THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARRIE STARKEY,
Grievant,

v. **Docket No. 2019-1893-CONS**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Carrie Starkey, was employed by Respondent, Wayne County Board of Education. On November 13, 2018, Grievant filed a grievance, assigned docket number 2019-0581-WayED, alleging hostile work environment and harassment. Grievant sought reinstatement to the substitute cook position at Spring Valley High School, back pay with interest, and an order for the behavior of the harassing employees to be investigated and addressed. On June 21, 2019, Grievant filed a second grievance direct to level three of the grievance procedure, assigned docket number 2019-1790-WayED, protesting the non-renewal of her contract, asserting procedural error and that the non-renewal was an act of reprisal. Grievant sought reinstatement of her contract, with back pay and the restoration of seniority, instatement into a regular cook position, and removal of all references to the non-renewal of her contract from all records. The matters were consolidated by order entered November 14, 2019, at the request and agreement of the parties.

A level three hearing was held on October 20, 2020, before Administrative Law Judge Carrie H. LeFevre[1] at the Grievance Board's Charleston, West Virginia office via video conference.[2] Grievant was represented by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent was represented by counsel, Leslie Tyree. This matter became mature for decision on December 16, 2020, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a probationary substitute cook. Respondent declined to renew Grievant's probationary contract of employment. Respondent failed to comply with the statutorily-required timeframe for the nonrenewal of a probationary contract. Respondent failed to provide Grievant with a proper evaluation and opportunity to improve. Grievant is entitled to reinstatement of her probationary substitute contract but failed to prove she was entitled to back pay or instatement into a permanent position. Grievant proved she was subjected to harassment but failed to prove hostile work environment. Accordingly, the grievance is granted, in part, and denied, in part.

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

[1] This case was assigned to the undersigned administrative law judge on January 19, 2021 for administrative purposes.

[2] The level three hearing was originally scheduled for November 21, 2019, and was continued without objection at the request of Grievant. The hearing was rescheduled for January 31, 2020, and was continued without objection at the request of Respondent. The hearing was rescheduled for May 20, 2020, and was continued due to the pandemic. The hearing was rescheduled to September 29, 2020, and was continued at the request of Respondent and over the objection of Grievant.

Findings of Fact

1. Grievant was employed by Respondent as a probationary substitute cook for half of the 2018 – 2019 school year.

2. Grievant had previously been employed as a probationary substitute custodian for the 2017 – 2018 school year.

3. During the 2018 – 2019 school year Grievant worked as a substitute cook ninety-seven days.

4. Grievant first worked at Kellogg Elementary School from August 22, 2018 through October 4, 2018. During that time, Grievant missed two days of work and was late one day.

5. The principal of Kellogg Elementary School, Rebecca Richards, sent two emails to Brenda Arrowood, Director of Food Service regarding Grievant's attendance. In the first, she simply states Grievant missed two days of work, without further detail or complaint. The second states that Grievant had texted the cafeteria manager stating she would be late due to the illness of her child.

6. Ms. Arrowood oversees all food service for Respondent and oversees all cooks, including substitutes.

7. Neither Ms. Arrowood nor Principal Richards notified Grievant that her attendance was a problem, or what the expectations were regarding attendance and call-off procedures.

8. Grievant next accepted a long-term assignment as a substitute cook at Spring Valley High School.

9. During this substitute assignment, Grievant was awarded the regular head cook position at Spring Valley High School but that award was rescinded before Grievant served as the head cook.

10. The award of the head cook position angered some at Spring Valley High School and the rescinding of the award was embarrassing to Grievant.

11. Grievant substituted at Spring Valley High School for thirteen days.

12. During that time, some employees made unprofessional comments regarding Grievant's boyfriend, including a specific comment regarding his alleged impotence. A coworker stated that Grievant walked like she thought she was very pretty. Although these comments made Grievant uncomfortable, she did not object to the comments because she wanted to keep things "low key" and not let others know she was upset.

13. After Grievant went out to her car and to the restroom due to starting her menstrual period, she was told she was not allowed to do so. Grievant did not explain that the situation was an emergency. Grievant was also told that she was not permitted to eat her lunch in the break room.

14. Grievant left the Spring Valley High School assignment after the head cook "screamed" at her because she was on her cell phone.

15. Grievant filed a grievance due to what she perceived to be harassment at Spring Valley High School. By agreement, the grievance was placed in abeyance to attempt to resolve the issue informally.

16. Grievant continued to be offered and accepted other substitute cook assignments for the remainder of the 2018 – 2019 school year.

17. On December 11, 2018, Principal Richards emailed Ms. Arrowood to inform her that Grievant missed two days of work and that "[s]he lets Wendy know, but does not contact us and says she is unable to reach anyone at the board office."

18. Again, neither Principal Richards nor Ms. Arrowood spoke to Grievant about her attendance or the appropriate call-out procedure.

19. Superintendent Todd Alexander met with Grievant and her union representative regarding her complaint on December 13, 2018.

20. Superintendent Alexander and other administrators investigated Grievant's allegations of harassment and hostile work environment, conducting interviews with witnesses. Witness statements were not recorded nor were witnesses asked to provide written statements.

21. During the investigation, Superintendent Alexander did not substantiate Grievant's allegations and notified Grievant of the same in a conference on February 18, 2019. At the conference, Grievant made a new allegation that one of the cooks from Spring Valley High School came to her new assignment location and made negative comments about Grievant, including that she had filed a grievance, to the head cook there.

22. Superintendent Alexander investigated the second complaint and substantiated it. It is unclear what action, if any, Superintendent Alexander took to correct this behavior.

23. Superintendent Alexander memorialized the above in a letter to Grievant dated February 25, 2019.

24. On March 5, 2019, Principal Richards emailed Ms. Arrowood stating that she was short a cook that afternoon because Grievant "called Gidget and told her that she told you all that she would need to be off today and you would find someone." She further questioned, "Shouldn't she go in and decline or cancel the job if she is not coming in?"

25. Ms. Arrowood scheduled a meeting with Grievant to be held at the Board offices on March 7, 2019.

26. Grievant appeared for the scheduled meeting with a union representative. After an extended wait, Ms. Arrowood called, stating she had forgotten about the meeting, and briefly spoke with Grievant by telephone.

27. Ms. Arrowood discussed with Grievant the allegations that she had been tardy. Grievant asserted that her tardiness was due to being offered jobs after the start time. Although it was clear from the emails that Principal Richards' main concern was the method by which Grievant was calling off work, Ms. Arrowood did not review call-in procedures or allege that Grievant's absences had been excessive. Grievant requested to respond in writing.

28. Ms. Arrowood memorialized the meeting in a note dated the same day, March 7, 2019.

29. Grievant testified she did mail her response but did not enter a copy of the same into evidence and Ms. Arrowood denies receiving the response.

30. By letter to Grievant dated March 14, 2019, Ms. Arrowood referenced the March 4, 2019 conversation and stated that Grievant would be required to adhere to full-

time cook hours from 6:00 a.m. to 2:00 p.m. and that if Grievant could not report to work on time she "may consider only accepting the part time assignments."

31. On March 27, 2019, Ms. Arrowood partially completed the Wayne County Schools Auxiliary and School Service Personnel Evaluation Form rating Grievant's performance. Although the form requires evaluation of eight categories, Ms. Arrowood only marked one category, "Work Habits" as unsatisfactory, leaving the other categories blank. She commented, "Reported late arrivals and reported no show" and "Is reported to accept calls and then cancel at the last minute leaving schools without coverage." Under "Behavior Patterns" she made no rating but entered the comment, "Comes to work late anywhere from 15 minutes to several hours." The form requires the signature of the employee but does not contain Grievant's signature. Ms. Arrowood testified she mailed the evaluation to Grievant.

32. Grievant denies receiving either the evaluation or the March 14, 2019 letter.

33. The *Detail Report* for the relevant time-period shows in hand-written notes Grievant "did not work" on September 20 and 21, 2018 and "did not show up for work" on December 11 and 12, 2018 or on March 18, 2019.

34. That Grievant "did not show up for work" is contradicted by Principal Richards' emails. For December 11th and 12th she states that Grievant had "let Wendy know." For March 18th, Principal Richards stated that Grievant had not come to work as "[s]he has a meeting this morning on 2 of the boys. During the meeting she told Ms. Hutchinson to keep her distance because she and the baby had a stomach bug. I guess that was her way of calling off."

35. The information on the *Detail Report* is unclear and was not explained by any of the witnesses called in this matter. The first page of the report lists "History-Cancellation Calls to Substitute" that lists the job number, date and time of call, location, start date/time and end date/time, and the disposition of the call. The remaining pages list the assignments worked. It appears most likely that the "History-Cancellation Calls to Substitute" list reflects automated calls to Grievant cancelling substitute jobs she had previously accepted. Therefore, there is no list of the automated calls to Grievant to substitute that she accepted or rejected.

36. By letter dated June 12, 2019, Director of Human Resources Chanda Perry notified Grievant that her contract would not be renewed at the board meeting held on June 11, 2019. The letter was sent by regular, not certified, mail.

37. Grievant's counsel wrote to Superintendent Todd Alexander on June 21, 2019, stating that the non-renewal was beyond the statutory timeframe and he would be filing a grievance but asking that Superintendent Alexander reconsider the non-renewal.

38. Principal Brian Davis of Ceredo-Kenova Middle School had no issues with Grievant's performance.

39. Nancy Reagan of Ceredo-Kenova Middle School and Joanie Rowe of Ceredo-Kenova Elementary School considered Grievant to be a very good worker.

40. Jennifer Hill of Ceredo-Kenova Elementary School considered Grievant to be a good worker and had no issues with her work.

41. Amy Fields of Wayne Middle School and Glen Walters of Kellogg Elementary Schools had no problems with Grievant's work and stated Grievant did everything that was asked of her to do.

Discussion

The nonrenewal of a contract is not a termination or a disciplinary matter, and, therefore, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Jenkins v. Jefferson County Bd. of Educ.*, Docket No. 2008-1760-CONS (March 4, 2009) (citing *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988)). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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*.

"West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious." *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010) (citing *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998); *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ*., 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002)). 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 at

614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant asserts the nonrenewal of Grievant's contract was arbitrary and capricious for several reasons: Respondent failed to comply with statutory procedural requirements, Respondent failed to properly evaluate Grievant's performance and allow her an opportunity to improve, and the nonrenewal was an act of reprisal. Grievant further asserts she proved she was the victim of sexual harassment. Respondent denies the nonrenewal was reprisal and asserts Grievant was not entitled to procedural protections and failed to prove harassment.

"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).

Grievant has made a *prima facie* case of reprisal. Grievant engaged in the protected activity of reporting alleged harassment by filing a grievance. Superintendent Alexander was aware of the grievance filing as he investigated the allegation and responded to it in writing on February 25, 2019. Respondent failed to renew Grievant's

contract only three and a half months later, which is a sufficiently short time to infer retaliatory motivation.

Respondent denies a retaliatory motivation, stating its concerns about Grievant's attendance were legitimate as Grievant's attendance problems were detrimental to the functioning of the schools. Respondent provided emails, two evaluation forms[3], and the testimony of Ms. Arrowood of other complaints that Respondent had a legitimate concern regarding Grievant's attendance. While, as will be further discussed below, the non-renewal of Grievant's contract was ultimately improper for other reasons, the evidence is sufficient to prove Respondent's reasons were erroneous rather than discriminatory. Grievant failed to prove that Respondent's actions were a pretext to retaliate against her for reporting harassment or filing a grievance. Respondent investigated Grievant's complaint, took no action against Grievant for failure to complete the Spring Valley High assignment, and continued to provide her with numerous opportunities to substitute. Respondent had received, both before and after the Spring Valley High incidents, complaints from other principals regarding Grievant's attendance. Therefore, Grievant has failed to prove her contract non-renewal was reprisal.

Grievant asserts her contract nonrenewal was procedurally deficient. Boards of education are required to give notice to probationary employees of rehiring or non-rehiring as follows:

> The superintendent at a meeting of the board on or before May 1 of each year shall provide in writing to the board a list of all probationary teachers that he or she recommends to be

[3] The second evaluation form has been excluded from consideration of whether the non-renewal was justified due to the untimely nonrenewal as will be fully discussed below but is appropriate to consider as a defense to the allegation that the motivation to not renew Grievant's contract was reprisal.

> rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one [§ 18A-2-1] of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two [§ 18A-2-2] and five [§ 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
>
> Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

W. VA. CODE § 18A-2-8a. The purpose of this statute is to allow an employee "an opportunity to respond in order to ensure that the nonrenewal was not occurring for unfair reasons." *Miller v. Bd. of Educ.,* 190 W. Va. 153, 158, 437 S.E.2d 591 (1993). Although Respondent argues this section does not apply to substitutes, Respondent offers no legal support for this argument, and, in fact, the text of the statute specifically applies it to substitute personnel. It states, "The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two [§ 18A-2-2] and five [§ 18A-2-5]." *Id*. West Virginia Code § 18A-2-5 states, "The board is authorized to employ such service personnel, *including substitutes*, as is deemed necessary for meeting the needs of the county school system. . . ." (emphasis added). Thus, there is no question Respondent was required to determine no later than May 1st which

substitutes would be rehired and provide notice by certified mail within ten days of that determination to any substitute not rehired. Respondent purposefully delayed this determination until June 11th and sent Grievant notice only by regular mail. Therefore, Respondent clearly violated West Virginia Code § 18A-2-8a. Further, Respondent will not be given the benefit of its neglect of statutory duty by allowing the consideration of evidence regarding Grievant's performance after that date to justify the nonrenewal.

Whether a grievant is entitled to reinstatement for such procedural violation appears to hinge on whether the non-renewal was otherwise justified. *See Hedrick v. Bd. OF Educ.*, 175 W. Va. 148, 332 S.E.2d 109 (1985); *Baker v. Bd. of Educ*., 207 W. Va. 513, 519-20, 534 S.E.2d 378, 384-85 (2000); *Wines v. Jefferson Cty. Bd. of Educ.*, 213 W. Va. 379, 386, 582 S.E.2d 826, 833 (2003). In this case, the reasons given for Grievant's non-renewal are not fully supported by the record and Respondent also failed to provide Grievant with the statutorily-required evaluation and opportunity to improve her performance.

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

> 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. . . .

Grievant asserts substitute probationary employees are entitled to the benefit of this section citing the definition of "school personnel," which is: "all personnel employed by a county board whether employed on a regular full-time basis, an hourly basis or otherwise." W. VA. CODE § 18A-1-1(a). There has been some past question whether West Virginia Code § 18A-2-12 applies to probationary employees. *See Baker v. Bd. of Educ.*, 207 W. Va. 513, 518, 534 S.E.2d 378, 383 (2000) (stating "we are not entirely convinced" the statute applies to probationary employees but ultimately declining to rule on the issue as unnecessary because the employee had received all the protections the statute would have provided). However, this question appears to have been resolved by the enactment of West Virginia Code § 18A-2-12a after *Baker* was decided. The combination of the language of West Virginia Code § 18A-2-12a(b)(6) and the definition of "school personnel" does appear to confer this benefit on substitute probationary employees.

Grievant was clearly not given appropriate evaluation and opportunity to improve, written or otherwise. Although Ms. Arrowood completed an evaluation, it was never provided to Grievant. The only notification of any issue with Grievant's attendance was one brief telephone call. While Principal Richard's concerns with Grievant clearly appear to be about call-in procedures and several multi-day absences, Ms. Arrowood mostly spoke with Grievant regarding tardiness. There was no discussion of call-in procedures or indication of what number of absences would be considered excessive. The note briefly states that there were complaints of Grievant "not showing up at all." This would appear to allege Grievant was failing to report to work without any notice. This is not supported by the evidence. Principal Richards' emails do not state Grievant failed to report to work without any notice. They only appear to question the notice Grievant did

give. Further, Grievant believed the issue was those times when the call-out telephone system called her for a job too late to get to the assignment on time. She believed based on what she had previously been told that she was permitted to accept those jobs without being considered tardy. If these were not the specific instances to which Respondent was referring, Grievant was never informed of the same. Grievant could have no opportunity to improve if she was not notified of her specific alleged deficiencies.

As to the allegation that Grievant's performance was unacceptable due to her attendance, this is simply not supported by the evidence. Grievant asserts her tardiness was mostly due to times when the callout system called her too late to arrive at the scheduled time. She provided the testimony of multiple co-workers from multiple schools who testified that she was a good worker and that there no issues with her performance. Ms. Arrowood's opinion that she should not be retained was based on a few emails from Principal Richards and an unspecified number of undocumented phone calls from other principals.

Ms. Arrowood's testimony was conclusory and general. She admitted she had not documented Grievant's alleged attendance deficiencies yet also stated she writes down every phone call she receives. She stated that Grievant would accept positions and "not show up" but she listed no specific instances where this happened, the *Detail Report* shows the only absences were at Kellogg Elementary, and Principal Richards' emails from Kellogg Elementary do no not state Grievant failed to "show up" only that she was absent or that she had reported her absence to someone other than Principal Richards. Ms. Arrowood agreed that if an employee was called out too close to the start time of the assignment they would not be counted as tardy. Grievant asserts almost all her tardiness

was for this reason.

Although county boards of education have broad discretion in deciding whether to retain a probationary employee, that decision cannot be arbitrary and capricious. In this case, Respondent failed in its statutory duty to provide Grievant with a proper evaluation and opportunity to improve and failed in its duty to timely notify Grievant of her non-retention. With the lack of evidence of a serious attendance issue and the failure to provide Grievant with a proper evaluation and opportunity to improve, the record does not support Respondent's stated reason for the non-renewal of Grievant's contract. Grievant has proven the decision not to renew her contract was arbitrary and capricious.

Grievant argues she is entitled not only to reinstatement of her probationary substitute contract but that she is entitled to instatement into a permanent cook position. Grievant argues that, but for the improper nonrenewal of her probationary contract, she would have been the successful applicant for one of the permanent cook positions that were filled during the 2019 - 2020 school year. "Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a 'make-whole' remedy, intended to restore the grievant to his or her rightful place as an employee. *Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ*., Docket No. 98-22-496 (Mar 30, 1999). *See Graf v. W. Va. Univ.,* 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ*., Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ*., Docket No. 97-40-459 (Dec. 3, 1997); *Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017)." *Pottorff v. Kanawha County Bd. of Educ*., Docket No. 2019-0878-KanED (May 19, 2020). Grievant's rightful place was as a probationary substitute employee, not a

permanent employee. Grievant's assertion that she would have been hired into a permanent position is entirely speculative. The Grievance Board will not grant relief sought that is "speculative or premature, or otherwise legally insufficient." *See Dooley v. Dept. of Trans./Div. of Highways,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991).

Moreover, even an award of back pay in this instance would be purely speculative. Substitute employees are employed on an "as needed" basis and are not guaranteed a certain number of hours. Substitute assignments are made based on need and through a rotating automated call-out system. Unlike in *Pottorff*, Grievant presented no argument or evidence regarding how many substitute assignments she would have been entitled to perform. Lost wage damages under such circumstances would be speculative and unavailable. *Carson v. Kanawha County Bd. of Educ*., Docket No. 2012-0633-KanED (July 31, 2012).

As Grievant has proven she is entitled to reinstatement, it is necessary to address her claim of harassment and hostile work environment. "'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). 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).

Neither party called any witness regarding the alleged harassment at Spring Valley High School. Although Grievant's testimony was credible, it lacked detail and specificity. She described one conversation in which a coworker said something about her boyfriend being impotent. She testified the same coworker said that Grievant walked like she

thought she was very pretty. She stated others had also made jokes about her sex life and boyfriend but did not say who, when, how often, or specifically what was said. Further, she testified that she attempted to keep things "low key" and that she did not want to show anyone she was upset so it is unclear if her coworkers were aware Grievant found the talk to be offensive. While such talk would be unprofessional, it would not be harassing if coworkers were unaware that Grievant was uncomfortable.

Grievant asserts she was not permitted to go the restroom and that her lunch break was "revoked." Regarding the restroom, Grievant testified that she started her menstrual period one day at work and when she retrieved supplies from her car and went to the bathroom she was told she was not allowed to do so. Again, her testimony lacked detail about who told her so and whether she had informed them of the emergency nature of her need to go to her car. If whoever told her this was unaware Grievant had an emergency it would not be unreasonable to tell Grievant she was not permitted to go to her car when she was not on break. Regarding her lunch break, it is not clear from the testimony what Grievant means by this. The only specific testimony offered was that one day she was taking food into a break room for lunch when she was told she could not eat lunch in the room and to "go over to stand somewhere." While this was strange and rude it was not a revocation of her lunch break.

What was clear harassment of Grievant and an attempt to sabotage her new work assignment was the incident at Ceredo-Kenova Middle School, which Superintendent Alexander substantiated. A Spring Valley High School cook came to Ceredo-Kenova Middle School and loudly disclosed to the head cook in earshot of the whole kitchen that

Grievant had filed a grievance, called her a "wimp" because of it, and made other derogatory comments.

Grievant requested reinstatement to the Spring Valley High School substitute cook position. Grievant further asserted, as she was forced to leave the Spring Valley High School assignment due to the alleged harassment, she is entitled to pay for the day of work she lost. Grievant requested that the inappropriate behavior be investigated and that the behavior be addressed through additional training or disciplinary action.

"'The Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Goff v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-048 (Apr. 7, 2003); *Coster v. W. Va. Div. of Corrections,* Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors,* Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.,* Docket No. 91-54-497 (May 14, 1992).' *Emrick v. Wood County Bd. of Educ.,* Docket No. 03-54-300 (March 9, 2004)." *Shaffer v. Kanawha County Bd. of Educ. & Pauley*, Docket No. 2013-0161-KanED (Sept. 19, 2013). Further, the Grievance Board generally lacks the authority to order adverse personnel action be taken against another employee. *See Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). However, "[a] board of education bears some responsibility to intervene and stop an employee from engaging in conduct which by definition constitutes harassment" and the Grievance Board can order a school board to "take whatever steps that are appropriate and necessary, utilizing the corrective and disciplinary measures available" to stop harassment. *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 31, 1994).

Grievant has failed to prove she was forced to leave the Spring Valley High School assignment and so is not entitled to lost pay. Superintendent Alexander has already conducted an investigation, so that relief is moot. The Grievance Board is without authority to order that an employee be disciplined for harassment. Therefore, the only relief available is to order Respondent to "take whatever steps that are appropriate and necessary, utilizing the corrective and disciplinary measures available" to stop the harassment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The nonrenewal of a contract is not a termination or a disciplinary matter, and, therefore, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Jenkins v. Jefferson County Bd. of Educ.*, Docket No. 2008-1760-CONS (March 4, 2009) (citing *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988)). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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. "West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his

case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious." *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010) (citing *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998); *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ*., 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002)). 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 at 614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. "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).

4. "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)).

5. "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).

6. Grievant made a *prima facie* case of reprisal, which Respondent rebutted, and Grievant failed to prove the stated legitimate reasons were pretext.

7. Boards of education are required to give notice to probationary employees of rehiring or non-rehiring as follows:

> The superintendent at a meeting of the board on or before May 1 of each year shall provide in writing to the board a list of all probationary teachers that he or she recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one [§ 18A-2-1] of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two [§ 18A-2-2] and five [§ 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
>
> Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

W. VA. CODE § 18A-2-8a.

8. The purpose of West Virginia Code § 18A-2-8a is to allow an employee "an opportunity to respond in order to ensure that the nonrenewal was not occurring for unfair reasons." *Miller v. Bd. of Educ.,* 190 W. Va. 153, 158, 437 S.E.2d 591 (1993).

9. "The board is authorized to employ such service personnel, *including substitutes*, as is deemed necessary for meeting the needs of the county school system. . . ." W. VA. CODE § 18A-2-5 (emphasis added).

10. Grievant proved Respondent violated W. VA. CODE § 18A-2-8a. in failing to timely and properly notify her of the non-renewal of her contract.

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

> 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. . . .

12. "School personnel" are "all personnel employed by a county board whether employed on a regular full-time basis, an hourly basis or otherwise." W. VA. CODE § 18A-1-1(a).

13. Grievant proved Respondent failed to properly evaluate her performance and failed to allow her an opportunity to improve.

14. Grievant proved that Respondent's non-renewal of her probationary contract was arbitrary and capricious.

15. "Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a 'make-whole' remedy, intended to restore the grievant to his or her rightful place as an employee. *Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Barker v. Lincoln County Bd. of Educ*., Docket No. 98-22-

496 (Mar 30, 1999). *See Graf v. W. Va. Univ.,* 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ*., Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ*., Docket No. 97-40-459 (Dec. 3, 1997); *Frost v. Bluefield State College*, Docket No. 2017-0472-BSC (Dec. 7, 2017)." *Pottorff v. Kanawha County Bd. of Educ*., Docket No. 2019-0878-KanED (May 19, 2020).

16. The Grievance Board will not grant relief sought that is "speculative or premature, or otherwise legally insufficient." *See Dooley v. Dept. of Trans./Div. of Highways,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991).

17. Grievant proved she is entitled to reinstatement of her probationary substitute contract but failed to prove she was entitled to back pay or instatement into a permanent position.

18. "'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). 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).

19. Grievant proved she was subjected to harassment but failed to prove hostile work environment.

20. "'The Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Goff v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-048 (Apr. 7, 2003); *Coster v. W. Va. Div. of Corrections,* Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors,* Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.,* Docket No. 91-54-

497 (May 14, 1992).' *Emrick v. Wood County Bd. of Educ.,* Docket No. 03-54-300 (March 9, 2004)." *Shaffer v. Kanawha County Bd. of Educ. & Pauley*, Docket No. 2013-0161-KanED (Sept. 19, 2013). Further, the Grievance Board generally lacks the authority to order adverse personnel action be taken against another employee. *See Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).

21. "A board of education bears some responsibility to intervene and stop an employee from engaging in conduct which by definition constitutes harassment" and the Grievance Board can order a school board to "take whatever steps that are appropriate and necessary, utilizing the corrective and disciplinary measures available" to stop harassment. *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 31, 1994).

22. Grievant failed to prove she was entitled lost pay for leaving the Spring Valley High School assignment for alleged harassment.

Accordingly, the grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to reinstate Grievant into a probationary substitute cook contract and to restore her seniority. Grievant is not entitled to lost wages. Respondent is **ORDERED** to remove all references to the nonrenewal of her contract from any and all personnel records maintained by Respondent, or its agents. Respondent is **ORDERED** to take whatever steps that are appropriate and necessary to prevent its employees from harassing Grievant and disclosing confidential grievance information.

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: February 3, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge