TOMMY GRALEY,

Grievant,

v. **Docket No. 99-PEDTA-406**

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Tommy Graley, filed this grievance against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about December 14, 1998. (See footnote 1) Grievant alleged a hostile work environment, reprisal, harassment, and discrimination. He seeks as relief that the supervisor and foreman of his section be transferred, demoted, or terminated. He also requested PEDTA take some type of action to protect his rights without any malice or prejudice toward him.

This grievance was denied at all lower levels and appealed to Level IV on September 28, 1999. The first three days of hearing at Level IV, November 19, 1999, December 15, 1999, and March 17, 2000, were heard by Administrative Law Judge Lewis Brewer. After Administrative Law Judge Brewer resigned his position with the Grievance Board, this grievance was assigned to the undersigned Administrative Law Judge. A fourth and final day of hearing was held on June 23, 2000, by the undersigned Administrative Law Judge. Before rendering this Decision, the undersigned AdministrativeLaw Judge read the transcripts of all the prior proceedings and reviewed all exhibits. (See footnote 2) This grievance became mature for decision on September 29, 2000, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

As previously stated, the undersigned Administrative Law Judge requested clarification of

the issues involved in this grievance. This grievance consists of three claims, which revolve around the issues of discrimination, harassment, a hostile work environment, and retaliation. Grievant presented three incidents which he asserts demonstrate his allegations. Grievant also believes PEDTA has exhibited a pattern of harassment against him for many years, and the complaints in this grievance follow this pattern. The three issues to be addressed in this grievance are: 1) whether Sam Rahal and Kendall Kidd were properly punished for remarks made about Grievant's daughter; 2) whether PEDTA should have punished Steve Shanklin and Stewart Hudnall for opening the trunk of Grievant's daughter's car and video-taping the contents; and 3) whether PEDTA was at fault when it did not discipline another, former employee, William Pell, for alleged remarks made to Grievant both at work and outside of work. Grievant also believes PEDTA should be and is required to control the behavior of this former employee for actions he engaged in after he no longer worked for PEDTA.

Originally, Grievant requested this grievance examine issues of harassment and discrimination from the beginning of his employment. The parties agreed at the start of the last day of hearing at Level IV, that the three issues presented above were the ones to be resolved by this grievance. Additionally, it is very clear that many of the issues Grievant wished to pursue in these grievances to demonstrate discrimination, harassment, reprisal, and a hostile work environment were resolved by prior settlements or were withdrawn or abandoned in before and during 1997. Many of the issues and events Grievant discussed in detail at this grievance hearing occurred prior to 1997, and these actions were part of those prior, abandoned grievances.

Grievant wished to use the information and situations from these prior grievances to demonstrate PEDTA's continuing hostile treatment of him. Since these grievances were either settled and resolved to Grievant's satisfaction, or abandoned for whatever reasons by Grievant, it is difficult to see how they provide evidence of malice, bad faith, and inappropriate treatment of Grievant or would prove his allegations.

The Grievance Board has spoken to this issue in previous cases. "When a grievance has been abandoned by the failure of a grievant to pursue it, it cannot be refiled or reconsidered at a later date." Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994);

Floren v. Kanawha County Bd. of Educ., Docket No. 93-20- 327 (May 31, 1994). Thus, it is found Grievant either settled or abandoned these grievances. Accordingly, Grievant cannot be allowed to address or essentially refile these prior grievances which have either been settled or abandoned. However, all the evidencepresented by Grievant was considered in reaching the specific issues of this grievance. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact. These Findings of Fact will be divided into four categories for ease of following Grievant's three specific complaints. The first group of Findings of Fact will relate to general information.

Findings of Fact

General Information

1. **Grievant has been employed by PEDTA for nineteen years as a night watchman.**

2. **Grievant was terminated by PEDTA in 1991 after he alleged wrongdoing on the part of a supervisor. He grieved this action, and this grievance was granted. See Graley v. W. Va. Parkways Dev. Auth., Docket No.91-PEDTA-225 (Dec. 23, 1991). Respondent did not appeal this Decision, and the parties entered into a settlement agreement to resolve all the issues in this grievance and an additional civil suit filed by Grievant. Grievant returned to work, and feels he has been treated badly since that time.** (See footnote 4)

3. **Grievant is a strong union member, and believes he has been treated badly because of this involvement.**

4. **Grievant has a history of difficulty working with fellow employees, and several times fellow employees have petitioned to have "something done about him", as he wasseen as a disruptive influence. Two petitions were filed in approximately 1991; these petitions were prior to his termination.**

5. **Sometime after his return to work in 1992, Grievant's co-workers sent a letter to management complaining about Grievant's negative behavior, constant criticizing, hostile remarks about temporary workers, and disruptive conduct. They requested management resolve the issue and discussed the negative effect Grievant's behavior was having on their morale and workplace environment. An investigation was conducted by Fred Combs, the Director of Operations whose duties include conducting investigations as directed by his**

supervisor. (See footnote 5) He found the majority of workers had numerous, specific problems with Grievant's behavior, and the problem was found to be a leadership issue. No finding was made by PEDTA that Grievant was at fault in any way. The supervisor of the area was directed to resolve the problem. No discipline of any kind was given to any employee. Grt. Ex. V, at Level IV.

6. Grievant filed a grievance over these petitions, arguing his fellow employees did not have a right to complain about his behavior, and the complaints were anti-union. This grievance was withdrawn at Grievant's request. (See footnote 6) 7. Grievant also filed a grievance over one of his evaluations because he received two "Needs Improvements". This issue was resolved through a prior settlement, and one "Needs Improvements" was removed, but the "Needs Improvements", dealing with difficulty relating to co-workers, remained.

8. Grievant has filed many grievances over the years, and at one point PEDTA's governing board asked why there were so many grievances being filed. In 1995 and 1996, reports were prepared by the Director of PEDTA's Personnel Department, at the Board's direction, and this issue was discussed in meetings. Later, an unsigned article was published in a newspaper labeling Grievant as a misfit. This article upset Grievant, and he argued this was an example of harassment. Since none of the Board Members called Grievant a misfit, it is unclear why the newspaper printed this article in this way. (See footnote 7)

9. Contrary to Grievant's belief, the Board's request for information about the number and type of grievances, and its subsequent discussion of these grievances was an appropriate action.

10. Grievant applied for promotion three times and did not receive the promotion. No evidence was submitted about the types of positions or the qualifications of the other applicants. (See footnote 8)

Comments about Grievant's daughter 11. At the end of November, 1997, Sam Rahal, Grievant's supervisor, overheard part of a negative comment Kendall Kidd made about Grievant's daughter. He did nothing about this comment at the time. A couple of days later he heard Mr. Kidd repeat the entire comment. He was upset by the comment and believed it would upset Grievant if he heard it. Mr. Rahal voiced this belief to other employees. He discussed the situation with another supervisor and decided to call Mr. Kidd in and give him a

verbal warning on the matter. He gave Mr. Kidd this verbal reprimand on or about December 9, 1997. Mr. Kidd said he was sorry, and he made no further comments about Grievant's daughter.

12. Later Grievant heard about the comments, and he asked General Manager William Gavan to investigate the situation. A detailed investigation was conducted by Mr. Combs at General Manager Gavan's direction, into both Mr. Kidd's and Mr. Rahal's comments. A comprehensive report was submitted to General Manager Gavan on January 21, 1998, which found Mr. Kidd made and repeated an inappropriate remark, and Mr. Rahal discussed the comment with others and did not act quickly enough to correct the situation. Because Manager Gavan saw the situation as one which could cause trouble and hard feelings, he gave both Mr. Kidd and Mr. Rahal written reprimands on February 9, 1998. The written reprimand for Mr. Rahal was for his repeating the comments and his failure to act more quickly. Grt. Ex. A, at Level III.

13. Grievant desires a more severe punishment for these acts by Mr. Kidd and Mr. Rahal. Grievant's daughter, who is a PEDTA employee, has not been involved in this grievance, has not filed a grievance of her own, and has not asked for any further punishment. She also did not testify in these proceedings. Video-taping Incident

14. In 1997, Grievant complained about being sent out on calls to help stranded motorists, as he believed this was an unsafe thing for him to do. Other night watchmen, Mr. Kidd and Mr. Steve Shanklin, believed this was a part of their job, and enjoyed this activity. After Grievant complained, Mr. Combs directed that night watchmen were not required to help stranded motorists. Grt. Ex. F, at Level IV. Mr. Kidd and Mr. Shanklin did not like this decision and were upset with Grievant for complaining.

15. Because Grievant did not want to help stranded motorists, Mr. Shanklin and a friend of his who was a temporary PEDTA employee, Stewart Hudnall, decided to watch Grievant at work and see if he was spending his time sleeping. (See footnote 9) Mr. Shanklin took his video camera with him when he went to watch Grievant at work.

16. Mr. Shanklin and Mr. Hudnall were off duty when they observed Grievant, and PEDTA was unaware of their activities.

17. Sometime in September 1997, Grievant asked PEDTA to help with a fund- raiser for a

disabled child. Grievant solicited PEDTA for some supplies to assist in putting on a meal. PEDTA told Grievant he could have some materials from Headquarters, and he was allowed to take plastic eating utensils, paper plates, napkins, and cups.

18. On two successive nights, September 30 and 31, 1997, Grievant was seen removing PEDTA materials from the Standard Maintenance Area where he worked andplacing them in the trunk of his daughter's car. (See footnote 10) Mr. Shanklin videotaped these actions. Because the materials Grievant carried were in a box, the watchers could not be sure exactly what was in them. After Grievant left the area, Mr. Hudnall went into Grievant's daughter's unlocked car and "popped" the trunk. Mr. Shanklin then videotaped the contents. The materials inside the boxes were PEDTA cleaning materials.

19. The videotape also showed Grievant, contrary to PEDTA policy, giving to his daughter, a PEDTA employee, a ride in the PEDTA vehicle he had been assigned.

20. Mr. Shanklin did not do anything with the tape because he did not want to get Grievant, who had been his friend, in trouble. He did eventually show the tape to fellow employees Mr. Kidd and Mr. Wayne Pell. (See footnote 11) When other employees saw this tape they believed Grievant was stealing, and they encouraged Mr. Shanklin to turn the tape over to management.

21. Grievant was not authorized to take these additional materials. Grt. Ex. B, at Level III. Test. of Fred Combs, Larry Cousins, and George Bostic. Finding of State Police Investigation.

22. Mr. Kidd continued to encourage Mr. Shanklin to give the video tape to their supervisor, Mr. Rahal, or to give him a copy of the tape. Mr. Shanklin continued to refuse as he did not want to get Grievant in trouble. Mr. Kidd had hinted to Mr. Rahal that therewas a video tape that would expose Grievant for wrongdoing. Mr. Rahal's response was he didn't want to hear any more about it without any evidence to support these charges.

23. Eventually, Mr. Shanklin gave Mr. Kidd the tape, and Mr. Kidd placed the tape in Mr. Rahal's truck on March 31, 1998, without anything to identify its origins.

24. Mr. Rahal watched the tape, and it appeared to him that it showed Grievant stealing supplies from PEDTA. He reported the situation to his supervisor.

25. Mr. Rahal's supervisor, General Manager Gavin, directed Mr. Rahal to give the tape to the State Police so an investigation could be conducted. This is the routine practice when

wrongdoing is suspected.

26. The State Police conducted an investigation and interviewed multiple witnesses.

27. During the investigation, Grievant claimed he had received permission to take these materials. Additionally, he stated he did not know what one of the objects was on the videotape. The investigator went to Standard Maintenance and was able to easily identify the object from the materials available in the stockroom.

28. The investigation found Grievant had removed the materials without permission, but the Kanawha County Prosecutor's Office refused to bring criminal charges against Grievant. The Kanawha County Prosecutor's Office also declined to pursue claims against Mr. Shanklin and Mr. Hudnall for entering Grievant's daughter's car.

29. Grievant has repeatedly demanded PEDTA must punish Mr. Shanklin and Mr. Hudnall for their unlawful entry into his daughter's vehicle "without a search warrant." Grievant's daughter has not complained about this entry into her car, and she has not filed a grievance in this matter.

30. General Manager Gavan reviewed the materials from the State Police and Grievant's request and decided to take no action against any party. The Whistle-Blower Law and its possible ramifications played a part in his decision. General Manager Gavan informed Grievant he was "disappointed" with Grievant's removal of items that he did not have authority to take, and he noted Grievant had engaged in a clear cut violation of PEDTA Vehicle Use Policy. General Manager Gavan stated that if Grievant "insist[ed] disciplinary action be taken against others, I would be inclined to take the disciplinary action I deemed advisable against all parties involved in the matter whose actions warranted it." (Emphasis in the original.) Resp. Ex. No. 11, at Level IV. He noted he would not be taking any disciplinary action against anyone at this time.

31. Grievant sued Mr. Shanklin in a civil action, and as settlement of this case, Mr. Shanklin paid Grievant $125.00 and wrote an apology letter. Grt. Ex. No. 1, at Level III.

Hostile work environment - difficulties with a fellow employee outside the workplace

32. Mr. Pell was a temporary employee with PEDTA who used to work summers for this agency. **(See footnote 12)**

33. Mr. Pell and Grievant have a history of a difficult working relationship. Grievant has

frequently complained about the way Mr. Pell has treated him. 34. Shortly after he started work, in mid-April of 1998, a friend of Mr. Pell's gave him a "No Hunting" sign made of plastic. Mr. Pell uses this type of plastic in his wood working. He hung the sign at work and forgot to take it home that evening.

35. Grievant removed the sign Mr. Pell had placed at work because he believed it was put there to harass him about the cleaning supply investigation. He also removed the sign because it was trash, and it was his job to remove the trash. Mr. Pell came to Grievant's house after work to ask him about the sign. Mr. Pell did not go on Grievant's property, and he remained in the roadway while he asked about the sign. This confrontation scared Grievant, and he demanded PEDTA to investigate the situation and make Mr. Pell leave him alone.

36. Grievant is approximately six foot three and weighs over 200 pounds. Mr. Pell is approximately five foot five and weighs approximately one hundred thirty pounds.

37. PEDTA refused to intervene because the events did not occur at work and both men were off duty. They informed Grievant that no action could be taken by them, and Grievant would have to address the problems in a different way.

38. It appears Mr. Pell did not complain about Grievant's behavior toward him until June 22, 1998. On that date, Grievant, who was on duty, repeatedly and slowly circled Mr. Pell in a PEDTA truck while Mr. Pell was off duty picking up aluminum cans on the side of the road so he could sell them. Both Grievant and Mr. Pell called in, and their complaints were noted on the Radio Station Log Sheet. (See footnote 13) Resp. Ex. No. 3, at Level IV. Grievant's behavior was observed by State Trooper Darrell Kincaid. (See footnote 14) Test. Pell; Kincaid at Level IV.

39. After the incident where Grievant circled Mr. Pell in the state vehicle, the situation between these two employees was assigned to Mr. Walter Brubaker, Department Head of the Highway Sections, to resolve. The majority of the complaints were unsubstantiated, with the exception of Mr. Pell's description of Grievant's circling him in a PEDTA vehicle. Mr. Brubaker counseled the two employees on June 23, 1998, in Mr. Rahal's presence, and they agreed they would try to get along. Mr. Brubaker also instructed these employees that for incidents that happened off work property, they should call the sheriff's department. Neither Mr. Rahal nor Mr. Brubaker received any further complaints, and Grievant agrees there were no further problems from June 1998 until Mr. Pell's employment ended October 15, 1998, with the

exception of one time when Mr. Pell "made a face" at him. Grievant did not report this face making, and this incident was not brought up until after Mr. Pell was no longer an employee. There was no testimony to substantiate the "face-making."

40. After the counseling session, Mr. Pell would wait in a hollow outside of work until Grievant left before he would come in the PEDTA building.

41. For many years, Mr. Pell has decorated his lawn and porch during a variety of holiday seasons. Resp. Ex. No. 10, at Level IV. After Mr. Pell was no longer a PEDTAemployee, he decorated his porch for Halloween. He put a male and female dummy on the porch, the male was in a PEDTA-like shirt (See footnote 15) and the female in a union T-shirt. (See footnote 16) A baby in a wagon was also in the display. Grievant pulls his granddaughter in a wagon.

42. Grievant complained frequently about this display, both to Mr. Pell and PEDTA. He wanted PEDTA to make Mr. Pell remove the display and to confiscate the shirts. PEDTA informed Grievant there was nothing they could do because Mr. Pell was no longer an employee, the display was on his own property, and once an employee uses his clothing allowance to purchase his clothes, the clothes are his to do with as he pleases. Resp. Ex. No. 7, at Level IV.

43. Mr. Pell, as a temporary employee, returned all his uniforms when he ceased his temporary employment the middle of October 1998. The shirts he used in the display were given to him by Mr. Kidd and from an unknown donor, who left the shirts in a bag on his porch.

44. Mr. Pell did not like Grievant telling him what he could put on his own front porch, and on Veteran's day and Thanksgiving, he put up displays in keeping with the seasons, but they were not flattering to Grievant.

45. Grievant is very distressed by these displays and insists PEDTA must do something to stop them.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-

6. See also 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).

A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). It may not be determined by the number of witnesses, but by the greater weight of all evidence, the witnesses' opportunity for knowledge, information the witnesses possess, and the witnesses' manner of testifying; these factors determine the weight of the testimony. Black's Law Dictionary, 5th Ed., p. 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S. E. 2d 712 (1957).

A. Credibility

In order to decide the merits of this grievance, it is first necessary to resolve the issue of witness credibility. Where, as here, the existence or nonexistence of contested material facts hinges on witness' credibility, detailed findings of fact and explicit credibility determinations are required. Pine v. W. Va. Dep't of Health and Human Resources,Docket No. 95-HHR-066 (May 12, 1995). E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements;

3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe the demeanor of some of the witnesses and to assess their words and actions during their testimony. Additionally, many witnesses testified both at Level III and Level IV, and the undersigned Administrative Law Judge was able to compare this testimony. Thestatements of these witnesses were consistent with each other, consistent with their prior statements, and internally consistent. There was no indication that any of the witnesses were untruthful. The demeanor of these witnesses was straightforward, and their testimony was plausible.

It is noted that both Mr. Shanklin's and Mr. Kidd's first statements to the State Police were untruthful. They corrected these statements of their own accord. Also, although the majority of Mr. Pell's testimony is found to be truthful and straight-forward, the undersigned Administrative Law Judge did not believe him when he said his Veteran's Day and Thanksgiving Day displays were not directed toward Grievant.

The same cannot be said for Grievant. Grievant appears to suffer from inadequate insight, and he frequently incorrectly assesses events in which he is involved. It was obvious Grievant had a strong tendency to personalize events, and also placed his own interpretation on these occurrences. It is very clear Grievant believes that the majority of PEDTA management and many co-workers are "out to get him".

Examples may be useful in understanding Grievant's point of view and interpretation of events. Grievant believed he was retaliated against for his complaint about assisting abandoned motorists. This is untrue. Grievant complained, Mr. Combs found this complaint was well founded, and shortly thereafter, a memo was sent by Mr. Combs to correct this problem. Additionally, Mr. Combs investigated Grievant's complaint about the inappropriate remarks made by Mr. Kidd and Mr. Rahal. Again, Mr. Combs found this complaint was well founded and action should be taken. This is the same Mr. CombsGrievant says is prejudiced against him. This allegation is unfounded, and calls into question Grievant's reporting on various events.

Another example is Grievant's repeated declaration that PEDTA was at fault to allow fellow employees to complain and file a petition, and then not punish them for these actions.

Grievant's analysis demonstrates his faulty logic. These employees have the right, just as Grievant does, to make their complaints known to management. Grievant's conclusions are frequently not based on the data presented and the facts in evidence. Accordingly, Grievant's testimony is found to be biased, self-serving, and non-credible.

B. Comments about Grievant's daughter - harassment and discrimination

The comments made about Grievant's daughter were inappropriate in the workplace, and it is understandable Grievant would be distressed by them. However, this incident does not demonstrate harassment or discrimination against Grievant. W. Va. Code § 29-6A-2(l) 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." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). In order to establish harassment in violation of W. Va. Code § 29-6A-2(l), the grievant must show a pattern of conduct, rather than asingle improper act. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also Thompson v. Bd. of Trustees, Docket No. 96-BOT-097 (Dec. 31, 1996). Repeated comments of a sexual nature by a supervisor have been found to constitute harassment. Hall, supra. See Tibbs v. Hancock County Bd. of Educ., Docket No. 98-15- 016 (June 16, 1998).

Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 17) of discrimination under W. Va. Code §§ 29-6A-2(d), must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show theoffered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not demonstrated he has been subjected to a pattern of harassment. There was no credible evidence that at the time Mr. Kidd made these remarks, he had engaged in a pattern of conduct directed toward Grievant with the intent, either direct or implied by the circumstances presented, of disturbing, irritating, or annoying him. See Phares, supra. See White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). Mr. Kidd, who is not a supervisor, repeated what was apparently "interesting gossip" without thinking about the effect it would have on Grievant's daughter. He has stated he was sorry for this behavior.

Mr. Rahal was incorrect in repeating this gossip when he was stating his concerns about what effect it would have on any father, and Grievant in particular. However, this one act by a supervisor does not meet the standard of repeated behavior. Further, it must be remembered that these comments were not directed toward Grievant, and thus cannot be seen as evidence of harassment of or discrimination toward him. (See footnote 18) Additionally, both these employees have been disciplined by having written reprimands placed in their personnel

files. (See footnote 19) Obviously, Grievant wants these individuals to be punished more severely, up to and including termination. The amount of discipline an employee receives for his inappropriate acts is a management decision.

The issue of whether an employee can request or require his employer to discipline a fellow employee has been addressed by this Grievance Board. "This Grievance Board may award relief against the employer based upon conduct of which the employer is aware and, which it in effect, 'condones.' White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). However, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. 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)." Rice v. Dep't of Transp., Docket No. 96-DOH-288 (Apr. 30. 1997). Accordingly, the undersigned Administrative Law Judge does not find harassment and discrimination in this set of facts and is without authority to order discipline against another employee.

C. Video-tape Incident

Grievant has also alleged he was harassed because of the videotape incident. He sees the failure of PEDTA to punish Mr. Shanklin and Mr. Hudnall for getting in hisdaughter's car as clear evidence of PEDTA's continued harassment and ill treatment of him. Grievant views the failure of PEDTA to issue a rule informing employees that they are not to get in other employee's vehicles as further proof of this hostile and appalling treatment.

Grievant's beliefs in this regard can be viewed as his difficulty in seeing the forest for the trees. Mr. Shanklin and Mr. Hudnall should not have "popped" the trunk on Grievant's daughter's unlocked car. This action was incorrect, even though they believed they were taping criminal activity, and the tape would be proof of Grievant's illegal behavior.

What Grievant fails to recognize is his own incorrect behavior, and his own behavior in violation of PEDTA rules. He took PEDTA materials without authority and without permission. While it is true he took them for a good purpose, this still does not give him the right to take them. State employees cannot steal the property of the state even if their intentions are good. Further, Grievant was in clear violation of the vehicle use policy when he gave his daughter a ride home in the PEDTA vehicle. Grievant has complained before about other employees using

PEDTA property for their own purposes, and he was correct. Here, he fails to see that his own behavior was similar and could have been punished by PEDTA if it so chose. Grievant wants Mr. Shanklin and Mr. Hudnall punished for a their infraction, while his taking of PEDTA's materials without permission, would go unpunished. An action such as requested by Grievant would be unfair.

General Manager Gavan informed Grievant he had decided to let the situation pass without punishment for anyone, and if he were to discipline anyone, everyone would bepunished. PEDTA's decision in this situation cannot be seen as evidence of harassment, discrimination, retaliation, or the creation a hostile work environment.

D. Hostile work environment and reprisal

Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. See Spencer v. Bureau of Employment Programs, Docket No. 98-HHR-130 (Jan. 29, 1999). Certainly any act might be construed by someone as harassing, hostile, disruptive, or offensive. The question is what standard is to be applied. See Hattman v. Bd. of Directors/West Liberty State College, Docket No. 95- BOD-265R (July 13, 1998). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. Accord Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. Redfearn v. Dep't of Labor, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." See Fonville v. DHHS, 30 MSPR 351 (1986)(citing Glover v. DHEW, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Hubble v. Dep't of Justice, 6 MSPR 659, 6 MSPR 553 (1981).

Grievant's complaints about a hostile work environment fall into two categories. First, Grievant complains about Mr. Pell's behavior towards him, and second, hecomplains, in general, that PEDTA has treated him in a hostile and negative manner ever since he was terminated and filed a grievance in 1991.

Grievant's complaints about Mr. Pell's behavior will be addressed first. The complaints these two employees made about each other were examined and discussed with them. A counseling session was held, and they were informed that complaints outside the workplace would have to be dealt with outside the workplace, PEDTA had no right or authority to control off-duty behavior. The incident of June 22, 1998, was addressed, and as far as PEDTA was aware the situation was resolved, and no further incidents or difficulties were seen or reported. Grievant's complaint that Mr. Pell made a face at him after this counseling session was not reported. Applying the foregoing principles to the evidence presented, the undersigned Administrative Law Judge finds Grievant has not proven by a preponderance of the evidence that PEDTA created an offensive and hostile working environment at Grievant's workplace in connection to his working relationship with Mr. Pell.

As for PEDTA controlling the display on Mr. Pell's front porch, any action of this type would be violative of Mr. Pell's rights. Although it is clear these displays upset Grievant, and it is easy to see why, this is not a grievable event as it did not occur in the workplace. PEDTA has no control over this activity. Further, as for Grievant's request that PEDTA go to Mr. Pell's house and seize the PEDTA uniforms, this is also not within PEDTA's authority, The testimony was clear, once a regular employee receives his uniforms, theyare his to do with as he pleases. If an employee decides to give them to someone else, he may do so.

Grievant has failed to demonstrate that the "display situation" directly impacted on his "conditions of employment", and that PEDTA's refusal to act was an "action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employee." See W. Va. Code § 29-6A-2(i); Dooley v. W. Va. Dep't of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Ford Motor Co. v. NLRB, 441 U.S. 488 (1979). Thus, Grievant has not established that PEDTA's failure to take effective action regarding this pattern of conduct constituted a substantial detriment to or interference with his job performance and his health and safety. See W. Va. Code § 29-6A-2(i); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28- 422/459 (Jan. 31, 1996). Accordingly, this complaint of Grievant's is not a grievable event. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other

participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in 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;**
>
> **4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**
>
> **5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.**

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has not established a prima facie case of reprisal. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). While Grievant has filed multiple grievances in the past, he has not shown he has currently been treated in an adverse manner. Even if the gossip about his daughter could be seen as Grievant's problem, he was not treated in an adverse manner in this regard. As soon as the problem was discovered, discipline was imposed. As for the videotape incident, this incident was turned

over to the State Police as is the norm forthese type of occurrence. (See footnote 20) Even though it was found that Grievant took PEDTA property without authority, he was not punished.

In assessing these grievances, the undersigned Administrative Law Judge did not find it necessary to discuss in detail each and every example Grievant gave as proof of mistreatment. Many of the incidents Grievant presented were easily explained, were not confirmed by the testimony of other witnesses, and were the result of Grievant's misperception of events. In actuality, Grievant's evidence demonstrated the opposite of what he claimed. For example, Grievant complained night watchman should not be checking abandoned cars. This complaint was investigated and within a week, a memo went out supporting Grievant's complaint and mandating night watchmen would not check abandoned cars any more. Additionally, when a third petition was sent to management, the majority of the employees in his unit saw Grievant as a disruptive and hostile force within the workplace. If management had been so inclined, it could have taken action against Grievant for his comments, and at the very least, could have transferred him. This PEDTA did not do. Instead they directed the supervisor to resolve the problem. When Grievant complained about the comment about his daughter, a complete investigation was conducted, and additional punishment was imposed. These are not the acts of a management which desires to punish Grievant, and which is engaged in retaliation, harassment, discrimination, or one which is promoting a hostile work environment. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

2. Harassment is defined as "repeated or continual disturbance, irritation, or annoyance

of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 29-6A-2(l).

3. In order to establish harassment in violation of W. Va. Code § 29-6A-2(l), the grievant must show a pattern of conduct, rather than a single, isolated improper act. See Black v. Dep't of Transp., Docket No. 99-DOH 362 (Jan. 21, 2000); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991).

4. Grievant did not meet his burden of proof and demonstrate he has been subjected to harassment by PEDTA .

5. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." 6. To establish a prima facie case of discrimination under W. Va. Code §§ 29- 6A-2(d) & (h), must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**
>
> **and,**
>
> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981);

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

7. Grievant not demonstrate PEDTA has discriminated against him.

8. This Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against an employee, or to impose criminal penalties. See Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994); Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992). 9. This Grievance Board does not have the authority to substitute its judgement for the management philosophy of the employer. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997). See Settle v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 00-PEDTA-031 (May 23, 2000); Bennett v. Dep't of Health and Human Resources, Docket No. 99-HHR-517 (Apr. 26, 2000); Terry v. Dep't of Transp./ Div. of Personnel, Docket No. 99-DOH-207 (Mar. 17, 2000).

10. 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 § 29-6A-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by proving the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in 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;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

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) ; 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).

11. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

12. Grievant failed to demonstrate a prima facie case of retaliation, as he was unable to establish he had been treated in an adverse manner by PEDTA.

13. Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. See Spencer v. Bureau of Employment Programs, Docket No. 98-HHR-130 (Jan. 29, 1999). Accord Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

14. An employer is entitled to expect its employees to conform to certain standards of civil behavior. Redfearn v. Dep't of Labor, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." See Fonville v. DHHS, 30 MSPR 351 (1986)(citing Glover v. DHEW, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Hubble v. Dep't of Justice, 6 MSPR 659, 6 MSPR 553 (1981). 15. Grievant failed to establish PEDTA created or encouraged a hostile work environment.

16. Grievant failed to establish PEDTA violated any law, rule, policy, regulation, or written agreement in regard to his grievances.

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 2000

Footnote: 1

Because of the lack of clarity in the first Statement of Grievance, PEDTA required Grievant to restate his complaint. This second Statement of Grievance was still lacking in clarity, and, on the fourth day of hearing, the undersigned Administrative Law Judge asked Grievant to restate his grievance, and to clarify the issues involved. Additionally, a claim for harassment and discrimination, which had not been heard below, was joined with this grievance by the agreement of the parties.

Footnote: 2

The majority of the proceedings had been reviewed before the hearing on June 23, 2000.

Footnote: 3

Grievant represented himself and was assisted by fellow employee, Boyd Lilly, and representative Steve Rutledge. Respondent was represented by General Counsel, David Abrams.

Footnote: 4

Grievant also alleged this former supervisor, who received a suspension and a lateral transfer, currently exerted control over his evaluations and promotion requests. No evidence was introduced to support this contention, and evidence was admitted to rebut this allegation.

Footnote: 5

Mr. Combs had signed a previous petition against Grievant, and Grievant has repeatedly argued that the investigations conducted by him are prejudicial to him. As is demonstrated by the findings in this investigation and the others discussed later in this decision, the results of Director Combs' investigations do not demonstrate prejudice against Grievant.

Footnote: 6

It should be noted that contrary to Grievant's belief, co-workers have a right, and indeed probably a

obligation, to notify management of morale and work related problems in a direct and forthright manner.

Footnote: 7

No reporter was called to clarify this statement, and with the evidence presented there can be no finding of wrongdoing on the part of PEDTA. Also, this issue was the subject of a prior grievance that was withdrawn by Grievant.

Footnote: 8

Given the lack of information on this issue, as well as the fact that PEDTA's failure to promote Grievant was the subject of a prior, abandoned grievance, this issue cannot support Grievant's contentions of harassment and discrimination.

Footnote: 9

Grievant argued Mr. Shanklin had also watched and video-taped him at work because Grievant had complained to his supervisor about the way Mr. Shanklin had handled a traffic problem. This belief is incorrect, as the accidents Grievant complained about occurred in November 1997. Resp. Ex. Nos. 2A and 2B, at Level IV.

Footnote: 10

Grievant's explanation as to why he chose to place these materials in his daughter's car as opposed to his own truck was because he did not want to "make an issue out of it." Grt. Ex. B, at Level III.

Footnote: 11

At the time Mr. Pell viewed the tape, it does not appear he was a PEDTA employee, as he had been employed only as a temporary worker, and their tour of duty ends in the middle of October.

Footnote: 12

It appears that Mr. Pell was not hired the past two summers, because of Grievant's numerous complaints about this employee. PEDTA was clear that Mr. Pell is a good worker, and their investigations did not reveal any wrongdoing on Mr. Pell's part.

Footnote: 13

Grievant alleged Mr. Pell gave him "the finger", and Mr. Pell reported he did not.

Footnote: 14

Grievant argued Trooper Kincaid was prejudiced against him and had lied, but he asked no questions of this witness to demonstrate this point, nor did he offer any reason why Trooper Kincaid should not be believed, other than he was allegedly friends with Mr. Kidd.

Footnote: 15

Mr. Pell later confirmed the shirt was a PEDTA shirt from which he had removed all the patches.

Footnote: 16

Mr. Pell stated he had drawn a straight line over the top of the U in WVSEU to make it an O so it would no longer be a union shirt.

Footnote: 17

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 18

It is questionable whether Grievant could even file a grievance over this episode as it would appear that he does not have standing. The undersigned Administrative Law Judge also wonders if indeed his daughter wanted a grievance filed in this case, as she did not testify or participate in this grievance in any way. Since the parties did not raise this issue it will not addressed further.

Footnote: 19

Grievant repeatedly alleged these employees did not receive these written reprimands because he had not seen them, even though numerous witnesses testified under oath about them. PEDTA did not feel it was necessary for Grievant to see another employee's written reprimand. During the Level IV hearing, the parties agreed to allow the undersigned Administrative Law Judge read the written reprimands to see if they were real and to report the date they were received. These written reprimands were dated February 9, 1998.

Footnote: 20

Grievant's allegation that Mr. Young's "bomb threat" should have been referred to the State Police, and PEDTA's failure to do so is discrimination, is without merit. Clearly, management did not view Mr. Young's statement as a threat, but viewed his statements in total as sufficiently important to issue a written reprimand for derogatory remarks. Resp. Ex. No. 6, at Level IV.