

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**DONNA JOY,  
Grievant,**

**v.**

**DOCKET NO. 2017-1495-JefED**

**JEFFERSON COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

This grievance was filed by Grievant, Donna Joy, against her employer, the Jefferson County Board of Education, on January 10, 2017. The statement of grievance reads:

Grievant asserts reprisal, harassment, and uninvited & unwanted conduct from administration which has created an intimidating, hostile, and offensive work environment. Excessive criticism of her work and unreasonable work expectations have negatively affected Grievant's job performance, health and safety, and have caused severe injury to her feelings, as well as damage to her professional reputation WVDE Policy 5902, WVC § 18-2C-1, WVC § 6C-2-2(l) and WVC § 6C-2-2(o).

As relief, Grievant seeks "for retaliation/reprisal to cease; for any and all harassment to cease; to be treated in a professional and unbiased manner; and any other relief the grievance evaluator deems appropriate."

A conference was held at level one on February 9, 2017, and the grievance was denied at that level on February 15, 2017. Grievant appealed to level two on February 27, 2017, and a mediation session was held on May 1, 2017. Grievant appealed to level three on May 18, 2017. A level three hearing was held before the undersigned Administrative Law Judge on November 6, 2017, at the Grievance Board's Westover office. Grievant was

represented by John Everett Roush, Esquire, American Federation of Teachers - WV, AFL-CIO, and Respondent was represented by Tracey B. Eberling, Esquire, Steptoe & Johnson, PLLC. Evidence presented at the level three hearing revealed that one of those accused of harassing Grievant is no longer in a position with Respondent where she would be observing or having any contact with Grievant. Mr. Roush indicated that Grievant is seeking as relief with regard to this individual, that the observations she conducted be removed from Grievant's files, and that Grievant's performance evaluation completed after the appeal to level three be removed from her personnel file. This matter became mature for decision on December 7, 2017, the deadline for receipt of Proposed Findings of Fact and Conclusions of Law, which both parties timely submitted.

### **Synopsis**

Grievant alleged that various individuals engaged in harassment, reprisal, created a hostile work environment, and placed unreasonable work expectations on her. Grievant was subjected to several observations of her teaching, and disagreed with the comments on the observation forms. Those observing Grievant had legitimate reasons for follow-up observations. Unreasonable work expectations were not placed on Grievant and she was not subjected to a hostile work environment or harassment, and no actions were taken against Grievant in reprisal for filing a grievance.

The following Findings of Fact are properly made from the record developed at level three.

## Findings of Fact

1. Grievant is employed by the Jefferson County Board of Education (“JBOE”) as a part-time classroom teacher at Jefferson High School (“JHS”). She has been a teacher for 30 years, and has been employed by JBOE for 5 years. During the 2016-2017 school year she taught three courses of transitional math for seniors, which is for students whose math skills are insufficient to allow the students to move forward to the next level of math instruction.

2. Grievant has a Bachelors Degree in Elementary Education and Math, a Masters Degree in Special Education and in Psychology, and a PhD in Educational Measurements, Statistics, Research and Evaluation.

3. During the course of the 2016-2017 school year, several observations were made of Grievant’s teaching by different administrators, observation forms were completed, and concerns were voiced regarding Grievant’s teaching efforts. A focused support plan (“FSP”) was to be put in place to assist Grievant. A FSP is an instrument developed by one or more school administrators, which is designed to support and assist a teacher in improving his or her teaching. It is not a disciplinary measure. If the FSP is not effective in improving teaching performance, then a corrective action plan may be put in place to try to correct behaviors. FSP’s are not retained in a teacher’s personnel file.

4. New teachers are subject to mandatory observations by administrators. During a teacher’s first year of employment, four observations must be conducted. In subsequent years of teaching, fewer observations are required to be conducted. Teacher observation forms have a number of items listed which are to indicate whether a teacher is meeting standards. The observer checks whether he or she has observed the listed

item, and there is space for written comments. Generally, the observer meets with the teacher after the observation.

5. During the 2016-2017 school year, Mary Beth Group was the Assistant Principal at JHS assigned to supervise the math teachers. Ms. Group holds a Secondary Education Teaching Certificate in math.

7. Ms. Group was on maternity leave from August 31 through December 6, 2016. Ann Workman substituted for Ms. Group while she was on maternity leave.

8. Grievant asked Ms. Group to conduct an observation of her classroom before she went on maternity leave. Ms. Group observed Grievant's teaching on August 30, 2016. Ms. Group noted that the beginning of the class was unorganized as calculators had not been prepared. Grievant did not deny this, but offered the excuse that she had borrowed higher quality calculators from another teacher, who said they all worked, and that the students had to share calculators. Grievant apparently had not verified prior to the start of class whether the calculators worked, and discovered during class that not all the calculators worked and Grievant used class time for changing the batteries in the calculators.

9. Grievant's teaching was observed by Ms. Workman on August 31, 2016. Ms. Group had planned for Ms. Workman to observe Grievant with her on August 30, as Ms. Workman does not have a strong math background, but this plan did not work out. Ms. Workman wrote on the observation form a question regarding whether the practice test being given to the students was too challenging for them. Grievant was unhappy with this notation as the test being administered to students had already been approved by Ms.

Group. The record does not reflect whether Grievant discussed this with Ms. Workman after the observation to address what was expected of her with regard to this issue.

10. Ms. Workman observed Grievant's teaching on October 17, 2016. Ms. Workman noted that lesson plans were not available for her, but they were provided to her later in the day, and she found them difficult to follow. Grievant mistakenly thought the lesson plans had already been transferred to the computer where they would be available to Ms. Workman, but they were still in her book, and not available on the computer. Ms. Workman noted that Grievant used a "lecture demonstration format." Grievant found this notation to be inaccurate, as she has never used a lecture format because she is of the belief that math cannot be taught using a lecture format. Ms. Workman suggested on the observation form that "some of the John Strebe strategies for working with groups" might be helpful. Ms. Workman noted under the Teaching section of the observation form that Grievant had asked several questions and not gotten much response, and noted Grievant's comments to specific students. Ms. Workman concluded her comments with "I am recommending that Ms. Joy be placed on a focused support plan with an emphasis on implementing curriculum, planning instruction, and engaging students in learning."

11. Nicole Shaffer was the Instructional Data Analyst for Secondary Math and Coordinator for JBOE from May 2016 through February 2017. Ms. Workman asked Ms. Shaffer to observe a few of the teachers at JHS in the fall of 2016, including Grievant, and she agreed to do so. The record does not reflect why Ms. Workman made this request. Ms. Shaffer observed Grievant's teaching on October 18, 2016. Ms. Shaffer noted on the observation form that Grievant "did not demonstrate extensive knowledge of the lesson," there was "little to no student engagement," and lesson plans were not available to her

during the observation, but she was able to access them later. Under the category “the learner and the learning environment,” Ms. Shaffer noted that “[t]his area was one of the weakest. The majority of the students were off task.” Under the category “teaching,” Ms. Shaffer noted that there was no active student participation and the students “were not motivated through positive praise or active engaging practices.” Grievant disagreed with Ms. Shaffer’s assessment, finding her comment about Grievant’s lack of knowledge to be ridiculous given her 30 years of teaching experience. Grievant also believed that if the majority of the students had been off-task there would have been behavior problems in the classroom.

12. A FSP meeting for Grievant was scheduled by Ms. Workman for October 31, 2016. Grievant replied to the notice scheduling this meeting by indicating “I would like to dispute this as there are numerous concerns about my observations. Perhaps a third party could hear my concerns.” When the FSP was presented to Grievant she refused to sign it. The FSP was not put into place at this time, but it was agreed by Grievant and Ms. Workman that certain goals needed to be met, and that Grievant would be provided with some individual support and an instructional coach, Ms. Cantley, who was a contract employee.

13. Ms. Workman observed Grievant’s teaching again on December 5, 2016. She noted on the observation form that Grievant’s lesson plans would be difficult for a substitute to follow. Grievant seemed to agree with this assessment, but found the comment to be inappropriate as she leaves different lesson plans for substitutes which set out an easier activity due to the fact that the average substitute teacher does not have the math background needed for instruction in any level of advanced math.

14. Ms. Shaffer again observed Grievant's teaching on December 21, 2016. She noted on the observation form that Grievant's lesson plans "had the required components." The observation form also noted that the two classes she observed took place in the library, and the students were on the computer using the "I Ready" pilot program, so she was unable to observe Grievant's instruction methods.

15. Ms. Shaffer observed Grievant's teaching on January 13, 2017. Ms. Shaffer noted on the observation form that the lesson plans were vague and could not be followed by a substitute. She did not see Grievant teaching during the last four minutes of the first class period she observed, and noted that "[t]he students were sitting with nothing to do and the teacher was on the computer e mailing the administrator. The students in the second period took a quiz, all took the same quiz and many were looking at each others papers to get the assignment completed." Grievant denied that she had been emailing an administrator, questioned how Ms. Shaffer arrived at this conclusion, particularly when she believed Ms. Shaffer had been "on her phone" during the entire observation, and referred to this notation as a lie. Grievant explained that she was using the computer to do as she had been instructed. She had been told to follow the Strebbe method, which provides some type of reward to students, and she was entering the students' reward points on the computer, asking them what reward they chose, and entering that on the computer. Grievant did not deny that students were attempting to copy answers from other students, but stated she always gives two or three different versions of a test, so if a student was trying to copy answers from another student, he would have to find a student with the same version of the test. Ms. Shaffer did not see more than one version of the test during her observation, and indicated that she was indeed "on her phone," as she uses it to record

her notes during the observation. Ms. Shaffer further noted on the observation that “[t]he classroom was not set up in a collaborative manner as suggested by the instructional coach. . . . and during the bell ringer many students were unclear yet did not ask questions. . . . there was no active engagement.”

16. Grievant viewed Ms. Shaffer as extremely rude to her on many occasions and condescending, and stated that Ms. Shaffer had raised her voice to her. Ms. Shaffer had told Grievant to shut up, and that she could not speak during meetings after observations.

17. Ms. Shaffer and Ms. Workman continued to believe Grievant should be placed on a FSP. A FSP was developed and a copy was provided to Grievant, which Grievant refused to sign and return. A meeting was held in January 2017 regarding the FSP for Grievant. Grievant opposed the development of a FSP, and contested many of the statements in the observation forms, indicating that Ms. Shaffer had lied on the observation forms. The meeting became heated. After the meeting, Ms. Shaffer was no longer to observe Grievant’s teaching, and in February or March 2017, Ms. Shaffer moved to a Principal position at an elementary school, and had no further contact with Grievant. The FSP was not put in place at that time.<sup>1</sup>

18. Due to Grievant’s opposition to the FSP, Ms. Group wanted to get her own read on Grievant’s instruction, so she observed Grievant’s teaching on February 3, 2017. Ms. Group noted on the observation form that the classroom was set up so that “[t]he group setting allowed students to work collaboratively on the review worksheet for peer

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<sup>1</sup> Respondent stated in Proposed Finding of Fact number 16 that Grievant was placed on a FSP; however, the record is unclear with regard to whether the FSP was actually put in place, and the undersigned concludes that it is more likely than not that the FSP was not formally put in place.



help and understanding. All students were on task and displayed appropriate behavior.” Ms. Group was not able to observe Grievant’s teaching due to the activity being engaged in by the students.

19. Ms. Group decided that she wanted to place Grievant on a FSP, but was unsure whether she could place Grievant on a FSP under the circumstances which had transpired during the year. Ms. Group went to Lee Ebersole, Coordinator of Federal Programs in School Improvement, and JBOE Superintendent Bondy Shay Gibson for guidance, and was told that she could place Grievant on a FSP. The record does not reflect that Grievant was placed on a FSP during the remainder of the 2016-2017 school year.

20. Grievant believed that Ms. Group had misled her into believing that she was on her side, and she had trusted her, which she believed was a mistake.

21. Grievant volunteered to be the new faculty sponsor for the National Honors Society at JHS during the late spring of 2016. At the beginning of the 2016-2017 school year, the former sponsor, Ms. Millicent, stated during a faculty meeting that she still needed someone to be the volunteer sponsor. Grievant stood up and said she would be the volunteer sponsor, and Ms. Millicent said that JHS Principal Shari Ross, now FitzGerald, had said Grievant could not be the volunteer sponsor because she was a part-time employee. Grievant was embarrassed by this. Principal FitzGerald believed that the sponsor needed to be available to the students during the entire school day, and that a part-time teacher was not the best candidate. Principal FitzGerald told Grievant that she could be a co-sponsor with the two teachers who were going to be co-sponsors for the

National Honors Society. Grievant did not see the need for three co-sponsors, and declined to accept this invitation.

22. Grievant found Principal FitzGerald's tone toward her to be demeaning, as she would say things to her like, "this conversation is over. The record does not reflect any detail on what it was that Principal FitzGerald did which caused Grievant to conclude that her tone was demeaning.

23. During the 2016-2017 school year Grievant applied for a posted position for which she was not selected, entitled Experiential Learning position. After the conclusion of the selection process, Grievant asked JBOE administrator Marty Saltis for the job description for this position. Mr. Saltis told Grievant if she wanted it she had to come and get it, and then when she did so, he told her he would give her the job description if she could tell him what an Experiential Learning position was, and asked her why she applied if she did not know what it was. Grievant then went to the Chief Human Resources Officer for JBOE, Joseph Pettiford, and told him what Mr. Saltis had said, and Mr. Pettiford accompanied Grievant back to Mr. Saltis' office and told him to give Grievant the job description, and he did so.

24. Mr. Pettiford did not have any role in deciding whether Grievant should be placed on a FSP, he did not direct anyone to place Grievant on a FSP.<sup>2</sup>

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<sup>2</sup> Grievant testified that Mr. Pettiford had told her he had been enlisted to try to get rid of her, and that Ms. Group had told her that Mr. Pettiford and a Mr. Blanc had told her to put Grievant on a FSP. No one asked Mr. Pettiford whether he had told Grievant he had been enlisted to try to get rid of her. Mr. Pettiford is the Human Resources Officer and does not participate in teacher observations. He testified that it was not his call as to whether Grievant was put on a FSP, and he would have no basis for such a decision. He testified that he had looked into issues raised by Grievant which were within the scope of his job, and had offered her suggestions for affecting outcomes. Ms. Group's testimony and

25. In October 2016, Grievant and her union representative spoke with Mr. Pettiford regarding an incident with a coach and the JBOE Athletic Director and Grievant. Grievant also told Mr. Pettiford she thought she was being “black-listed” and harassed. Mr. Pettiford looked into the allegations and concluded that there was no basis for a Title 7 or Title 9 harassment claim.

26. Grievant complained to Superintendent Gibson that individuals were being included on emails about her performance who should not have been provided with such information. Superintendent Gibson agreed with Grievant and directed that the individual(s) identified by Grievant not be included on any further such emails. Grievant also complained to Superintendent Gibson that a secretary had been opening private mail and reading it. Superintendent Gibson met with the secretary’s supervisor and the disciplinary process was followed with regard to this situation.<sup>3</sup>

27. In November 2013, a FSP was developed for Grievant by JHS administrator Howard Guth, which was to end January 10, 2014. At the conclusion of the time period for the FSP, Mr. Guth observed Grievant’s teaching and found she was still deficient in

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Superintendent Gibson’s testimony was very clear that Ms. Group had asked Mr. Ebersole and Superintendent Gibson for guidance on whether she could place Grievant on a FSP given all the events during the school year. Ms. Group never indicated that she had received a directive from anyone to place Grievant on a FSP. On the other hand, during her testimony at the level three hearing, Grievant had difficulty focusing on the question being asked, and answering the question being asked in a clear and concise manner. The undersigned concludes that Grievant’s beliefs that Mr. Pettiford and Mr. Blanc had told Ms. Group to place Grievant on a FSP and that he had told Grievant he had been enlisted to try to get rid of her are not an accurate portrayal of events.

<sup>3</sup> Grievant testified that her concerns are blown off and there is no follow-through, and that Superintendent Gibson did not try to work with her. Grievant’s perceptions in this regard appear to be inaccurate.

several teaching standards. Mr. Guth intended to place Grievant on a corrective action plan. Mr. Guth resigned shortly thereafter, and JHS Assistant Principal Mary Beth Group became Grievant's supervisor. Grievant asserted there were procedural defects in the review process, and Grievant and Ms. Group came to an agreement to put another FSP in place for the 2014-2015 school year, rather than placing Grievant on a corrective action plan.

28. Ms. Group completed Grievant's evaluation for the 2013-2014 school year. Teachers are rated in most of the categories on this form as Unsatisfactory, Emerging, Accomplished, or Distinguished, with Distinguished being the best possible rating. Grievant was rated as Unsatisfactory in 3 categories, Emerging in 12 categories, and Accomplished in 1 category, with no ratings of Distinguished. Ms. Group noted that, "Mrs. Joy has not shown a deep and extensive knowledge of the subject matter. She has difficulty getting the content across to her students." She also noted that Grievant is not successful in classroom management "due to the confrontational communication that occurs. The atmosphere is inadequate for the learner to be successful." In the area of Professional Conduct, the possible ratings are Meets Standard, Below Standard, and Unsatisfactory. Grievant was rated as Meets Standard in three of the four categories, and Below Standard in Respect. Ms. Group noted in this area, "[c]ommunication with students and parents are not professional. Communication with peers is respectful." The summative performance rating was Unsatisfactory.

29. Grievant took a leave of absence for most of the 2014-2015 school year, and the FSP was never put in place.

30. In December 2015, Principal FitzGerald observed Grievant's teaching and completed an observation form. Principal FitzGerald had concerns at the time about Grievant's content knowledge and classroom routine.

31. Grievant received a rating of Accomplished in 12 categories on her 2015-2016 evaluation, and Emerging in 2 areas. She was not rated in 2 areas, nor was there a summative performance rating. In Professional Conduct, Grievant was rated Meets Standard in 3 areas, and Below Standard in Policy and Procedure, with the unidentified rater noting, "[w]ith her policies and procedures, it must be consistent with all students."

32. At some unidentified time prior to the filing of this grievance, Grievant filed a grievance about a different issue. The record does not reflect who was involved in that grievance, or that anyone alleged by Grievant to have retaliated against her was aware of the grievance except Ms. Workman. Grievant disclosed that a grievance had been filed in an email to Ms. Workman on October 26, 2016. The record does not reflect whether Ms. Workman was aware of the grievance prior to this date. Superintendent Gibson was aware of the grievance.

33. At some unidentified time, Grievant filed some type of complaint about the services being provided to her daughter by Jefferson County Schools. The record does not reflect what school Grievant's daughter attends or has attended, or that anyone accused by Grievant of retaliating against her was aware of the complaint.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health &*

*Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

Grievant asserted that several individuals engaged in a concerted effort to harass her, and created a hostile work environment that has affected Grievant's health and well-being. 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. *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).

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. See *Lanehart v. Logan County*

*Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 09-AA-92 (Dec. 8, 2010). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n]*, 206 W. Va. 86, 522 S.E.2d 180 (1999), citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8<sup>th</sup> Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006), *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 06-AA-65 (Jan. 4, 2007).

Certainly, Grievant was subjected to what would seem at first blush to an inordinate number of observations. However, once the situation is examined further, the reason for most of the observations becomes clear, and they were conducted for a legitimate reason. The first observation by Ms. Group was conducted at Grievant's request. Ms. Workman was supposed to join Ms. Group during that observation, but was unable to do so, so she did her own observation the following day. During Ms. Workman's next observation over a month later in October, she observed issues which she believed were significant enough that Grievant should be placed on a FSP. At some point she asked for Ms. Shaffer to observe Grievant, perhaps because of the issues she observed and Ms. Workman's lack of a math background, and Ms. Shaffer observed Grievant the next day. Grievant then opposed the FSP, so instead, additional support was provided to Grievant, and it was certainly reasonable and responsible to then do a follow-up observation, which was done on December 5, 2016, by Ms. Workman, and on December 21, 2016, by Ms. Shaffer, who was assisting with this process. Ms. Shaffer's December 21, 2016 observation form notes that the students were working the I Ready program, so she was not able to conduct a teaching observation. She returned to Grievant's classroom then on January 13, 2017, and noted several concerns. Ms. Shaffer was removed from the process shortly thereafter. Efforts to place Grievant on a FSP were being fought by Grievant and she had raised issues regarding the validity of the observations by Ms. Shaffer and Ms. Workman, so Ms. Group tried to conduct her own observation on February 3, 2017, but was unable to get a good read on the situation. Ms. Group at that point decided to throw in the towel on the observations for that school year due to the number which had occurred. While Grievant may have been uncomfortable with the number of observations, there is a reasonable



explanation for them, and the volume alone does not constitute harassment or a hostile work environment.

Grievant claimed that suggestions made by those observing her during the most recent school year that she lacked some knowledge regarding the subject matter and that her teaching could use some improvement were ridiculous given her teaching experience and education. While Grievant may believe that her many years of experience and education render her teaching exceptional, this is not the first time these issues have been raised, and they have been raised by several administrators. Grievant testified that after she filed the complaint regarding her daughter, she knew there would be a backlash. With this mindset, it appears that Grievant's response to any comment was to take it as a personal criticism, generated not by what the observer was seeing, but rather, as part of a concerted effort to get her fired. While Grievant may harbor the view that all the administrators are incompetent and engaged in a concerted effort to attack her, and accordingly, feels harassed, she did not demonstrate that her views are accurate.

Grievant did demonstrate that Ms. Shaffer jumped to some unfounded conclusions on one of the observation forms about Grievant emailing an administrator during class, just as Grievant jumped to the conclusion that Ms. Shaffer was not paying attention to the class because she was "on her phone," indicating she was talking or texting, the entire time she was in the room, when Ms. Shaffer testified she was taking notes on her phone. Certainly, both individuals need to find out the facts of a situation before making unfounded conclusions, and making accusations that someone is a liar, but nothing about this or any other observation notes rises to the level of unreasonable work expectations or constant criticism.

Grievant did provide detailed testimony on her interaction with Mr. Saltis, which demonstrated that his responses to her request were unprofessional and inappropriate. However, there is no evidence that his actions were motivated by anything other than his own personality. While this one incident cannot be condoned, and the undersigned would suggest that Mr. Saltis be advised that his behavior was unprofessional, it does not rise to the level of harassment or creation of a hostile work environment.

Finally, Grievant believed that Principal FitzGerald had spoken to her using a demeaning tone, and that Principal FitzGerald's decision that Grievant could not serve as National Honors Society sponsor because she was a part-time teacher was not a legitimate reason. Grievant provided no detail of her interactions/discussions with Principal FitzGerald from which the undersigned can find that Grievant's opinion that she used a demeaning tone of voice toward her are accurate. The only detail is that Principal FitzGerald would tel Grievant, "this conversation is over." Without any context, even this detail provides no useful information. Principal FitzGerald is Grievant's supervisor, and certainly has the authority to end a conversation which has gone off track. The undersigned further finds it perfectly reasonable to require a National Honors Society sponsor to be a full-time teacher.

The undersigned concluded that Grievant did not demonstrate that she has been subjected to harassment or a hostile work environment. Nonetheless, the undersigned will briefly address Grievant's allegations of retaliation. Grievant alleged the actions complained of were in retaliation for the filing of a prior grievance and a complaint regarding services being provided by JBOE to her daughter. For purposes of the grievance procedure, 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 Dep’t 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. Dep’t of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

While JBOE’s Superintendent was aware of the grievance and the complaint regarding Grievant’s daughter, there is no evidence that any of the individuals Grievant accused of inappropriate behavior toward her had knowledge of either until Grievant disclosed to Ms. Group in late October that a grievance had been filed, after Ms. Group had advised Grievant that a meeting had been set up to place her on a FSP. Further, Grievant did not demonstrate that the filing of her grievance or the complaint generated the observations or FSP or any inappropriate behavior toward her.

The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep’t of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

2. 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).

3. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably

interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris*, supra at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 09-AA-92 (Dec. 8, 2010). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006).

4. 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).

5. Grievant did not demonstrate that the actions complained of constituted harassment or that they created a hostile work environment, or that the filing of her grievance or the complaint she filed related to her daughter was a factor in any of the actions complained of.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

**Date: January 22, 2018**

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**BRENDA L. GOULD**  
**Deputy Chief Administrative Law Judge**