ARTHUR L. SMITH,

Grievant,

v.

DOCKET NO. 96-DEP-456

WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION/OFFICE OF AIR QUALITY,

Respondent.

D E C I S I O N

Grievant, Arthur Smith, filed the following grievance on February 28, 1996:

> Ms. Venisa Flesher in her capacity as Supervisor of the Laboratory Section, Mr. Charles Spann in his capacity of Assistant Chief for Chemistry and Air Monitoring, and Mr. G. Dale Farley as Chief of the West Virginia Department of Environmental Protection Office of Air Quality, have in the past and do continue to presently violate the statutes, rules, regulations or policies of the Division of Environmental Protection and have in the past and do presently continue to demonstrate favoritism and harass the grievant. Such favoritism and harassment has resulted in a substantial detriment to and interference with effective job performance of the grievant.

Relief Sought-

That Ms. Flesher be directed to refrain from any further harassment of grievant;

That Ms. Flesher be directed to refrain from any further favoritism of any employees under her supervision;

That Mr. Charles Spann review any further applications for leave from the grievant;

That Mr. Spann specifically review and approve any and all personnel decisions made by Ms. Flesher which affect the job performance of the grievant; and

That in consideration of grievant having been in the position of Chemist III since 1984 and having been informed by both Ms. Flesher and Mr. Spann that they had both recommended him for a pay raise, that his salary be increased to a level commensurate with his duties and responsibilities.

Following adverse decisions at the lower levels, grievant appealed to level four on October 28, 1996. Hearing was held on February 21, 1997, and this case became mature for decision on March 22, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

Findings of Fact

1. Grievant is a Chemist III in the West Virginia Division of Environmental Protection, Office of Air Quality ("DEP"), and has held that position since 1984.

2. At all times relevant to this grievance, Venisa Flesher, Laboratory Supervisor, was Grievant's immediate supervisor. (See footnote 1)

3. At all times relevant to this grievance, Charles Spann, Assistant Chief of Air Monitoring, was Ms. Flesher's supervisor.

4. At all times relevant to this grievance, G. Dale Farley, Chief of DEP's Office of Air Quality, was Mr. Spann's supervisor.

5. Grievant's complaints in this matter center primarily around the following incidents:

a. A February 6, 1996 note that Ms. Flesher addressed to Grievant wherein she questioned his annual leave requests for the month of February, citing the length of time he was requesting off and her concern regarding upcoming work deadlines; b. What Grievant perceives as Ms. Flesher's unwillingness to consider and implement a laboratory test procedure that he is a proponent of;

d. What Grievant perceives have been overly critical performance evaluations of his work by Ms. Flesher; and

e. Memoranda prepared by Ms. Flesher regarding Grievant sleeping on the job, and regarding quality control procedures that Grievant was to apply in future laboratory reports.

6. Ms. Flesher had asked Grievant several times in 1994 and again in 1995 to write up what he does when he analyzes a coal sample for reference purposes. Grievant had not complied with Ms. Flesher's request as of January 17, 1996, the date she presented him with his 1995 performance

evaluation. Ms. Flesher again asked him for the report and put a February 29, 1996 deadline in Grievant's evaluation.

7. On January 30, 1996, Grievant submitted a leave request for 24 hours of annual leave for the month of February. G. Ex. 3. Ms. Flesher responded to Grievant's request with a handwritten note expressing her concern that Grievant would not be able to complete his report by the above-noted February 29 deadline. Ms. Flesher did not deny Grievant's leave request and he took the leave.

8. Grievant was offended by Ms. Flesher's response because the circumstances surrounding his leave requests included burst water pipes causing flooding in his home and the hospitalization of his critically ill son.

9. When Grievant returned from leave, Ms. Flesher met with him on February 20, 1996. Ms. Flesher had heard rumors and Grievant confirmed that his son was critically ill in the hospital. Ms. Flesher extended Grievant's report deadline to March 15, 1996. 10. This leave incident was the first time in the four years Ms. Flesher supervised Grievant that she ever questioned his leave requests.

11. Grievant has developed a laboratory testing procedure which he believes to be superior to the one currently being used by DEP. Grievant discussed his method with Ms. Flesher, and she indicated that the methodology being used by DEP was certified by the U.S. Environmental Protection Agency and is a method sanctioned by federal regulations. She also told him, however, that if he wanted to pursue the matter, he could prepare the necessary reports and she gave him the telephone number of an individual to call.

12. Grievant acknowledges that the method being used by DEP is an approved and federally sanctioned method of testing. Grievant has not pursued the matter further because he does not feel it is his job to do so.

13. Grievant believes Ms. Flesher's performance evaluations of him have been overly critical. In 1993, Ms. Flesher supervised three chemists, and she rated all of them “satisfactory”. In 1994, Ms. Flesher supervised three chemists; one received a “marginal” rating, one was “satisfactory”, and Grievant received a “good” rating. In 1995, Ms. Flesher supervised four chemists. Three, including Grievant, received a “good” rating, while the other received a “very good” rating. Grievant did not file grievances over his performance evaluations at the time he received them from Ms. Flesher.

14. In a memorandum dated August 25, 1994, addressed to Grievant's personnel file, Ms.

Flesher memorialized an August 17, 1994 incident wherein she had discovered Grievant sleeping on the job. Ms. Flesher spoke with Grievant about the incident, but did not tell him she was documenting the same to his personnel file. After putting the memoin Grievant's personnel file, Ms. Flesher learned that agency policy dictated that it should be placed in an administrative file and not Grievant's personnel file. She corrected the situation and removed the memo from Grievant's personnel file.

15. In a memorandum dated August 26, 1992, addressed to Grievant, Ms. Flesher instructed him to document quality control procedures with future laboratory reports. Grievant received a copy of this memo and a copy was also placed in his personnel file. Ms. Flesher credibly testified that all memos on procedural matters addressed to chemists were placed in their personnel files.

16. In 1995, Ms. Flesher recommended Grievant to her superiors for a merit raise in recognition of his improvement in several areas. Grievant did not receive the merit raise in 1995.

Discussion

In a non-disciplinary grievance, the burden of proof lies with the grievant to prove his case by a preponderance of the evidence. Crow v. W. Va. Dept. of Corr., Docket No. 89-DOC-043 (Mar. 29, 1989). Grievant alleges the above incidents indicate a pattern of harassment and favoritism on the part of Ms. Flesher, individually, and DEP as a whole. West Virginia Code § 29-6A-3(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”. Favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees”. W. Va. Code 29-6A-3(h).

Grievant presented no evidence that Ms. Flesher, or any of her superiors, treated him differently than other employees with regard to leave requests, consideration ofsuggestions, performance evaluations, and supervisory/disciplinary memorandums. With regard to Grievant's leave requests, he clearly received the time off as well as a deadline extension. With regard to the memoranda prepared by Ms. Flesher regarding Grievant, she corrected the situation on the August 25, 1994 memorandum and was not proven to have done anything improper with the August 26, 1992 memorandum. Although Grievant generally disagrees with his performance evaluations, he did not prove Ms. Flesher abused her supervisory discretion by evaluating him in a manner constituting harassment or exhibiting favoritism, nor did he file grievances over his performance evaluations.

With regard to his suggestion that DEP utilize a different methodology than the one currently being used, Grievant did not prove DEP was under any obligation to undertake what would undoubtedly be an expensive and time-consuming effort to validate his proposed methodology when it was currently utilizing a federally sanctioned methodology developed by the U.S. Environmental Protection Agency. Grievant failed to prove that any other chemists were indulged by DEP in the manner Grievant suggests he should be with regard to proposals for different methodologies.

While Grievant clearly feels that Ms. Flesher's conduct towards him was demeaning and that she did not value his work, Grievant has failed to prove that any of the above conduct constitutes harassment or favoritism on the part of Ms. Flesher towards Grievant. Indeed, the fact that Ms. Flesher recommended Grievant for a merit raise flies in the face of Grievant's assertions that Ms. Flesher engaged in a pattern of harassment and favoritism towards him.

Conclusions of Law

1. W. Va. Code § 29-6A-3(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”. Grievant has failed to prove by a preponderance of the evidence that DEP or Ms. Flesher has engaged in harassment of him.

2. Favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees”. W. Va. Code 29-6A-3(h). Grievant has failed to prove by a preponderance of the evidence that DEP or Ms. Flesher engaged in favoritism.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 22, 1997

Footnote: 1

Ms. Flesher is no longer employed by DEP. Any relief Grievant requests concerning Ms. Flesher's supervision of him is therefore moot.