**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SALENA WILLIAMS-GRANT,**

**Grievant,**

**v.** **Docket No. 2018-1479-CONS**

**JEFFERSON COUNTY BOARD OF EDUCATION,**

**Respondent.**

## DECISION

Grievant, Salena Williams-Grant, is employed by Respondent, Jefferson County Board of Education. On February 21, 2018, Grievant filed her first grievance under docket number 2018-1005-JefED which stated, "On or about February 6, 2018 the Grievant became aware of a letter of reprimand without notations, dated January 17, 2018. The letter of reprimand was placed in the Grievant personnel file without due process. The Grievant did not receive the letter of reprimand from Human Resources. The Grievant became aware of the letter of reprimand 15 days after Respondent placed the letter of reprimand in Grievant personnel file. The letter of reprimand violates Code 6C-2-2 (o) [reprisal]; 6C-2-2(1) [harassment]. In addition, the Respondent violated the Grievant civil liberties; to not face her accusers, to not present her evidence, and to not see evidence brought against her." For relief, "The Grievant requests that the letter of reprimand be removed from her file."

A level one conference was held for the first grievance sometime in April 2018, and a decision was issued on April 18, 2018, denying the grievance. Grievant appealed to level two on April 20, 2018, and a mediation session was held on June 11, 2018. Grievant appealed to level three of the grievance process on June 21, 2018.

On April 20, 2018, Grievant filed a second grievance under docket number 2018-1115-JefED which stated, "The Respondent placed the Grievant on a Correction Action Plan (CAP). The Grievant contends she never should have been placed on a CAP. Grievant alleges that her placement on a CAP violates West Virginia Department of Education Policy 5310; W.Va. Code 6C-2-2 (o) [reprisal]; 6C-2-2(d) [discrimination]; 6C-2-2(1) [harassment], and that there is insufficient evidence to place her on a CAP. Additionally, the Grievant alleges that the CAP is punitive in nature and based on erroneous falsehoods; initiated without due process; used as punishment for a falsehood of an erroneous nature; and lacks concrete goals." For relief, "Grievant seeks the cessation of the current corrective action plan and removal of the corrective action plan from any and all records maintained by Respondent and on WVEIS; and any other relief the Grievance Evaluator deems appropriate."

A level one conference was held for the second grievance sometime in May 2018, and a decision was issued on May 21, 2018, denying the grievance. Grievant appealed to level two on May 25, 2018, and a mediation session was held on June 11, 2018. Grievant appealed to level three of the grievance process on June 21, 2018.

The grievances were consolidated under docket no. 2018-1479-CONS by order dated November 28, 2019. A level three hearing was held before the undersigned administrative law judge at the Grievance Board's Westover, West Virginia office on May 1, 2019. Grievant appeared in person and was represented by John Roush, Esquire. Respondent appeared by Superintendent Dr. Bondy Shay Gibson and was represented by Tracey Eberling, Esquire. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on June 21, 2019.

## Synopsis

Grievant has been employed by Respondent as a teacher at Jefferson High School for 36 years and is black. After determining that Grievant was disrespectful and insubordinate, Respondent placed her on a Corrective Action Plan (CAP) and issued her a letter of reprimand. When Grievant used her CAP assignments as a vehicle to criticize supervisors, Respondent issued a second letter of reprimand. Grievant contends that Respondent's actions were retaliatory, since she had previously filed a grievance against Respondent, and a denial of due process, since she had no disciplinary record, had never been asked for her version of events, and had never received lesser directives such as a Focused Support Plan (FSP) or verbal warning. Grievant asserts that Respondent's actions entailed harassment and race and age discrimination. Respondent proved a basis for its letters of reprimand. Grievant did not prove she was entitled to an FSP or verbal warning. Grievant did not make a *prima facie* case for retaliation. Grievant did not prove that the discipline was arbitrary and capricious, that she was denied due process, or that she was subject to discrimination and harassment. Accordingly, 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 regularly employed by Respondent as a classroom teacher at Jefferson High School. She has worked for the county school system for approximately 36 years and is black.

2. Sherry FitzGerald is the principal of Jefferson High School.

3. At Jefferson High School, the principal and three assistant principals divide responsibility for the observation and evaluation of teachers. Principal FitzGerald had previously supervised Grievant, but after Grievant filed a grievance against her, Assistant Principal (AP) Mary Beth Group assumed that role. Therefore, in the 2017-18 school year, Grievant was supervised by AP Group.

4. In the fall of the 2017-18 school year, Grievant was accused of involvement in several incidents.

5. Grievant had confronted a student in the hallway shortly after the beginning of the school year. The student was on a 504 plan and quite sensitive. Grievant was verbally counseled about her interaction with that student.

6. On November 30, 2017, Todd Chiccirichi, the Head Technologist for Jefferson County Schools, went to Grievant's classroom at the direction of his supervisor to check on the status of a Technology Assistance Request Form previously submitted by Grievant. When Mr. Chiccirichi arrived, Grievant stopped him and required him to announce his appearance with "good morning class" in the standard professional greeting she required of anyone entering her classroom. Grievant deemed Mr. Chiccirichi's first attempt unacceptable and directed him to repeat it more loudly. He complied. Later that day, Mr. Chiccirichi approached Grievant to discuss the incident while she was on hall duty, whereupon Grievant told him not to approach her during her hall duty time and that he should come talk to her during class time.

7. That same day, Grievant stopped a parent volunteer after her son attempted to enter an activity area restricted to staff, whereupon he obtained a pass to access the area. Grievant later reported that bubble-wrap popping and the fragrance used by the

parent in volunteer activities adversely affected her. The parent was unaware that in generating these smells and sounds she was in violation of school policy.

8. Later that same day, Grievant emailed her direct supervisor AP Group to voice her displeasure with Mr. Chiccirichi and the volunteer parent. AP Group investigated the matters and, ironically, found Grievant at fault.

9. On December 12, 2017, AP Group met with Grievant to discuss concerns regarding Grievant's conduct. Grievant denied unprofessional conduct.

10. On December 13, 2018, Principal FitzGerald emailed Superintendent Gibson about Grievant's conduct towards the parent volunteer and requested assistance in addressing the conduct.

11. On December 14, 2017, AP Group emailed Grievant a recap of the December 12, 2017 meeting with her and directed Grievant to be mindful of her actions towards others, noting that reports had been made that Grievant behaved unprofessionally. This was not a letter of reprimand and was not placed in Grievant's personnel file.

12. Later that day, Grievant contacted AP Group by internal telephone and addressed her in a loud and confrontational tone. AP Group was shaken by the encounter. She met with Principal FitzGerald after the call and was told to document the call and avoid interacting with Grievant until further notice.

13. Following the call, Grievant sent a lengthy email critical of AP Group and Principal FitzGerald to AP Group, copying Principal FitzGerald, as well as the Chief Human Resources Officer for the County, Assistant Superintendent Patrick Blanc, Superintendent Gibson, and Grievant's union representative.

14. On December 15, 2017, Principal FitzGerald sought guidance from Superintendent Gibson and Ms. Pettiford about Grievant's conduct. Dr. Gibson requested that Lee Ebersole, a central office employee with substantial experience in professional employee performance matters, meet with Principal FitzGerald and AP Group concerning the next steps. Respondent often includes Mr. Ebersole to support school administrators in considering employee conduct and the appropriate steps to support improvement.

15. On December 22, 2017, Mr. Ebersole met with Principal FitzGerald and AP Group, as well as Bryan Cooley, a representative of Respondent's HR. They concluded that Grievant's conduct should be documented and a Corrective Action Plan (CAP) be considered as a means to address Grievant's unprofessional conduct.

16. Mr. Ebersole subsequently emailed AP Group, stating, in part, "[y]ou provided details surrounding one or more incidents where Ms. Williams-Grant demonstrated unprofessional behavior consistent with insubordination. Based on our preliminary conversation, I would recommend we explore designing and implementing a corrective action plan, given the nature of the insubordinate behavior. Focused support plans may not be well suited to addressing insubordination and like instances of misconduct specified in West Virginia Code 18A-2-8." (Respondent's Exhibit 5)

17. By letter dated January 10, 2018, Principal FitzGerald recommended that Superintendent Gibson terminate Grievant. In the alternative, she requested that Grievant be placed on a CAP to remedy her behavior. (Grievant's Exhibit 1)

18. Superintendent Gibson rejected the recommended termination, given Grievant's lack of prior discipline, and chose the issuance of a letter of reprimand based on the Employee Code of Conduct and the implementation of a CAP.

19. On January 17, 2018, Respondent issued Grievant a letter of reprimand, stating, “I am in receipt of documentation substantiating your display of disruptive and insubordinate behavior in the workplace. … You have failed to utilize those processes in a professional and productive manner. Your aggressive and demeaning language, your elevated volume of discourse, and your written invective demeaning your supervisor are all unacceptable means to convey your disagreement or unhappiness with a course of events. It is expected that in the future you will conduct yourself in a more professional manner by addressing both JCS employees and visitors courteously and respectfully regarding their abilities or actions and that you will do so without a tone and volume that has been universally interpreted as aggressive and threatening.” (Respondent’s Exhibit 6)

20. Neither Superintendent Gibson nor Mr. Ebersole contacted Grievant prior to issuing the letter of reprimand and the CAP.

21. AP Group contacted Grievant by email on February 2, 2018, to advise her that she and Mr. Ebersole would be conducting an observation of her in the following week to proceed with the CAP process.

22. Grievant responded to AP Group’s email as follows: “This e-mail is very inappropriate to me as well as disrespectful to me, especially, when I am an ‘Advanced Teacher’. How could you send me something like this at the start of Black History Month? A written apology is requested.” (Respondent’s Exhibit 1)

23. On February 6, 2018, Principal FitzGerald responded to Grievant’s email and advised her that the CAP was at the directive of Superintendent Gibson and that her email to AP Group was further evidence of insubordination. (Respondent’s Exhibit 1)

24. Grievant first received the January 17, 2018, letter of reprimand as an attachment to Respondent's February 6, 2018, email.

25. On February 6, 2018, Grievant contacted Marty Soltis, Respondent's Title IX Officer, and filed a formal complaint of harassment against Superintendent Gibson and Principal FitzGerald, alleging that she had been disciplined without due process and that her civil rights had been violated. She also asserted that she had been discriminated against based on her race and age. (Respondent's Exhibit 10)

26. On February 21, 2018, Grievant grieved the letter of reprimand to initiate the current action.

27. Mr. Soltis informed Superintendent Gibson of Grievant's complaint and Dr. Gibson ordered the retention of an outside party to investigate the complaint. Respondent retained Allen Hewett, a former law enforcement officer, to conduct the investigation.

28. AP Group and Mr. Ebersole conducted an observation of Grievant on February 14, 2018. They noted concerns about Grievant's teaching under Standard 2 of Policy 5310. A post-observation conference was held and a summative evaluation completed in which Grievant was rated as "unsatisfactory" in the area of "respect" under Standard 7. It was noted that "[e]vidence supports that Ms. Williams-Grant has demonstrated a consistent pattern of insubordination. Her demeanor has been progressively disrespectful toward her principal and supervisor. She has not responded well to suggestion for improvement…."

29. Policy 5310's Standard 2 (The Learner and the Learning Environment) states: "The teacher understands and responds to the unique characteristics of learners." (Respondent's Exhibit 3)

30. Policy 5310's Standard 7 (Professional Conduct) states: "The teacher demonstrates professional conduct as defined in law, policy, and procedure at the state, district, and school level. (Respondent's Exhibit 3)

31. On April 13, 2018, Principal FitzGerald, AP Group, and Mr. Ebersole met with Grievant and her representative to discuss the CAP and schedule an activation date of April 16, 2018. The CAP cited areas of concern under Standard 2 and Standard 7. Under Standard 7, it stated that Grievant "demonstrates a pattern of behavior with students, parents/guardians, and colleagues which is unprofessional." (Respondent's Exhibit 3)

32. The CAP included the directive that Grievant prepare and submit a report on the book Social and Emotional Learning. While the inclusion of this assignment was unique to Grievant's CAP, every CAP is uniquely tailored to fit the needs of the subject. (Respondent's Exhibit 3)

33. Grievant submitted three book reports on Social and Emotional Learning, but commandeered each of these assignments by using her written reports to detail her displeasure with her supervisors.

34. On April 20, 2018, Grievant took issue with the CAP by filing a second grievance in this action.

35. At the level one conference therein, Superintendent Gibson issued a decision directing that the CAP be revised to remove Standard 2 and to add suggestions for reforming Grievant's conduct under Standard 7. (Respondent's Exhibit 13)

36. To this end, the CAP was revised and all language concerning Grievant's lack of knowledge of student social and emotional needs was removed. (Respondent's Exhibit 4)

37. The CAP established a goal for Grievant to "communicate with parents/guardians and colleagues in a consistently professional manner." It targeted examples of Grievant's conduct and provided suggested changes.[1] (Respondent's Exhibit 4)

38. AP Group and Mr. Ebersole met with Grievant and her representative to implement the updated CAP. Grievant again voiced her displeasure with AP Group.

39. Respondent issued Grievant a second letter of reprimand after determining that Grievant's submissions under the revised CAP were disrespectful towards AP Group and Principal FitzGerald.

40. The information compiled by Respondent at Grievant's request showed that other employees of various races and ages have received written reprimands and have been placed on FSPs or CAPs for violating Standard 7. (Grievant's Exhibit 4)

**Discussion**

[1]Examples of Grievant's statements and CAP's suggested modification thereto include the following: a) Change "I do not take kindly to treats [sic], racism, unfair practices I have encountered with Principal Sherry FitzGerald" to (as a direct address) "I would appreciate having an opportunity to understand better your concerns"; b) Change "[y]our messages are … quite redundant, over exaggerated, distasteful, false, harassing, disrespectful" to "[p]lease help me understand better your concerns. I would appreciate greater clarity"; c) Change "I am highly upset and stress about how I have been portrayed from the meeting I had requested of you and not to mention how surprise [sic] your correspondence and ability not to comprehend my concerns enough to communicate them effectively to Principal Sherry FitzGerald" to "I would appreciate having the opportunity to explain my concerns to you, Ms. FitzGerald."

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent contends that the letters of reprimand were warranted given Grievant's disrespectful conduct towards students, volunteers, and supervisors. Grievant contends that Respondent actions in placing her on a Corrective Action Plan (CAP) and issuing her multiple letters of reprimand were unwarranted because her actions did not amount to the conduct proscribed by West Virginia Code § 18A-2-8. Grievant contends that she was the victim rather than the perpetrator; that the student in one incident was cursing at her; that in the next Grievant merely questioned why an unauthorized student was in her area, and never took issue directly with the parent volunteer spraying fragrance and monitoring bubble wrap popping activities; and that in requiring a technician to greet her class upon entering, she was simply mandating that he follow the simulated workplace rules of her classroom. Grievant further contends that her interaction with her supervisors was not misconduct, disrespect, or insubordination, because she was simply expressing her honest opinion in a private setting without any witnesses to actuate an undermining

of the administration's authority and hinted that her direct supervisor may be too sensitive. Grievant contends that she was denied due process because she was not provided an opportunity to respond to the allegations, did not first receive a Focused Support Plan (FSP) or verbal warning, and had no disciplinary record to warrant skipping over these lesser forms of discipline. She asserts that Respondent was retaliating for prior grievances she filed against it and discriminated against and harassed her due to her race, age, and grievance activity.

Respondent counters that it is not mandated to apply progressive discipline to written reprimands. It further contends that, as CAPs are not disciplinary, progressive discipline does not apply. It asserts that it was justified in issuing letters of reprimand due to Grievant's disrespect and insubordination, and that it did not retaliate against, discriminate, or harass Grievant.

A grievance concerning a letter of reprimand involves a disciplinary matter in which the employer bears the burden of establishing the charges against an employee by a preponderance of the evidence. *Simms v. Division of Natural Resources*, Docket No. 2015-1156-DOCS (Nov. 12, 2015). "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. … *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995)." *Beckley v. Lincoln County Bd. of Educ*., Docket No. 99-22-168 (Aug. 31, 1999); *See Turner v. Kanawha County Bd. of Educ*., Docket No. 00-20-300 (February 26, 2001). Thus, while Respondent must establish the allegations which led to its letters of reprimand, Grievant has the burden of proving her charges against Respondent.

The allegations relevant to the written reprimands and the CAP are that Grievant loudly confronted a student; required a coworker to address her class when he showed up to fill a work order; loudly told the coworker not to discuss the matter with her when she was on hall duty; questioned a student about his entering a restricted area; confronted his mother about her interactive activities involving spraying fragrance and popping bubble wrap; addressed AP Group in a loud and hostile tone of voice when AP Group called Grievant to follow up with the results of her investigation; sent AP Group an email critical of her and Principal FitzGerald and copied it to the chain of command; requested an apology and accused AP Group of being disrespectful and inappropriate after AP Group emailed Grievant in order to schedule an observation in conjunction with the CAP processes; demonstrated a consistent pattern of insubordination through her disrespect of her principal and supervisor; failed to respond well to suggestions for improvement; and commandeered the written CAP assignments to express her displeasure with her supervisors.

The initial allegations that led to Respondent's investigation of Grievant involved her coworker, a parent, and students. These allegations are accounted for only through hearsay statements. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form;

3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id*.; *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

Respondent did not summon to the hearing the parent, students, or coworker involved in the underlying incidents. Respondent failed to present any signed statement from these individuals or from anyone who witnessed these incidents, and gave no explanation for its failure to do so, even though some may have been unbiased employees. While Respondent implied that some declarants were disinterested individuals, most were individuals who Grievant had allegedly wronged. Respondent presented no collaborating records. Grievant's testimony directly contradicted these statements. As the undersigned could not determine whether the declarants were credible at the time they made their statements, he will disregard the underlying incidents.

The remaining incidents entail Respondent's investigation of the underlying incidents and its remedial efforts towards Grievant, resulting in incidents of alleged insubordination. As Grievant contests these allegations, the undersigned must make credibility determinations. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility

determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENT THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

The relevant fact witnesses to these events of alleged insubordination are Grievant, AP Group, and (to a lesser degree) Principal FitzGerald. Relevant to the respective interests of each witness, some background is necessary. Grievant had filed a grievance against Principal FitzGerald a few years prior, which, while not resulting in an adverse decision, caused Respondent to voluntarily transfer supervisory duties over Grievant to AP Group. AP Group had been Grievant's student and had only been with Respondent for a few years before ascending to the role of assistant principal, both of which factored into Grievant's demeanor towards AP Group. Although Grievant initially seemed to have a good working relationship with AP Group, praying together through tough moments, things went awry when AP Group found it necessary to manage Grievant's conduct. These dynamics appear to be a driving factor in the incidents

involving AP Group and Grievant. An additional consideration is that Grievant is a 36-year employee with no disciplinary record.

While Grievant's demeanor was natural and forthright (even offering to hug Superintendent Gibson as she entered the hearing room as the party representative), AP Group was emotional and Principal FitzGerald was guarded. Nevertheless, the integrity of these witnesses was not impugned either through reputation for honesty, attitude, admission of untruthfulness, or prior inconsistent statements. While Grievant had previously grieved Principal FitzGerald, some time had passed since without incident. Plausibility thus became the most insightful credibility factor, along with the respective self-interests of each witness, making AP Group's testimony the driving factor for Respondent's case against Grievant. AP Group was believable in its plausibility when she testified that Grievant addressed her in a loud and hostile tone after AP Group informed her of the results of her investigation.

In-light-of its credibility determinations, the undersigned must determine whether the evidence substantiates the charges against Grievant. Respondent labeled Grievant's behavior as insubordination. 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, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *See Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

> Notwithstanding any other provisions of law, 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 contendere to a felony charge.

W. VA. CODE § 18A-2-8(a).

Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that 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 wilful; 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 curiam). [F]or a refusal to obey to be "willful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

The events surrounding Respondent's discipline of Grievant are mired in confusion as to cause and effect. The end result, however, is that Grievant was disrespectful towards her supervisors and commandeered her corrective assignments to complain about her supervisors, thus justifying the second letter of reprimand. While the efficacy of those assignments may have been suspect, Grievant does not have leeway to be insubordinate just because she disagrees with directives. "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). An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997). The later ineffectiveness of the assignments does not make their issuance unreasonable.

Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority ...". *McKinney v. Wyoming County Bd. of Educ*., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co. , 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). "All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW*, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice*, 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth*., Docket No. 99-PEDTA-406 (Oct. 31, 2000)." Grievant loudly voiced her displeasure with AP Group when Group told her the results of the investigation. Grievant then accused AP Group of being disrespectful after she scheduled an

observation, a required prelude to Grievant's CAP. The first letter of reprimand was therefore not unreasonable. The fact that Superintendent Gibson eventually rescinded the corrective assignments given to Grievant does not, even in retrospect, negate or justify Grievant's conduct. Not all of Grievant's behavior fits easily into a definition of insubordination that encompasses the refusal to obey a directive, but it does fall under the definition of insubordination that includes the employer's right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority. . .". *McKinney , supra*.

In proving a legitimate basis for its letters of reprimand, Respondent showed that it did not act arbitrarily or capriciously in issuing them. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). In relying on multiple instances of insubordination by Grievant, Respondent showed that the reprimands were reasonable in light of Grievant's actions.

The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W.Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169, 175 (1981)). Due process is generally seen as at least providing notice of the alleged violation and an opportunity to be heard.[2] Grievant gave Respondent her version of events before the letter of reprimand was issued. Grievant's email to AP Group demonstrated that she understood the nature of her supervisor's concern about her behavior. No further due process was required.

This Board has previously held that a "[g]rievant was entitled to notice of her misconduct and an opportunity to respond to the charge before Respondent placed the memorandum documenting a reprimand in her personnel file. *See Nadler v. West Virginia University*, Docket No. 05-HE-455 (June 22, 2006)." *Byrd v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017), *rev'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018). However, in reversing the decision, the Circuit Court held that "[i]n dealing with routine personnel matters, the WVDHHR should not be required to afford extensive procedural protections for the imposition of verbal reprimands – a very minor form of discipline." *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Byrd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018), *overruling Byrd*

[2] SEE, BLACK'S LAW DICTIONARY 500 (6th ed. 1990)

*v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017).

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "The scope of due process protection affordable in the instant case is governed by Syllabus Point 5 in *Waite, supra*, which states, '[t]he extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Byrd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018), *overruling Byrd v. Department of Health and Human Resources/William R. Sharpe*, Jr. Hospital, Docket No. 2017-0769-DHHR (Aug. 8, 2017). In *Byrd*, the Circuit Court found that the memorialization of the verbal reprimand in employee's file did "not reach the level of stigmatization which would foreclose future employment opportunities or severely

damage Grievant's standing and associations in the community" and that the reprimand did not involve any falsity.[3]

Even though Byrd received only a verbal reprimand, which was then memorialized in Byrd's file, Grievant's written reprimand is still a relatively minor form of discipline very similar to Byrd's. In *Waite*, the West Virginia Supreme Court found that the employee's suspension was not a protectible due process interest because it did not involve the necessary level of stigmatization. Grievant's liberty interest is not at stake here and does not reach the necessary level of stigmatization in a letter of reprimand. Similarly, it appears likely that because the discipline is only a letter of reprimand, Grievant's property interests in her continued employment are not sufficiently at stake to entitle her to a heightened due process.

Grievant contends that Respondent violated West Virginia Code § 18A-2-12a(b)(6) in issuing her letters of reprimand. "All 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** and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel **are entitled to opportunities to improve their job performance** prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based

[3]*See* Syl Pt. 2, *West Virginia Department of Education v. McGraw*, 239 W. Va. 192 (2017), "a stigmatizing statement made against a government employee must be false in order to implicate a protected liberty interest, *overruling Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977).

upon the evaluations, and not upon factors extraneous thereto. All school personnel **are entitled to due process** in matters affecting their employment, transfer, demotion or promotion". (Emphasis Added). The nature of progressive discipline is that it incrementally provides employees opportunities to improve their job performance prior to being terminated. Respondent complied with this provision in choosing to issue a letter of reprimand instead of terminating Grievant.

As for her CAP, Grievant bears the burden of proof to show that it was either arbitrary and capricious or a denial of due process. Grievant did not present any authority setting forth due process protections to which it was entitled. Because CAPs are not disciplinary, certain due process protections do not apply. Further, Respondent has much discretion in choosing to implement a CAP even when the employee has not been subjected to an FSP, and can proceed directly to a CAP when it determines that employee misconduct calls for it. West Virginia Board of Education Policy No. 5310 (126CSR142) provides, in pertinent part, as follows:

> 10.1.b. Corrective Action Plan – The Corrective Action Plan is initiated when a focused support plan results in inadequate progress and when an evaluation is completed that shows unsatisfactory performance based on one or more of the standards **OR when certain instances of misconduct as specified in West Virginia Code § 18A-2-8 may require immediate action and/or a Corrective Action Plan**. The Corrective Action Plan may address unsatisfactory performance involving student learning goals when in conjunction with one or more of the standards. A minimum of one (1) observation must be complete for the educator prior to the beginning of a Corrective Action Plan. The Corrective Action Plan spans eighteen (18) weeks and may commence at any time during the school year.

(Emphasis Added).

Misconduct is generally more severe than unsatisfactory performance, and can also be distinguished by the willfulness of the conduct. As previously shown, insubordination is characterized by an employee's willfulness in refusing to obey an order. As such, insubordination can be characterized as misconduct. Respondent was therefore within its discretion to address Grievant's conduct directly through a CAP. In conducting at least one observation prior to the beginning of the CAP, Respondent complied with the West Virginia Board of Education policy and State code. Grievant did not prove that Respondent failed to provide her with due process in its implementation of the CAP.

Grievant alleges she was retaliated against as a result of her prior grievance activity and due to her race and age. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

The West Virginia Supreme Court has set forth a three-phased assessment for determining whether a disciplined employee has been retaliated against for engaging in a protected activity. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004).

In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

*Id*., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). While Grievant filed a grievance against Respondent, it was during the 2015-16 school year, well over a year before the current letters of reprimand and CAP. The undersigned deems this too large a time gap for the inference of retaliatory motive. Grievant has failed to make a *prima facie* case for retaliation. The remaining phases are therefore inapplicable and there is no retaliatory presumption for Respondent to rebut.

Likewise, Grievant did not put forth any standard for determining the existence of discrimination based on a protected class such as race or age. Grievant only presented as guidance the standard case and statutory law used for discrimination in the grievance process. Discrimination for purposes of the grievance process has a very specific definition. "'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 discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr*., Docket No. 04-CORR-278 (Feb. 14, 2005). After setting forth this discrimination standard, Grievant failed to then compare herself to other similarly situated employees and failed to prove discrimination. In claiming that Respondent often failed to meet with her to discuss problems and allegations in the way it did for other employees, that Respondent placed other similarly situated employees on FSPs rather than proceed directly to CAPs, that Respondent does not let her remain in the building after 6pm as it does other employees, and that Respondent failed to provide her a working printer, Grievant failed to compare herself to specific similarly situated employees who were treated differently.

Further, Grievant presented no factual or legal basis for her race and age discrimination claims. On the other hand, Respondent presented a legitimate basis for its issuance of written reprimands. Respondent was within its discretion in bypassing an FSP for a CAP. While the information compiled by Respondent did not show whether any other employee was placed on a CAP before first being placed on an FSP for violating standard 7, it did show that other employees of various races and ages have been placed on FSPs or CAPs for violating Standard 7. Superintendent Gibson testified, however,

that in many instances of insubordination, Respondent bypasses an FSP in favor of a CAP.

Grievant claims that Respondent harassed her by pursuing disciplinary actions against her and attempting to improve her performance. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "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 equates to hostile work environment. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010).

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, 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) (*citing Harris*, 510 U.S. at 23). 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 "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (per curiam). "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. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

Respondent's attempts to discipline and improve Grievant's behavior could qualify as harassment if they were both unreasonable and sufficiently severe or pervasive to alter the conditions of Grievant's employment. While Respondent did not present sufficient evidence for the initial underlying incidents it cited as a basis for its letters of reprimand, in claiming harassment, Grievant did not show that these incidents were on their face an improper basis for a reprimand. Some instances cited by Respondent in its CAP, however, were not legitimate on their face: these included attempts to reform Grievant's non-offensive language in her written complaints against supervisors. Respondent's attempt to rehabilitate Grievant's communicative style through its CAP seems trivial, at best, particularly when considering the non-offensive examples of Grievant's language Respondent used in formulating "acceptable" alternatives. For example, Respondent suggested that Grievant not say "I do not take kindly to treats [sic], racism, unfair practices I have encountered with Principal Sherry FitzGerald" but to instead say (as a direct address Principal FitzGerald) "I would appreciate having an opportunity to understand

better your concerns" or to change "I am highly upset and stress about how I have been portrayed from the meeting I had requested of you and not to mention how surprise [sic] your correspondence and ability not to comprehend my concerns enough to communicate them effectively to Principal Sherry FitzGerald" to "I would appreciate having the opportunity to explain my concerns to you, Ms. FitzGerald." Nevertheless, these excessive instances of behavior modification were not sufficiently prevalent to raise Respondent's conduct to the level of pervasiveness necessary to alter the conditions of Grievant's employment and make for a hostile work environment.

Accordingly, the grievance is DENIED.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. A grievance concerning a letter of reprimand involves a disciplinary matter in which the employer bears the burden of establishing the charges against an employee

by a preponderance of the evidence. *Simms v. Division of Natural Resources*, Docket No. 2015-1156-DOCS (Nov. 12, 2015).

3. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENT THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

4. 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, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *See Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

5. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. W. Va. Code § 18A-2-8(a) sets out the causes for discipline as follows:

> Notwithstanding any other provisions of law, 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 contendere to a felony charge.

7. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that 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 wilful; 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 curiam). [F]or a refusal to obey to be "willful," the motivation for the disobedience must

be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

8. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ*., Docket No. 92-55-112 (Aug. 3, 1992) (*citing In re Burton Mfg. Co*., 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW*, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice*, 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

9. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate on multiple occasions prior to being issued each letter of reprimand, and that this discipline was not arbitrary and capricious.

10. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "The scope of due process protection affordable in the instant case is governed by Syllabus Point 5 in *Waite, supra*, which states, '[t]he extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Byrd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018), *overruling Byrd v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017).

11. "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). Further, 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); *See Turner v. Kanawha County Bd. of Educ*., Docket No. 00-20-300 (February 26, 2001).

12. West Virginia Code § 18A-2-12a(b)(6) provides:

> All 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 and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion.

13. West Virginia Board of Education Policy No. 5310 (126CSR142) provides, in pertinent parts, as follows:

> 4.6. Corrective Action Plan (CAP) – Initiated when a focused support plan results in inadequate progress and when an evaluation is completed that shows unsatisfactory performance based on one or more of the standards OR when certain instances of misconduct as specified in West Virginia Code § 18A-2-8 may require immediate action and/or a Corrective Action Plan. The Corrective Action Plan may address unsatisfactory performance involving student

> learning goals when in conjunction with one or more of the standards.
>
> 10.1.b. Corrective Action Plan – The Corrective Action Plan is initiated when a focused support plan results in inadequate progress and when an evaluation is completed that shows unsatisfactory performance based on one or more of the standards OR when certain instances of misconduct as specified in West Virginia Code § 18A-2-8 may require immediate action and/or a Corrective Action Plan. The Corrective Action Plan may address unsatisfactory performance involving student learning goals when in conjunction with one or more of the standards. A minimum of one (1) observation must be complete for the educator prior to the beginning of a Corrective Action Plan. The Corrective Action Plan spans eighteen (18) weeks and may commence at any time during the school year.
>
> 10.4.1. Certain instances of misconduct as specified in West Virginia Code § 18A-2-8 may require immediate disciplinary action and/or a Corrective Action Plan.
>
> 10.4.2. Instances of unsatisfactory Professional Conduct not specified in West Virginia Code § 18A-2-8 shall result in either a Focused Support Plan or Corrective Action Plan determined at the discretion of the evaluator.

14. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o). "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004).

In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

*Id*., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc*., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ*., 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

15. Discrimination for purposes of the grievance process has a very specific definition. "'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 discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr*., Docket No. 04-CORR-278 (Feb. 14, 2005).

16. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "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).

17. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). 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, 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) (*citing Harris*, 510 U.S. at 23). 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 “no single factor is required.” *Harris*, 510 U.S. at 23. “To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).” *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (per curiam). “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. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997).” *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

18. Grievant did not prove by a preponderance of the evidence that Respondent violated her due process rights in issuing her letters of reprimand or a Corrective Action Plan.

19. Grievant did not prove by a preponderance of evidence that Respondent’s actions were retaliatory, discriminatory, or harassment.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: August 2, 2019**

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**Joshua S. Fraenkel**
**Administrative Law Judge**