CURTIS MEEKS,

Grievant,

v. **Docket No. 96-20-095**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Curtis Meeks (Grievant) is employed by Respondent Kanawha County Board of Education (KCBE) as a Heating and Air Conditioning Mechanic II (HACM II). On October 20, 1995, Grievant initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contending that the "unsatisfactory" performance evaluation he was issued on October 2, 1995, was unfair, and that he was the victim of reprisal prohibited by W. Va. Code "§ 19- 29-3(s)." (See footnote 1) This grievance was denied at Level I, and Grievant appealed to Level II, where an extensive evidentiary hearing was conducted on February 14 and 16, 1996. Following denial at Level II by the Superintendent's designee, Douglas Walters, in a decision dated March 1, 1996, Grievant elected to waive Level III, as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on March 8, 1996. A Level IV evidentiary hearing was held in this Board's office in Charleston, West Virginia, on May 23, 1996. At the conclusion of that hearing, the record was left open to allow the parties to obtain additional deposition testimony. Ultimately, the parties elected not to supplement the record, and this matter became mature for decision upon receipt of Grievant's post-hearing brief on October 9, 1996. (See footnote 2)

The following findings of fact necessary for resolution of this grievance are appropriately made from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant is currently employed by the Kanawha County Board of Education (KCBE) as a Heating and Air Conditioning Mechanic II (HACM II).

2. Grievant was initially employed by KCBE as a Custodian in 1981. HT at 12. (See footnote 3)

3. KCBE was ordered to instate Grievant to the position of HACM I as the result of a decision by the West Virginia Education and State Employees Grievance Board dated October 31, 1991. Meeks v. Kanawha County Bd. of Educ., Docket No. 90-20-424 (Oct. 31, 1991) (Meeks I).

4. Grievant was subsequently reduced-in-force at the end of the 1991-92 school year. Grievant filed a grievance alleging that this action was not properly taken. He unsuccessfully pursued this matter through Level IV of the grievance procedure. HT I at13; Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-204b (Sept. 25, 1992) (Meeks II).

5. While on preferred recall, Grievant applied for two posted Custodian IV vacancies but was not selected. Grievant filed a grievance challenging his nonselection. He unsuccessfully pursued this matter though Level IV of the grievance procedure. Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-249 (Sept. 25, 1992) (Meeks III).

6. In December 1992 Grievant applied for a posted position of HACM II. KCBE selected Grievant for the HACM II position, based on their determination that this Grievance Board's earlier decision in Meeks III and W. Va. Code §§ 18A-4-8b and 18A-4- 8g compelled such a result. Meeks v. Kanawha County Bd. of Educ., Docket No. 95-20- 019 (Oct. 27, 1995) (Meeks IV).

7. An HACM I installs, maintains and repairs heating and air conditioning plants and related equipment at the "apprentice" level. W. Va. Code § 18A-4-8b, ¶ 56.

8. An HACM II installs, maintains and repairs heating and air conditioning plants and related equipment at the "journeyman" level. W. Va. Code § 18A-4-8b, ¶ 57.

9. Shortly after Grievant returned to work as an HACM II in 1992, Benjamin Shew, KCBE's Director of Maintenance and Energy Management, directed that Grievant was not to work independently, but was to be accompanied to the job site by another HACM II. HT I at 18-19; HT II at 15.

10. Grievant grieved this directive on various grounds, including discrimination. He unsuccessfully pursued this matter through Level IV of the grievance procedure. Meeks IV. 11. At the time Grievant returned to work as an HACM II, certain conditions of his employment were memorialized in a December 29, 1992, letter from KCBE Treasurer Dave Stewart, stating the following:

> Your return to work was approved by the Kanawha County Board of Education at its December 17, 1992 meeting. As you know, Mr. Shew and Mr. Harper have expressed reservations about employing you as a Heating and Air Conditioning Mechanic II when you admittedly do not possess the skills and expertise normally required in the position. Nevertheless, state law has deemed you qualified for the position.
>
> You will initially be assigned to work with other experienced personnel in order to learn new skills and to minimize any safety hazards to yourself, co-workers and others. You indicated during your interview that you were willing to take classes on your own time to increase your level of knowledge and skills. By copy of this letter, I am asking Mr. Shew to contact the vocational schools to determine what relevant classes would be available.
>
> After a reasonable time has passed for you to learn the new job, you will be expected to perform the tasks required in the Heating and Air Conditioning Mechanic II job description (attached). Failure on your part to master the required skills will result in the initiation of a plan of improvement per the evaluation procedure. As a regular employee, you are also eligible to apply for any other positions that may be posted.

G Ex 7.

12. Boiler vendors sponsor a two-day training course on boiler safety and repair. Since returning to work in 1992, Grievant has requested to attend this training. HT I at 20- 22.

13. Grievant successfully completed a course in "Burner and Boiler Controls" conducted by Honeywell in August 1993. HT I at 27; G Ex 5. This is a separate course from the safety course discussed in Finding of Fact No. 12, above. HT I at 27.

14. Since Grievant's return to work in 1992, Mr. Shew has asked Grievant to take a course in Air Conditioning and Refrigeration Technology at KCBE's Benjamin FranklinCareer and Technical Education Center (Franklin). HT II at 21-22. This is a 1,080 hour comprehensive course in refrigeration and heating systems. HT II at 22. The course is taught for three to five hours each evening, Monday through Friday, over a period of five and one-half to six months. HT I at 22; Williams testimony at L IV.

15. Grievant has declined to take the extensive course in air conditioning and refrigeration discussed in Finding of Fact No. 14, above, on his own time. HT I at 25-27.

16. Although Mr. Shew believes the comprehensive course at Franklin would be most beneficial, he is willing to accept Grievant's completion of a comprehensive correspondence course or courses

covering the same subjects. Benjamin Shew testimony at L IV.

17. In March 1993 Grievant successfully completed a job-related Refrigeration II short course at Franklin. HT I at 24; G Exs 3 & 4.

18. Since returning to work as an HACM II, Grievant has successfully completed the required examination to obtain a "refrigeration handling license" required under federal law. HT I at 31.

19. On one occasion since returning to work as an HACM II, Grievant has incorrectly hooked up a three phase electric motor, resulting in approximately $235 in damage to the motor. HT I at 29.

20. Since returning to work as an HACM II in 1992, Grievant has received on-the- job training from other HACM IIs employed by KCBE. HT I at 37, 41. 21. On October 2, 1995, Grievant's immediate supervisor, Charles Rucker, issued a revised evaluation form rating Grievant "unsatisfactory" in the following categories: (See footnote 4)

a. Initiative;

b. Attitude;

c. Quality of work;

d. Follows instructions;

e. Employee relationships;

f. Operation & care of equipment;

g. Knowledge of work; and

h. Job-related training.

G Ex 2.

22. The evaluation also contained the following "specific goals or improvement programs to be undertaken during next evaluation period:"

> Needs more training on HVAC [heating, ventilation and air condition ing] controls and safeties, especially hot water and steam boilers.

G Ex 2.

23. The evaluation further noted the following "specific work performance areas for improvement or job behavior requiring improvement or correction:"

> Needs to spend more time trying to learn and less time arguing about whether he or the mechanic is right. These very loud arguments disrupt the entire shop and cause bad employee relationships.

G Ex 2.

24. The "overall appraisal" of Grievant's performance was rated "unsatisfactory." G Ex 2.

25. Mr. Rucker assigned Grievant "unsatisfactory" ratings in "initiative" and "attitude" because of Grievant's refusal to take the state competency test for HACM II. Mr. Rucker also considered Grievant's refusal to continue working with a co-worker following an argument in rendering this rating. HT II at 51, 55-56. (See footnote 5)

26. Mr. Rucker assigned Grievant an "unsatisfactory" rating in "quality" because Grievant is unable to perform repair work on boilers and related heating equipment. HT II at 51.

27. Mr. Rucker assigned Grievant "unsatisfactory" ratings in "follows instructions" and "employee relationships" because of Grievant's arguing with the various HACM IIs to which he has been assigned as a "helper." Mr. Rucker was present during "several" such incidents. HT II at 51-53.

28. Mr. Rucker assigned Grievant an "unsatisfactory" rating on "knowledge of work" because Grievant is not able to work on the full scope of equipment required of an HACM II, based upon Grievant's lack of initiative to obtain the necessary training as requested by Mr. Shew. HT II at 53.

29. Mr. Rucker believes that it is unfair for Grievant to receive pay as an HACM II, if Grievant is unable to perform the full range of HACM II duties. HT II at 58. 30. Grievant has performed his assigned duties at the HACM I level in a satisfactory manner. Shew testimony at L IV.

31. Mr. Rucker did not consider incidents where Grievant refused to follow directions from another employee based upon proper considerations of personal safety. HT II at 59-60.

32. Mr. Rucker and Mr. Shew believe Grievant is capable of learning the full range of duties as an HACM II, provided he completes the appropriate formal training and receives comprehensive on-the-job training. Shew testimony at L IV.

33. Grievant's "unsatisfactory" ratings for "quality of work," "knowledge of work," and "job-related training" are consistent with the expectations set forth in KCBE Treasurer Stewart's letter of December 29, 1992, quoted in Finding of Fact No. 11, above. See G Ex 7.

DISCUSSION

Generally, a grievant alleging that he has received an improper evaluation bears the burden of establishing, by a preponderance of the evidence, that there was "such an abuse of discretion on the evaluator's part that the primary purpose of the evaluation process was confounded." Dancy v.

Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995). See Brown v. Wood County Bd. of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); Oni v. Bluefield State College, Docket No. 93-BOD-515 (Dec. 30, 1994); Jarrell v. Raleigh County Bd. of Educ., Docket No. 93-41-341 (Sept. 16, 1994). See also Higgins v. Randolph County Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981). This determination recognizes that the purpose of most evaluations is to correct rather than to discipline. Dancy, supra; Oni, supra. Thus, Grievant bears the burden of proof that his evaluation wasunfair and inaccurate, and that good cause exists for its removal from his personnel file. Myers v. Wetzel County Bd. of Educ., Docket No. 94-52-530 (May 19, 1995). See Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

Grievant also claims that the negative comments in his evaluation represent reprisal or retaliation for previous grievances which Grievant filed against KCBE. Reprisal is defined by W. Va. Code § 18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in protected activity, e.g., filing a grievance;
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> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by

offering legitimate, nonretaliatory reasons for its action. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988);Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Grievant established a prima facie case of retaliation. Administrative notice is taken that Grievant prevailed before this Grievance Board in Meeks I, based upon a finding that KCBE violated W. Va. Code § 18A-4-8b in failing to select Grievant for a posted HACM I position. As a result of that decision, KCBE was ordered to instate Grievant into a HACM I position. Grievant subsequently grieved his RIF from that position (Meeks II), KCBE's failure to select him for a Custodian IV vacancy (Meeks III), and KCBE's refusal to allow him to perform the full range of his duties in his present HACM II position (Meeks IV). It was clearly established that Mr. Shew and Mr. Rucker were aware of some or all of these decisions. (See footnote 6)

Establishment of a prima facie case of retaliation shifts the burden of production to the employer to show that the ratings assigned to Grievant on the contested evaluation were given for legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra. In this regard, Mr. Rucker specifically cited Grievant's refusal to take the competency test as the basis for the unsatisfactory ratings he issued to Grievant in the areas of "initiative" and "attitude." HT II at 51. Grievant's refusal to voluntarily take the state HACM competency test isapparently based upon the fact that he previously took and passed the HACM test offered by KCBE, and the following language in W. Va. Code § 18A-4-8e:

> Achieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title. Once an employee passes a competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [§ 18A-4-8b] of this article and shall not be required to take the competency test again.

It does not appear that Grievant is under any obligation to take the state competency test for HACM II since he presently holds that classification title. W. Va. Code § 18A- 4-8e clearly provides that "once an employee holds . . . a classification title in a category of employment, that employee shall be deemed as qualified for said classification title . . . ." However, there is nothing inappropriate with KCBE offering Grievant the opportunity to take the state competency test as a means of superseding the present directive that he work only under the supervision of another HACM II. (See footnote 7)

Another provision in W. Va. Code § 18A-4-8e states, "[c]ompetency tests shall not be used to evaluate employees who hold the classification title in the category of their employment." Mr. Rucker specifically stated that he considered Grievant's refusal to take the state competency test for HACM II in assigning "unsatisfactory" ratings in "attitude" and "initiative." Approving this approach would permit the employer to consider indirectly a factor which it is prohibited from considering directly. Accordingly, Grievant's ratings in these two areas must be corrected to "satisfactory." KCBE also attempted to justify Grievant's evaluation through the testimony of Mr. Shew. Mr. Shew asserts that Grievant will never be able to perform the full range of duties as an HACM II until he at least completes the comprehensive heating and air conditioning course offered at Franklin or an equivalent correspondence course. Thus, it does not appear that Grievant can ever meet Mr. Shew's standards if he only completes the courses which he wants to take, or through extensive on-the-job training. This is because Mr. Shew is convinced that Grievant cannot learn from doing the work under the supervision of a journeyman, unless he first obtains a thorough technical foundation through the formal training process. Because Mr. Shew is a college-educated engineer with extensive experience in the design, installation and maintenance of heating and air conditioning systems, his opinion appears to be well founded.

However, Mr. Shew has offered Grievant the alternative of taking the state competency test for HACM II, indicating that he would defer to the results of that examination, allowing Grievant to perform the full range of HACM II duties at the journeyman level if he obtains a passing score. HT II at 44. As previously discussed, Grievant correctly asserts that he has a statutory right to decline Mr. Shew's proposal. A portion of what might otherwise be at issue in this grievance was previously resolved in Meeks IV. Thus, these matters may not be relitigated under the maxim of res judicata, a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Black's Law Dictionary 678 (Abridged 5th Ed. 1983). See Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dept. of Health & Human Serv., Docket No. 90-H- 478 (July 31, 1991).

One matter resolved in Meeks IV is that "certain conditions were placed on [Grievant's employment as an HACM II] at the outset. These conditions included taking additional classes on his

own time, working under constant supervision, and mastering additional skills on an ongoing basis." Meeks IV, Finding of Fact No. 2. It was likewise established in Meeks IV, and not further disputed in this case, that Grievant has refused to take the course recommended by Mr. Shew and has declined to take the competency test for his current classification. Meeks IV, Findings of Fact Nos. 3 & 4.

Grievant contends that his evaluation was rated as "unsatisfactory" simply because he has not been permitted to perform the duties of an HACM II. Clearly, lowering Grievant's rating in these circumstances would be based on a factor other than merit and would be patently unfair. Meeks IV upheld KCBE's decision to restrict Grievant's duty assignments to working under the supervision of a journeyman and, during the time period of this evaluation, (See footnote 8) Grievant was employed consistent with this ruling. However, the undersigned is unable to conclude that Grievant's evaluation was substantially influenced by KCBE's limitation on the scope of Grievant's duties.

Grievant's position is weakened by the credible testimony of Mr. Rucker that Grievant has had a poor working relationship with the journeyman with whom he has been teamed for most of the evaluation period. Mr. Rucker testified from direct observation ofmore than one incident where Grievant became involved in a verbal altercation regarding the assignment of duties. Moreover, the incidents described by Mr. Rucker are completely separate from events Grievant recounted where he had a proper safety-related basis for either questioning or refusing to follow the directions of the journeyman employee to whom he was assigned. See Peery v. Rutledge, 177 W. Va. 548, 355 S.E.2d 41, (1987); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). See generally, Frank Elkouri & Edna A. Elkouri, How Arbitration Works 671 (3rd Ed. 1973). In these circumstances, the undersigned finds that KCBE has provided legitimate, nonretaliatory reasons to support the "unsatisfactory" ratings Grievant received for "follows instructions" and "employee relationships."

In addition, Grievant acknowledged that he had improperly wired a motor, resulting in over $200 damage to KCBE property. HT I at 29. This incident would appear to substantiate the "unsatisfactory" rating Grievant received under "operation & care of equipment." See G Ex 2. Thus, KCBE has likewise established by a preponderance of the evidence of record that this rating was given for legitimate, nonretaliatory reasons. The remaining "unsatisfactory" ratings for "quality of work," "knowledge of work," and "job-related training" substantially resulted from the impasse that has arisen between Grievant and his employer over whether it is necessary for Grievant to complete on

his own time the comprehensive course of instruction Mr. Shew expects, or whether some less onerous training of Grievant's choosing will provide an adequate foundation of formal training for Grievant to perform his duties at the journeyman level. Meeks IV determined that "taking classes on his own time" was one of the conditions placed on Grievant at the time he became an HACM II. Meeks IV, Finding of Fact No. 2. The undersignedrecognizes that Grievant's reluctance to spend the amount of off-duty time that this course of instruction will require is founded upon legitimate concerns for his family. However, KCBE has agreed to provide this course of instruction without charge to Grievant through its vocational training centers and to attempt to alleviate any schedule conflicts. See J Ex 1 at L IV.

Grievant has failed to establish by a preponderance of the evidence that the training courses he has taken prior to October 2, 1995, or the courses which he requested to take at KCBE's expense but did not receive, provide a sufficient foundation to learn the full range of duties a journeyman heating, ventilation and air conditioning mechanic classified as an HACM II is expected to perform for KCBE. KCBE has established by a preponderance of the evidence that the comprehensive course in air conditioning and refrigeration technology offered through one or more of KCBE's vocational training centers would provide a sufficient technical foundation for Grievant to perform the full range of the duties expected of a school service employee classified as an HACM II. Therefore, KCBE has established a legitimate, nonretaliatory basis for the "unsatisfactory" ratings assigned by Mr. Rucker for "quality of work," "knowledge of work," and "job-related training."

At Level II, although the grievance was denied, the following relief was granted by KCBE:

> Mr. Ben Shew, Director of Maintenance and Energy, is to identify with specificity the kinds of courses, training and other actions that the grievant should undertake in order to elevate his qualifications. Mr. Shew shall provide this information in writing to the grievant on or before April 1, 1996. No action adverse to the grievant is to be taken with regard to the evaluation of October 2, 1995 until the grievant has had a reasonable amount of time to complete the recommended training. If the grievant fails to achieve the necessary level of competency for the HACM II, a plan of improvement shall be initiated.KCBE provided the list of courses as directed. See J Ex 1 at L IV. Neither party provided a substantial reason to modify or set aside any of the other relief ordered at Level II. Therefore, it is anticipated that KCBE will follow through in complying with that portion of the Level II decision. At Level IV, Grievant has established that he is entitled to additional relief only in regard to changing the assigned ratings for "attitude" and "initiative" from "unsatisfactory" to "satisfactory." See Dancy, supra; Puskarich v. Hancock County Bd. of Educ., Docket No. 91-15-094 (May 29, 1995); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). As the other "unsatisfactory" ratings have not been shown to have resulted from a retaliatory motive or otherwise improper considerations, the overall rating of "unsatisfactory" will remain. In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. A grievant alleging that he has received an improper evaluation bears the burden of establishing, by a preponderance of the evidence, that there was "such an abuse of discretion on the evaluator's part that the primary purpose of the evaluation process was confounded." Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995). See Brown v. Wood County Bd. of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); Oni v. Bluefield State College, Docket No. 93-BOD-515 (Dec. 30, 1994); Jarrell v. Raleigh County Bd. of Educ., Docket No. 93-41-341 (Sept. 16, 1994). See also Higgins v. Randolph County Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981). Thus, Grievant bears the burden of proving that his evaluation was unfair and inaccurate, and that good cause exists for its removal from his personnel file. Myers v. Wetzel County Bd. of Educ.,Docket No. 94-52-530 (May 19, 1995). See Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

2. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code § 18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in protected activity, e.g., filing a grievance;
>
> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v.

W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

3. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its action. Conner, supra. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). 4. To the extent a grievance involves the same parties, cause of action, relief requested, and factual situation as that of a prior matter decided by this Grievance Board, such issues are barred from further consideration by the doctrine of res judicata. Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994). See Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975); Ramsey v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-478 (July 31, 1991). See also Liller v. W. Va. Human Rights Comm'n., 180 W. Va. 433, 376 S.E.2d 639 (1988).

5. "Competency tests shall not be used to evaluate employees who hold the classification title in the category of their employment." W. Va. Code § 18A-4-8e.

6. Grievant made out a prima facie case of retaliation in regard to the "unsatisfac tory" ratings he received on his performance evaluation issued on October 2, 1995. See Conner, supra.

7. Grievant established by a preponderance of the evidence that his immediate supervisor improperly considered his failure or refusal to take a state competency test for the classification of employment which he presently holds as the controlling factor for assigning "unsatisfactory" ratings to Grievant for "initiative" and "attitude." See W. Va. Code § 18A-4-8e.

8. Because Grievant's immediate supervisor specifically considered a prohibited factor in rendering Grievant's performance evaluation in two categories, KCBE failed to establish a legitimate, nonretaliatory basis for those particular ratings, and Grievant is entitled to have those ratings rescinded and replaced by "satisfactory" ratings. W. Va. Code § 18-29-5b. See Dancy, supra; Puskarich v. Hancock County Bd. of Educ., DocketNo. 91-15-094 (May 29, 1995); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87- 199 (June 16, 1988).

9. Although Grievant established a prima facie case that the "unsatisfactory" evaluation he received on October 2, 1995, was rendered in retaliation for a series of grievances which Grievant had previously filed and pursued against his employer, KCBE established by a preponderance of the

evidence that, except as determined in Conclusion of Law No. 7, above, the ratings in question were assigned for proper, job-related, and nonretaliatory reasons. Grievant failed to persuasively demonstrate that these reasons were either pretextual or a subterfuge for retaliation. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983).

Accordingly, this Grievance is **GRANTED**, **IN PART**. The Kanawha County Board of Education is hereby **ORDERED** to correct the employee evaluation issued to Grievant on October 2, 1995, by changing the ratings under the categories of "attitude" and "initiative" from "unsatisfactory" to "satisfactory." The Kanawha County Board of Education is further **ORDERED** to provide the relief directed by the Grievance Evaluator at Level II, to the extent that has not already been accomplished. All other relief sought in this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 28, 1997

Footnote: 1

W. Va. Code § 18-29-3(s) provides that "[t]he number of grievances filed against an employer or agent or by an employee shall not, per se, be an indication of such employer's or agent's or such employee's job performance." Reprisal for participation in the education employees' grievance procedure is more specifically prohibited by W. Va. Code § 18-29-2(p).

Footnote: 2

Apparently, KCBE elected to rely upon the Level II decision in this matter.

Footnote: 3

The transcript of the Level II hearing consists of two volumes. This transcript will be cited as "HT I at " or "HT II at ," with the Roman numerals designating the volume number. Exhibits admitted at Level II will be cited as "G Ex " for grievant's exhibits, "E Ex " for Evaluator's exhibits and "R Ex " for KCBE's exhibits.

Footnote: 4

Grievant also received "satisfactory" ratings in the categories of observance of work hours, attendance, compliance with rules, safety practices, meeting schedules, acceptance of change, appearance of work area, public relations, efficiency under stress, work coordination, and personal appearance. See G Ex 2.

Footnote: 5

Although the supervisor could have relied upon this incident to assess Grievant as unsatisfactory in these categories, a preponderance of the evidence indicates that Grievant's refusal to take the competency test was the controlling factor in Mr. Rucker's decision to assign these ratings.

Footnote: 6

Administrative notice is taken that Grievant filed at least two grievances that proceeded to Level IV a few years earlier. Meeks v. Kanawha County Bd. of Educ., Docket No. 89-20-032 (May 19, 1989), and Meeks v. Kanawha County Bd. of Educ., Docket No. 20-87-016-1 (July 31, 1987). These grievances are not considered relevant to this matter as there is no showing that the KCBE employees who rendered the evaluation at issue in this grievance were aware of these earlier grievances. See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Footnote: 7

To the extent Grievant has argued that W. Va. Code § 18A-4-8e precludes KCBE from offering this alternative to Grievant as a means of moving beyond the current directive which restricts him to performing HAMC I work, that contention is rejected.

Footnote: 8

This evaluation appears to cover the entire time of Grievant's tenure as an HACM II from December 1992 to October 2, 1995. Grievant has not pointed to any law, rule, policy, or regulation which prohibits a school board from rating an employee over a period in excess of one year.