THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN BRECK,

Grievant,

v. **Docket No. 2011-1541-PutED**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Brian Breck, submitted this grievance action dated April 20, 2011, against his employer, Respondent Putnam County Board of Education asserting as follows: "[g]rievant asserts that his evaluation and plan of improvement are: (a) unjustified by misconduct or unsatisfactory performance of duties; (b) not in compliance with county and state policies; and (c) constitute part of a pattern harassment and discrimination. Grievant cites violations of W. Va. Code 18A-2-12a and 6C-2-2." As relief sought, "Grievant seeks cessation of harassment and removal of the evaluation and plan of improvement from all of the records maintained by Respondent or its agents."

A Level One hearing on this grievance was conducted on May 3, 2011. By a decision dated May 17, 2011, the grievance was denied. Grievant appealed to Level Two of the grievance process on May 23, 2011. A Level Two mediation was conducted on September 13, 2011. Grievant perfected his appeal to Level Three on September 28, 2011. A Level Three hearing was conducted by the undersigned administrative law judge on January 20, 2012, at the Grievance Board's office in Charleston, West

Virginia.[1] Grievant appeared on that date in person and by his counsel, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent appeared by counsel, Rebecca Tinder, Esquire, Bowles Rice McDavid Graff & Love LLP. This matter became mature upon the receipt of the last of the parties proposed Findings of Fact and Conclusions of Law on February 23, 2012.

Synopsis

Grievant is employed as an HVAC II/General Maintenance by Respondent, Putnam County Board of Education. Grievant's job requires him to change and clean HVAC filters at the Respondent's facilities throughout the county. Grievant was involved in an argument with his supervisor on March 25, 2011, which resulted in Grievant being suspended without pay for ten days for insubordination. Upon his return to work on April 11, 2011, the Assistant Superintendent performed Grievant's yearly performance evaluation, noting four areas of deficiency, and placed Grievant on an improvement plan. Grievant disagreed with his evaluation, denying the alleged deficiencies. Grievant alleged the evaluation and improvement plan were not based upon the facts, were unfair, and unjustified. Grievant also asserted claims of discrimination and harassment. Grievant failed to meet his burden of proving that his evaluation was flawed or arbitrary and capricious. Further, Grievant failed to meet his

[1] In a separate grievance action, *Breck v. Putnam County Bd. of Educ.,* Docket No. 2011-1542-PutED, Grievant challenged the disciplinary action taken against him for an incident occurring on March 25, 2011. The events of March 25, 2011, are not the main issue in the instant grievance. However, the March 25, 2011, incident is discussed in this matter. To expedite this proceeding, the record of Docket No. 2011-1542-PutED with respect to the evidence presented concerning the March 25, 2011, incident was incorporated into this grievance, there being no need to go through the specifics of that incident when there has already been sworn testimony and evidence presented on that issue.

burden of proving his harassment and discrimination claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as an HVAC II/General Maintenance. Grievant is assigned to change HVAC filters at Respondent's facilities throughout the county. Grievant has been employed by Respondent since 2007. Grievant has been responsible for changing HVAC filters in the Responent's facilities since 2010.

2. Sam Housley, Maintenance Supervisor, is Grievant's immediate supervisor. Assistant Superintendent, Brad Hodges, supervises all maintenance employees and is responsible for evaluating all maintenance employees.

3. In July 2010, Grievant used the Respondent's account number at Lyon Conklin & Company to make two equipment purchases for his personal use. Grievant paid for the equipment and only used the Respondent's account number because he did not yet have one of his own. Respondent was not charged for this equipment. Later, when Mr. Hodges discovered that Grievant had so used the Respondent's account number, Mr. Hodges told Grievant not to do it again and Grievant complied.[2]

[2] In 2007 and in 2009, the prior school year, Grievant had been admonished for failing to comply with different purchasing procedures. However, such had nothing to do with using Respondent's Lyon Conklin account, and such were not noted in the Evaluation Addendum.

4. On March 21, 2011, Grievant was assigned to work at Hurricane Middle School ("HMS"). However, on that date, Grievant's van was observed at his apartment in Winfield, West Virginia, at 11:50 a.m. On March 24, 2011, Grievant was assigned to work at HMS and Hurricane Town Elementary School. However, on that date, Grievant's van was observed at his apartment in Winfield, West Virginia, at 11:00 a.m. [3]

5. On March 25, 2011, Grievant was working at HMS changing HVAC filters. Sam Housley assigned Frank Hanson to assist Grievant on this job because some of the filters are located in the ceiling, and Grievant would need help with the ladder and with moving the ceiling tiles. Mr. Housely is also Mr. Hanson's supervisor.

6. Mr. Hanson had another job to do first thing that morning in Buffalo, West Virginia. As such, he met Grievant at HMS between 10:30 a.m. and 11:00 a.m.

7. Before Mr. Hanson arrived at HMS, Grievant realized that he did not have the correct filters to finish the job and that he would need to go to the maintenance office to get the correct filters. When Mr. Hanson arrived, Grievant told Mr. Hanson that he needed to go to the maintenance office to get filters. Mr. Hanson also needed to go to the maintenance office to speak to someone about getting parts he needed for another job.

8. Because it was near lunchtime and because both had reasons to go to the maintenance office, Grievant and Mr. Hanson rode together in Mr. Hanson's van. After lunch and going to the maintenance office, the two headed back to HMS. On their way, they passed Mr. Housley in his vehicle on Teays Valley Road.

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[3] Mr. Hodges testified that he observed the van at Grievant's house on one of the two days at issue, and Mr. Housley observed it on the other.

9. Thereafter, Mr. Housley telephoned Mr. Hanson, and instructed Mr. Hanson to turn around and meet him at West Teays Elementary School ("WTES"). Mr. Hanson complied.

10. While at WTES, before getting back to HMS, Grievant was involved in an argument with Mr. Housley on March 25, 2011. As a result, Assistant Superintendent Hodges suspended Grievant for ten days for insubordination. This suspension began on March 28, 2011, and Grievant was allowed to return to work on April 11, 2011.[4] Mr. Housley was not disciplined for his conduct during the March 25, 2011, incident.

11. On the very day Grievant returned to work from his suspension, Assistant Superintendent Hodges conducted a performance evaluation on Grievant for the 2010-2011 school year. As part of the evaluation process Mr. Hodges completed a Service Personnel Evaluation form and drafted an "Evaluation Addendum." Although Mr. Hodges evaluated Grievant as "meets standards" in numerous areas, he scored Grievant as "does not meet standards" in many other areas. *See,* 2011 Evaluation and Addendum, Grievant's Level One Exhibit 1.

12. The areas in which Grievant was evaluated as "does not meet standards" were as follows: maintains work habits that facilitate a positive work environment; follows supervisor's instructions; works cooperatively with supervisor and other employees; accepts constructive criticism and makes changes accordingly; responds well to extraordinary situations; uses resources and supplies properly; implements the supervisor's directives; recognizes and uses the appropriate channels of authority;

[4] This disciplinary action was upheld by the Grievance Board. *See*, *Brian Breck v. Putnam County Bd. of Educ.,* Docket No. 2011-1542-PutED (Feb. 13, 2012).

performs duties efficiently and productively; plans and organizes work to make maximum use [sic] of available time; follows instructions; works efficiently under stress; and displays good judgment in behavior inside of work area. *See,* 2011 Evaluation, Grievant's Level One Exhibit 1.

13. In the Evaluation Addendum, Mr. Hodges addressed, in narrative form, four specific areas in which Grievant needed to improve, those being absenteeism, disrespect and insubordination, making unauthorized purchases on Putnam County School's Account, and not planning, organizing and staying on task to make maximum use of available time.

14. At the time of his evaluation, Grievant had missed 16.5 days of work. However, Grievant had doctor's excuses for some of these days, and he had not yet exhausted his accrued leave.

15. Mr. Hodges placed Grievant on an Improvement Plan as a result of his evaluation. In the improvement plan, Mr. Hodges identified the following three deficiencies: Disrespect and insubordination (3/25/11 West Teays Incident); Unauthorized purchases (7/29/10 Lyon Conklin); and, Not planning, organizing, and staying on task to make maximum use of available time (3/21/11, 3/24/11, & 3/25/11 incidents).

16. This improvement plan set forth the following "corrective action to remediate deficiency(ies): I. Following supervisor's instructions and directives without arguing/complaining/back talking and being disrespectful. II. Following Purchasing Procedures. III. Being at the job site that you have been assigned. Staying on task. After completion of job, moving directly to the next job site."

17. Absenteeism is not mentioned in the improvement plan.

18. The written improvement plan includes a section entitled "Resources and Assistance Available" which states as follows:

> I. Have made you aware of your actions and the corrective actions needed to resolve issues.
> II. Purchasing Procedures will be explained to you again.
> III. Keep Daily Work Log:
> a. That includes location, task, start time, finish time, and have Principal sign and date including finishing time.
> b. Notify Mr. Housley when you have finished a job assignment and are going to the next assignment.
> c. Record all breaks and lunch times.
> d. If Principal or Assistant Principal is not available to sign off, notify Mr. Housley and give him the information.
> e. Filters should be picked up at the end of the day when you report back to the shop or at the beginning of the day before leaving the shop. If unusual circumstances should arise, please get approval from Mr. Housley to go back to the shop.

19. The time frame set for this improvement plan was from April 11, 2011 to June 30, 2011. June 30, 2011, was set as the deadline for meeting the performance criteria.

20. Grievant successfully completed the improvement plan by June 27, 2011.

Discussion

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a

preponderance of the evidence." *Baker v. Fayette County Bd. of Educ*., Docket No. 94-10-427 (Jan. 24, 1995). "A preponderance of the evidence is evidence 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 proved is more probable than not." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

WEST VIRGINIA CODE § 18A-2-12a(b)(6) provides, in part, as follows: "[a]ll school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis . . . ." W. VA. CODE § 18A-2-12a(b)(6). An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. *See,* W. VA. CODE § 18A-2-12. *See also, Brown, supra.*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *See, Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988).

"This Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been

confounded.' *Kinder v. Berkeley County Bd. of Educ*., Docket No. 02-87-199 (June 16, 1988). *See, Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant asserts that his evaluation and improvement plan were not based upon the facts; therefore, it was not an open and honest evaluation as required by statute.

Grievant argues that he was not guilty of absenteeism or insubordination.[5] Grievant further denies that he failed to plan, organize, and stay on task as alleged.

The evidence presented in this matter, as well as in the previous grievance action regarding Grievant's ten-day suspension for insubordination, establishes that Grievant was insubordinate on March 25, 2011.[6] *See, Breck v. Putnam County Board of Educ.,* Docket No. 2011-1542-PutED (Feb. 13, 2012). As Grievant was insubordinate and disrespectful toward Mr. Housley on March 25, 2011, it is logical that Grievant's behavior needed addressed, and an improvement plan, implemented. The evaluation and improvement plan do just that. Accordingly, it cannot be said that the Respondent's evaluation of Grievant regarding his conduct toward his supervisor was arbitrary and capricious. Given the March 25, 2011, incident, the evaluation and improvement plan imposed by Respondent was justified.

Grievant does not deny that he made two unauthorized purchases from Lyon Conklin for his personal use using the Respondent's account number in July 2010. Grievant paid for the items himself; he only used the Respondent's account number because he did not have one of his own at the time. Grievant did not have permission to use the account number and his actions were improper. It is not arbitrary and capricious that this incident was considered in Grievant's evaluation and improvement plan, even though Mr. Hodges had already discussed the incident with Grievant. The

[5] Absenteeism is not mentioned in the improvement plan instituted by Respondent. As absenteeism was not significant enough to be mentioned in the improvement plan, the undersigned will not further address such herein.

[6] As requested by the parties, as the March 25, 2011, incident was the subject of the prior grievance, such was not re-litigated in this action. The record of the prior grievance has been incorporated by reference herein.

April 2011 evaluation was Grievant's yearly evaluation. It was logical to include this incident in the evaluation as it occurred earlier during the year. Further, this was not Grievant's first problem with following purchasing rules. Therefore, Respondent's inclusion of the unauthorized purchases as a deficiency in the improvement plan was justified.

The last area of deficiency that Respondent identifies in the Evaluation Addendum is "not planning, organizing, & staying on task to make maximum use of available time." For this, respondent points to two times when Grievant's van was "observed" at his residence during work hours, as well as to Grievant having to return to the maintenance office to obtain needed filters on March 25, 2011, while he was working at HMS. Respondent asserts that Grievant should not need to go back to the maintenance office during the course of his day. Instead, Respondent states that Grievant should pick up filters at the end or beginning of each day so as to maximize the use of available time. The March 25, 2011, incident between Grievant and Mr. Housley began with Grievant needing to go back to the shop to obtain filters to complete the job at HMS.

The evidence establishes that Grievant had been working at HMS on March 21, 2011, and March 24, 2011. Respondent argues that Grievant should have known which filters were at the school, or should have brought the needed filters with him that morning. Respondent argues this lack of planning and organization causes Grievant to waste time. It seems that Respondent asserts that if Grievant had planned and been better organized, he would not have had to go back to the office and, perhaps, the incident with Mr. Housley would not have occurred. However, if "ifs" and "buts" were

candy and nuts, we'd all have a merry Christmas. Everyone makes mistakes. Clearly, the failure to plan and organize can reduce productivity. It is reasonable for Respondent to address Grievant's apparent need to go back to the office during the work day because such can result in loss of productivity, among other things. Therefore, the undersigned cannot conclude that Respondent's actions in evaluating Grievant on this aspect of his performance and placing him on an improvement plan to help him maximize his use of available time was arbitrary and capricious.

As for why Grievant's vehicle was at his home during the day, Grievant explains that he was taking his lunch at the time. Grievant's job entails traveling to various schools and facilities in Putnam County each day changing or washing out HVAC filters. No one told him he could not take his lunch break at home, and apparently, no one talked to him about this before his evaluation on April 11, 2011. It is unclear from the evidence presented how long Grievant's van was "observed" outside his apartment. The undersigned wonders what are the duties of those who "observed" Grievant's van outside his apartment on the days in question. Were those people making maximum use of their available work time on those days?

Grievant has failed to prove by a preponderance of the evidence that his April 11, 2011, evaluation was incorrect, or that it was arbitrary or capricious. Clearly, Grievant does not agree with his evaluation; however, the undersigned cannot intrude on the evaluation unless he proves that the evaluation was "such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded." *Kinder, supra.* Grievant has not established such in this grievance. What is very clear is that Grievant and his supervisor, Mr. Housley, do not get along and

seem to be particularly adept in pushing each other's buttons. Grievant and Mr. Housley must learn how to work together as adult professionals, and overcome their personal differences.

Grievant asserts that he is being harassed and discriminated against. Grievant points to his being required to complete a single work order for each filter he changes, while Mr. Hanson was not required to do the same when he filled in for Grievant while Grievant was suspended. Grievant also asserts that the way he has been treated by Mr. Housley amounts to harassment, as well as his April 2011 evaluation. "'Discrimination' means 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 claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

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). A single incident does not constitute harassment. *See, Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998).

Based upon the evidence presented, the undersigned cannot find that Grievant has met his burden in proving his harassment and discrimination claims. First, it is evident that Grievant and Mr. Housley do not get along well, but no evidence has been presented to establish by a preponderance of the evidence that Mr. Housley or Mr. Hodges have harassed Grievant. Again, Grievant and Mr. Housley need to stop pushing each other's buttons for sport. Further, although Grievant has been required to fill out a work order for every filter he changes, instead of just one per job, as Mr. Hanson was apparently allowed to do, the two men are not similarly situated. Mr. Hanson's job is not solely changing filters. He only filled in for Grievant while Grievant was suspended. Grievant is the only person whose job it is to change filters throughout the county. The undersigned cannot find that such is discriminatory or harassment.

However, it seems to the undersigned that the requirement for Grievant to complete a separate work order for each filter changed runs contrary to the Respondent's goal of Grievant making maximum use of his available time. It takes a great deal of time for Grievant to complete a work order form for each filter he changes or washes at a facility. It seems one work order would suffice. If Respondent is using this process as a mechanism to track Grievant's work and/or the volume of his work, it seems there must be a more efficient way.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence." *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995). "A preponderance of the evidence is evidence 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 proved is more probable than not." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. WEST VIRGINIA CODE § 18A-2-12a(b)(6) provides, in part, as follows: "[a]ll school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis . . . ." W. VA. CODE § 18A-2-12a(b)(6). An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and

professional. *See,* W. VA. CODE § 18A-2-12. *See also, Brown, supra.*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *See, Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988).

3. "This Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ*., Docket No. 02-87-199 (June 16, 1988). *See, Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without

consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Grievant's evaluation was conducted properly, in an open and honest manner, and was fair and professional. Grievant's evaluation and improvement plan were not arbitrary and capricious.

6. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

7. 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).

8. Grievant has failed to prove by a preponderance of the evidence his claims of harassment and discrimination.

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 (eff. July 7, 2008).

DATE: September 25, 2012.

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Carrie H. LeFevre
Administrative Law Judge