# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CONNIE S. MIZE,**
**Grievant,**

**v.** **Docket No. 2017-2145-CabED**

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

## DECISION

Grievant, Connie Mize, is employed by Respondent, Cabell County Board of Education ("Board") as the principal for Meadows Elementary School, in Huntington, West Virginia. Ms. Mize filed a Level One grievance form dated May 3, 2017 alleging the following:

> I am grieving the letter of reprimand sent to me via US Mail dated April 27, 2017. This letter outlines facts which are indicative of my harassment and lack of support from the County Administration and retaliation for the exercise of my rights pursuant the West Virginia grievance law.

As relief, Grievant seeks "[r]emoval of the letter of reprimand, discontinuation of harassment and retaliation, and proper administrative support."

A Level One conference was held on May 9, 2017, and a decision denying the grievance was issued the next day. Grievant's Level Two appeal was dated May 16, 2017, and a mediation was conducted on July 18, 2017. Grievant's Level Three appeal was dated July 24, 2017.

A Level Three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board over two days: January 8, 2018, and March 30, 2018. Grievant personally appeared on both dates and was represented by Katherine L. Dooley,

Esquire, The Dooley Law Firm, P.L.L.C. Respondent was represented by Rebecca M. Tinder, Esquire, Bowles Rice LLP.[1] This matter became mature for decision on May 3, 2018, with receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

## Synopsis

Grievant was given a written reprimand for allegedly ordering her secretary to listen in on meetings Grievant was conducting, from a position where the secretary could not be seen. Respondent argued that this activity was in violation of a directive Grievant had been given to not request her secretary to sit in on meetings as a witness. Grievant alleged that she merely asked her secretary to stay in the office and listen in case the meeting got out of hand. The secretary was not to take notes or serve as a witness to the meetings. Respondent did not prove the reasons for the written reprimand.

Grievant additionally claimed that Respondent's agent subjected her to habitual harassment and the reprimand was a reprisal for her filing prior grievances. Grievant did not prove these claims.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## Findings of Fact

1. Grievant, Connie Mize, is employed by Respondent, Cabell County Board of Education, as the principal for Meadows Elementary School ("Meadows"), in Huntington, West Virginia. She has been the principal of that school for three years.

[1] The same attorneys appeared on behalf of their respective client at all levels of this grievance process.

2. Grievant has been a professional educator for more than twenty-seven years. She has been a principal in Cabell County for sixteen years. She holds professional certification for the principal position was well as a superintendent. She has earned two Master's Degrees; one in Special Education, and another in Education Leadership.

3. Grievant is the only administrator assigned to Meadows.

4. Prior to the 2016-2017 school year, Grievant allegedly instructed a substitute secretary to sit in on an employee disciplinary meeting to take notes. After the meeting Grievant allegedly requested the secretary to change something in her notes and the secretary complained to the central office.

5. Grievant's supervisors directed Grievant not to have her secretary sit in on meetings as a witness or take notes of meetings. She was directed that on any occasion when she felt having a third-party present in a meeting was necessary, to call the central office, and one of the administrators would attend the meeting with her.

6. During the 2016-2017 school year, Aimee LeRose was the secretary assigned to Meadows Elementary School.

7. The office suite shared by Grievant and the school secretary measures roughly twelve feet by twenty-four feet. The secretary's desk is closer to the door to the principal's room than the length of a standard conference table. The principal's desk is roughly two feet from the door. It was estimated by the witnesses that the two desks were between five and eight feet apart.

8. While seated at their desks, Grievant could hear conversations held in the outer office and Ms. LeRose could hear conversations held in the principal's office.

9. Three meetings occurred in Grievant's office during the course of the 2016-2017 school year which led to a written reprimand. On two occasions, Grievant met with a classroom teacher and her representative. On a third occasion, Grievant was meeting with a parent. On these occasions, Grievant told Ms. LeRose to stay in the office and listen in case something went wrong.[2] The parent Grievant was meeting with had previously knocked the window out of the office door.

10. Grievant did not tell the secretary to witness the meetings or take notes of the meetings. After the meetings ended without incident, Grievant did not mention anything about the meetings to Ms. LeRose.

11. Prior to the two meetings with the teacher and her faculty representative, Ms. LeRose heard the representative tell the teacher that she planned to surreptitiously record the meeting. Ms. LeRose did not tell Grievant that her meeting was going to be tape recorded without her knowledge.

12. Ms. LeRose did not mention to Grievant that she was uncomfortable with hearing meetings in Grievant's office. She reported to Jerry Lake, Manager of Service Personnel for Cabell County Schools that she was being required to stand outside Grievant's office and listen in on meetings with teachers and parents from a position where she could not be seen.

13. Manager Lake informed Ms. LeRose that listening to conversations in Grievant's office in the manner she described was not part of her job description. He then

[2] Ms. LeRose testified that Grievant told her to stand someplace in the office where she could not be seen and listen to what was said at the meetings.

arranged a meeting for Ms. LeRose with Todd Alexander, Assistant Superintendent for Cabell County Schools.[3]

14. On another occasion, Grievant was going to review a school video monitor for what might have been improper behavior by a staff person. The monitor was located behind Ms. LeRose's desk. Grievant asked Ms. LeRose to leave the room while she viewed the monitor. Ms. LeRose was very upset that she was asked to leave. She testified that it would not matter what she saw because, as the secretary, it was common for her to see or overhear things, but she was required to keep it confidential. She reported this incident to Manager Lake as well, but did not mention her aggravation with being asked to step outside.

15. Assistant Superintendent Alexander met with Ms. LeRose, and on a later date, he met with Grievant about the situation. He reported the matter to Superintendent William A. Smith.[4] Mr. Alexander recommended Grievant be disciplined for insubordination for not following his previous directive to not require her secretary to sit in on meetings as a witness and note-taker. He advised the superintendent that Grievant violated the *Cabell County Schools Code of Conduct* by failing to exhibit professional behavior, responsible citizenship and comply with policies.

16. Superintendent Smith issued a written reprimand to Grievant by letter dated April 27, 2017. Superintendent Smith found that Grievant had directed Secretary LeRose to "witness" conferences held in Grievant's office from a position where she could not be

[3] Mr. Alexander has left his Cabell County position to become the superintendent for Wayne County schools. Ms. LeRose was the successful applicant for a secretary position at Cabell-Midland High School.

[4] Prior to the Level Three hearing, William Smith retired from the position of Superintendent of Cabell County schools.

seen in case a complaint was filed regarding the content of the conference. He found that this occurred after Grievant was instructed to call for a central office administrator if she needed someone to sit in on a meeting as a witness.[5]

17. Superintendent Smith specifically did not find Grievant to be insubordinate. He stated that Grievant used poor judgement by not realizing that she was still asking her secretary to be a witness to the proceedings even though she was not in the office where the meeting was taking place. He specifically wrote:

> [Y]ou seem to be predisposed to poor judgement and have a documented history of misjudging interpersonal communications, and mishandling employee and community relationships.

18. Superintendent Smith referred to the *Cabell County Schools, Employee Code of Conduct*, Sections A and F in the letter and implied without specifically stating that Grievant violated these provisions which specifically state:

> All Cabell County professional employees shall:
>
> A. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance;
>
> F. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

*Id.*[6]

19. Tim Hardesty is the Elementary Administrative Assistant for the Cabell County Board of Education, and Grievant's supervisor. Grievant's performance had been

[5] The parentheses around the word witness were in the original document.

[6] Mr. Alexander testified that he believed that Grievant had also violated similar provisions of *State Board of Education Employee Code of Conduct* and the *Cabell County Schools Policy 2112, Bill of Rights and Responsibilities for Students and School Personnel.* However, these provisions were not cited by Superintendent Smith as reasons for the written reprimand and consequently will not be considered.

criticized previously by both Mr. Hardesty and Mr. Alexander. During the last year she was the principal at Geneva Kent Elementary she was provided informal support including working with a retired principal, Mary Campbell, as a mentor. In the 2015-2016 school year, Grievant's second year at Meadows, additional alleged performance issues led to a Focused Support Plan, which Grievant completed successfully. Ms. Campbell again provided assistance.

20. During the 2016-2017 school year, Mr. Hardesty began receiving complaints from staff members regarding Grievant's poor communication with them and written complaints regarding Grievant's lack of leadership abilities. Parents also expressed concern and dissatisfaction with Grievant's action.

21. Mr. Hardesty did not inform Grievant about all these complaints and held at least one meeting with staff members and their representative without Grievant being present.

22. Grievant scheduled a fire drill for a time during the day when kindergarten students were taking a nap. The kindergarten teacher did not wake up her students to take them out for the drill. She reported Grievant's "poor" scheduling to Mr. Hardesty. Mr. Hardesty criticized Grievant for scheduling a fire drill during the kindergarten nap time. Grievant believes the kindergarten teacher was not criticized for failing to have her students participate in the fire drill.

23. After receiving these complaints over the course of seven months during the 2016-2107 school year, Mr. Hardesty accelerated Grievant's evaluation schedule and found her performance to be unsatisfactory in the standards of "Interpersonal and Collaborative Skills" and "Positive Learning Climate and Cohesive Culture."

24. Grievant believes that by meeting with parents and staff without her, Mr. Hardesty has deliberately undercut her authority at the school and contributed to any lack of a cohesive climate which may exist at the school.

25. Grievant contested the evaluation as well as Mr. Hardesty's action through the grievance procedure. A Level Three Decision denying the grievance was issued on February 7, 2018. *Mize v. Cabell County Bd. of Educ.*, Docket No. 2017-2232-CONS (Feb. 7, 2018).[7]

26. Grievant had filed other grievances related to Mr. Hardesty's treatment of her between 2013 and 2016.[8]

## Discussion

Respondent issued a written reprimand to Grievant for incidents occurring during the 2016-2017 school year. As this is a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by

[7] Grievant also claimed the unsatisfactory evaluation was reprisal for her utilizing the grievance procedure of prior occasions. The administrative law judge found that claim to be abandoned and did not rule of it. *Id. fn 2, p. 2.*

[8] The specific number of grievances and their outcome were not put into evidence.

> sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

*W. Va. Dep't of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant alleges that Respondent's agents are guilty of "harassment" and "reprisal". Grievant bears the burden of proving these claims. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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).

In the first instance, Respondent argues that Grievant is guilty of "insubordination," "willful neglect of duty," and violating the *Cabell County Schools, Employee Code of Conduct* by directing the Meadows secretary to stay in the office, while a meeting was being conducted and listen for things getting out of hand.[9]

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 (April 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

[9] Respondent characterizes Grievant's actions as telling the secretary to stand in the office, out of sight of the meeting participants, and witness what was said.

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."

The first charge leveled by Respondent during and after the hearing is insubordination. For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

We need only look at the letter of reprimand to dispose of this issue. Superintendent Smith specifically wrote that one of his options was finding Grievant was insubordinate for refusing to comply with the instruction to bring an administrator to witness potentially contentious meetings. He specifically chose not to charge Grievant with insubordination. Superintendent Smith has been a school administrator for decades and obviously knew what his words meant. When Mr. Alexander was asked if Superintendent Smith charged Grievant with insubordination, he said the superintendent "chose to go another way." This is not a case where no specific charge was leveled, and

insubordination may be inferred from the facts. Superintendent Smith made the specific and conscious choice not to cite insubordination as a reason for the reprimand. Respondent cannot later use that charge to support the reprimand at the hearing.

Additionally, Grievant did not violate the directive she was given to not have a secretary sit in and witness a potentially contentious meeting and to call in a central office administrator instead. Even if the testimony of Ms. LeRose was totally credible, she was not asked to sit in and witness the meeting and take notes. Grievant testified that she told Ms. LeRose to stay in the office and listen for things getting out of hand. Ms. LeRose alleges Grievant told her to stand in the office somewhere that she could not be seen by the meeting participants and witness the meeting.

In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or

nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Ms. LeRose's demeaner was contentious and defensive while testifying, even though she no longer works under Grievant's supervision. It was apparent that she held some animus toward Grievant. This was apparent when she testified that she overheard a representative say that they intended to surreptitiously tape their meeting with Grievant and she took no action to let her supervisor know of this deceit. Her assertion that Grievant instructed her to stand somewhere that she could not be seen is absurd. No one disputed that the secretary could hear the entire meeting sitting at her desk. If Grievant wanted Ms. LeRose to secretly serve as a witness it would have made much more sense to instruct her to remain at her desk where everything would appear normal. Ms. LeRose's assertion that she was upset by having to listen to the meeting is also inconsistent with her other statements. She was clearly upset about the fact that Grievant asked her to leave the office when Grievant and another person were reviewing the video display to verify the activities of a teacher. She was upset that Grievant did not trust her to witness the video footage and noted that as a school secretary she often hears confidential matters and it is her duty to keep those matters confidential.

Rather than tell Grievant that she was uncomfortable staying in the office during these meetings, she went to Mr. Lake at the Central Office to complain. She clearly felt

dislike for her supervisor which renders her motives for the report suspicious at best. Ms. LeRose's account of these incidents is not credible.

Grievant told Ms. LaRose to stay in the office so she would hear if things got out of hand at the meetings. Grievant has a stake in the outcome of this matter as much as any grievant. Her testimony was guarded which one would expect from an employee who feels she is being unfairly criticized by her supervisors. But her account is much more consistent with the situation. She had been told to not have a secretary sit in on meetings and take notes. While it was not specifically stated, the implication of the directive was that she was not to use the secretary as a witness. Grievant knew that Ms. LeRose could hear the meetings from her desk. She also had a prior meeting where a parent unexpectedly become so upset the he/she broke the glass in the office door. Grievant understood that the directive was to only call for an administrator when it was necessary, and overuse of this option was improper. In these meetings Grievant did not expect anything to get out of control but was also aware that something could happen, and she would be without assistance if the secretary was not in the office. In this situation it was prudent to instruct Ms. LeRose to stay in the office to listen for thing getting out of control.

Grievant's actions following each of these meetings was consistent with Grievant's version of the events. She did not mention the meetings to Ms. LeRose. She did not ask Ms. LeRose about what she had heard, and she did not ask Ms. LeRose to take notes. Since the meetings occurred without incident she had no reason to consult with the secretary thereafter.

Grievant was not consistent with how she described her instructions to Ms. LeRose each time she was asked about the meetings. But each statement was consistent with

the idea that she only wanted the secretary to be there for an emergency and not to act as a witness in some future dispute generated by the meeting. Grievant did not intentionally violate the prior directive give to her by Mr. Hardesty and Mr. Alexander.

Respondent next argues that Grievant was guilty of “willful neglect of duty.” The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). “Willful neglect of duty may be defined as an employee’s intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

Respondent asserts that Grievant willfully ignored the directive that she not require her secretary sit in on meetings to act as a witness. As set out above, Respondent did not prove that Grievant willfully or otherwise violated that directive.[10] Respondent asserts that Grievant also willfully violated the State and Cabell County codes of conduct in these instances. Superintendent cited violation of the *Cabell County School, Employee Code of Conduct* (“Policy 3201”) as the reason for issuing the written reprimand. He specifically cited paragraphs A. and F which state:

> All Cabell County professional employees shall:

[10] Superintendent Smith did not cite “willful neglect of duty” as a reason for the written reprimand. Respondent Exhibit 4.

> A. exhibit professional behavior by showing positive examples preparedness, communication, fairness, punctuality, attendance, language, and appearance;
>
> F. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.[11]

Grievant instructed Ms. LeRose to stay in the office to listen for the meetings to get out of control. This was a reasonable measure to ensure the safety of the meeting participants and possibly others. Respondent did not prove that Grievant's actions were unprofessional, unethical or lacked self-control. In short, Respondent did not prove by a preponderance of the evidence that Grievant was guilty of willful neglect of duty or that she violated Policy 3201. Accordingly, the grievance challenging the written reprimand is GRANTED.

We now turn to Grievant's allegations that Respondent's agents' treatment of her constituted harassment and that the reprimand was the result of reprisal for filing prior grievances.

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;
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;

[11] Policy 3201

> (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.

*Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *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).[12]

In this case Grievant has participated in the grievance process a number of times between 2013 and 2017. No evidence was provided as to how many grievances were filed, when they were filed, or their outcome. We know that one resulted in a level three decision dated February 7, 2018. The most recent claim filed in that consolidated grievance was dated April 21, 2017. *Mize,* 2017-2232-CONS, *supra.* The letter of reprimand was dated April 27, 2017, but the disciplinary conference concerning the letter

[12] One might find that it is unnecessary to address reprisal since the written reprimand has already been invalidated. However, W. VA. CODE § 6C-2-3(h) states: "Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination."

was held with Superintendent Smith on April 17, 2017, before the grievance was filed. Respondent Exhibit 4.

Grievant was subjected to adverse action (written reprimand) after some of the grievances were filed, but not the most recent grievance. There is not doubt that Mr. Hardesty and Mr. Alexander knew about the prior grievances, since Mr. Hardesty's actions were the genesis for the claims. However, Grievant did not prove by a preponderance that there was a retaliatory motive for the written reprimand. Mr. Alexander had the statements of Ms. LeRose upon which he based his recommendation to Superintendent Smith. Superintendent Smith issued the letter of reprimand upon those statements. Ms. LeRose's testimony herein has been found to be not credible based upon the totality of her testimony and the surrounding facts. While the reliance upon the statements of Ms. LeRose was erroneous, Grievant did not prove by a preponderance of the evidence that it was a mere pretext for the nefarious motive of reprisal.

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); *Breck v. Putnam County Bd. of Educ*., 2011-1541-PutED (Sept. 25, 2012).

Grievant alleges that Mr. Hardesty has constantly heaped unfounded criticism upon her causing her immense stress, undermining her authority with her staff, and making it impossible for her to properly perform her job. As example of this she points to Mr. Hardesty meeting with parents and staff about complaints without her being present, and his failure to accept her side of the story with regard to those complaints. These same allegations were the basis for Grievant's contesting her evaluation in the prior grievance. The Administrative Law Judge in that case wrote:

> Grievant also asserts that Mr. Hardesty, as her supervisor, has treated her unfairly, subjected her to constant criticism, and circumvented her authority in the building by allowing faculty and staff to contact him directly without advising her of the contact. Grievant has generally offered only her testimony in support of these claims. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

*Mize,* 2017-2232-CONS, *supra.* The same holds true in this matter. Grievant's beliefs are not enough to establish harassment. It is just as likely that Mr. Hardesty was following a legitimate managerial path to promote improve performance on Grievant's part. Grievant did not prove by a preponderance of the evidence that she has been subjected to harassment or reprisal. Accordingly, these claims in her grievance are **DENIED**.

## Conclusions of Law

1. Respondent issued a written reprimand to Grievant for incidents occurring during the 2016-2017 school year. As this is a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant's has the burden of proof regarding her allegations of "harassment" and "reprisal." These claims must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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).

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 (April 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."

4. For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

5. The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). “Willful neglect of duty may be defined as an employee’s intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

6. Respondent did not prove by a preponderance of the evidence that Grievant was guilty of insubordination or neglect of duty.

7. *Respondent did not prove by a preponderance of the evidence that Grievant violated the Cabell County Schools, Employee Code of Conduct.* Respondent did not prove the reasons for the written reprimand by a preponderance of the evidence.

8. 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;
>
> (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.

9. Grievant did not prove that the issuance of the written reprimand was an act of reprisal for her filing prior grievances against the Respondent.

10. 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).

11. Grievant did not prove by a preponderance of the evidence that her supervisors were guilty of harassment.

Accordingly, the grievance is **GRANTED** with respect to the challenge of the written reprimand and **DENIED** with regard to the claims of reprisal and harassment.

The written reprimand is found to be void. Respondent is Ordered to remove the letter of reprimand from all files related to Grievant's employment.

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).

**DATE: June 18, 2018.**

_____

**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**