performance. She stated it was difficult to do this when Grievant would not refer to the observation form when she asked him to do so. She would then read out loud what she had written on the form; he would tell her she did not need to read to him, that he could read; and she would then ask him to please refer to the observation form, and again he would not; and she would read out loud to him.

The behavior described by Ms. Daniel is consistent with the behavior exhibited by Grievant at the Level IV hearing. He continually interrupted the witnesses, counsel for KBOE, and the undersigned, after being repeatedly told not to do so; he pushed one exhibit to the end of the table and refused to look at it after the undersigned went off the record to allow him time to do so; he had to be given the same instructions repeatedly over the course of the hearing; he repeated the same testimony more than once; and he had a difficult time focusing on the issue at hand at any given point of the hearing. The undersigned finds Ms. Daniel's testimony on this issue to be more credible than Grievant's.

Grievant's evaluation notes as a deficiency that Grievant left the November 19, 1999 conference with Ms. Daniel before she was finished, and refused to return. Grievant admitted that he raised his voice during the conference with Ms. Daniel on November 19, 1999, and that he left. He believed his action was justified, however, because Ms. Daniel was “talking down” to him “like [he] was a child,” and being disrespectful toward him, when she sneered at him and told him “[d]on't stand over top of me,” rather than simply asking him to sit down when he came to her office for a conference. Ms. Daniel was sitting behindher desk, and Grievant was standing on the other side of her desk. Grievant did not believe Ms. Daniel's tone of voice and the words used were properly respectful toward a person of his age, and he believed he should be allowed to stand during the conference if he chose to do so.

While it would certainly be unprofessional of Ms. Daniel to sneer at Grievant, Grievant obviously misunderstands his relationship with Ms. Daniel. Regardless of her age, Ms. Daniel was Grievant's supervisor. If she told him to do something, he was to do it, absent some exceptional reason for not doing so. Grievant has presented no such exceptional reason for his failure to do as he was told by Ms. Daniel at various times throughout the school year. There is no justification for him raising his

voice to Ms. Daniel, exiting the conference before she was finished, standing over her, or speaking to her in an inappropriate manner.

With regard to Ms. Daniel's comments about Grievant's use of IGO's, Grievant explained he would write one IGO on the board and would gear a question around it one day, and he would add a new IGO to the board the next day, and so on, so that by the end of the week, there would be five IGO's written on the board. While this may explain why Ms. Daniel observed on March 3, 2000, that the same three IGO's were listed for several days, it does not address Ms. Daniel's concerns that the same IGO's were used in lesson plans for a week in October and in December; that the IGO's listed in lesson plans were not consistent with the work students were performing; that objectives did not seem to relate to IGO's; and that few IGO's were listed in Grievant's lesson plans.

Grievant asserted that the evaluation period was long, running from August 28, 1999, through March 20, 2000, and that it was an invalid evaluation period because August 28, 1999, was a Saturday. He cited no authority for his legal conclusions. Grievant testified, however, that his employment period for the 1999-2000 school year began prior to August 28, 1999. It makes no difference whatsoever whether the listed datewas a Saturday, Sunday, or any other day of the week, so long as it was within the evaluation period. Even if there were some requirement of which the undersigned is unaware which states that the beginning date of the evaluation period cannot be a Saturday, listing a Saturday as the beginning date would be harmless error absent some evidence that Grievant was prejudiced because of this. As to the length of the evaluation period, the undersigned's reading of Policy 5310 is that the evaluation period would normally be for a longer period: the entire school year. W. Va. Code § 18A-2-12 provides that “evaluations shall be completed on a regular basis and of such frequency and duration as to insure the collection of a sufficient amount of data from which reliable conclusions and findings may be drawn.” The evaluation period in this case met the criteria of this Code Section.

Grievant complained that Ms. Daniel and Mr. Clendenin would not allow him additional time so he could contact his West Virginia Education Association representative to assist him at a conference called for the purpose of going over his evaluation. KBOE admitted Grievant was not allowed additional time to obtain representation, and that the evaluation was a “done deal,” as suggested by Grievant. KBOE argued that the evaluation was not negotiable, and KBOE is not required to allow Grievant time to obtain representation. Grievant pointed to no statute, regulation, policy, or practice

which provides teachers with a right to representation at evaluation conferences.

W. Va. Code § 18-29-3(f) discusses the right of an employee to have representation, stating,

> An employee may have the assistance of one or more fellow employees, an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure, as well as at any investigative meeting or other meeting which is held with the employee for the purpose of discussing the possibility of disciplinary action. When a fellow employee is assisting a grievant, the employee shall do so without loss of pay and shall have protection from reprisal as that term is defined in section two of this article.

The purpose of the evaluation conference was to go over the evaluation which had been completed by Ms. Daniel. This was not a disciplinary meeting, nor was it a meeting about a grievance which had already been filed. This statutory provision does not apply to an evaluation conference. Policy 5310 provides that the supervisor is responsible for completing the performance evaluation, and is required to share the evaluation with the employee during a scheduled conference. It then states the employee has the right to include a written statement as an addendum to the evaluation. 126 C.S.R. 142 § 10. It says nothing about the employee having a right to representation at the evaluation conference. “The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our state Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc., v. Pence, 240 S.E.2d 668 (W. Va. 1977). Thus, if an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney.” Hale v. Div. of Corrections, Docket No. 97-CORR-353 (Feb. 20, 1998). The sixth amendment right to counsel is not applicable here. The undersigned concludes that Grievant did not have a right to representation at the evaluation conference.

Further, while Grievant complained that he would not have time to obtain representation, he did not testify that he had in fact attempted to have representation, but his representative was not available on such short notice.

Grievant argued that Ms. Daniel had no intention of allowing him to “contest” his improvement plan. KBOE conceded that this was probably correct. However, as KBOEcorrectly points out, there is

no requirement that Grievant be provided an opportunity to contest his improvement plan, except through the grievance procedure. What is required is that Grievant have input into development of the improvement plan. Ms. Daniel testified that Grievant and his representative were provided with an initial draft of the improvement plan, and, at the representative's request, he was given several days to review this with Grievant. Grievant then provided suggested changes to the plan at the next meeting, and these suggestions were considered by Ms. Daniel and Mr. Clendenin. Those in attendance at the meeting to develop the improvement plan then reached some agreement about the changes to be made to the plan. Grievant did not dispute this testimony. At first, Grievant could not remember whether he was allowed to provide input into the development of the improvement plan. He then recalled that he had discussed who would be “supervising him.” He offered no evidence that any suggestions he made, other than that the improvement plan not be put in place at all, were not considered and made a part of the improvement plan. Grievant was allowed input into the improvement plan. He has not demonstrated that it was not developed in accordance with the requirements of Policies 5300 and 5310.

Grievant argued the improvement plan states it “will commence on March 27, 2000,” and that it has improperly extended beyond one semester. The undersigned does not understand this argument. If Grievant is referring to the fact that, as of the Level IV hearing, the improvement plan had not yet been implemented due to Grievant's inability to return to work due to medical reasons, Grievant cannot escape the improvement plan so easily. When he is able to return to work, the improvement plan will be waiting for him. Principal Clendenin advised Grievant by memorandum dated May 24, 2000, that the improvement plan would be placed on hold pending his return to work. (See footnote 7) Grievant has not demonstrated that his performance during the 1999-2000 school year was satisfactory, or that Ms. Daniel acted in an arbitrary manner in her evaluation of his performance. The improvement plan was developed in conformance with the requirements of Policy 5310.

C C.

Reprisal.

Grievant alleged Ms. Daniel's observations, his poor evaluation, and placement on an improvement plan were in reprisal for filing a complaint with the Human Rights Commission. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant

or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> 1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;
>
> 2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> 3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
>
> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra.

Grievant did not demonstrate reprisal, as that term is defined by the grievance procedure. There was no evidence that he had filed a grievance in the past. His filing of a complaint with the Human Rights Commission is not a grievance, and is not covered by the statutory definition of reprisal. See Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998). Further, the undersigned finds no inference of retaliatory motive. KBOE has established the validity of the observation forms and performance evaluation completed by Ms. Daniel. It is crystal clear that Grievant was not performing his duties in a satisfactory manner, and that he refused to take direction from Ms. Daniel to correct his behavior.

In an effort to demonstrate that Ms. Daniel had treated him in an unfair manner, Grievant testified a student enrolled at Riverside with 14 days remaining in the first grading period. Ms. Daniel told him he was to give this student an Incomplete, and let him make up the work during the next grading period. Ms. Daniel scheduled a meeting with Grievant and this student's mother for October 21, 1999. Grievant thought the meeting was for the purpose of discussing the work the student would be

making up. Ms. Daniel told Grievant to bring his grades and lesson plans to the conference. Grievant stated that during the meeting Ms. Daniel asked for Grievant's grades, and then asked him how the student had an “A” in his class. Grievant stated he responded that the student did not have an “A,” and he did not believe that was why they were meeting. Grievant believed it was significant that he was told the purpose of the meeting was to discuss the student making up missed work, and instead, it centered on the student's grade. Ms. Daniel testified that KBOE is required to allow a student who has missed school for an extended period of time due to medical reasons, as was the case here, to make up the work he has missed, but Grievant was reluctant to allow this student to make up the work he had missed. She stated she scheduled the conference so they could develop a make-up plan for the student. However, it was at that time she discovered Grievant did not have his lesson plans to date. She also discovered that Grievant was not keeping accurate grade records, with one assignment not labeled, and some student records showing blanks where the grades should be for some assignments. Ms. Daniel testified Grievant had reported this student was failing, but his recorded grade was an “A.” This was what led to the completion of the first observation form by Ms. Daniel, not Grievant's filing of a complaint with the Human Rights Commission. Neither Grievant nor Ms. Daniel explained what was done to develop a make-up plan for this student without any lesson plans being available, but given this fact, and the fact that the grade reports were not being accurately kept, it is no wonder that the conference may not have gone off as originally planned.

As another example of poor treatment, Grievant testified he wrote discipline slips for two students, and gave them to Neil Hopkins, who was in charge of discipline. He also told Ms. Daniel he did not want one of the students back in his class unless he was able to speak with the parents first. Mr. Hopkins gave Ms. Daniel the discipline slips, and she scheduled a meeting with both parents, the parent of a third student who had participated in the action for which the other students were disciplined, and Grievant. Grievant believed it was significant that Mr. Hopkins did not handle the student discipline in this case. Grievant did not wish to meet with all three parents at the same time, as Ms. Daniel had arranged. Grievant believed the conference was to be about the behavior of the students. Grievant complained that his completion of discipline slips was used to evaluate him and put him on a plan of improvement. He also complained that Ms. Daniel omittedinformation from her written summary of the conference. He suggested that these students were being used to put him on a plan of improvement.

Ms. Daniel's version was that on February 24, 2000, three students from Grievant's third block class had come to her office with concerns about Grievant's class. They told her they had requested permission from Grievant to come to the office, he had denied them permission, and they had left his class anyway. They expressed to her a concern with the high number of failures in the class, the lack of instruction, work being lost, and work not being returned in a timely manner.

With regard to the discipline slips completed by Grievant, Ms. Daniel testified that Mr. Hopkins was aware that the students had gone to Ms. Daniel with concerns about the class. Mr. Hopkins also told her and Principal Clendenin that he would not be comfortable handling this problem due to a complaint Grievant had filed, which involved him in some way. For these reasons, the discipline slips were given to Ms. Daniel. The undersigned finds nothing improper or conspiratorial in this.

Ms. Daniel contacted the parents and scheduled a conference to discuss not only the students' actions which had resulted in the discipline slips, but also the concerns the parents had with Grievant's classroom instruction. Ms. Daniel's summary of the February 28, 2000 conference with the parents states that the purpose of the meeting was to discuss the high number of failures in Grievant's third block class. It does not indicate that the students' actions which resulted in the discipline slips were discussed at all. Ms. Daniel explained the reason for this was that all the parents met with her, Grievant, and Principal Clendenin at first to discuss the parent concerns with Grievant's classroom instruction. She stated she made it very clear at the beginning of the conference that she would not discuss individual student acts and discipline with the parents of other students, and that at the conclusion of the joint conference, she would meet with individual parents privately. She stated she did not address discipline of the students in the summary for this reason,and also because she sent the summary to the parents. Ms. Daniel testified that after the joint conference, one of the students had to leave, because of a medical appointment. One parent was willing to stay and discuss the discipline of her child, but no one then asked for such a conference, and Grievant went on to his second block class. Ms. Daniel administered the discipline to the students she deemed appropriate.

Ms. Daniel's handling of this situation certainly seems reasonable. Just because Grievant did not agree with her approach did not mean it had to be done his way, or that anything improper occurred. It is understandable that Grievant would prefer to focus on the behavior of the students, rather than on complaints about his teaching methods. Ms. Daniel obviously could not simply ignore the complaints of these students because of their incorrect behavior, and there was nothing improper in

noting these student complaints on Grievant's evaluation.

Grievant asserted that other employees who were “scoundrels” had not been put on an improvement plan, and that the goal of putting him on an improvement plan was to eliminate him as a coaching candidate. No evidence was presented which would tend to support the veracity of these assertions. It should be noted at this point, however, that Grievant was also placed on an improvement plan during the 1997-98 school year.

The undersigned concludes that the evidence presented does not demonstrate that Grievant was treated in an unfair manner.

D D.

Discrimination.

Grievant further suggested that he was being discriminated against because of his race. Grievant is an African-American. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. A grievant alleging discrimination must establish a prima facie case by demonstrating:
>
> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra.

Grievant did not demonstrate that he was treated differently from any other similarly situated

employee. As a classroom teacher, Grievant was subject to teacher observations by his supervisor just as any other teacher, he was required to have lesson plans just as any other teacher, he was required to maintain his grades on the computer just as any other teacher, and he was required to maintain a certain standard in his instruction, just as any other teacher.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that heshould be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. An informal conference must be scheduled within 15 days " following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance," and the grievance must be filed within ten days of receipt of the response from the immediate supervisor after the informal conference, unless the parties agree to extend the time periods. The time periods "shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code." W. Va. Code §§ 18-29-3 and18-29-4(a).

3. Grievant did not request an informal conference or file his grievance within the time periods specified in W. Va. Code § 18-29-4(a). However, these time periods were tolled, as is provided in W. Va. Code §§ 18-29-3 and 18A-4-10, due to the fact that he was on leave for medical reasons for nearly the entire period of time after he became aware of his unsatisfactory evaluation and that he would be placed on an improvement plan, until (and after) he filed this grievance. The grievance as it relates to Grievant's evaluation and improvement plan was timely filed.

4. As a grievance about an employee's evaluation is not a disciplinary grievance, a grievant has the burden of proving his case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995).

5. Generally, this Grievance Board will not intrude on the evaluations of employees unless

there is evidence to demonstrate "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." Kinder v. Berkley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 286 S.E.2d 682 (W. Va. 1981); Thomas v. GreenbrierBd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).

6. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in Policies 5300 and 5310 and W. Va. Code §18- 2-12. See Brown, supra; Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982).

7. The mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

8. Grievant's evaluation was performed correctly, fairly, and competently in all respects. Not only were the procedural requirements set by Policy 5310 met, but the expectations established for Grievant in the improvement plan were appropriate, clear, and determined with his full knowledge.

9. Grievant did not meet the standard set for satisfactory performance as stated by Policy 5310: "Performance is consistently adequate and acceptable."

10. Grievant did not establish a violation of W. Va. Code § 18A-2-12, State Board of Education Policy 5310, or a violation of KBOE's policies pertaining to performance evaluations.

11. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra.

12. Grievant did not demonstrate reprisal, as that term is defined by the grievance procedure. There was no evidence that he had filed a grievance in the past. His filing of a complaint with the Human Rights Commission is not a grievance, and is not covered by the statutory definition of reprisal. See Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998). Further, Grievant failed to show any inference of retaliatory motive.

13. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);

> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

14. Grievant did not demonstrate that he was treated differently from any other similarly

situated employee. As a classroom teacher, Grievant was subject to teacher observations by his supervisor just as any other teacher, he was required to have lesson plans just as any other teacher, he was required to maintain his grades on the computer just as any other teacher, and he was required to maintain a certain standard in his instruction, just as any other teacher.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 26, 2001

Footnote: 1

Grievant sought to challenge whether he was properly placed on a performance evaluation phase at the beginning of the 1999-2000 school year, arguing he should have been placed on a professional growth and development phase. The undersigned ruled at the Level IV hearing that this was not an issue which could be addressed in this grievance, both because it was untimely and because it would be a different grievance, and no evidence was accepted on this argument.

Footnote: 2

An informal conference was requested by Grievant on May 12, 2000. As this did not satisfactorily resolve the issues, this grievance was filed at Level I on June 30, 2000. The grievance was denied at Level I on July 11, 2000, and Grievant appealed to Level II. A Level II hearing was held on July 21, 2000. A Level II decision denying the grievance was issued on August 28, 2000. Grievant waived Level III, appealing to Level IV on September 15, 2000. A Level IV hearing was held on October 6 and 17, 2000. Grievant represented himself, and Respondent was represented by James W. Withrow, Esquire.

During the course of the hearing, Grievant's Exhibit H was reserved for an e-mail message from Cindy Daniel to Grievant dated March 20, 2000, notifying him of hisevaluation conference the next day. Grievant supplied this exhibit on October 26, 2000, and it has been marked as Grievant's Exhibit H, and is ordered admitted into evidence. While Grievant

was adamant that this document was the only exhibit he ever introduced at Level II, the Level II transcript does not reflect that Grievant offered this document into evidence. Grievant was also given time to compare his records at home to Respondent's Exhibit 8 after the hearing. Grievant offered no objection to the exhibit after the hearing, and Respondent's Exhibit 8 is ordered admitted into evidence.

Grievant submitted several documents after the close of the Level IV hearing, by letters dated October 25 and November 1, 2000, which he asked be marked as Grievant's exhibits. He also made statements in these letters regarding matters about which no testimony was offered at either the Level II or IV hearings. Respondent objected to this attempt to introduce new evidence after the close of the hearing, and without any opportunity to cross-examine. Grievant again submitted additional documents when he submitted his written argument on November 30, 2000. As the record in this proceeding was closed at the conclusion of the Level IV hearing, except for receiving Grievant's Exhibit H and objection to Respondent's Exhibit 8, and Grievant presented no reason for reopening the record, these additional documents will not be marked as exhibits, and neither these documents nor Grievant's statements in these letters will not be considered evidence in this proceeding. This grievance became mature for decision on December 7, 2000, the deadline for KBOE to submit a reply brief, which it declined to do.

Footnote: 3

Ms. Daniel described a sponge activity as an activity designed to keep the students engaged and eliminate down time at the beginning of the day while the teacher is taking care of routine matters.

Footnote: 4

Ms. Potter did not testify.

Footnote: 5

Grievant contested the authenticity of the improvement plan offered into evidence at Level IV as Respondent's Exhibit 14, based upon the fact that a copy of the improvement plan placed into evidence at Level II as Kanawha County Schools Exhibit 2, was not identical to Respondent's Exhibit 14. The only differences were that the Level II exhibit was not signed while the Level IV exhibit was signed by Principal Clendenin, Ms. Daniel, and Dr. Williams, and the Level IV exhibit had the word "Final" handwritten at the top of page one, the word "Added" handwritten, pointing to two lines at the bottom of page one, and it had a handwritten asterisk beside item number six on the third page. The content of the two documents is exactly the same. Ms. Daniel testified that the Level IV exhibit was Grievant's improvement plan. Grievant did not bring his copy of the improvement plan with him to the Level IV hearing. Grievant could not point to any area in which these two documents did not accurately reflect the final terms of the improvement plan. It is accepted that both documents accurately reflect the terms and conditions of the improvement plan finalized on March 27, 2000. Further, the burden of proof in this grievance was upon Grievant to demonstrate that the improvement plan was not properly developed, not upon Respondent to demonstrate its validity. As Grievant did not make any argument challenging the content of the improvement plan, other than disagreeing with Ms. Daniel's conclusions about his performance, it makes no difference whether the improvement plan itself is a part of the record in this grievance.

Footnote: 6

Grievant disputed the dates KBOE witnesses stated he had been on medical leave, testifying he was at work at certain times, although no specific dates were provided by Grievant. It is sufficient for this finding of fact, which will be used in determining the timeliness of the grievance, that Grievant has been on medical leave nearly every day since he was provided with his evaluation and told he would be placed on an improvement plan.

Footnote: 7

Grievant argued for the first time in his post-hearing written argument, submitted after KBOE filed its argument, that the improvement plan was flawed because it provides for anevaluation at the end of the improvement period, stating, "[n]o where in Policy 5310 have I found that there would be two Evaluations concerning one Plan of Improvement." This Grievance Board does not consider new arguments raised by any party for the first time in their post-hearing written argument, as the opposing party was not placed on notice that this would be an issue, and had no opportunity to submit evidence to dispute the claim. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). Even were this argument to be considered, however, it would be rejected. The undersigned is not aware of any provision which would preclude an evaluation of whether Grievant's performance improved during the improvement period.