THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROGER SAMPLES,
Grievant,

v. **DOCKET NO. 2008-1589-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Roger Samples, on May 16, 2008, against his employer, the Kanawha County Board of Education ("KBOE"). The statement of grievance reads:

> I have been the recipient of retaliation by my Principal and the Director of Elementary Education in violation of West Virginia Code §6C-2-3(h) inasmuch as I have a pending grievance with Kanawha County Schools and the West Virginia Public Employees Grievance Board. Following the filing of the aforementioned grievance on April 21, 2008, I have been harassed and discriminated against at my place of employment and within the county school system. This harassment and disparate treatment, in violation of state law and State Board of Education Policy 2421: Racial, Sexual, Religious/Ethnic Harassment and Violence Policy, have resulted in two letters of reprimand being placed on record and in my personnel file. Such treatment has also caused me to not be a successful applicant for teaching positions posted for summer school and homebound instruction within the county, as well as not being selected for the Technology Cadre for which I applied. A pattern and practice of such maltreatment of me is documented, and has been aggravated since I exercised my right to file a grievance in accordance with West Virginia Code §6C-2-1. Discriminatory or otherwise aggrieved applications of unwritten policies or practices by my supervisor(s) continue to occur which have resulted in my filing this additional grievance.

The relief sought by Grievant is:

> I want the retaliation and harassment by my principal and the Director of

> Elementary Education to stop.[1] I am requesting that I be treated professionally, fairly, and equal to other employees. I also request the two letters of reprimand be retracted and removed from my personnel file, and that any supervisor or administrator responsible for retaliation or reprisal against me be subjected to disciplinary action as delineated in West Virginia Code §6C-2-3(h). I am also seeking to recover any and all lost wages due me for the county's failure to place me in the positions outlined above in my statement of grievance.

A hearing was held at level one of the grievance procedure on October 30, 2008, and a level one decision denying the grievance was issued on January 28, 2009. Grievant appealed to level two on February 2, 2009, and a mediation session was held on March 12, 2009. Grievant appealed to level three on April 9, 2009.

Two days of hearing were held at level three before Administrative Law Judge Mark A. Barney, on June 15 and September 3, 2009, in the Grievance Board's Charleston office. Grievant was represented by Susan Lattimer Adkins, General Manager, WV Professional Educators Association, and Respondent was represented by James W. Withrow, Esquire. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on November 2, 2009. This matter was reassigned to the undersigned on January 6, 2010, due to the resignation of Administrative Law Judge Barney.

Synopsis

Grievant alleged that various personnel actions were taken against him in reprisal for filing a grievance. Grievant failed to prove that any of the actions complained of constituted reprisal. One of the actions occurred many months before the grievance was

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[1] Grievant transferred to another school after the end of the 2007-2008 school year, and is no longer supervised by the Principal referred to in this grievance.

filed, and in two instances those taking the actions did not have knowledge of the grievance. Grievant also alleged harassment and discrimination. Grievant was not in any instance treated in a manner that was contrary to the behavior which would be expected in the workplace. Grievant further did not demonstrate he was treated differently in any instance from any similarly situated employee. Grievant's assertion that a letter written by his Principal was a reprimand was not proven. The letter memorialized a meeting with Grievant and made clear what was expected of him. Grievant received a written reprimand for his inappropriate behavior toward a co-worker, after he approached her after an IEP meeting, and in a raised voice and intimidating manner, made clear to her that she would not treat him in an unprofessional manner ever again. Respondent was justified in reprimanding Grievant for his improper confrontation of a co-worker.

The following Findings of Fact are made based upon the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Kanawha County Board of Education ("KBOE") as a classroom teacher for 26 years. Grievant is certified in elementary education, social studies, math, and school administration. He began working at Bridgeview Elementary School in August 2007, teaching fourth grade. Grievant transferred to another school at the end of the 2007-2008 school year.

2. During the 2007-2008 school year, Bill Reynolds was Principal of Bridgeview Elementary School, and he was Grievant's supervisor. This was the only year Principal Reynolds supervised Grievant, and he is no longer Grievant's supervisor.

3. On April 21, 2008, Grievant filed a grievance. That grievance was resolved

at level one, and was withdrawn by Grievant on June 27, 2008.

4. On Saturday, April 12, 2008, Grievant met two parents and their children, who were students at Bridgeview Elementary, in the school parking lot. Grievant transported these two children, in his personal vehicle, to the Clay Center in Charleston for a performance of the Charleston Symphony Orchestra that night. Grievant had the written permission of the parents to transport the students to this event, but he did not obtain the approval of Principal Reynolds, nor did he submit a field trip permission slip.

5. KBOE does not have a written policy or procedure which precludes teachers from transporting students in their personal vehicles. KBOE does have a written policy in place which requires teachers to submit a field trip permission slip to their supervisor for approval prior to taking students on a field trip, and it requires more than one adult chaperone on every field trip.[2]

6. Principal Reynolds heard one of the students talking about the trip to the Clay Center, and learned that Grievant had transported the students in his personal vehicle. Principal Reynolds does not believe teachers should ever transport students in their personal vehicles because of the potential liability. Principal Reynolds met with Grievant on April 14, 2008, to discuss this matter. He informed Grievant at that time that Grievant was to obtain approval for such trips, and was not to transport students in his personal vehicle. Grievant told Principal Reynolds he was not aware that he was not to transport students, and he would abide by Principal Reynolds' directive.

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[2] Grievant disputed that this was a field trip, even though he pointed out that Principal Reynolds should have been aware of the Symphony performance because it was announced in work emails, and even though he met the parents on school property.

7. Principal Reynolds discussed this situation with his supervisor, Jane Roberts, Assistant Superintendent For Elementary Education, and she advised him that it would be a good idea to put his concerns in writing to make sure his expectations were understood. On April 24, 2008, Principal Reynolds sent Grievant a letter marked "Confidential," as a follow-up to the April 14th conference. The letter states at the beginning that its purpose is to recap the meeting on April 14th. The letter states, "[p]lease note the following and adhere to these guidelines." It then states that Principal Reynolds must be consulted "and approve any after hours and weekend extensions of the school experience." It further states that Principal Reynolds will not support teachers transporting students in their personal vehicles due to the risk of liability. It notes that a permission slip is required for all after hours activities, that more than one "school-based chaperone must attend any field trip," and "[m]eeting with students at the school after hours or on weekends without the knowledge and support of the school administration is not permitted." The letter concludes:

> I applaud your interest in providing your students with extended learning experiences. I believe this can be done under the aforementioned regulations, which are for the safety of students as well as personnel. I trust you will support the school's mission and work in a cooperative manner. Failure to comply with these safety regulations will compel me to handle the matter through the teacher evaluation process.

Ms. Roberts was copied on the letter.

8. Neither Principal Reynolds nor Ms. Roberts viewed this April 24th letter as a reprimand. Principal Reynolds felt this was an important issue, and that it was important to recap the conference in writing. This was not the first time Principal Reynolds had followed up a conference with a teacher with a letter memorializing the conference. This

letter was not placed in Grievant's personnel file. Principal Reynolds maintains his own file on every employee in the school, and he placed a copy of the letter in the file he maintains for Grievant.

9. The record does not reflect whether Principal Reynolds was aware that Grievant had a grievance pending when he wrote the April 24th letter.

10. On April 16, 2008, Grievant attended an IEP meeting for a student. Also in attendance were School Psychologist JoAnn Bragg, Sandra Wilson, Educational Specialist, Principal Reynolds, Robert Calhoun, KBOE's Director of Elementary Education, and the child's parents. During the meeting Ms. Bragg stated that she had not received a form Grievant was supposed to complete and return to her regarding the child. Grievant stated that he had completed the form and placed it in her school mailbox. Ms. Bragg stated she had not received it, to which Grievant repeated his previous statement, and the two of them went on this way for a short period of time, with Grievant becoming visibly upset.

11. After the meeting Principal Reynolds saw Grievant in the hallway. Principal Reynolds attempted to calm Grievant down, suggesting that it had been a long day, they needed to work together for the benefit of the students, and he should put the incident behind him. Principal Reynolds felt Grievant was overreacting. Grievant then approached Mr. Calhoun and told him he felt Ms. Bragg had questioned his professionalism in front of the parents, and that he had had problems with Ms. Bragg for six months.[3] Mr. Calhoun tried to assure Grievant that he had not taken Ms. Bragg's comments to question Grievant's professionalism, and Grievant responded that he was glad. Mr. Calhoun and

[3] It is unclear exactly what period of time Grievant was talking about, as he had been out on sick leave for some time until March 1, 2008.

Principal Reynolds thought that was the end of it, and Grievant did not pursue the matter with either of them. Grievant took no action which would have made clear to either Principal Reynolds or Mr. Calhoun that he was making a formal complaint which required any additional action on their part.

12. Grievant then followed Ms. Bragg and Ms. Wilson into the main office, and told them, in a raised voice and in a forceful and animated manner, that they had attacked his professionalism, he would not be treated in that manner "ever again," and he would not allow them to challenge his reputation as they had. Ms. Wilson asked him why he was shouting at her, and Grievant pointed his cane at Ms. Bragg. Grievant was standing in the exit out of the room, and appeared to be so angry that Ms. Bragg became frightened by the situation.

13. Ms. Bragg felt threatened and intimidated by Grievant and talked to her supervisor about what had occurred, and considered filing a grievance. She was advised to contact Mr. Calhoun, and she did so, telling him that she had felt threatened by Grievant. Mr. Calhoun asked Principal Reynolds to contact Grievant and set up a meeting in an effort to determine what had occurred, and to resolve the situation. Mr. Calhoun called Ms. Wilson. She declined to attend the meeting, but gave a statement.

14. Mr. Calhoun and Principal Reynolds met with Grievant and Ms. Bragg on April 30, 2008. Grievant admitted that he was upset with Ms. Bragg and had approached Ms. Bragg and Ms. Wilson after the IEP meeting, and was "animated" as he told Ms. Bragg in no uncertain terms that he expected to be treated as a professional and with respect. Ms. Bragg requested an apology, which Grievant declined to provide, insisting that he had done nothing wrong. Mr. Calhoun was not able to resolve the problem

between Grievant and Ms. Bragg.

15. Mr. Calhoun wrote a letter dated May 5, 2008, reprimanding Grievant for confronting Ms. Bragg and Ms. Wilson. The letter states that Grievant's conduct had caused another employee to feel threatened, that he is "not to treat another employee in such a manner that causes them to be uncomfortable in the workplace," and that he is not to discuss this further with Ms. Bragg.

16. At the time he wrote the May 5, 2008 reprimand, Mr. Calhoun was not aware that Grievant had filed a grievance.

17. KBOE advertised for Homebound Instructors in August 2007, and Grievant applied online. Grievant did not request or sign a contract to serve as a Homebound Instructor, nor was he asked to complete a contract. Grievant was not called to serve as a Homebound Instructor during the 2007-2008 school year.

18. Grievant was off work on medical leave for some period of time during the 2007-2008 school year, and returned to work on March 1, 2008.

19. Homebound Instructors must be certified in the area they will be teaching. KBOE does not call on teachers to serve as Homebound Instructors outside their certification areas.

20. KBOE employs seven Homebound Instructors on a full-time basis, to provide instruction to students who are too ill to attend school, or whose behavioral issues prevent them from attending school. During the 2007-2008 school year, if KBOE had more students than these seven teachers could provide services for, then Joyce DeWeese, a Clerk working with KBOE's Homebound Program, would go through the contracts she had from those who had applied to provide Homebound instruction on a part-time basis, looking

for those who were certified in the required area. The record does not reflect whether any Homebound Instructors were needed in Grievant's areas of certification during the 2007-2008 school year.

21. When Grievant received an email in March or April 2008, indicating that Homebound Instructors were needed, he contacted Ms. DeWeese by email and told her he was available. On May 5, 2008, Ms. DeWeese's supervisor, Sandy Boggs, made clear to Grievant that he would have to sign a contract in order to be considered for Homebound instruction. Grievant chose not to sign a contract at that point.

22. Bridgeview Elementary has sponsored a two week summer program for students for several years. It was the recommendation of the Bridgeview Elementary Faculty Senate that preference be given to those teachers who had worked on the grant application for this program. On April 25, 2008, KBOE posted positions for the Bridgeview Elementary Title I Extended School Year program for the summer of 2008 for one teaching principal and elementary teachers/resource. The posting stated that preference would be "given to Bridgeview teachers who worked on the Bridgeview Extended Year." The preference in hiring teachers who had previously worked in the Bridgeview summer program was desirable because the program is only two weeks, and those who had worked the program before would have less down time at the beginning.

23. Grievant applied for a teaching position in the Bridgeview summer program and was not selected. Grievant had not previously worked in a summer program at Bridgeview Elementary, and he had not worked on the grant for that program. Grievant had worked in a summer program at two other elementary schools in Kanawha County, giving him two years of experience working in summer programs in the county.

24. All those selected to work in the Bridgeview summer program had worked on the grant application for the program, and had worked in the summer program before. The record does not otherwise reflect the qualifications of any of the successful applicants, nor does it reflect their years of experience working in summer programs in the county.

25. On March 31, 2008, KBOE posted vacancies for the Technology Cadre. The Technology Cadre is a group of about 20 classroom teachers who are proficient in using technology and who train other teachers in the use of technology after hours.

26. Grievant was selected to be a member of the Technology Cadre on May 21, 2008, and was informed of his selection. Other members were notified of their selection about the same time as Grievant. Individuals who had served on the Cadre in the past and did a good job were selected to continue to serve on the Cadre, and those individuals may have been aware before May 21, 2008, that they would continue to serve.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be

based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendre to a felony charge." " Although reprimands are not specifically addressed in W. VA. CODE § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

In this case, Grievant has alleged that various actions, including alleged written reprimands, were taken in reprisal for filing a grievance. Accordingly, even the disciplinary action or actions will first be analyzed to determine whether at least a *prima facie* case of reprisal has been proven. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer 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* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he 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; and

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

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a

pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant did not demonstrate that any of the personnel actions complained of were taken in reprisal for filing a grievance. First, as to the April 24, 2008 letter written by Principal Reynolds, the record does not reflect whether Principal Reynolds was aware of the grievance, an essential element in proving reprisal, as Principal Reynolds was not asked this question. Further, the April 24, 2008 letter was written to memorialize what had occurred during a meeting which took place prior to the grievance being filed. Grievant did not state that he had any problem with the conference. Rather, Grievant apparently believes Principal Reynolds decided to turn the event into a written reprimand after the grievance was filed. The letter is no different than the conference. Both can best be characterized as an attempt by the Principal to make sure that the employee is aware of expectations, and to assure that this type of action does not occur again. Grievant complained that he was not aware of any written policy which precludes a teacher from transporting a student in his personal vehicle. This letter places that expectation in writing so that it is clear to Grievant what is expected of him, and there is no misunderstanding of this expectation. The letter was not placed in Grievant's personnel file. It was not a reprimand, and it was not written in reprisal for filing a grievance.

Likewise, the written reprimand from Mr. Calhoun was not in reprisal for filing a grievance. Grievant again failed to prove an essential element of reprisal, as he has failed to provide the causal connection. Mr. Calhoun testified he was not aware that Grievant had filed a grievance. He credibly testified that Ms. Bragg called him and complained

about Grievant's conduct, and his next step was to set up a meeting to try to resolve the dispute between Grievant and Ms. Bragg. While he was not able to accomplish this, he did determine from the statements of Ms. Bragg, Ms. Wilson, and Grievant that Grievant did raise his voice to Ms. Wilson and Ms. Bragg, and that his conduct was not appropriate. Grievant was reprimanded for improper conduct, not for filing a grievance.

Grievant also complained that Mr. Calhoun did not conduct his "investigation" in accordance with KBOE policies. Whether he did or did not, Grievant was given notice of Ms. Bragg's complaint, and the opportunity to respond to Mr. Calhoun, and he essentially admitted that he approached Ms. Bragg and Ms. Wilson when he was angry, had raised his voice, and had been forceful in making clear to them that he would not be treated in this manner "ever again." It is clear that Grievant's intent was to intimidate Ms. Bragg, as he made clear to her that he would not tolerate this treatment. As to Grievant's particular complaint that Mr. Calhoun did not interview him separately from Ms. Bragg or request a written statement from him, while both may be desirable investigation techniques, the undersigned finds nothing in the policies cited by Grievant which require either.

Grievant further asserted that Mr. Calhoun did not consider the surrounding circumstances, because he was not allowed to tell Mr. Calhoun about every interaction he had had with Ms. Bragg over the course of the school year. It was up to Mr. Calhoun to determine what the relevant surrounding circumstances were, not Grievant, and the undersigned cannot disagree with Mr. Calhoun's apparent conclusion that Grievant's actions could not be justified. Grievant's conduct was inappropriate under any circumstances. Grievant was told both by Principal Reynolds and Mr. Calhoun that they did not view Ms. Bragg's comments as attacking his reputation, and they tried to calm him

down. Grievant, however, chose to dismiss their counsel, and made no attempt to gain control of his anger before approaching Ms. Bragg and Ms. Wilson.

As to the issues with the Homebound Instructor position, first, Grievant did not demonstrate reprisal. Grievant applied to be a part-time Homebound Instructor in August of 2007. The grievance was not filed until April 2008. By that point seven months had passed with Grievant not being called to provide Homebound instruction. The grievance filing came after the treatment complained of, so again, there is no causal connection.

Further, Grievant did not demonstrate that there was any Homebound instruction work for which he was qualified and was not called. "In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.' *See Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998)." *Jamison v. Monongalia County Bd. of Educ.,* Docket No. 05-30-338 (Jan. 20, 2006). A Homebound Instructor must be certified to teach the required subjects. No evidence was presented that Grievant was certified in any of the areas for which instruction was required. Grievant's evidence consisted of his own speculation that, "I would think that somewhere along the line there would have been some students that I would have been certified to serve." Tr. June 15, 2009, at page 202.

Additionally, Homebound instruction is a unique service, and even if Grievant had been certified to provide instruction to a particular student, he would not be entitled to provide the service just because of his certification. "The West Virginia Supreme Court has stated, '[t]he quality and efficiency of [homebound] instruction may more properly be a

matter left to the discretion and expertise of the Board.' *State [ex rel. Boner v. Kanawha County Bd. of Educ.,* 475 S.E.2d 176 (W. Va. 1996)], at 186." *Suan v. Lewis County Bd. of Educ.*, Docket No. 96-21-296 (Sept. 30, 1997). Grievant presented no evidence that he was entitled to be called to provide homebound services to any particular child.

With regard to the posting for the summer school program at Bridgeview Elementary, Grievant argued that a provision was added to the posting giving preference to those who had served in the summer program at Bridgeview, to prevent him from qualifying for a position in reprisal for filing a grievance. While Grievant did not recall this preference ever being in the posting before, there was insufficient evidence in the record to support a finding that this was, in fact, the case. Nonetheless, whether this is true or not, Respondent cannot give preference to those who have worked in a summer program at a particular school in the past.

Summer school programs are authorized and controlled by W. Va. Code § 18-5-39(a) - (h). Subsection (e) provides that, "[p]rofessional positions for summer school programs must be filled on the basis of certification and length of time the professional has been employed in the county's summer school program. W. VA. CODE § 18-5-39(e); *Boone v. Cabell County Bd. of Educ.*, Docket No. 07-06-386 (Dec. 18, 2007)." *Scarbrough v. Fayette County Bd. of Educ.*, Docket No. 08-10-004 (Sept. 5, 2008). "A school board must calculate summer program seniority for professional personnel based on service in any summer position in the county rather than service in a particular course of instruction or at a particular school." *Id.*

However, Grievant presented no evidence that, had his summer seniority been

properly considered, he would have been placed in one of the positions at Bridgeview Elementary during the summer of 2008. No evidence was placed in the record regarding the summer program seniority of Grievant, or any of the successful applicants. Grievant has not met his burden of proof.

Finally, the undersigned has no idea why Grievant has continued to pursue his complaint about the Technology Cadre. Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra*." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008). Grievant was, in fact, advised that he had been chosen to serve as a member of the Cadre, and that remains the case. Grievant complained that other members were notified before he was that they would be serving on the Cadre, and he complained that he had not been notified of any meetings. However, as of the first day of hearing at level three, Grievant had been notified of two meetings, but had been unable to attend either meeting and had suggested that if he needed to withdraw from the Cadre he would accept that. Grievant did not demonstrate that he was harmed in any way by others being notified

before he was that they would be on the Cadre, or by meetings not being scheduled until after the level one hearing.

Grievant asserted for the first time in his Proposed Findings of Fact and Conclusions of Law that the retaliation against him was further evidenced by the failure of KBOE to follow through on an alleged agreement to provide certain training, which apparently was part of the settlement of the first grievance. There is absolutely no evidence in the record regarding this allegation, and it is inappropriate for any party to attempt to add to the record in post-hearing written argument. This allegation is not properly before the undersigned, and will not be considered.

Finally, Grievant alleged he was the victim of discrimination and harassment. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

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

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

As to the letter regarding the trip to the Clay Center, the fact that he was not called

to provide Homebound instruction, and his non-selection to provide services for the summer program, Grievant did not point to any similarly-situated employee who was treated differently than he. Grievant asserted that he was treated differently than Ms. Bragg because her complaint was investigated and his complaint about her was dismissed. Grievant approached Mr. Calhoun and Principal Reynolds after the IEP meeting and expressed his view that his professionalism had been questioned in front of the parents.[4] Both Mr. Calhoun and Principal Reynolds were in the meeting and observed the exchange between Ms. Bragg and Grievant, and both concluded from their observations that Ms. Bragg had done nothing wrong and Grievant was overreacting. Grievant did not tell either of them that he was making a formal complaint and expected them to take some action. They both felt that when Grievant left, that was the end of it. Ms. Bragg, on the other hand, made clear that she wanted some action taken, and that she had felt threatened by Grievant. Grievant was not treated differently than Ms. Bragg.

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior

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[4] In his Proposed Findings of Fact and Conclusions of Law, Grievant stated that Ms. Bragg had made multiple disparaging remarks during the IEP meeting. The record in this case contains nothing from which a reasonable person could reach such a conclusion. It will also be noted at this point that it appears from the record that the primary problem Grievant had had with Ms. Bragg over the course of the school year was that she disagreed with Grievant about what services should be provided to the child who was the subject of the April 16, 2008 IEP meeting. Ms. Bragg apparently also did not give Grievant's opinions the deference he believed they deserved, and she did not phrase her statements to his liking. For example, Grievant was upset when Ms. Bragg stated that the student should be able to be successful in Grievant's classroom. Rather than understanding that Ms. Bragg was simply stating her conclusion that the student should be able to be successful in a classroom setting, Grievant took this as a personal attack on him, and that she was saying he was not a good teacher.

expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). Grievant did not demonstrate that he was treated in any instance in a manner that is contrary to the behavior which would be expected.

The following Conclusions of Law support the decision reached.

Conclusions of Law

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

2. WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendre to a felony charge." "Although reprimands are not specifically addressed in W. VA. CODE § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-

175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

3. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

4. To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he 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; and

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

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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). "[T]he critical question is whether the grievant has established by a preponderance of the

evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

5. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

6. Principal Reynolds did not send Grievant the April 24, 2008 letter memorializing their April 14, 2008 conference in reprisal for filing a grievance.

7. The April 24, 2008 letter was not a written reprimand, and Principal Reynolds was within his rights as a supervisor to make sure that Grievant understood what was expected of him by reducing what had occurred during his conference with Grievant to writing.

8. The May 5, 2008 written reprimand was not in reprisal for filing a grievance.

9. Respondent demonstrated that Grievant engaged in the action set forth in

the written reprimand, and that his conduct was unsatisfactory, justifying a written reprimand.

10. Grievant did not demonstrate that he was not called upon to serve as a Homebound Instructor during the 2007-2008 school year in retaliation for filing a grievance; nor did he otherwise demonstrate that he was certified to provide services to any student requiring homebound instruction during that period.

11. "WEST VIRGINIA CODE § 18-5-39(e) provides that professional positions for summer school programs be filled on the basis of certification and length of time the professional has been employed in the county's summer school program. *Boone v. Cabell County Bd. of Educ.*, Docket No. 07-06-386 (Dec. 18, 2007); *Freeland v. Marshall County Bd. of Educ.,* Docket No. 05-25-259 (Nov. 29, 2005); *Muncy v. Mingo County Bd. of Educ.*, Docket No. 95-29-336 (Dec. 21, 1995)." *Scarbrough v. Fayette County Bd. of Educ.*, Docket No. 08-10-004 (Sept. 5, 2008).

12. "A school board must calculate summer program seniority for professional personnel based on service in any summer position in the county rather than service in a particular course of instruction or at a particular school." *Id.*

13. Grievant did not demonstrate that the posting for the summer program was changed in reprisal for filing a grievance, nor did he demonstrate that he had more countywide summer seniority than any of the successful applicants for the Bridgeview Elementary summer program.

14. Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood*

County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990).

15. Grievant did not demonstrate that he was harmed in any way by other members of the Technology Cadre being notified that they would be serving on the Cadre before he was notified.

16. In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

17. As to the letter regarding the trip to the Clay Center, the fact that he was not called to provide Homebound instruction, and his non-selection to provide services for the summer program, Grievant did not point to any similarly-situated employee who was treated differently than he.

18. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the

behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

19. Grievant did not demonstrate that he was treated in any instance in a manner that is contrary to the behavior which would be expected. Grievant was not subjected to harassment in the workplace.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 2 , 2010