THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

THERESA GRANT and ROBERT GRANT,

Grievants,

v. **Docket No. 06-06-012**

Janis I. Reynolds

Senior Administrative Law Judge

CABELL COUNTY BOARD OF EDUCATION,

Respondent,

and

KAREN OLDHAM,

Intervenor.

D E C I S I O N

Grievants, Theresa and Robert Grant, husband and wife, filed separate grievances against the Cabell County Board of Education ("CCBOE" or "Board") on October 25, 2005. Theresa Grant's Statement of Grievance says:

> Violations of WV 18-29-2 section "p" and WV Code 18-29-3 section "h" reprisal and retaliation by principal toward grievant by attempting to redress grievance through magistrate court and peace bond. Violates 18-29-3 section "h"[.] (See footnote 1)

> RELIEF SOUGHT: Relief sought is for Dr. Oldham to cease harassment and be subject to disciplinary action for insubordination.

These grievances were consolidated at the lower level, denied at Levels I and II, and waived at Level III. Grievants appealed to Level IV on January 11, 2006. Dr. Karen Oldham asked to intervene on March 6, 2006, and this request was granted. A Level IV hearing was held on March 13, 2006, at the Grievance Board's office in Charleston. This case became mature for decision on April 4, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievants were represented by Susan Hubbard from the West Virginia Education Association, CCBOE was represented by Attorney Rebecca Tinder of Bowles Rice McDavid Graff and Love, and Intervenor was represented by Attorney Brent Wolfingbarger.

Past History (See footnote 2)

This grievance grew out of a prior grievance filed by Grievant T. Grant ("Grant I") about a hostile work environment created by Intervenor when Intervenor served as her Assistant Principal. Grievant R. Grant also testified in that grievance, and gave a statement in a prior investigation concerning Intervenor's complaints about Grievant T. Grant and others. Intervenor was aware of his presence at the Level IV hearing. Intervenor testified in Grant I and did not seek to intervene.

This prior grievance was granted on February 28, 2006, and the undersigned Administrative Law Judge noted Dr. Oldham/Intervenor had created a hostile work environment and acted in an unprofessional manner toward Grievant T. Grant. The undersigned Administrative Law Judge found:

> Grievant [T. Grant] has clearly demonstrated she has been subjected to harassment by her then-Assistant Principal [Oldham], and that she is currently harassed by her Principal [Oldham]. Grievant has established a pattern of repeated and continual maltreatment by Oldham, and she has demonstrated she has been treated in a manner contrary to law. This treatment has interfered with Grievant's job performance and increased the

> amount of time needed to complete her work, as well as creating stress and concern for herself and her family.

Additionally, the undersigned Administrative Law Judge noted:

> W. Va. Code § 18-29-2(p) defines reprisal 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." It should be noted that no reprisals of any kind may be taken by any agent of the employer against any interested party or other participant in the grievance procedure. A reprisal constitutes a grievance, and any person held responsible for reprisal action is subject to disciplinary action for insubordination. See Woody, supra. CCBOE should be on guard for any action by Oldham that would violate this Code Section.

This Level IV decision has not been appealed by the parties at the time of this Level IV hearing, and CCBOE indicated the Decision would not be appealed. (See footnote 3)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The undersigned Administrative Law Judge has also noted some findings from Grant I. The undersigned Administrative Law Judge was aware that a United States Supreme Court case on retaliation would be issued soon and waited for that decision before issuing this decision.

Findings of Fact

1. Grievant T. Grant has been employed by CCBOE for 21 years as an English teacher. At the time she filed this grievance, she was teaching English at Cabell Midland High School and was in charge of the yearbook. Intervenor was the principal of the school and her supervisor.

2. Grievant T. Grant and Intervenor worked together at Cabell Midland High School for several years. Intervenor was the Assistant Principal at the time the Grant I grievance was filed. After Grievant T. Grant's father, the president of CCBOE, did not vote to place Intervenor in a principal's position, Intervenor began to create a hostile

environment for Grievant T. Grant and her son, who was a student at Cabell Midland High School. This harassment and hostile work environment were the subject of Grant I, the above-mentioned prior grievance.

3. In Grant I, the undersigned Administrative Law Judge found Grievant T. Grant had been repeatedly harassed, and Intervenor had subjected Grievant T. Grant to a hostile work environment and had also harassed Grievant's husband and her son, who was a student at Cabell Midland High School.

4. Grievant R. Grant is Grievant T. Grant's husband. He had taught science for a number of years in Cabell County, and then worked in school publications for 18 years. Because Grievant R. Grant had some health problems and held a position where he traveled constantly all over the country, he decided to return to teaching. In 2005, he applied for two, posted, CCBOE positions, one at Cabell Midland High School and another at Huntington High School. He was told he could not have the position at Huntington High School because, at the time of his application, Intervenor was the Principal there, and shehad filed complaints about him and his wife. He received the position at Cabell Midland High School. Later, Intervenor was placed in Cabell Midland High School's Principal's position. Intervenor has incorrectly accused Grievant R. Grant of intentionally taking the position at Cabell Midland High School to harass her. At the time he filed this grievance, Intervenor was the principal of the school and his supervisor.

5. Grievant R. Grant started work at Cabell Midland High School in August 2005, but was off work from early September until early November of 2005 because of a heart attack.

6. Because of the many complaints Intervenor had filed against Grievant T. Grant, and Grievant T. Grant's grievance about the hostile work environment, CCBOE placed her under Assistant Principal Brenda Scott for supervision and evaluation for the 2005 - 2006 school year.

7. Intervenor made several complaints about Grievants during the first part of the 2005 - 2006 school year. Some of these were examined in the prior grievance, Grant I, and found to be without merit.

8. During the 2003 - 2004 school year, several investigations into Intervenor's numerous complaints against Grievant T. Grant and others were conducted by CCBOE. At that time, Intervenor was an Assistant Principal at Cabell Midland High School. Initially, many of these complaints were investigated by then Cabell Midland High School Principal Robert Lake. The last two investigations were conducted by Allyson Schoelein and Dennis Miller from the Central Office. Thirty-eight employees, and Grievant R. Grant, were questioned, and the investigations took ten to fifteen hours a week of Ms. Schoelein's time for months. Ms. Schoelein found the investigations to be a waste of time because of allthe charges filed in these citizen complaints, (See footnote 4) only one was proven at the conclusion of the investigation during the Spring semester of 2005. This one complaint was against then Principal Lake. Additionally, on July 2, 2004, during a hearing on two other grievances filed by Intervenor, she again repeated many of the previous allegations against both Grievants. (See footnote 5)

9. On or about September 13, 2005, Intervenor received a subpoena to appear at the October 4, 2005 hearing in Grievant T. Grant's prior grievance about the hostile work environment.

10. Shortly thereafter, Intervenor was in a car with Assistant Principal Scott, Grievant T. Grant's evaluator, and called magistrate court about the need to take out Peace Bonds against Grievants. Ms. Scott also served Intervenor's numerous subpoenas requested for this hearing. (See footnote 6)

11. Grievants had difficulty obtaining release forms to attend the October 4, 2005, Grant I, Level IV hearing, because Sharon Pierson, Intervenor's Secretary, would not give these papers to them. Grievants were able to get the required forms from another secretary when Ms. Pierson was not there. 12. On October 4, 2005, Intervenor

appeared as a witness in Grant I, pursuant to a subpoena.

13. At the Grant I hearing, the undersigned Administrative Law Judge questioned Intervenor in an attempt to clarify many of Intervenor's answers and found in that Decision:

> Oldham's interpretation of events [is] profoundly skewed and rather paranoid. Thus, her credibility is nil. The Findings of Fact support this conclusion of the undersigned Administrative Law Judge. Additionally, Oldham's demeanor at hearing was odd, almost manic. She had to be directed repeatedly to answer the question asked and not ramble off point. When Oldham did not want to answer the question, she was evasive and used the opportunity to give more examples of how she believed Grievant [T. Grant] had mistreated her. Several of her statements were just not plausible or believable, and other of her statements were outright lies or gross exaggerations.

14. On October 5, 2005, the day after her testimony in Grant I, Intervenor filed for a Peace Bond in magistrate court against Grievant T. Grant alleging that from July 1, 2004, to October 5, 2005, Grievant T. Grant:

> did unlawfully make threats to do bodily harm to the said complainant and/or family members, and she, the said complainant, has good cause to fear that the said defendant will carry out her said threats in violation of Chapter 62, Article 10, Section 2, of the Code of West Virginia, to-wit: following my son, Colton Jacob Oldham, and complainant in the vehicle; ongoing hostile work relations and false accusations of complainant; humiliation and defamation of character; fearful of harm due to verbal comments made by defendant; belief of intent to harm complainant and/or family member, my son, Colton Jacob Oldham, and my daughter, Tylee Oldham; in Cabell County, WV.

Grt. No. 2 at Level III.

15. Also on October 5, 2005, Intervenor filed for a Peace Bond in magistrate court against Grievant R. Grant alleging that from July 1, 2004, to October 5, 2005, Grievant R. Grant:

> ma[d]e threats to do bodily injury to the said complainant and/or family members, and she, the said complainant, has good cause to fear that the said defendant will carry out his said threats in violation of Chapter 62,

> Article10, SEction 2, [sic] of the Code of West Virginia, to-wit: in Cabell County, WV, defendant made comment of doing jail time for murder; video taping and picture taping of complainant; belief of intent to harm complainant, Dr. Karen Oldham and/or family members, son, Colton Jacob Oldham, and daughter, Tylee Oldham. (See footnote 7)

Grt. No. 4 at Level III.

16. Grievants were commanded to appear in magistrate court on November 1, 2005, to enter a plea on the charges.

17. The assertions listed in the magistrate court complaint were basically the same as those filed during the 2004 - 2005 school year. These same complaints were not only investigated by the principal, but were also investigated in detail by administrators from CCBOE, and found to be without merit. See Finding of Fact 8.

18. On October 26, 2005, Grievant T. Grant attempted to open her desk drawer at Cabell Midland High School and hit something sharp with her hand. She called Assistant Principal Robert Overmoyer, and he called the deputy on duty at the school. He found a section from a utility knife blade had been taped to Grievant T. Grant's desk drawer. Although the incident was investigated, no one has ever been accused of the incident.

19. Prior to November 1, 2005, magistrate court date, Grievants filed a Motion to Dismiss and, in the alternative, a Motion for a Jury Trial.

20. On November 1, 2005, Magistrate Patty Spence denied the Motion to Dismiss, but granted the Motion for a Jury Trial. This trial was scheduled for February 8, 2006. 21. Ms. Pierson, Intervenor's Secretary, and Pam Hughes, a teacher at Cabell Midland High School, took personal leave days to attend the proceedings. These two employees testified at some length at this Level IV hearing about Grievants. While Ms. Hughes was Grievants' son's teacher, she received many complaints from them about her failure to follow his required teaching plan. Ms. Hughes is still very angry about

Grievants' actions as parents. Ms. Pierson and Ms. Hughes dislike Grievant T. Grant intensely and dislike Grievant R. Grant.

22. On Saturday, November 5, 2005, Grievant R. Grant brought an aluminum ladder to school to hang a banner for his wife. It was unrebutted that it is difficult to get work orders filled in a timely manner, and so Grievant R. Grant performed this task for his wife. Intervenor found out Grievant R. Grant was in the school with a ladder. Intervenor asked her supervisor, Todd Alexander, to investigate the matter. He asked Grievant R. Grant about the incident and found Grievant R. Grant's explanation satisfactory. There were other faculty members at Cabell Midland High School at the same time, but there was no evidence that any of these teachers were reported and investigated.

23. During the Fall semester of the 2005 - 2006 school year, a student complained to Ms. Pierson that Grievant T. Grant had made a negative comment about Intervenor in her classroom. Ms. Pierson reported this to Intervenor, Intervenor did some initial checking, and then she assigned Ms. Scott to investigate the incident further. Ms. Scott interviewed the complainant and nine other students at random, and none of the other nine students heard the alleged statement. This complaint was unsubstantiated.

24. During the Fall semester of the 2005 - 2006 school year, a student complained to Ms. Pierson that Grievants' son and his friend had said vulgar things to herduring lunch break. Ms. Pierson reported this to Intervenor, and she assigned Ms. Scott to investigate the incident. Ms. Scott interviewed the complainant, the two boys, and an alleged witness and found the witness could not support the complainant's story, the two boys denied the incident, and the boys and the complainant did not have the same lunch period. Again, this complaint was unsubstantiated.

25. Grievants and Intervenor have avoided each other during the 2005 - 2006 school year. Grievant T. Grant has not spoken to Intervenor since August of 2003, and Grievant R. Grant has not spoken to Intervenor since 2004.

26. Grievants have talked to some of their friends who are teachers for CCBOE about the rough time they are having and their concerns.

27. Contrary to Intervenor's assertion, Grievants did not invite Ms. Scott to lunch and ask her to join them in creating problems at Cabell Midland High School to get Intervenor removed. Grievants did not attend this lunch meeting and were not a part of this group. (See footnote 8)

28. On January 30, 2006, the Peace Bonds against Grievants were dismissed "per state and def[ense] counsel." Grt. Nos. 1 & 2 at Level IV. The Bonds were dismissed because of a lack of proof. Test. Grievant T. Grant, Level IV Hearing.

29. During the 2005 - 2006 school year, Intervenor did not exhibit fear of bodily injury from Grievants while she was at Cabell Midland High School. Intervenor did exhibit discomfort and annoyance. Test. Scott, Long, Roberts, Cross, Price, Selbe, Level IVHearing. Grievants and Intervenor did not speak to each other during this school year. Test. Grievant T. Grant, Grievant R. Grant, Intervenor.

30. Intervenor filed for the two Peace Bonds on October 5, 2005, the day after she testified in Grant I grievance. Sharon Pierson, her Secretary went with her to get these Peace Bonds.

31. Although Intervenor is well aware of the grievance process, she never filed a grievance about her alleged treatment by Grievants.

Issues and Arguments

Grievants assert Intervenor, their Principal at Cabell Midland High School, has retaliated against them and their son, for Grievant T. Grant asserting her right to file a grievance.

Respondent's assertions have varied over time. After the Level II hearing, Respondent asserted that since Intervenor's request for Peace Bonds had not yet been

dismissed, the filing of the complaint could not be considered harassment. Respondent also asserted Grievants had not met their burden of proof and demonstrated any other harassment. At Level IV, Respondent asserted that because Intervenor had not heard the testimony of Grievants in Grant I, that grievance "did not serve as the impetus for the filing of the [Peace Bonds] by Dr. Karen Oldham."

In the Level IV post-hearing proposals, Respondent asserted Intervenor had "justifiable" fear of Grievants. (See footnote 9) Respondent also argued Grievant T. Grant had alreadyreceived a favorable ruling from the Grievance Board in the prior grievance, thus, this grievance was moot. It should be noted the majority of Respondent's arguments focused on the issue of harassment, but Grievants have not asserted that issue. They allege they have been retaliated against for their participation in the grievance procedure in Grant I. Respondent also asserted that since the filing of the Peace Bonds occurred outside the school setting, it could not be addressed though the grievance procedure. This argument would hold more weight, if CCBOE had followed this direction when conducting the investigation discussed in Finding of Fact 8, infra. That investigation concerns some complaints that did not occur on school property, but CCBOE investigated these assertions anyway.

Intervenor avers she has never harassed Grievants or their son, and indeed it is Grievants who have made her life unbearable and made her fearful for the safety of herself and her children. At this Level IV hearing, the undersigned Administrative Law Judge ruled Intervenor could not collaterally attack the Grant I Decision. As previously noted, Intervenor was aware of the grievance, testified at the Level IV hearing, and chose not to intervene.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the

W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Credibility

An issue to address is credibility, as Intervenor used the Level IV hearing to put the character of Grievants into question. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'sinformation. (See footnote 10) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

A. Witnesses

Most of the witnesses produced by Intervenor had no personal knowledge about any events/incidents between Grievants and Intervenor. The majority of Intervenor's witnesses also testified they saw no interaction between the parties this school year, Intervenor did not appear to be afraid, and there was tension on both sides.

Several of these witnesses discussed things they thought Grievants had done that they saw as rude, scary, or mean in relation to themselves. For example, Lisa Riley, a health teacher at a middle school, who knew nothing about any interaction between Grievants and Intervenor, testified about a rude thing Grievant T. Grant said several years ago. She also alleged Grievant R. Grant purposely followed her car on Route 60 one afternoon. Ms. Riley testified Grievant R. Grant did not follow her when she turned off this highway.

Grievant R. Grant asserts he never followed Ms. Riley, but does agree he drives on this highway. Apparently, the only purpose of this testimony was to convince the undersigned Administrative Law Judge that Intervenor had good reason to fear bodily harm to herself and children from Grievants. Ms. Riley's testimony was not on point, odd, and presented nothing of use in assessing whether Intervenor should fear for her life. Sharon Pierson and Jane Ferguson both stated they had not seen Grievants do or say anything to Intervenor this school year. Ms. Ferguson noted Intervenor was nervous, but Intervenor did not explain the reason. Ms. Ferguson also testified that when some people went through the concourse at the school it made Intervenor nervous. This statement was not clarified. Ms. Pierson testified Intervenor was very emotional, she had not seen or heard Grievant T. Grant do anything wrong, but also stated Grievant T. Grant had said bad things about Intervenor all this school year. She also indicated, contrary to Intervenor's assertion, that most of Cabell Midland High School knew who came to the Grant I hearing.

As for Intervenor's witnesses, much of their testimony was not on point and none of

them had seen any interaction between Grievants and Intervenor this school year. The Peace Bonds were not filed until October 5, 2005, and the school year began for teachers in late August. (See footnote 11) None of the witnesses saw any negative actions by Grievants toward Intervenor during this entire time. The majority of the witnesses called by Intervenor could not confirm Intervenor was frightened or upset.

Pam Hughes was another witness called by Intervenor. Ms. Hughes had not worked at Cabell Midland High School for at least two years at the time of her testimony. Accordingly, she had no testimony about any recent events involving Intervenor and Grievants, but instead focused mainly on the events specified in Finding of Fact 21.

The undersigned Administrative Law Judge believes it is entirely possible Grievants were not pleasant in their interaction with Ms. Hughes while they were attempting to enforce their son's learning plan, this interaction was as concerned parents, not as co-workers or teachers, and had nothing to do with Intervenor. Clearly, Ms. Hughes took Grievants' multiple complaints personally and now detests Grievants with a passion. It should be noted Ms. Hughes and Ms. Pierson took personal leave days to watch Grievants being called up before the magistrate. Also it should also be noted the complaints Ms. Pierson brought to Intervenor about Grievant T. Grant and her son were investigated and unproven. One of these complaints was made by Ms. Pierson's niece.

The testimony of Ms. Hughes, Ms. Pierson, and Ms. Ryder was contradictory, not on point, and full of spite. All agreed Intervenor should be afraid of Grievants, but none had seen any negative acts by Grievants toward Intervenor this school year.

The testimony of Carla Jo Linville, a Secretary at Cabell Midland High School, that Grievant T. Grant told her Grievant R. Grant had taken pictures of Intervenor's parents' house was contradicted by Grievants. The same with her testimony that Grievant R. Grant had gotten pictures of Intervenor from her high school yearbook. At the time this conversation took place in the Summer of 2005, both Grievant T. Grant and Ms. Linville were discussing their concerns about Intervenor's return to Cabell Midland High School,

and they believed things would be difficult for both of them during the ensuing school year. Ms. Linville is now very pleased with her position with Intervenor.

Even if this testimony is believed, there is no evidence Grievants did anything to Intervenor's parents or their house or with her high school pictures. The most this behavior could be called is odd, but there was no threat of mental or bodily harm, and no evidenceGrievants used these alleged pictures to harass Intervenor or her family. In truth, the undersigned Administrative Law Judge has a hard time believing these stories. It is much more likely that as with several of the complaints made by Intervenor in Grant I, there is only but a kernel of truth.

For example, Intervenor asserted in Grant I, Grievant R. Grant repeatedly videotaped her. The investigation conducted by CCBOE established Grievant R. Grant was parked at school to pick up his son. He believed he was legally parked, and other cars were parked where he was. He was told, after Intervenor complained, that he must move and park his car elsewhere. The next day, Grievant's husband stood across the road, not on school property, and videotaped the cars parked exactly where he had been parked the previous day, and noted these drivers were not asked to move. He did not remember seeing Intervenor at all while he videotaped. He only videotaped one time.

B. Intervenor

It is clear from the Findings of Fact, that the undersigned Administrative Law Judge did not find Intervenor to be credible in Grant I. (See footnote 12) "[A] factor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). The undersigned Administrative Law Judge found Intervenor's interpretation of events to beprofoundly skewed and rather paranoid in Grant I, and her credibility was nil. The undersigned noted in that Decision "that while Oldham's testimony lacked credibility, it is not necessarily found Oldham knew she was lying, but

rather the undersigned Administrative Law Judge finds Oldham is unable to perceive events properly when they involve Grievant, Grievant's husband, Grievant's son, and certain other teachers at Cabell Midland High School. This is truly a shame, and these inaccurate perceptions do not appear correctable."

The testimony and evidence presented at this hearing has done nothing to change this determination. As in Grant I, Intervenor had trouble focusing on the questions asked and remained rather evasive and rambling. Intervenor continued to complain bitterly about the trauma Grievants had put her through for the past three and one-half years. But Intervenor could not cite to anything Grievants have said or done to her this school year that would cause her to fear for her life or the well being of her children. (See footnote 13) The parties agree they have basically not spoken to one another for many months, thus, it is unclear what actions Grievants could have taken to place Intervenor in such fear of bodily harm from Grievants that Peace Bonds were required. Further, even though there were, and continue to be, frequent investigations of Grievants and their son, CCBOE has not made any findings of wrongdoing on the part of Grievants or their son.

On the subject of the Peace Bonds, Intervenor testified she filed them because she had been told by an employee that Grievants had driven by her parents' house and had taken pictures, and they had gone to her old high school to get her picture from theyearbook. There was no evidence to confirm Intervenor heard these stories before she looked into filing the Peace Bonds in September of 2005. (Ms. Linville only remembered she told Intervenor sometime during the Fall semester.)

Additionally, the Peace Bonds do not mention these incidents, do not refer to any fear for her parents, but they do rehash previously complained about incidents not confirmed by CCBOE's lengthy investigation and found to be without merit in Grant I. (See Findings of Fact 14 & 15.) Accordingly, Intervenor did not establish these two rumors were her reasons for filing Peace Bonds, or that these rumors put her in fear of

harm to herself and her children. Further, the Peace Bonds were dismissed without any hearing whatsoever, thus, the prosecutor found them to be without merit on their face. Grievant T. Grant testified she was told they were dismissed because of a lack of evidence.

Intervenor's continued behavior demonstrates the prior assessment of her credibility is correct. She is unable to properly perceive events when they involved Grievants. But some of Intervenor's behavior is just too devious to be attributed to a faulty perception of events. For example, Intervenor just happened to wait to call about the Peace Bonds until Grievant T. Grant's evaluator, Ms. Scott, was in the car to hear about it. Apparently, Intervenor asked Ms. Scott to serve her subpoenas for this hearing. Intervenor asked Ms. Scott to conduct investigations concerning Grievant T. Grant and her son.

It appears Intervenor believes Grievants are devils incarnate, but the standard by which to judge her behavior and actions is that of a reasonablely prudent person. Intervenor's beliefs and actions do not measure up to this standard. Accordingly, the undersigned Administrative Law Judge does not find Intervenor's statements that she wasso in fear of bodily harm to herself and her children that she had to take out Peace Bonds on Grievants to be truthful or rational.

C. Grievants

The testimony of Grievants was basically straightforward, plausible, and consistent. They have not talked to Intervenor for an extended period of time and do not go around her. It is true Grievants have discussed their situation with colleagues and acquaintances at work. It is quite likely these conversations did not contain positive comments about Intervenor. These discussions would be considered normal and part of how individuals deal with difficult situations, and should not be seen as attempt to cause bodily harm to Intervenor or her children as stated in the Peace Bonds.

II. Retaliation

Grievants assert they have been retaliated against for their prior participation in the

grievance process. Grievant T. Grant was retaliated against for filing a grievance about Intervenor's creation of a hostile work environment, and Grievant R. Grant for testifying in the grievance and participating in CCBOE's investigation. Reprisal is defined in W. Va. Code § 29-6A-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.

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).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the

presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievants have met their burden of proof and established Intervenor engaged in retaliation. Each element of the retaliation test is met. One, Grievant T. Grant engaged in protected activity of filing a grievance and Grievant R. Grant testified in the grievance.

Two, they were both subsequently treated in an adverse manner by the employer's agent, Intervenor, the principal of Cabell Midland High School, as they were required to appear in magistrate court to defend themselves after Intervenor filed Peace Bonds falsely alleging they were trying to physically harm Intervenor and her children.

Three, Intervenor had actual knowledge that Grievants engaged in the protected activity. Intervenor testified in Grant I, and was well aware Grievant T. Grant had filed this grievance and alleged Intervenor had created a hostile work environment. Although Intervenor testified she did not know Grievant R. Grant testified or was present at the hearing, the undersigned Administrative Law Judge finds this statement to be untrue. Intervenor testified at Grant I and had two employees with her at the hearing.

Four, there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity, the Level IV hearing, and the adverse treatment. The grievance was about Intervenor's creation of a hostile work environment for Grievant T. Grant, and it was clear to Intervenor at hearing that her testimony was not accepted as the gospel, as she was caught in several exaggerations during this testimony.

Five, the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred. Intervenor indicated her need to file Peace Bonds with Grievant T. Grant's supervisor shortly after she received her subpoena, and she filed the Peace Bonds the day after the Level IV Grant I hearing.

Clearly, Grievants have met their burden of proof and established retaliation by

Intervenor. Respondent and Intervenor did not demonstrate legitimate, non-retaliatory reasons for the adverse action

II. Harassment and Hostile Work Environment

Respondent has focused on the issue of harassment, but while it appears Intervenor continues to harass Grievants, this is not what the grievance is about and will not be addressed further. The same reasoning applies for the issue of a hostile work environment. **IV. Employee Code of Conduct**

Although not raised by the parties, the undersigned Administrative Law Judge finds it again necessary to address Intervenor's failure to abide by the Employee Code of Conduct at W. Va. C. St. R. § 126-162-4. In pertinent part, this Code of Conduct requires all West Virginia school employees to:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.
>
> . . .
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

As noted by the above-cited Code of Conduct, it is clear Intervenor has violated these requirements and has not conducted herself in a professional and responsible manner. Intervenor has specifically not "demonstrate[d] responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." Intervenor attempted to use the Magistrate Court system to accuse Grievants of actions they had not done and to launch another attack with the same complaints that had been found unproven in two investigations by CCBOE. While Intervenor has every right toprotect herself from dangerous individuals, she was aware Grievants had not threatened or caused her or her children any bodily harm. The fact Intervenor's case was dismissed demonstrates the court did not find her assertions to have merit as well. The undersigned Administrative Law Judge again finds Intervenor is in violation of the Employee Code of Conduct.

V. Relief

Grievants have met their burden of proof, but the next question is what relief should be granted. W. Va. Code § 18-29-3 (h), a specific section dealing with the required discipline for retaliation, states:

> No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

(Emphasis added).

No other cause of action has a similar specific direction.

It is clear Intervenor, as Grievants' supervisor and principal of Cabell Midland High School, is an agent of CCBOE. The above-cited statute states the agent who engages in reprisal "shall be subject to disciplinary action for insubordination." (Emphasis added). Intervenor is guilty of insubordination as she has retaliated against Grievants. The Grievance Board has routinely held it cannot discipline an employee found guilty of wrongdoing. "Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Education and State Employees Grievance Board." Collins v. Div. of Highways, Docket No. 02-DOH-206 (Sept. 20, 2002) (citing Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996)). However, none of these cases dealt with a statute which mandated that unacceptable behavior "shall be subject to disciplinary action for insubordination." Thus, the direction in the statute and the Grievance Board's current case law are in conflict.

The recent decision issued by the United States Supreme Court, Burlington Northern & Santa Fe Railway Company v. White, No. 05-259 U.S. (June 22, 2006), is instructive. In this decision, the United States Supreme Court noted the difference between a provision dealing with discrimination and one dealing with retaliation. The Court discussed the difference between the discrimination provision of the Civil Rights Act of 1964 ("Act") and the anti-retaliation provision of the Act, and noted the difference in the wording of these provisions. The Court held the anti-retaliation provision did not confine "the actions and harms it forbids to those that are related to employment or occur at the workplace," and "the employer's action must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id.

The Court believed Congress intended and included the language differences because the provisions differ in purpose. "The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their race, ethic, religious, or gender-based status," and "the anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an

employee's efforts to secure or advance enforcement of the Act's basic guarantees." Id.

The Court noted, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." The Court cited Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996) to demonstrate this point. In Berry, the retaliation took the form of false criminalcharges filed against a former employee who complained about discrimination. The Court stated "a provision limited to the employment related actions would not deter the many forms that effective retaliation can take." Id. The Court explained a broad interpretation "helps assure the cooperation upon which accomplishment of the Act's primary objective depends." Id.

The Court focused next on the type of harm covered by the provision, and set the following standard, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse" . . . and "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Rochon v. Gonzales, 438 F.3d. 1211, 1215 (D.C. Cir. 2006)(quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (10th Cir. 2005)). Whether a particular action "is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Serv. Inc., 523 U.S. 75, 81 (1998).

The undersigned Administrative Law Judge finds similarities between the Act's provisions and the provisions in the grievance statutes. W. Va. Code § 18-29-3 (h) is a unique, and strongly-stated statute that mandates discipline for retaliation. It does not limit the type of reprisal, but instead states, "[n]o reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure. . . ." An employee can file a grievance over this reprisal, and, if the employer or his agent is found to be responsible, the actor "shall be subject to disciplinary action for insubordination." Following the reasoning outlined in

Burlington, the undersigned Administrative Law Judge first finds a materially adverse action was taken against Grievants by CCBOE's agent, the filing of unfounded Peace Bonds. See Berry, supra. This action caused Grievants harm. Second, the undersigned notes this adverse action occurred outside the workplace, and third, the adverse action was one that could dissuade a reasonable employee from filing a grievance. Intervenor's actions, while outside the work place, should be considered an act of retaliation.

W. Va. Code § 18-29-5(b) states an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article. . ." Given this directive, the undersigned Administrative Law Judge must attempt to fashion relief that will make it clear to Intervenor that her behavior is unacceptable and MUST cease.

In Grant I, Intervenor was not a party to the case, and the authority the undersigned Administrative Law Judge could exercise over her was limited. CCBOE was ordered to:

> to closely, correctly, and competently evaluate Oldham immediately utilizing the facts found in [the Grant I] Decision. Particular notice to areas involving effective communication, conflict resolution, effective leadership, etc. are to be addressed. Violations of the Employee Code of Conduct must be noted. This ordered evaluation cannot be a pretense or charade and should involve appropriate input of other CCBOE employees. Action necessary to correct problems, including an Improvement Plan or discipline, must follow this evaluation. As this assessment will be based on the Employee Code of Conduct and the defined evaluation process, there can be no surprise on Oldham's part that these areas are considered.

Intervenor chose to become a party to this grievance, and this request was granted. W. Va. Code § 18-29-3 (h) states "any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination." Thus, the retaliation ofIntervenor constitutes insubordination, and disciplinary action is required. Given the statute and its dictates, the undersigned Administrative Law Judge **orders** CCBOE to discipline Intervenor for her retaliatory actions. This discipline must be severe enough to make it clear to Intervenor that this type of insubordinate behavior, as defined by statute,

cannot occur again. A verbal or written reprimand would be insufficient. Additionally, CCBOE must note Intervenor's unsatisfactory performance on her evaluation and institute an Improvement Plan. The undersigned Administrative Law Judge clearly understands this action is highly unusual, but is at a loss to find another way to get Intervenor's attention and to inform her that her harassment of and retaliation against Grievants and their son MUST cease. (See footnote 14)

Grievants' request for Intervenor's termination is too severe at this point. (See footnote 15) As previously stated in Grant I and noted in Oldham v. Cabell County Board of Education, Docket No. 03-04-269 (Feb. 27, 2004)(Intervenor's selection grievance granted by the undersigned), Intervenor has many qualifications, numerous educational skills, and an abundance of additional training. Intervenor has her doctorate and has attended more specialized education/training than anyone the undersigned Administrative Law Judge hasever seen. It is hoped Intervenor can move past her obsession with Grievants and be the principal that other employees, with whom she does not have conflict, find her to be.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not

met its burden. Id.

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offeredin written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

3. Reprisal is defined in W. Va. Code § 29-6A-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."

4. W. Va. Code § 18-29-3 (h), a specific section dealing with the required discipline for retaliation, states:

> No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

5. 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).

6. Grievants have met their burden of proof and have demonstrated they were retaliated against by their supervisor. Pursuant to W. Va. Code § 18-29-3 (h), Intervenor was insubordinate when she retaliated against Grievants.

7. Even though the proven, adverse action by Intervenor occurred outside the workplace, it was reprisal for Grievants asserting their rights to file and participate in the grievance procedure, and this act would serve as a deterrent. See Burlington Northern & Santa Fe Railway Company v. White, No. 05-259 U.S. (June 22, 2006)

8. Intervenor violated W. Va. C. St. R. § 126-162-4.2.6 of the Employee Code of Conduct.

9. W. Va. Code § 18-29-5(b) states an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article. . . ."

Accordingly, this grievance is **GRANTED**. Respondent is Ordered to take the

appropriate and necessary steps to resolve this situation. Respondent is also ordered to follow the directions given in this Decision, including taking disciplinary action against Intervenor, and giving Intervenor an unsatisfactory evaluation with an accompanying Improvement Plan.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Cabell 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 partyto 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.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: October 17, 2006

Footnote: 1

Robert Grant's grievance was similar to his wife's, but his allegation of retaliation centered on his participation/testimony in his wife's grievance against Intervenor, as well as testimony during a prior investigation into Intervenor's complaints about Grievant T. Grant and others.

Footnote: 2

To increase understanding, the reader should peruse the prior case, Grant v. Cabell County Board of Education, Docket No. 04-06-345 (February 28, 2006)("Grant I").

Footnote: 3

Although the Grievance Board has never been officially informed, the parties to the prior grievance sent the Grievance Board an appeal of the Grant I Decision filed by Intervenor. As Intervenor was only a witness in the prior grievance, and chose not to intervene even though she was aware of the grievance, the undersigned Administrative Law Judge takes judicial notice that there are no statutory provisions allowing a non-party to appeal a Grievance Board

Decision.

Footnote: 4

After Intervenor had filed her complaints, and these were found to be without merit, Intervenor's husband then filed these same complaints, as well as additional ones, in a citizen's complaint. It was not explained to the undersigned Administrative Law Judge in Grant I how this complaint process could be used in this manner.

Footnote: 5

Intervenor was assigned to Huntington High School during the majority on the 2004 - 2005 school year, but returned to Cabell Midland High School during the 2005 - 2006 school year.

Footnote: 6

A Peace Bond is defined as a "[t]ype of surety bond required by a judge or magistrate of one who has threatened to breach the peace or harm someone's property, or has a history of such misconduct." Black's Law Dictionary 588 (5th abridged ed. 1983).

Footnote: 7

These issues were dealt with in Grant I and found to be without merit.

Footnote: 8

It should be noted Intervenor argued Grievants engaged in this act in her proposals, even though this assertion is in direct contradiction of Ms. Scott's testimony at Level IV.

Footnote: 9

It should be noted Respondent did not present evidence at the Grant I hearing that Intervenor had a justifiable fear of Grievants. Instead, the evidence revealed CCBOE had conducted numerous investigations into Intervenor's multitude of allegations about Grievant T. Grant without finding any evidence to support these assertions.

Footnote: 10

The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 11

Grievant R. Grant did not start work for CCBOE until mid to late August of 2005. He was off on medical leave from early September until early November, thus, he present at school for only two to three weeks, and he had not worked for approximately a month at the time Intervenor file these Peace Bonds

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Footnote: 12

Intervenor's credibility was also called into question in Oldham v. Cabell County Board of Education, Docket No. 04-06-280 (June 23, 2005), a case decided in Intervenor's favor. In that case Intervenor alleged a board member had intentionally embarrassed, humiliated, and terrified her son. The findings of that administrative law judge did not support Intervenor's allegations.

Footnote: 13

It is interesting to note that Intervenor, who is no novice to the grievance process, never filed a grievance against Grievants for these alleged acts.

Footnote: 14

The undersigned Administrative Law Judge is also aware that legal attempts to correct interpersonal interactions are usually doomed to failure, but some type of relief is fitting.

Footnote: 15

The case of Woody v. Division of Rehabilitation, Docket No. 02-RS-382 (June 8, 2005) is somewhat instructive. In Woody, the agency removed a supervisor from her position because she was unfit for the supervisory assignment to which her otherwise good work performance had catapulted her. She abused her power by harassing and threatening her employees, and bragging about her power over them.