THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KAREN K. VANCE,
Grievant,

v. **DOCKET NO. 2010-0648-CONS**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent, and

TAMMY LYNN CUSTER,
Intervenor.

DECISION

Grievant, Karen K. Vance, filed two grievances against her employer, the Jefferson County Board of Education, on August 27, and September 17, 2009. The first grievance challenged the posting of a position, alleging that the posting "favored a specific applicant," and violated "West Virginia School Law Code No. 18A-2-7, 18A-4-8b, 6C-2-3 and all applicable West Virginia School Law Codes." Grievant also asserted in the statement of grievance that Respondent "violated the Administrative Law Judge's decision for Grievance No. 2009-0232-JefED." As relief Grievant sought: "The Grievant shall be made whole in every way. Based on the decision in case no. 2009-0232-JefED, the Grievant is entitled to all benefits that ha[ve] been provided to the employee who held the Special Education Aide position for the 2008-2009 school year, including all training, information, time, materials, and equipment provided to that employee."

The second grievance alleged "[c]ompetency testing violation 18A-4-8e; 18A-4-8b(c) Aide classification; 18A-4-8(o) priority status to cont' contract employee-cannot perform

duties; 6C-2-2(1)(o) harassment/reprisal and all applicable WV School Law Codes." As relief Grievant sought that she be placed in her "former position with the 5th grade, visually impaired student @ Tale School along with Braille Sp. designation per title on posting 8/12. Restore absentee days taken due to stress/debil[it]ation. Grievant made whole in every way."

After an agreed extension of the time lines, the Chief Administrator responded at level one on October 7, 2009, that she had no authority to grant the relief requested, and these matters proceeded to level two. A mediation session was held on November 2, 2009. The two grievances were then consolidated, and Grievant appealed to level three on November 27, 2009. Two days of hearing were held at level three before the undersigned Administrative Law Judge on January 14 and 29, 2010, in the Grievance Board's Westover office. Grievant was represented by Robert A. Fahnestock, Business Agent, Teamsters Local Union No. 992, Respondent was represented by Amy S. Brown, Respondent's General Counsel, and Intervenor was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association. This matter became mature for decision upon receipt of the last of the parties' written arguments, on March 11, 2010.

Synopsis

These two grievances presented several issues. First, Grievant claimed that Respondent did not properly implement a Grievance Board Decision issued in April 2009. Grievant's sole remedy, by statute, was to seek enforcement through the Circuit Court, not through the filing of another grievance.

In the summer of 2009 Respondent posted a Braille Specialist position, and required that the applicants pass a competency test. Grievant asserted that the posting unfairly

favored the person who had worked with the subject visually impaired student the previous year, but did not produce any evidence in support of this claim. There was no state competency test for the Braille Specialist, and none of the applicants held the title. Respondent hired a person competent to provide the training and testing on a contract basis, as it had no employee available who could provide this service. Grievant's claim that Respondent violated the law because a full-time employee of Respondent did not provide the training and testing failed for several reasons, but importantly, Grievant did not demonstrate that the training and testing was inadequate. Grievant also claimed that the testing was not uniform, her test was not graded in the same manner as other applicants, and the passing score had to be 70%, and could not be 75%, because that is the passing score for the state competency test for Aides. Grievant did not demonstrate that the training and testing were fatally flawed, or that she had passed the competency test and should have been placed in the position.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Jefferson County Board of Education ("JBOE") for 20 years. Her current classification is Aide. She holds a paraprofessional certificate.

2. During the 2005-2006 and 2006-2007 school years Grievant was assigned to work with a blind student at T.A. Lowery Elementary School, E.C.[1]

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[1] In order to protect the student's privacy, he was referred to throughout the hearing by his initials or his nickname. Consistent with the Grievance Board's practice, this student

3. Jannene Carr is employed by JBOE as the teacher for visually impaired students. Mrs. Carr began working with E.C. when he was three years old, strengthening his tactile motor skills in preparation for Braille instruction and usage. When E.C. was in the second grade, Mrs. Carr ordered his textbook in Braille, and by the third grade E.C. was using Braille in his class work. Grievant was E.C.'s Aide when he was in the second and third grades.

4. Grievant never took any action on her own to learn Braille. Mrs. Carr inquired about training Grievant in Braille, but did not pursue this when Grievant said she was not interested in doing any training after school hours. Mrs. Carr did not believe that Grievant wanted to learn Braille.

5. Grievant's position for the 2006-2007 school year had been posted as a one year only position. Grievant did not seek placement in another position, and her employment was terminated at the end of the school year. Grievant filed a grievance, and was returned to her employment with JBOE by the Grievance Board in a decision issued by Administrative Law Judge M. Paul Marteney, dated April 23, 2009. The decision states that Grievant "should have been placed on the transfer list at the end of the school year and transferred into an appropriate position based on her seniority through the reduction in force process." The decision ordered that Respondent recognize Grievant's continuing contract, and that Respondent "grant her any lost seniority, pay and benefits to which she would have been entitled *had she been properly transferred to* ***an*** *available position* for the 2008-2009 school year, *and to take any actions* consistent with her continuing contract

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will also be referred to by his initials in this decision.

status *for the 2009-2010 school year*." (Emphasis added.) Neither party appealed this decision. JBOE did not place Grievant in a position for the last month of the 2008-2009 school year.

6. During the 2008-2009 school year Tammy Custer was employed by JBOE as an Itinerant Special Education Aide. As Ms. Custer was an Itinerant Aide, JBOE moved Ms. Custer to T.A. Lowery Elementary School for the 2008-2009 school year, and she was assigned to work with E.C. E.C. was in fourth grade during that school year, and was able to read along in his Braille textbooks with the rest of the class, and type his spelling words in Braille. Ms. Custer's job was to act as a scribe for E.C., reading him assignments, and putting his work into print form so that his teacher could grade his work. Ms. Custer had been employed by JBOE since October 2006, as a substitute and then full-time custodian, and first began working as an Aide in February 2008.

7. Ms. Custer became interested in Braille, and believed she would need to learn Braille in order to better help E.C. Ms. Custer chose to sit in on the individual sessions when Mrs. Carr was instructing E.C. in Braille, even though she was allowed during that time to go on break. Ms. Custer asked Mrs. Carr for learning materials so she could learn the Braille alphabet on her own, and Mrs. Carr provided her with some materials. Ms. Custer also asked E.C.'s parents if she could borrow E.C.'s Brailler, the machine used to type in Braille, and was allowed to do so. She took it home with her and practiced both during the school year and over the summer. Mrs. Carr did not ask Ms. Custer to learn Braille, nor did she encourage her to do so.

8. In May 2009, Mrs. Carr and Ms. Custer participated in an IEP meeting held regarding E.C. Ms. Custer did not stay for the entire meeting. While Ms. Custer was in

attendance, Mrs. Carr discussed the need for a Braille Specialist for E.C., because he had progressed to the point that he no longer needed a scribe, but now needed an Aide who could transcribe his work in Braille to print for his teacher to grade. The goal of the IEP Team is for E.C. to become able to function independently of an Aide at school within a few years. The IEP Team decided that a Braille Specialist was needed for E.C., and this was recommended in the IEP for the next school year.

9. Bill Askew, JBOE's Human Resources Facilitator, developed a job description for a Braille Specialist. He used the generic Special Education Aide job description, and then added the qualifications needed for the Braille Specialist, after consultation with Mrs. Carr. Mrs. Carr had reviewed a posting for a Braille Specialist developed by RESA for some guidance on what duties the person in this position would perform. Mr. Askew added the provision that the successful applicant must be familiar with Braille and the rules of Braille transcribing, and the Nemeth Code of Braille Mathematics and Scientific Notation, and "demonstrate a knowledge of blindness and visual impairments and their affect on the individual's development." The Special Education Aide job description includes a lifting requirement, and that requirement was retained in the Braille Specialist job description.

10. On August 11, 2009, JBOE posted a Braille Specialist/Special Education Classroom Aide, Itinerant position, assigned to T.A. Lowery Elementary School, with the new job description attached. There were six applicants for the position, including, Grievant, Ms. Custer, Sandra Longerbeam, and Joyce Fisher. Grievant was the most senior applicant. None of the applicants held the title of Braille Specialist.

11. Grievant thought the posting was suspicious, even before she saw the posting.

12. The State Department of Education has not developed a competency test for the Braille Specialist classification. JBOE determined that a competency test should be given to the applicants in order to assure that the successful applicant was qualified.

13. Mrs. Carr was attending to personal matters during the summer of 2009, and could not participate in developing or administering training or a competency test. She recommended Christine Cook for this role, and JBOE contracted with Ms. Cook to provide eight hours of training, and to develop and administer the competency test. Ms. Cook has been employed by the Berkeley County Board of Education as a teacher of visually impaired students for 20 years, and is visually impaired herself. She has a Masters Degree plus 30 hours from the University of Virginia, and a certificate in Visual Impairment from Vanderbilt University. Ms. Cook had trained other adults to be Braille Specialists. She and Mrs. Carr had gone through some training together. JBOE had no employees available who were qualified to provide the necessary training or develop and administer the competency test.

14. Ms. Cook developed training materials which would give the applicants a basic introduction to the Braille Code, the alphabet, some punctuation, and four operations in math, but no instruction on contractions. Ms. Cook gave the in-service training for the Braille Specialist. Two of the original applicants withdrew their names prior to the training. The one day training was scheduled for August 20, 2009, and Mr. Askew contacted the remaining applicants. Ms. Cook trained Ms. Custer, Ms. Fisher, and Ms. Longerbeam on that day, providing eight hours of training. She prepared some worksheets for the applicants, and added in some materials Mrs. Carr had given to her, with the idea that the applicants could practice with these materials after the training. She prepared all the

packets for the four applicants at the same time.

15. The applicants each had a Brailler which they used during the training. One of the Braillers was borrowed by Mrs. Carr from the School for the Deaf and Blind. Mrs. Carr tested the machine before delivering it to Ms. Cook, and it was working properly. The other three machines belonged to Berkeley County.

16. Grievant chose not to attend the training on the same day as the other three applicants, because of her scheduled vacation. She had worked the summer and felt she needed the time away. Grievant received one on one training from Ms. Cook on August 26, 2009.[2] Ms. Cook moved through the training materials faster with Grievant since it was one on one instruction. After six hours of training Grievant acknowledged that she had received sufficient training. Ms. Cook called Beverly Hughes and had Grievant explain to her that she was satisfied that she had received sufficient training. Grievant received no additional training.

17. Ms. Fisher printed an evaluation form and asked Ms. Cook if the applicants could complete it to evaluate the training. Ms. Fisher was impressed with the training. Ms. Fisher, Ms. Custer and Ms. Longerbeam all rated the training as sufficient, and one of the applicants wrote on the evaluation that Ms. Cook was "fantastic." Ms. Cook forgot to give Grievant an evaluation form.

18. Ms. Cook developed the competency test. It contained two parts, a reading section with 54 words, and a writing section with eight sentences and four simple math

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[2] Ms. Cook testified that the training was administered on August 27, but she also testified that three of the applicants were tested on August 27. Based upon the entirety of the testimony, the undersigned concludes that Ms. Vance actually trained on August 26.

problems to solve. The writing section required the applicant to type the sentences using a Brailler, and was graded for alphabet, punctuation, and neatness. Neatness is important in typing Braille, and Ms. Cook explained this to the applicants during the training. She told the applicants to start over if they made a mistake. The score for the reading section was then combined with the score for the writing section. Applicants were not encouraged to use contractions, but they received extra points for doing so. All applicants' tests were graded in the same manner. Ninety minutes was allocated for taking the test.

19. Based upon her experience as a teacher and Braille user, Ms. Cook decided prior to administering the test that a passing score would be 75%, and she made the decision on how the test scores would be combined for the two parts, and how the test would be graded. Ms. Cook thought that a score of 75% was reasonable, and gave everyone a chance to pass.

20. The West Virginia Department of Education has established a single competency test for the classification titles of Aide I, Aide II, Aide III, and Aide IV. In order to pass the competency test for the Aide classification, an individual must correctly answer at least 35 of the 50 questions on the test. The minimum score to pass this test is 70%.

21. Ms. Fisher, Ms. Longerbeam and Ms. Custer were given a week after the training before they took the competency test. They used this time to practice their new skills.

22. Ms. Fisher, Ms. Longerbeam and Ms. Custer took the competency test on the same day, August 27, 2009, but at different times.

23. Grievant was offered a week to practice her new skills between the training and the competency testing. Grievant chose to take the test on August 28, 2009, two days

after the training. She did not take the test on the same day as the other applicants.

24. After the training was completed, Berkeley County received a new Brailler. Three of the four Berkeley County Braillers had to be delivered to students prior to the testing, leaving two Braillers for the testing, one belonging to Berkeley County, and the Brailler Mrs. Carr had borrowed from the School for the Deaf and Blind. The four applicants tested on one of these two Braillers.

25. The applicants read to Ms. Cook from a basic Braille reader titled "Frog and Toad," and Ms. Cook kept track of what each applicant read to her on her computerized Brailler. Ms. Cook's Brailler suffered a malfunction after she had scored the reading portion of the tests, and all the information she recorded from the reading tests was lost.

26. During the testing, Ms. Longerbeam was using one of the Braillers owned by Berkeley County, and had some difficulty getting the Braille paper in the Brailler during the testing. This was not part of the test, and Ms. Cook helped her with this task. Ms. Longerbeam took the test in the hallway, and had a lot of distractions. The machine stuck once while she was taking the test, and she started over. Ms. Cook found Ms. Longerbeam's Braille paper to be extremely neat, and she was pleased with it.[3]

27. The remaining three applicants all tested on the Brailler which Mrs. Carr had borrowed from the School for the Deaf and Blind.

28. Ms. Custer had no problem with the Brailler during the testing.

29. Ms. Fisher took the test in Ms. Cook's office, where she was interrupted several times, and Ms. Cook was talking on the telephone. The right margin on the Brailler

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[3] This explains why Ms. Cook did not reduce Ms. Longerbeam's score for neatness, as is noted in Grievant's Proposed Findings of Fact.

she was using had gotten pushed over too far to the right and caught on the paper. Ms. Cook corrected the margin and told Ms. Fisher not to erase, but to start over. Ms. Cook gave Ms. Fisher a little extra time to complete the test because of the interruptions, and she did not penalize Ms. Fisher for the problem with the machine because it was a mechanical issue which Ms. Cook should have checked before the testing started.

30. Grievant took the competency test in Ms. Cook's office. The Brailler Grievant used jammed four or five times during the testing. Ms. Cook had not noticed any problem with this Brailler before. Ms. Cook determined that the problem was that Grievant was not pressing down on all the keys evenly, and she instructed Grievant that this was necessary for the machine to work properly. Ms. Cook believed Grievant ignored her instruction. Ms. Cook fixed the machine immediately each time it jammed, and Grievant was not given any additional testing time because of this problem.

31. Grievant chose to spend more than 60 minutes on the writing section of the test, leaving her with less time for the reading section. Grievant read only 39 words. Grievant had 37 errors on letters, and 8 mistakes on punctuation. Ms. Cook found the paper Grievant produced using the Brailler to be very sloppy, and she was not happy with it. She subtracted 5 points for neatness, and she added 1.2 points for use of contractions. Grievant scored a 73.6% on the competency test, which was not a passing grade.

32. Ms. Fisher and Ms. Longerbeam both passed the competency test, scoring 89.9% and 92.05%, respectively, and both were more senior than Ms. Custer. Ms. Custer scored 90.7%. Ms. Longerbeam and Ms. Fisher were offered the job in order of seniority, and both turned it down. Ms. Custer was then offered the job as Braille Specialist, and she accepted the position. Ms. Custer was placed in the Braille Specialist position in the fall

of 2009.

33. Grievant is a member of the Teamster's Union. She requested professional leave to attend a Teamsters Women's Conference. The principal of the school where she was working refused to grant her request, telling her that she had not received the request until after the date of the conference.

34. Grievant's name did not appear on the September 2009 seniority list prepared by Joyce Fanjoy, a clerical employee of JBOE. Ms. Fanjoy simply takes the previous year's list and uses Board minutes to update it. Grievant's reinstatement as an employee did not appear in the Board minutes. Ms. Fanjoy was not told to omit Grievant from the seniority list.

35. Grievant was chosen in April 2008 to be a member of the staff development group. Because her employment was terminated at the end of the 2008-2009 school year, she was not able to serve in this role. When she was returned to her employment in April 2009, Grievant was not immediately returned to her place with the staff development group. The first meeting she was notified about and attended was in December 2009.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence

equally supports both sides, the employee has not met her burden. *Id*.

Grievant made several arguments. First, Grievant believes that the Grievance Board Decision issued April 23, 2009, required that she be returned to the position she held during the 2007-2008 school year immediately. She asserts that had that been done, she would have been able to participate in the IEP meeting in May 2009,[4] and then she would have known at that time, as Ms. Custer did, that a Braille Specialist would be needed for E.C. Respondent disagreed with Grievant's reading of the Decision, and felt it would have been disruptive for the student to have returned Grievant to this position so close to the end of the school year, particularly when countywide testing was taking place.

W. VA. CODE § 6C-2-5 states clearly that "[t]he decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County." If Grievant believed the April 23, 2009 Decision was not followed by Respondent, her remedy was to seek enforcement of the Decision through the proper forum. The undersigned would note, however, that the Decision does not state that Respondent had to return Grievant to *any* position for the remainder of the 2008-2009 school year, and it clearly states that the award of backpay, seniority, and benefits is to be calculated based upon the assumption that Grievant had been properly transferred to an available position.

Grievant further opined that the posting unfairly favored Ms. Custer, and that Ms. Custer had an unfair advantage because she had illegally worked with E.C. during the 2008-2009 school year. First, Grievant did not produce any evidence that the posting

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[4] Grievant did not explain how her participation in this meeting would have been useful to the development of an IEP for this student, given that she had not worked with the student for almost a year.

favored Ms. Custer. Mr. Askew developed the job description for the position beginning with the generic Special Education Aide job description, and then adding the qualifications needed for the Braille Specialist, after consultation with Mrs. Carr. The position was filled after in-service training of all applicants, and competency testing. All applicants who passed the competency test were offered the position in order of seniority. Ms. Custer actually received a lower score on the competency test than Ms. Longerbeam, who had no prior exposure to Braille, and Ms. Custer had the least seniority. Grievant had the same opportunity to pass the competency test as all the other applicants who took the training, and the fact is, she did not pass the test while everyone else did.

Second, Grievant asserted that Respondent's action in moving Ms. Custer into the position for the 08-09 school year was unlawful. Grievant challenged Respondent's action of removing her from this position in the prior grievance. She has no standing to separately challenge how Respondent went about filling the position after she was removed from it. Moreover, it is of no relevance to this grievance how Ms. Custer came to be placed in the position she held during the 08-09 school year. It is clear that a Braille Specialist was needed for the student, and that none of the applicants held that title. Ms. Custer had the right to apply for that position, regardless of what occurred the preceding year, without penalty. Certainly, Ms. Custer did have some familiarity with Braille prior to the in-service training, but this familiarity came from her own initiative. Grievant worked with E.C. for two years, yet never made any effort to learn Braille. That was her choice. While Grievant testified that no one ever encouraged her to learn Braille, no one encouraged Ms. Custer to do so either. Grievant cannot fault Ms. Custer for going beyond what was required of her, or blame JBOE for Grievant's own choices.

Grievant challenged the Braille training and testing, arguing (1) that the training and testing was not provided by an employee of JBOE; (2) no recordings were made or maintained for the oral portions of the competency test; (3) the testing was not provided under uniform conditions; (4) Grievant did not receive the same preparation materials as the other applicants; (5) Ms. Cook did not grade Grievant's test in the same manner as she graded the tests of the other applicants; and (6) it was improper to require a score of 75% as the passing score for the competency test, because the competency test for the Aide classification requires a passing score of 70%.

An employee challenging the inservice training must ultimately demonstrate that the training provided was not sufficient to assist the employee in preparing for the competency test.

> As here, the adequacy of competency testing was challenged in *Bailey v. Logan County Board of Education*, Docket No. 97-23-436 (Feb. 27, 1998). In that case, the administrative law judge noted that the statute only requires that the in-service training "assist" employees preparing for competency tests, so the key issue is whether or not the training was helpful and the board of education substantially complied with its obligation. As in the instant case, the grievant in *Bailey* made no suggestions of who would have better conducted the training or what specific materials should have been handled differently.

Frampton v. Kanawha County Bd. of Educ., Docket No. 06-20-108 (June 8, 2006).

Grievant is correct that the training and testing was not provided by a full-time employee of JBOE. W. VA. CODE § 18A-4-8e(c) provides, in pertinent part, that "[t]he competency test consists of an objective written or performance test, or both." Section 18A-4-8e(c)(1) states that "[t]he *performance test* for all classifications and categories other than bus operator is administered by an employee of the county board or an employee of a multicounty vocational school that serves the county..." (Emphasis added.) The

undersigned could find no statutory provision which requires that training be provided by a county employee. JBOE pointed out that Ms. Cook was employed as a contract employee by JBOE for a period of time, to provide the training and testing.

As to the testing, first it is questionable whether W. VA. CODE § 18A-4-8e(c)(1) is applicable here since there is no state competency test. *Hayhurst v. Harrison County Bd. of Educ.*, Docket No. 94-17-1113 (June 8, 1995). Further, Ms. Cook was, in fact, a contract employee of JBOE. Most importantly, however, Grievant did not demonstrate that she suffered any harm by being trained and tested by Ms. Cook. To the contrary, the training and testing received by the applicants would have clearly been inadequate had JBOE had one of its employees provide the training, as it had no one available who was familiar with Braille. Ms. Cook on the other hand is herself visually impaired, she is an experienced visually impaired teacher, and she has trained others in the use of Braille. The other three employees who were trained by Ms. Cook felt that she did a wonderful job. Grievant did not indicate otherwise. JBOE provided a competent person to provide the inservice training and competency testing, who trained the applicants in the skills which would be subject to testing. "The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding

substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure)." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010–0824-PutCH (May 4, 2010).

Grievant next argued that the testing was flawed because no recordings were made of the oral portion of the test. WEST VIRGINIA CODE § 18A-4-8e(c) continues providing that "[a]pplicants may take the written test orally if requested. Oral tests are recorded mechanically and kept on file. The oral test is administered by persons who do not know the applicant personally." First, this provision clearly is intended to apply in situations where an applicant has for some reason asked to take the competency test orally, and that request has been granted. That was not the case here. What occurred here was that the applicants were required, as part of the testing, to read a few sentences from a Braille text to Ms. Cook. Ms. Cook did, in fact, record manually on her computerized Brailler the words that were read to her, and she had this record available to her when she did the final grading. Ms. Cook graded the tests the week-end after the tests were administered, and the test summary sheets were prepared on the following Monday. After the tests were graded, Ms. Cook suffered the not uncommon problem of losing her files when her computer malfunctioned. Ms. Cook did not know any of the applicants, and had no reason

to fabricate Grievant's test results. Ms. Cook testified that Grievant spent much more time than she should have on the written test, leaving little time for the reading section, and that consequently, she read only 39 out of 54 words before her time was up. Grievant herself testified that she did not think she had done well on the reading section. The undersigned concludes from the evidence that Ms. Cook accurately recorded Grievant's score on the reading section of the competency test, and that is all that is required.

As to Grievant's argument that the testing was not provided under uniform conditions, WEST VIRGINIA CODE § 18A-4-8e(e) provides that "[c]ompetency tests are administered to applicants in a uniform manner under uniform testing conditions. County boards are responsible for scheduling competency tests, notifying applicants of the date and time of *the* one day of training prior to taking the test, and the date and time of *the* test." (Emphasis added.) It is unclear what Grievant believes JBOE needed to do differently in order to make the testing uniform, and the undersigned declines to speculate as to Grievant's specific concerns. It should be pointed out that Respondent went beyond what it was required to do by statute by scheduling a separate day of training and a separate day of testing for Grievant to accommodate her schedule. The statute does not require a county board of education to adjust its training and testing schedule to accommodate the schedules of the applicants. The statute does provide in paragraph f that if the scheduling conflicts with an employee's work schedule, "the employee is excused from work to take the competency test without loss of pay." In this case, Grievant received one on one training, and was not tested with the other applicants by her own choice. The training provided to all applicants was from the same materials, and the test was the same for all applicants. Grievant was tested at the same location as the other

applicants, was given the same test, and used the same Brailler used by other applicants when she tested. Generally, the testing was done in a uniform manner, despite the special accommodations for Grievant.

Grievant did specify in her written argument that she did not receive the same *practice* materials as the other applicants, apparently arguing she was not properly prepared. Ms. Cook credibly testified that she copied all four packets which she handed out to the applicants at the same time. Given this, it would be unlikely that any materials would have been omitted from Grievant's packet. Grievant did not place into evidence the packet of materials she actually received, but rather testified that she did not remember seeing certain parts of the practice materials. The undersigned concludes that Ms. Cook took the steps necessary to assure that all the applicants received the same materials. Grievant did not take much time to practice between the time of the training and the testing anyway, which could explain why she was not familiar with some of the materials. Importantly, these were not the actual training materials, they were simply additional worksheets which the applicants could use for additional practice after the training. Ms. Cook was under no obligation to provide these materials at all, and it was up to the applicants whether they utilized these practice materials. Finally, assuming that she did not receive all of the practice materials for some reason, Grievant did not demonstrate that this contributed to her inability to pass the competency test. Grievant did suggest that these materials contained "contracted Braille," which was part of the test. This statement is inaccurate. The applicants were not tested on contractions, nor were they encouraged to use them. They were given extra credit on the test for use of contractions, and Grievant actually received more credit for use of contractions than either Ms. Longerbeam or Ms.

Fisher.

Grievant argued her test was not graded in the same manner as the tests of the other applicants. Although it is difficult to discern exactly how Grievant believes her test was graded differently, it appears that this relates to the actual use of the Braillers during testing. Grievant's proposed findings of fact contain a finding that Ms. Fisher was allowed to use a different Brailler after she had trouble with the one she was using, while Grievant was not allowed to use a different Brailler when she was having some difficulties with the one she was using, and had points deducted from her score because her paper was not neat. This simply is not true. Ms. Fisher testified that she could not get the machine to return. Ms. Cook testified that the right margin had gotten pushed over too far, and caught on the paper. Ms. Cook testified that she should have checked this before the testing started, and that she corrected the problem and Ms. Fisher continued to use this machine. She told Ms. Fisher to start over and did not penalize her for this mechanical issue.

Likewise, Ms. Longerbeam had a problem getting the paper into the Brailler. She was using the Berkeley County Brailler, which Ms. Cook explained could be "contrary." Getting the paper into the Brailler was not part of the test, so Ms. Cook helped her with this problem. Contrary to the suggestion in Grievant's proposed findings of fact, this problem did not have any affect on the neatness of Ms. Longerbeam's work product, so her grade was not affected in any way by this problem.

Grievant's problem with the Brailler, however, had nothing to do with the margin set or getting the paper loaded. Ms. Cook has many years of experience using a Brailler and training others to use Braillers. She concluded that Grievant's problem with the Brailler was the result of Grievant's own failure to properly push down on the keys evenly, and she

repeatedly told Grievant to push down evenly. Ms. Cook did not believe Grievant followed the simple instruction she was given. Grievant did not demonstrate that she was treated differently than any of the other applicants with regard to the testing using the Brailler,or that she was treated unfairly.

Grievant argued that the passing score for the competency test should have been 70%, not 75%, because that is the passing score set by the state for the Aide competency test, and the Braille Specialist is in the Aide classification. W. VA. CODE §18A-4-8b requires school service personnel positions to be filled on the basis of seniority, evaluations and qualifications. An applicant meets the qualifications of the position by meeting the definition of the job. One way an applicant may "meet the definition of the job," is to hold the classification title. None of the applicants held the classification title of "Braille Specialist". "The other way to 'meet the definition of the job' is to pass the state competency test for the classification. However, when, as with the classification at hand, no state competency test exists for a classification, W. VA. CODE §18A-4-8e is not applicable. Absent a state competency test, a county board of education may develop its own competency test, so long as it is applied to everyone." *Hayhurst, supra*.

W. VA. CODE §18A-4-8(I)(15) states:

> "Braille or sign language specialist" means a person employed to provide braille and/or sign language assistance to students[.] A service person who has held or holds an aide title and becomes employed as a braille or sign language specialist shall hold a multiclassification status that includes both aide and braille or sign language specialist title, in accordance with section eight-b [§ 18A-4-8b] of this article[.]

It is clear that a Braille Specialist is not the same as an Aide, and that the requirements for classification as a Braille Specialist are different from those to be classified as an Aide.

There was no state competency test for the Braille Specialist. Because there was no state competency test for the Braille Specialist, there likewise was no passing score set by the State Department of Education for the Braille Specialist competency test. There was no evidence that all competency tests have a passing score of 70%. To the contrary, there was some testimony that the State Department of Education has set a passing score of 75% for some tests. Accordingly, it is of no consequence here what the passing score for the Aide competency test is, as set by the State Department of Education. JBOE had the authority to develop its own competency test, and to determine what the passing score would be.[5] In this case, the person with the knowledge and experience in this area who actually prepared the test was authorized by JBOE to determine what an appropriate score would be.

"'Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . .' *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum*

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[5] Grievant noted that Berkeley County has not developed a competency test for Braille Specialist. The undersigned does not find this information to be of any relevance to the issues presented here.

v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). Ms. Cook relied upon her expertise to determine that a passing score of 75% would give everyone the chance to pass, and was the appropriate passing score for a test which she considered to be fairly easy. And it seemed to be for the other three applicants who all scored 89.9% and above, while Grievant scored only 73.6%. Grievant did not demonstrate that the decision to set the passing score at 75% was arbitrary and capricious.

There is no question in this case that had Grievant passed the competency test she would have been awarded the position. Ms. Cook was very clear and sure that Grievant did not pass the competency test. Grievant was given the same chance to pass the test as all the other applicants. Grievant failed to demonstrate that the competency training or testing was fatally flawed.

Finally, Grievant asserted she was the victim of reprisal and harassment. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the

following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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). "[T]he 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. 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." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. 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). "Should the

employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior 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). "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. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

Grievant demonstrated she had filed other grievances. Grievant believes the reprisal and harassment took several forms. She complained that her name did not appear on the Fall 2009 seniority list, she was not allowed to attend a union conference, and she was not notified of any staff development meetings until December 2009.

Grievant did not demonstrate that the omission of her name from the Fall seniority

list was anything more than a clerical oversight. People make mistakes, and Grievant should not take everything that she finds offensive as a personal attack on her.

As to the denial of Grievant's request to attend the union conference, the record is insufficient to draw any conclusions. Grievant's testimony was simply that her principal told her she did not receive the request for professional leave on time, and the record does not reflect that the request was provided in a timely manner.

Finally, as to the staff development meetings, there is no evidence that there were any meetings between the time Grievant was returned to her employment in April 2009, and December 2009, about which Grievant should have been notified, and this problem has now been resolved. Grievant did not demonstrate that JBOE personnel took any adverse action toward her.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. W. VA. CODE § 6C-2-5 states clearly that "[t]he decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County." The undersigned has no authority to enforce decisions issued by the Grievance Board.

3. Grievant did not demonstrate that the posting was written to favor Ms. Custer.

4. W. VA. CODE §18A-4-8b requires school service personnel positions to be filled on the basis of seniority, evaluations and qualifications. An applicant meets the

qualifications of the position by meeting the definition of the job. One way an applicant may "meet the definition of the job," is to hold the classification title. "The other way to 'meet the definition of the job' is to pass the state competency test for the classification. However, when, as with the classification at hand, no state competency test exists for a classification, W. VA. CODE §18A-4-8e is not applicable. Absent a state competency test, a county board of education may develop its own competency test, so long as it is applied to everyone." *Hayhurst v. Harrison County Bd. of Educ.*, Docket No. 94-17-1113 (June 8, 1995).

5. "The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the

procedure)." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010–0824-PutCH (May 4, 2010).

6. Grievant did not demonstrate she suffered any harm from the action of JBOE in contracting with an experienced educator to provide the Braille training and testing.

7. Grievant did not demonstrate that the competency test was graded incorrectly, or that her test was graded differently than the tests of the other applicants.

8. Grievant did not demonstrate that the competency testing was not provided under uniform conditions.

9. "'Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . .' *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is

unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

10. Grievant did not demonstrate that it was arbitrary and capricious to set a passing score of 75% for the Braille Specialist competency test.

11. To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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).

12. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. 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). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

13. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession."

14. Grievant did not demonstrate that any adverse action was taken against her which would support a finding of reprisal or harassment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 28, 2010