YVONNE HOWDERSHELT,

Grievant,

v. **Docket No. 06-HE-105**

WEST VIRGINIA NETWORK for EDUCATIONAL TELECOMPUTING,

Respondent.

D E C I S I O N

Yvonne Howdershelt ("Grievant"), employed by the West Virginia Network for Educational Telecomputing ("WVNET"), as a Senior Administration Applications Software Specialist, filed a grievance at level two on December 5, 2005, in which she alleged discrimination and retaliation in violation of the Public Employees Whistleblower Law. (See footnote 1) For relief, Grievant requested that a written reprimand be removed from her personnel file, permission to engage in outside consulting work, or the compensation she would have earned from the work, that the harassment cease, and the Whistleblower law be posted in the WVNET offices.

The grievance was denied at levels two and three. A level four appeal was filed on March 27, 2006. An evidentiary hearing to supplement the level three record was conducted in the Grievance Board's Westover office on May 18, 2006. Grievant was represented by Mary McQuain, Esq., of the Calwell Practice, PLLC, and WVNET was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The grievance became mature for decision upon receipt of WVNET's response to Grievant's proposed findings of fact and conclusions of law on July 10, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the record at levels three and four.

Findings of Fact

1. Grievant has been employed by WVNET as a Senior Administration Applications Software Specialist at all times pertinent to this grievance.

2. WVNET was created in 1975 to provide deployment of technology and support for telecommunications and computing services throughout West Virginia, linking its central site in Morgantown with the campus computing systems at most of the colleges and universities throughout the state. Since July 1, 2000, WVNET reports to the West Virginia Higher Education Policy

Commission ("HEPC").

3. Use of the Banner Finance software program, which integrated with the Banner student program already in use, was mandated for institutions of higher education by a statewide committee in 2000. The implementation of the program was primarily completed by an outside company, SCT, with assistance from WVNET employees. (See footnote 2) The implementation phase was completed in 2002, and WVNET has been providing support services to the institutions for the Banner program since that time.

4. The Eastern West Virginia Community and Technical College ("EWVCTC") was created after the implementation phase of the Banner program had begun. There has since been intermittent discussion with WVNET regarding its separate implementation of the program.

5. Roberta Linger, WVNET Director of Administration, advised various WVNET employees, including Grievant, by e-mail on September 13, 2002, that a follow-up meeting on the Banner Finance implementation at EWVCTC had been scheduled for September19, 2002. Ms. Linger requested that the participants review the draft Project Document which had been distributed at the previous meeting, and draft a plan describing how they wanted to implement their area of expertise, including the number of visits necessary and target dates for completion.

6. By letter dated September 19, 2002, Grievant advised Ms. Haddix as follows:

I regret to inform you that I will not be putting together a draft plan, nor will I be playing any role in implementing Eastern.

Here are my reasons:

1) I have a FULL workload. Period. The expectation to take on a project in addition to a full workload constitutes the expectation of me to donate my time and expertise. I cannot afford to donate either.

2) The termination of my "interim" position was based on your definition of "the end of the Banner Finance Implementation Project." You determined that date to be June 30, 2002. My July 15 paycheck clearly reflected that.

3) As of July 1, 2002 Banner Finance is in Support/Development Mode. The Eastern Implementation is a separate project. It requires separate Finance staff. The decision to understaff Finance doesn't make me a part of the solution to your problem.

4) You are attempting to set a precedence by assigning full responsibility of an Implementation to Finance staff. You are attempting to make the leap from staff assisting SCT to staff assuming full responsibility. Why don't you test the waters with an Implementation that requires a much narrower scope such as AR or Financial Aid?

5) You are attempting to depart from our standard of assisting SCT with Implementation in a standard fashion statewide. Let's see, training per school was 240 hrs x $160 per hour plus preparation and travel expenses - what was it, about $80,000? And what about my time and expertise? And you expect your Finance staff to do both SCT's work and my work at a rate of $8,000 while supporting seven other institutions? Ha, ha, ha, ha, ha, ha, ha, ha, ha, oh, sorry, got a little carried away there.

Good Luck on the Eastern Implementation. 7. In April 2003, Grievant failed to attend another meeting with EWVCTC regarding the Banner implementation. Bonnie Lynch, WVNET Manager of Application Services and Grievant's immediate supervisor, notified Grievant on April 16, 2003, that “I have tried to accommodate your position of the [Eastern] implementation, but the fact is we can't do it without you. You do not have the option to completely refuse to be involved. Just wanted to make that clear in case I didn't before.”

8. On November 3, 2005, Grievant sent John Kelly, CFO of EWVCTC, the following e-mail: Bonnie emailed us about a Friday conference call regarding an Eastern Implementation. . . I wanted to provide you with some background information that you may or may not have so that you can be a more informed participant in Friday's conference call.

What is an Implementation?

The Banner Finance Implementation Project (I'll refer to it as BFIP) began in Fiscal Year 2001 and ended in Fiscal Year 2002. The major functions of the BFIP were Design, Training, Implementation, and Support. Major responsibility for these functions resided with SCT. As part of their implementation, SCT provided 240 hours of training per school at a cost of $160 per hour, plus travel expenses and hours charged for preparation. In addition to SCT's training, WVNET provided hundreds of hours of additional training and problem resolution. The success of each Implementation was dependent on resources dedicated to the project, and expertise of key personnel.

DBA functions accounted for approximately 10-20 percent of the project. Functional training and

implementation accounted for approx [sic] 80 percent. WVNET employs 5 DBAs for Banner and 2 Functional Specialists for Banner Finance. **WVNET does not provide Implementation services for Functional Support.** The main reason is that they lack sufficient resources. Even in the area of Support (as contrasted with Implementation), WVNET lacks sufficient resources in meeting industry standards. (Industry standards recommend one functional specialist per module. Roman Chuby and I support six modules. The only modules supported by WVNET that meet industry standards for resource allocation - one specialist per module - are AR and Financial Aid.) Although Roman and I account for the highestproductivity rates as measured on our Oz Problem System for all Banner Functional Specialists, we still have approximately 85 Open Problems at any given time due to WVNET's lack of sufficient resource allocations.

Three years ago, WVNET proposed an Implementation with Eastern. The problem is that you would have a database with the Banner Finance software installed (DBA service), but no one to Implement it (Functional Specialist). Nothing has changed in the last three years, except that WVNET added 2 DBA positions. This puts Eastern in the same position as three years ago - an installation of software with no one to Implement it.

Roman and I currently Support 10 Institutions. Until we meet industry standards (WVNET should hire at least 2 more Functional Specialist for Support services, and contract out Implementation services in a consistent manner as the BFIP), it is impossible for WVNET to provide Eastern with a Banner Finance Implementation.

9. On November 17, 2005, Ms. Lynch, issued a written warning, advising Grievant that she did not have the option to refuse to be involved with the EWVCTC implementation. Ms. Lynch surmised that “you are effectively attempting to insure that you won't have to participate by convincing the college not to implement Banner Finance.” She continued, in part:

Sending such a memo to our customer without the prior consent of your management was unprofessional and completely inappropriate, and reflected insubordinate behavior. Your opinions on staffing levels and related issues are not appropriate topics for discussion with our customers, particularly in an effort to discourage customers from doing business with the organization. The result of your memo may be an initial loss of approximately $50,000 a year which EWVCTC pays WVNET

for hosting their Banner Finance system. This income will stop immediately unless the Community and Technical College Council mandates that they implement the software. This income was budgeted by WVNET to help cover expenses for housing their Banner database and will represent a significant shortfall this fiscal year and in the future.

Subsequent losses because of your memo, including the damage to WVNET's reputation with all our customers, as well as the Higher Education Policy Commission and the Community College Council, is yet to be seen, but could be significant.
The PIQ, that you signed, indicates that you provide implementation services to our customers. WVNET agreed in writing to provide implementation services to EWVCTC specifically, and advertises that we provide such services. You do no have the authority to decide that you will not be a part of a service that WVNET is obligated to provide and that you are compensated for providing; doing so is regarded as insubordination.

Because of the above documented unprofessional and inappropriate behavior, resulting in the potential loss of a $50,000 contract and immeasurable damage to our reputation, you are being given this written warning. It is expected that you will modify your behavior in the future to insure that our services are provided in a professional and customer friendly manner. Future incidents of insubordinate, unprofessional and/or inappropriate behavior will result in additional disciplinary action, up to and including termination.

10. Subsequently, EWVCTC requested and received an exemption from implementation of Banner Financial, and declined to renew a contract with WVNET. 11. The Position Information Questionnaire ("PIQ") completed by Grievant in 2005, states that approximately 60% of her duties and responsibilities include:
provid[ing] on-going support to the West Virginia Higher Education Fiscal Officers in the areas of financial accounting and reporting and data processing using SCT's Banner software. This includes:

- Travel to individual institutions to assist with the implementation and ongoing success of Banner Finance in a standard fashion statewide.

12. WVNET Employee Handbook, § 10.22 provides that employees may engage in outside computing activities, including but not limited to teaching, consulting, systems analysis, programming,

data analysis and preparation. However, activities which are essentially the same as those provided by the employee in the normal course of full-time WVNET employment for a regular WVNET customer, constitutes a conflict of interest and will not be allowed. 13. On November 4, 2005, Grievant requested approval to engage in personal consulting activity with Northern Community College ("NCC"). She described the proposed activity as providing "general ledger module and related finance operations implementation/training that Northern did not complete during their Banner Finance implementation project." Grievant stated that the contract was for services which WVNET "does not provide on a routine basis." Grievant was to be paid $50 per hour, not to exceed $10,000.00.

14. When asked to provide more information about the NCC contract, Grievant advised Ms. Lynch that "[m]y personal consulting with Northern involves General Ledger Module training/implementation. WVNET cannot provide Support Services in Banner Finance to institutions that didn't meet the pre-requisites in the General Ledger Module and related Financial Operations. Currently my Support Services to Northern include the Accounts Payable and Purchasing modules."

15. Grievant's request to engage in private services for NCC was denied after Ms. Lynch spoke with a NCC representative regarding the services, and WVNET's senior staff concluded that there would be a conflict of interest because the activities described were essentially those performed by Grievant during the regular course of her employment, and NCC was a WVNET client.

16. Grievant's request to engage in personal consulting work for West Liberty State College was approved in April 2005. In this case Grievant was to analyze and provide solutions to internal accounting problems over a year old.

17. On November 17, 2005, Ms. Lynch provided Grievant with her performance review for 2004. Grievant was rated as "Meets Requirements" in six categories, and"Highly Satisfactory" in five categories, for an overall rating of "Meets Requirements +." In 2002, Grievant was rated "Highly Satisfactory" in all categories. In 1999, Grievant was rated as "Meets Requirements" in four categories, and "Exceeds Requirements" in three categories.

18. Prior to completion of the 2004 evaluation, the application of the rating system had been adjusted pursuant to HEPC recommendations, to reflect the premise that there are no perfect employees. As a result, the ratings of many employees were lower than on previous evaluations.

Issues and Arguments

Initially, Grievant asserts that WVU did not follow the procedure as set forth in *W. Va. Code* § 18-29-4, inasmuch as the level two hearing was not conducted by the Chief Administrator and the level three hearing was not conducted by the governing board of the institution. Grievant further asserts that WVNET defaulted when the level three decision was not timely issued. Grievant argues that the letter of reprimand must be removed from her file as her memorandum to Mr. Kelly was protected by her right to free speech, and due to the nature of the content, by the West Virginia Public Employees' Whistle-blower Act. Grievant next argues that the denial of her request to perform outside consulting work, and the lowered performance evaluation were in retaliation for her communication with Mr. Kelly, and serve as a pretext for unlawful discrimination.

WVNET denies a misapplication of the statutory grievance procedure, or that it defaulted at level three. WVNET argues that the letter of reprimand was properly issued, and that Grievant was protected in this instance by neither the Whistle-blower Act nor her right to free speech. Both the decision to deny Grievant's outside activity and theperformance evaluation were based on independent factors, and WVNET asserts that neither was in retaliation for Grievant's letter to Mr. Kelly. Finally, WVNET denies that it has subjected Grievant to discrimination.

Discussion

Because several issues have been raised by the parties, and the burden of proof changes, the default claim, the letter of reprimand, retaliation and discrimination will be addressed separately.

Default Claim

___ The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ*., Docket No. 02-17-003 (Sept. 20, 2002). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

___If a default occurs, Grievant is presumed to have prevailed on the merits of the case. *W. Va. Code* § 29- 6A-3(a)(2); *Carter v. W. Va. Div. of Corr.*, Docket No. 99-CORR-147D (June 4, 1999); *Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999). However, an employee is allowed to pursue a default claim only if she raises it as soon as she becomes aware of the default. *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997); *Martin*

v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit thedefault claim before a response to the grievance has been received. *Harmon v. Fayette County Bd. of Educ*., 205 W. Va. 125, 516 S.E.2d 748 (1999). Since Grievant obviously believed that the level three decision was untimely before it was issued, declaration of default after receipt of the decision AND appeal to the next level was long after Grievant was aware of the alleged default. The pursuit of this default claim was untimely.

Even if the claim for default had been timely filed, Grievant could not have prevailed. A review of the level three transcript establishes that at the conclusion of the level three hearing, the hearing evaluator advised the parties that she would receive a transcript of hearing within ten working days. At that time she would execute a complete review of the record and request additional information, if necessary. “When I'm convinced that everything is taken care of, I will close the hearing at that time and notify Mary Neely so that she can contact both parties by e-mail and say that it's done. At that time, the five-day working report to the level three person and his or her decision will be rendered.” Grievant stated no objection to the procedure or schedule at that time. The record does not state when the examiner completed her review of the transcript.

Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. *Gerencir v. Kanawha County Bd. of Educ*., Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ*., Docket No. 01-20-038D (Apr. 10, 2001). Further, “[a] party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. *See e.g. State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) ('Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate andadverse consequences.'); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993) ('It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.' (Citation omitted).)." *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

Grievant's concern that the level two and three proceedings were conducted by the wrong individuals is based on the application of an incorrect statutory procedure. While higher education employees were originally included in the grievance procedure set forth in *W. Va. Code* §§18-29-1 *et seq.,* a revision of *W. Va. Code* § 18B-2A-4 transferred those individuals to the grievance procedure

for state employees, effective July 1, 2001. Included in the powers and duties of the higher education governing boards, subsection (k) states:

(k) Administer a system for hearing employee grievances and appeals. Notwithstanding any other provision of this code to the contrary, the procedure established in article six-a, chapter twenty-nine of this code is the exclusive mechanism for hearing prospective employee grievances and appeals. In construing the application of said article to grievances of higher education employees, the following apply:

(1) "Chief administrator" means the president of a state institution of higher education as to those employees employed by the institution and the appropriate chancellor as to those employees employed by the Commission or Council;

(2) The State Division of Personnel may not be a party to nor have any authority regarding a grievance initiated by a higher education employee; and

(3) The provisions of this section supersede and replace the grievance procedure set out in article twenty-nine, chapter eighteen of this code for any grievance initiated by a higher education employee after the first day of July, two thousand one;

W. Va. Code § 29-6A-4 states the procedural levels for state employees to be: Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.

The chief administrator or his or her designee shall hold a hearing in accordance with section six

of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.

The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

___Accordingly, it was appropriate that Ms. Haddix, as Ms. Lynch's supervisor, conduct the level two conference, and that Henry L. Blosser, Director of WVNET, issue the level three decision.

Letter of Reprimand

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). WVNET has established that the letter of reprimand was in response to Grievant advising Mr. Kelly of her opinion that implementation of the Banner Financial program was not feasible, thereby undermining WVNET's relationshipwith EWVCTC. Grievant does not deny the action, and believes her statements are valid. Grievant argues that she is protected by her right to free speech, and the Whistle-blower law.

W. Va. Code § 6C-1-2(g) defines whistle-blower as " a person who witnesses or has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." *W. Va. Code* § 6C-1-3(a) provides that:
No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

In order to prove an action is covered by the Whistle-blower law, an individual must "show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported or was about to report

in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." *W. Va. Code* § 6C-1-4.

Ms. Lynch testified that WVNET does offer implementation services, and that EWVCTC would only be billed for work as it was completed, with an estimated total cost of no more than $12,000.00. While it does not appear that WVNET has undertaken the sole implementation of the system since the mass project was completed in 2001, it is likely due to the fact that only EWVCTC has needed the service. Grievant's concern that WVNET lacks sufficient staff to complete the implementation, in addition to their otherduties, does not support a finding of wrongdoing or waste. Grievant made her position quite clear in the September 2002 letter to Ms. Haddix; she would not participate in implementation of Banner at EWVCTC. Accepting that her concerns were made in good faith, her actions remain contrary to the valid objective of her employer, and may well constitute insubordination.

Neither was Grievant protected by her right to free speech. The United States Supreme Court recently determined that "[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti, et al. v. Ceballos,* ___ U. S. ___ (May 30, 2006). Noting that "[w]ithout a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public service efficiently," the Court determined that restricting a public employee's speech, as it relates to the employee's professional responsibilities, "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.*

Reprisal/Retaliation

Grievant did not prove that her 2004 performance evaluation was lower than prior evaluations as a result of retaliation for her communication with Mr. Kelly. *W. Va. Code* § 29-6A-2(p) defines reprisal as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. To demonstrate a *prima facie* caseof 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *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 v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

As previously determined, Grievant had not engaged in an activity for which she was protected from retaliation. Further, the evaluation was for the calendar year 2004, and would not have addressed events of 2005. Finally, Ms. Lynch credibly testified that the evaluations were completed in compliance with the HEPC directive that the ratings be “more realistic.” Her testimony that ratings in general were lower than they had been in previous years was not rebutted by Grievant. Although Grievant's evaluation was somewhat lower than her “perfect” evaluation of 2002, it remained a very satisfactory “Meets Requirements +”. Discrimination

The final issue to be addressed is whether WVNET engaged in discrimination when Grievant's request to engage in outside activities was denied. *W. Va. Code* § 29-6A-2(d) defines discrimination 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 must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);
(b) that the different treatment is not related to the actual job responsibilities of the employees; and,
(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

Grievant has failed to establish that she has been treated differently from another employee. Although other WVNET employees have requested permission to engage in outside work at institutions of higher learning, the requests have been primarily to teach. Grievant's own description of the work she would perform for NCC was with “general ledger module and related finance operations implementation/training that Northern did not complete during their Banner Finance Implementation project.” In fact, this work appears to be remarkably similar to that which she declined to perform for EWVCTC. Concerns that the request was a conflict of interest is supported by Grievant's explanation that she would be providing services which WVNET *does not provide on a routine basis,* indicating they are services which may be provided by WVNET. Grievant did not show that anotheremployee had been allowed to engage in outside work providing services offered by WVNET, and failed to establish that she was subject to discrimination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ*., Docket No. 02-17-003 (Sept. 20, 2002).

2.___An employee is allowed to pursue a default claim only if she raises it as soon as she becomes aware of the default. *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997); *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. *Harmon v. Fayette County Bd. of Educ*., 205 W. Va. 125, 516 S.E.2d 748 (1999).

3. Grievant failed to pursue a claim for default before the level three decision was issued.___

4. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

5. WVNET established good cause for issuing Grievant a letter of reprimand. 6. *W. Va. Code* § 6C-1-2(g) defines whistle-blower as “ a person who witnessesor has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the

employer or to an appropriate authority."

7. In order to prove an action is covered by the whistle-blower law, an individual must "show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." *W. Va. Code* § 6C-1-4.

8. Grievant was not protected by the whistle-blower's law in this instance.

9. "When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti, et al. v. Ceballos,* ___ U. S. ___ (May 30, 2006).

10. Grievant was not protected by her right to free speech since the statements were made pursuant to her official duties as a public employee.

11. *W. Va. Code* § 29-6A-2(p) defines reprisal as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

12. 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *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 v. Bd. of*

Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

13. Grievant failed to prove that her performance evaluation for 2004 was affected by retaliation for her 2005 communications with EWVCTC.

14. *W. Va. Code* § 29-6A-2(d) defines discrimination 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”.

15. A grievant must establish a case of discrimination by showing:
(a) that he or she has been treated differently from one or more similarly-situated employee(s);
(b) that the different treatment is not related to the actual job responsibilities of the employees; and,
(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005). 16. Grievant has failed to establish that WVNET engaged in discrimination by treating her differently from one or more similarly-situated employees.

Accordingly, the grievance is **DENIED.**

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. However, the appealing party is required by *W. Va. Code* § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JULY 28, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

There is no evidence that the grievance was processed at level one.

Footnote: 2

The record does not reflect the full name of SCT.