ELAINE KOONTZ,

Grievant,

v. **DOCKET NO. 01-25-431**

MARSHALL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

This appeal from a Level II Decision of Donald Yost, designee of the Superintendent of Marshall County Schools, entered June 26, 2001, was submitted by the parties for a decision based on the record developed at the lower levels, and became mature for consideration on October 3, 2001 when the parties (See footnote 1) agreed that they did not wish this grievance to be combined with another pending grievance. The Statement of Grievance filed at Level I on May 17, 2001, is: "I am being harassed and retaliated against by my supervisor for previously filing a grievance. This is a violation of my rights under WV Code, 18-29-2(n)(p)." As relief, Grievant seeks: "The harassment to stop and take the appropriate action towards my supervisor."

The record developed below comprises the original Grievance Form, Transcript of the Level II hearing, exhibits admitted at the Level II hearing, Respondent's Proposed Level II Findings of Fact and Conclusions of Law, and the Level II Grievance Decision. Based ona review of this record (See footnote 2) , the undersigned concludes that the following material facts are apparent:

FINDINGS OF FACT

1. Grievant Elaine Koontz is a custodian employed by Respondent Marshall County Board of Education at Center McMechen Elementary School (CME) and has held that position since 1990. [Tr. p. 9] Her work day begins at 5:30 a.m. and ends at 1:30 p.m. [Tr. pp. 12, 13]

2. Grievant's immediate supervisor is the principal of CME, Edward Sherman. [Tr. p. 54]

3. In August, 2000 Grievant filed a grievance, the details of which are not contained in the record, that resulted in a change in Grievant's responsibilities and a plan of improvement. [Tr. pp. 42, 76, 80]

4. From approximately October, 2000 to May, 2001 (seven months), Grievant had been away

from work to recuperate from knee surgery. [Tr. p. 11] A substitute custodian filled in for her during this time. [Tr. p. 64]

5. The gymnasium at CME is also used as a commons area/cafeteria. On her first or second day back to work (See footnote 3) , May 2, 2001, Mr. Sherman verbally reprimanded Grievant because he felt that the gymnasium floor was not clean that morning. [Tr. pp.10-12] 6. On May 9, 2001 Grievant received both verbal and written reprimands from Mr. Sherman because the floor of the gymnasium was not clean. [Tr. pp. 10, 27; Gr. Exh. No. 1] Grievant admitted that the floor was dirty. [Tr. p. 15, 28]

7. On May 11, 2001 Grievant received a written reprimand from Mr. Sherman stating "it was apparent that [Grievant] did not sweep or mop the gym floor after breakfast." [Tr. p. 10, Gr. Exh. No. 2]. Grievant admitted she "was a little lax" and did not clean under the tables thoroughly. [Tr. p. 20].

8. Part of Grievant's daily duties is to prepare the cafeteria before 7:50 a.m. and to clean it, including mopping the floor, after breakfast and again after lunch. [Resp. Exh. No. 2] Less specifically, she is to "wash, strip and wax floors as needed." [Id.]

9. Grievant is responsible to the principal of the school and receives her instructions from the principal. [Resp. Exh. No. 1] She is responsible for the cleanliness and attractiveness of the school building and grounds. [Id.]

10. The cleanliness of the gymnasium floor has been an ongoing problem that is not limited to only those occasions when Mr. Sherman has given Grievant a verbal or written reprimand. [Tr. p. 56]

11. The substitute who filled in for Grievant while she was on leave was able to keep the school clean to Mr. Sherman's satisfaction. [Tr. p. 79-80]

DISCUSSION

Grievant alleges both harassment and retaliation as defined in Section18-29-2 of the W.Va. Code. Since these are not disciplinary matters, the burden of proving these allegations is on the Grievant. "Harassment" is defined as repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to thedemeanor expected by law, policy and profession. W.Va. Code § 18-29-2(n). Harassment is basically a series of actions taken by a person's supervisor for no reason other than the vexation of the employee. See, Coster v. Div. of Corrections, Docket No. 98-CORR-109R (Nov. 30, 1998). 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 (1999). The common elements of these definitions are a repetition of the supervisor's actions and a lack of reason for them. Here, it is undisputed that Mr. Sherman repeatedly chastised Grievant about the cleanliness of the gymnasium floor. However, it is also beyond dispute that on each of these occasions, the floor was not clean.

"Reprisal" means the 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. W.Va. Code § 18-29-2(p). Retaliation and reprisal are practically synonymous. The Supreme Court of Appeals of West Virginia has defined the elements necessary to make a prima facie case for an action of unlawful reprisal. Although the case it considered dealt with a discharged employee, the test applies equally well to an employee subjected to other disciplinary measures, such as verbal and written reprimands. The court held:

> The burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's dischargefollowed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Frank's Shoe Store v. W.Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

In the instant case, Grievant did engage in the protected activity of filing a grievance, and her employer was aware of the activity. Subsequently, she was subjected to a series of written and verbal instructions and reprimands asserting her work performance was unsatisfactory. Although these disciplinary actions occurred several months later, Grievant had not been at work for seven months in the intervening time period. Thus, the retaliatory motivation may be inferred despite the protracted interval.

An employer may rebut the presumption of retaliatory action by offering "credible evidence of legitimate nondiscriminatory reasons for its actions . . . ." Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461, 464 (1988); see also Shepherdstown Vol. Fire Dep't v. State ex rel. W.Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the

evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. Mace, 377 S.E.2d 461 at 464. Grievant's employer rebuts this inference with evidence that Grievant's work performance actually was substandard. Each reprimand concerned the unclean state of the gymnasium floor, and in each case Grievant admitted that she had not followed her supervisor's instructions for cleaning the floor.

In order to meet her burden of proof on both the retaliation and reprisal claims, Grievant must overcome the “reason” obstacle: whether Mr. Sherman's actions were basedon a reasonable expectation that Grievant comply with his instructions to clean the floor, or whether his actions were designed merely to irritate Grievant. It has been established that cleaning the gymnasium floor is a part of Grievant's everyday duties, therefore it is reasonable for Mr. Sherman to expect that, in the absence of some unforeseen circumstance, this job be done by Grievant.

On the instance of the first reprimand, Grievant admitted that on May 2 the floor was dirty when Mr. Sherman inspected it that morning before breakfast. While Grievant explained that it had become dirty after it was cleaned the previous afternoon, she did not explain why she had left it unclean when she set the cafeteria up for breakfast that morning.

On May 9, Mr. Sherman gave grievant both verbal and written reprimands that clearly stated his expectations of her performance and the reasons why he felt the reprimand was necessary. The written reprimand stated that the floor was dirty on the afternoon of May 8 and on the morning of May 9. Although Grievant did mop the floor on the 8th, which took the shine off but presumably left it clean, she admitted that the floor was dirty on the 9th. She explained that she felt that she could not mop the floor because a gym class began before breakfast was finished on the 9th.

Grievant admitted that the floor was dirty and littered with breakfast debris on the afternoon of Friday, May 11 when she was reprimanded for those reasons. Her explanation as to why it was that way, however, is unclear. At one point, she testified that she “usually just sweep[s] around the tables and mop[s] around the tables [and] take[s] the trash out on Friday.” [Tr. p. 18] She later stated that on this particular Friday, the tables were left down because they had an ice cream party. [Tr. p. 30] Whichever account is accurate,neither adequately explains why she could not have moved and cleaned under the tables the way she does the other four days of the week.

In each case, Grievant has demonstrated that it was her belief that there were reasons why it would have been difficult for her to perform her duties as she normally would be expected to, and that

Mr. Sherman refused to consider her reasons. She admitted that it was a matter of perception, where she perceived that she had done her job and he did not. It is not evident, however, that her excuses would have changed the overall reality that, in Mr. Sherman's opinion, the school was not as clean as it should be. While it is Grievant's perception that the area is a clean as she can make it, it is Mr. Sherman's opinion that counts, because he is the principal. That it is not impossible to meet his standard is evident by the fact that the substitute was able to do so. It may be assumed that the substitute would have encountered the same or similar problems, but obviously overcame them in a way Grievant is unwilling to.

"The critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision." Conner v. Barbour County Bd. of Educ., 93-01-154 (April 8, 1994). The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a "significant," "substantial" or "motivating" factor in the adverse personnel action. Warren v. Dept. of Army, 804 F.2d 654 (Fed. Cir. 1986); Harvey, supra; See P. Broida, A Guide to Merit Systems Protection Board Law & Practice, Chapter 13 (5th ed. 1988). It appears that the working relationship between Grievant and Mr. Sherman is strained, at best, and that neither is interested in improving that relationship. However, the strain apparentlyoriginated long before Grievant filed her first grievance, and is based on her insistence on doing things her way rather than as her supervisor instructs her to. While Mr. Sherman, as the administrator, could take the initiative by listening to Grievant's explanations as to the difficulties she has in following the letter of his instructions and helping to devise a workable solution, he clearly prefers to exercise his authority rather than his management skills. Grievant, on the other hand, could exercise more diligence and give Mr. Sherman less reason to complain. However, the legal burden is on Grievant to do what she is told, and Mr. Sherman is within his rights when he repeatedly brings her omissions to her attention. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Dilley v. Cabell County Bd. of Educ., Docket No. 97-06-164 (Sept. 19, 1997); Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990). Grievant has clear and proper instructions to keep the gymnasium floor clean to Mr. Sherman's standards, and each time Mr. Sherman has reprimand her for a failure to do so, the floor was not clean. It has not been proven that Mr. Sherman's cleanliness standards are based on retaliation for a prior Grievance.

The following conclusions of law support the above discussion:

CONCLUSIONS OF LAW

1. While this grievance does involve certain disciplinary actions, the harassment and retaliation charged are not disciplinary. Grievant therefore has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 §§ 18-29-2, 18-29-6.

2. "Harassment" means 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 § 18-29-2(n). Harassment is basically a series of actions taken by a person's supervisor for no reason other than the vexation of the employee. See, Coster v. Division of Corrections, Docket No. 98-CORR-109R (Nov. 30, 1998). 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 (1999). The common elements of these definitions are a repetition of the supervisor's actions and a lack of reason for them.

3. "Reprisal" means the 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. W.Va. Code § 18-29-2(p).

4. To establish a prima facie reprisal claim:

> The burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Frank's Shoe Store v. W.Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). An employer may rebut the presumption of retaliatory action by offering "credible evidence of legitimate nondiscriminatory reasons for its actions . . . ." Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461, 464 (1988); see also, Shepherdstown Vol. Fire Dep't v. State ex rel. W.Va. Human Rights

Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. Mace, *supra.*

5. "The critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision." Conner v. Barbour County Bd. of Educ., 93-01-154 (April 8, 1994). The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a "significant," "substantial" or "motivating" factor in the adverse personnel action. Warren v. Dept. of Army, 804 F.2d 654 (Fed. Cir. 1986); Harvey, supra; See P. Broida, A Guide to Merit Systems Protection Board Law & Practice, Chapter 13 (5th ed. 1988).

6. Respondent successfully rebutted the inference of reprisal by showing that the reprimands for substandard job performance were directly related to Grievant's failure to maintain the cleanliness of the school to her supervisor's standards. Grievant did not establish that the Principal's reasons for reprimanding her were merely pretext.

For the foregoing reasons, this grievance is hereby **DENIED**. Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall County. Any 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: October 17, 2001 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant was represented by Owens Brown, Region I Uniserv Consultant, and Respondent was represented by Kimberly Croyle, Esq.

Footnote: 2

A Level IV hearing was held October 3, 2001, on a separate grievance filed by Grievant involving related issues. Although additional facts were adduced at that hearing which might have a bearing on the matters under consideration here, only those facts contained in the lower level record of this grievance were considered in this decision.

Footnote: 3

Grievant's testimony is somewhat conflicting. She stated that she mopped the floor after lunch on May 1, and that the date she returned to work was May 2 (Tr. p. 11).