EDWARD COSTER, III,

Grievant,

v. **Docket No. 98-CORR-109R**

DIVISION OF CORRECTIONS/

NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Edward Coster III, employed by the Division of Corrections (Respondent) as a Correctional Officer at the Northern Regional Jail and Correctional Facility, filed a level one grievance on January 2, 1998, in which he alleged, "1-1-98 I missed work due to being iced in. I tried to get a ride [but] could not get one. Had to have my car towed next day. Then had to give a written explanation as to why this happened." Grievant requested an apology and an explanation for this action. The grievance was denied at levels one and two. A level three hearing was convened but was adjourned in less than an hour due to behavior by Grievant and his representative toward the hearing evaluator and witnesses, characterized by the hearing evaluator as "slanderous, hostile, and aggressive".

Grievant advanced his complaint to level four on April 7, 1998. During a conference call conducted on May 19, 1998, Grievant advised the undersigned that he wished to amend his complaint to include twenty-four incidents of harassment. The request wasgranted, and the matter remanded to level three by Order dated May 29, 1998, to allow an initial review of the new claims by Respondent **.** The grievance was subsequently denied at level three, and was appealed to level four on July 20, 1998. A level four hearing was conducted in the Grievance Board's Wheeling office on September 30, 1998 **.** Grievant was represented by his father, Edward Coster, Sr., and Respondent was represented by Cindy Quillen and Andrea Dernberger, paralegals. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

In nondisciplinary matters, the grievant has the burden of proving his case by a preponderance of the evidence. Kent v. Dept. of Health and Human Resources/Bureau of Public Health, and Div. of

Personnel, Docket No. 98-HHR-253 (Oct. 6, 1998); Tucci v. W. Va. Dept. of Transp./Div. Of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). Grievant asserts that he is being harassed, which is defined by W. Va. Code §29-6A-2(l) as the "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Grievant presented the testimony of a number of co-workers, and testified on his own behalf. Respondent did not offer any evidence at level four.

Grievant did not address many of the two dozen alleged incidents of harassment, and several of the allegations were presented in a vague, unsubstantiated fashion. Three of the incidents are supported by documentation and warrant evaluation. The first is a memorandum from Unit Manager Leonard Wellman to the Operations Officer, noting that Grievant had made only two entries on a Daily Log Sheet:"relieved afternoon watch", and"relieved by day shift". Mr. Wellman noted that there is activity in the pods during the night, such as pill call, inmates working, two formal counts are conducted, and breakfast served. He requested that Grievant be directed to keep a more accurate log.

Although Grievant stated he had acted in response to a directive that he conserve on log sheets, his action was clearly inappropriate, and the memorandum was justifiably issued.

The second matter involves Grievant reporting that he could not come to work on January 1, 1998, due to icy road conditions. Lieutenant Richard Littell testified that he directed Grievant to file a report due to the nature of the "call-off". Specifically, the Lieutenant did not understand why Grievant had proceeded down an icy road, to a destination other than his residence, when he knew that he had to go to work. The Lieutenant characterized the day as unauthorized leave.

There does not appear to be any dispute that the area suffered from bad weather on January 1, 1998, or that Grievant was unable to travel to work. The record does not establish if any other employees were unable to get to work, but, notwithstanding Lieutenant Littell's opinion on Grievant's lack of forethought, there appears to be no valid reason for requiring that he compose a written report on the matter.

The final matter to be considered is an Incident Report dated May 15, 1998, and completed by Sergeant Ron O'Neil. Sergeant O'Neil reported:

At approx :0203 I Sct. O'Neil tried by radio and phone to contact Coster but could get no answer. I ask C. Cumerledge who was in D-1 to check on Officer Coster. I waited about 2 minutes and Coster

called me with his count.

I talked to Officer Cumberledge and he said that when he went to D-2 E. Coster was walking around on pod floorlooking like he was in a daze. Officer Cumberledge told Coster that I was calling for his count, then Coster called his count in.

At approx :2245 hrs. when E. Coster came to work I informed him that he had one inmate for CSC to send at 0530 hrs. At 0530 hrs E. Coster sent two inmates out for work. I informed Coster that I only ask for one inmate. Coster said there is two coming. I had control to stop the inmate that I didn't want and send him back to the pod.

Although completed on an Incident Report form, at level four Sergeant O'Neil denied that it was a official report because it was not given a number or signed. He characterized the document simply as passing on information to Lieutenant Littell. Inconsistent with the report, Sergeant O'Neil testified that he recalled Grievant calling in his count, and opined that he sounded fine. He stated that he did not know how or why the document was placed in Grievant's personnel file. Lieutenant Littell also denied that the document was an Incident Report, and stated that it was an investigative report. Interestingly, Correctional Officer Cumberledge testified that he did not observe Grievant acting in a daze. There was no explanation offered regarding any investigation being conducted on Grievant, and no reason given for why Sergeant O'Neil found it necessary to pass erroneous information on to Lieutentant Littell. Further, no one could explain how the report came to be in Grievant's personnel file, where he was likely to find it, or why it was there.

It is clear that Grievant does not enjoy a copacetic working relationship with many of his co-workers. Frankly, a number of the individuals subpoenaed by Grievant to testify at level four exhibited open animosity. It does not appear that Grievant is an entirely innocent party, and contributes to the turmoil, as evidenced by Mr. Wellman's memorandum. Nevertheless, Lieutentant Littell's requirement that a written report be composed when Grievant was prohibited from reporting to work due to weather conditions,and Sergeant O'Neil's non-Incident Report, both appear to have no purpose other than to disturb, irritate, or annoy Grievant. Behavior which occurs solely to disturb, irritate, or annoy an employee is contrary to the demeanor expected by law, policy and profession, and constitutes harassment. (See footnote 1)

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

Findings of Fact

1. Grievant is employed by the Division of Corrections as a Correctional Officer at the Northern Regional Jail and Correctional Facility.

2. After Grievant was prohibited from traveling to work due to weather conditions, his supervisor required that he file a written report regarding the matter.

3. An undated, unsigned Incident Report completed by Sergeant O'Neil stating that Grievant was walking around “looking like he was in a daze” was placed in Grievant's personnel file.

4. Respondent offered no evidence that Grievant was in a daze, as reported by Sergeant O'Neil.

Conclusions of Law

1. In nondisciplinary matters, the grievant has the burden of proving his case by a preponderance of the evidence. Kent v. Dept. of Health and HumanResources/Bureau of Public Health, and Div. of Personnel, Docket No. 98-HHR-253 (Oct. 6, 1998); Tucci v. W. Va. Dept. of Transp./Div. Of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. “Harassment” is defined by W. Va. Code §29-6A-2(l) as the “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

3. Respondent's administrators have engaged in actions for no apparent purpose but which have disturbed, irritated, and annoyed Grievant.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to stop the harassment of Grievant.

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, andshould not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the

record can be prepared and transmitted to the appropriate court.

Date: November 30, 1998 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The witnesses subpoenaed by Grievant to attend the level four hearing requested witness fees and costs. Consistent with the provisions of W. Va. Code §59-1-16, those individuals who appeared at the hearing on their own time are awarded $10.00 (ten dollars) for their attendance. Further, those employees who drove to the hearing are awarded $.15 (fifteen cents) for each mile traveled to and from the hearing, plus all necessary bridge, ferry and road tolls.