TIMOTHY B. BUTLER,

Grievant,

v. **Docket No. 98-11-214**

GILMER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Timothy B. Butler, employed as a teacher by the Gilmer County Board of Education (GCBE), filed a four page, level one grievance on or about May 18, 1998, in which he alleged retaliation and harassment. Grievant cited a number of incidents which primarily involved the discipline of students and a school dress code for faculty. For relief, Grievant requested that Principal Grace Tallhamer issue him a letter stating that he “did nothing wrong” in any of the student-related matters, “that there is no dress code concerning the wearing of jeans”, and that the matter would not negatively impact his annual evaluation. He also requested a memorandum be issued to the staff, advising them there is no official dress code, “except it be clothing which is obviously immodest or that it exposes the body as to result in a distraction which would interfere with instruction.”

The grievance was denied at levels one and two, and Respondent waived consideration at level three, as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on June 22, 1998, and the grievance became mature for decision when the parties declined the opportunity to file proposed findings of fact and conclusions of law following a hearing conducted on August 18,1998. (See footnote 1)

Grievant's complaint appears to arise from the following incidents:

1. Grievant directed a student, L.O., to Principal Tallhamer's office with adetention slip which stated only Grievant's name and identified the infraction as, “called me a freak “. Grievant included and circled, “5 days.” Ms. Tallhamer proceeded to impose a five day detention on the student, and returned him to Grievant's class. Grievant objected to the return of the student who had been “excluded” from the class.

2. Grievant apparently did not respond to a student who had a question during class. When

Grievant directed the students to go inside the building, wash their hands and prepare for music class, the student, N.M., instead proceeded to Ms. Tallhamer's office to report the matter. The student returned to Grievant, advised him that he told the principal that Grievant had ignored him, and would not answer his question concerning sound, and that she directed him to ask Grievant why he would not answer the question. Grievant answered the question, told N.M. that he did not always have time to answer everyone's questions, and directed him to go to music class. He also warned the student that if he was caught in the office again without permission, Grievant would give him detention. Grievant found N.M. in the principal's office a short while later, at which time he advised Grievant that Ms. Tallhamer had told him to come back if Grievant did not satisfactorily answer his question. Shortly thereafter, Ms. Tallhamer walked outside with the student, approached Grievant, and inquired as to why the question was not answered.

3. Ms. Tallhamer issued a memorandum dated April 27, 1998, to the faculty in which she requested that professional dress be maintained for the remainder of the year. Specifically, she requested that blue, denim jeans be worn only on Fridays. Grievant wore blue denim jeans twice within the next week, provoking Ms. Tallhamer to draft a letter to him on April 30, 1998, in which she suggested that his defiant behavior was an attempt to undermine her authority. 4. Ms. Tallhamer completed an observation form for Grievant dated May 21, 1998. She noted that during class a student held his hand up for twenty-five minutes before being recognized by Grievant, and seven teachers had complained to her about the manner in which Grievant treated or talked to them.

The complaints will be addressed separately.

1. Grievant's “exclusion” of a student from class.

It should first be noted that this matter references W. Va. Code §18A-5-1, which provides in part: (c)the teacher shall have authority to exclude from his or her classroom or school bus, any pupil who is guilty of disorderly conduct; who in any manner interferes with an orderly educational process; who threatens, abuses, or otherwise intimidates or attempts to intimidate a school employee or a pupil; or who willfully disobeys a school employee; or who uses abusive or profane language directed at a school employee. . . .

As previously stated, Grievant sent a student with a detention slip to the principal's office. The detention was assigned, and the student directed to return to class. Apparently, Grievant had not intended for the student to be returned to his class. In a letter to Ms. Tallhamer dated April 8, 1998,

Grievant stated that he had sent L.O. to the office with instruction to remain there until Grievant could meet with him and the principal. When L.O. returned to class and advised Grievant that the principal had stated “things don't work that way here”, Grievant immediately proceeded to the office to learn why the student was returned. Ms. Tallhamer advised Grievant that he could not exclude a student from class unless he was interfering with the instruction of others. Although Grievant admits that it was not his intention to formally exclude L.O. from class, he had desired a cooling offperiod, and he asserts that the immediate return of the student undermined his authority and damaged his credibility with the students.

At level four, Ms. Tallhamer testified that when L.O. entered her office with the detention slip she called his parents and scheduled a conference, imposed the five day detention, and directed him to go back to class. L.O. did not tell Ms. Tallhamer that he was to stay in the office until Grievant arrived, but said he could not return to class because Grievant had told him he did not want to see his face again. She advised the student that things did not work that way, and returned him to class. She recalled advising Grievant that he could not exclude a student unless he was interfering with instruction, and there was no written indication he wanted the student to be excluded, or how long he intended the student to be out of the classroom.

2. Grievant's failure to respond to a student inquiry.

Grievant complains that Ms. Tallhamer's actions sending the student back outside to ask why he would not answer his question, and then coming outside with the student to repeat the situation, again undermined his authority as a teacher. He notes that he had directed N.M. to wash his hands and proceed to music, and expected the student to act accordingly. Grievant expressed concern that because Ms. Tallhamer allows students to visit the office on their own initiative, he could no longer be certain of a student's location. Grievant also addressed related issues of students entering the office and interrupting adult conversations, and the use of bathroom passes to stop by the office.

Ms. Tallhamer testified that it is her policy that any student may visit the office at any reasonable time, and she perceived that Grievant was simply upset because N.M. had complained that he was being ignored.3. Principal's memorandum addressing faculty attire.

In a memorandum dated April 27, 1998, Ms. Tallhamer addressed a number of subjects, including faculty attire. She stated in pertinent part, “[t]eachers, we need to remember school is not out, therefore we need to keep students on task. Also we are professional role models and need to dress

accordingly. Dress Skorts are fine, but not shorts. Also jeans are fine on Fridays for casual wear, but please try to refrain from jeans or shorts daily."

By letter dated April 30, 1998, Ms. Tallhamer advised Grievant:

I am writing this letter about you wearing jeans to school on a regular basis. I sent each teacher a memo about wearing professional clothes because we are role models for the students in our class.

* * *

I strongly believe that me giving all teachers a memo about not wearing jeans on a regular basis, and you wearing jeans the next day (Tuesday) and again two days later (Thursday), is a defiant move to undermine my authority as your principal. Other teachers in the building notice what you do and say. It is important that if you feel, my asking all staff members to dress professionally is inappropriate that we need to have a discussion about it. . . .

Grievant strongly asserts that Ms. Tallhamer has no authority to direct that he not wear jeans frequently, that there is no state or county policy addressing the wearing of jeans, and that employees throughout the county, including principals, wear jeans when they feel like it. At level four, Grievant stated that Ms. Tallhamer has set a ludicrous standard, and that he believes the blue denim jeans are part of the best outfit he owns. He proclaimed that he will continue to wear jeans, and that Ms. Tallhamer cannot do anything about it. Grievant characterizes the April 30 letter as "totally unjust", possiblydisciplinary, and harassment.

Ms. Tallhamer testified that with the arrival of warm weather she had noticed a change in the faculty attire. Specifically, teachers were wearing casual shorts, even bib overalls, to work. Based upon a concern that the faculty dress more appropriately, she issued the April 27 request. When Grievant exhibited what appeared to be intentional disobedience, she advised him that jeans of any color other than blue would be acceptable, because students perceive colored jeans to be dressy. She explained that the purpose of the April 30 letter was only to reiterate her position that faculty should dress professionally. She further explained that while she placed a copy of the letter in her files, it is her policy to remove all such letters at the beginning of the next school year. The letter was not placed in Grievant's personnel file, and was not a letter of reprimand.

4. The May 21, 1998 observation form.

Grievant objected to comments that one student had his hand up to be acknowledged from 12:55

to 1:20, and that some staff had complained to the principal regarding him. Grievant opines that it was impossible for the student to hold his hand up continuously for twenty-five minutes, and objects that complaints from his co-workers should not be mentioned when they had not been brought to his attention, and he had not been given an opportunity to address the complaints.

Ms. Tallhamer explained that during her observation of Grievant's class, she had observed the student with his hand up for the period of time in question. She noted that the student changed hands from time to time, but did wait for acknowledgment from Grievant for twenty-five minutes. Addressing the staff complaints, Ms. Tallhamer explained that seven of the twelve teachers on staff had complained to her about Grievant, but thatthey did not want her to approach him with their specific complaints. When she advised him that he might be more tactful, he had replied to the effect that he could not help it they were idiots.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

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 redress 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;

(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, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of

Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Grievant may still prevail by then showing the stated reason to be merely pretextual.

Grievant alleged in his complaint that Ms. Tallhamer's actions regarding his attire were part of an overall attempt to retaliate against him for written and oral concerns about her decisions relating to a series of incidents beginning on April 7, 1998. Because Grievant did not file a prior grievance regarding any of the incidents, he has failed to make a prima facie case of reprisal.

Grievant also argues that Ms. Tallhamer's actions constitute a pattern of harassment. W. Va. Code §18-29-2(n) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” What constitutes harassment varies based upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket No. 97-52-183 (Sept. 30, 1997). The undersigned finds that Ms. Tallhamer's conduct regarding these matters do not rise to the level of harassment, as it is defined by statute. Clearly, Grievant and Ms. Tallhamer have very different philosophies and opinions, as illustrated in issues one, two, and three. However, the fact that the principal chooses a different administrative approach than Grievant, does not constituteharassment. By Grievant's own admission, the complaint regarding the May observation report is moot, in that his annual evaluation was satisfactory.

In addition to the foregoing discussion, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant is employed by the Gilmer County Board of Education, and has been continuously assigned as a teacher at Normantown Elementary School since 1973, with the exception of a period of time in October and November, 1997, when he was acting principal of the school.

2. Ms. Grace Tallhamer was appointed principal of Normantown Elementary School effective

December 1, 1997.

3. Since her appointment, Grievant has disagreed with a number of Ms. Tallhamer's decisions and actions.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

2. 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 redress it." A grievant claiming retaliation mayestablish 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, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Grievant may still prevail by then showing the stated reason to be merely

pretextual.

3. Grievant failed to prove by a preponderance of the evidence that any decisions or actions by Ms. Tallhamer relating to faculty attire were motivated by retaliation or reprisal.

4. W. Va. Code §18-29-2(n) defines “harassment” as “repeated or continualdisturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

5. 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).

6. Grievant failed to prove by a preponderance of the evidence that Ms. Tallhamer engaged in acts which constitute harassment as defined by statute.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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.

Date: September 28, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant appeared pro se, and GCBE was represented by Howard Seufer, Esq.