BENJAMIN BLAKE,

Grievant,

v. **DOCKET NO. 97-DOH-352**

WV DEPARTMENT OF

TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Benjamin Blake, Grievant, initiated this proceeding pursuant to the provisions of W. Va. Code §29-6A-1, et seq., as follows:

> An order to cease the harassment of Grievant and to assign him to his grader in the same fashion as other employees and to otherwise be made whole.

The grievance was initiated on February 7, 1997, with Grievant's immediate supervisor, who denied the grievance on February 18, 1997. Grievant appealed to level two, where the grievance was again denied on February 27, 1997. A level three hearing was conducted on June 3, 1997, followed by a written decision denying the grievance dated August 11, 1997. A level four appeal was filed on August 27, 1997. Prior to the level four hearing scheduled for November 3, 1997, the parties agreed to submit this matter on the record developed below, accompanied by written proposals submitted by November 19, 1997.

The following findings of fact are made from a preponderance of the evidence submitted at the lower levels, including all level three testimony and all documents introduced.

Findings of Fact

1. Grievant is employed in Lewis County by the Division of Highways ("DOH") as an Equipment

Operator III. His assigned piece of equipment is a grader.

2. Between November, 1996, and February, 1997, Grievant's grader was not used by DOH, and Grievant did other types of work, including laborer assignments. During that time period, only Cary Williams, the least senior Operator III, was allowed to run his assigned grader. In addition to Grievant, two other grader operators were not allowed to run their machines during part of the period of time in question.

3. Cary Williams has filed at least four grievances while employed at the Lewis County DOH.

4. Grievant filed a grievance in February of 1997. The record does not reflect what the grievance involved, or what its outcome was.

5. At an unknown point in time, William Cayton, Lewis County Superintendent, insinuated to other employees that Grievant was a “cry baby” for filing grievances. Mr. Cayton did this by saying “boo hoo hoo hoo hoo” with reference to Grievant. However, it is unknown to whom he said this, when it occurred, or to what grievance he was referring.

6. Grievant's grader was used less than any of the four graders assigned to the Lewis County DOH. Between July 1, 1996, and February 27, 1997, the graders were used the following amounts of total hours:

Grievant	994 hours
“Red” Burkhammer	1078 hours
Cary Williams	1046 hours
Bob Heater	1169 hours

7. When Grievant does not operate his assigned grader, other employees are not asked to operate it.

8. Deward Williams, shop foreman for Lewis County, performs maintenance on the equipment. He did not believe that Grievant's grader was “downed” (placed in the shop for repair) any more than the other graders.

9. There is no DOH policy requiring that equipment be operated on the basis of employee seniority. All such decisions are placed in the discretion of the County Superintendent, who has the authority to accomplish all projects within the county in whatever manner he deems necessary.

Discussion

Grievant bears the burden of proving his claims by a preponderance of the evidence. See W. Va. Code § 29-6A-6. At level four, in his written proposed findings of fact and conclusions of law, Grievant asserted theories based upon discrimination, favoritism, harassment, and reprisal. However, at the lower levels of this grievance, Grievant only argued that Mr. Cayton's actions constituted reprisal, alleging that Mr. Cayton retaliated against him by not allowing Grievant to operate his grader. Because Respondent was given notice that new claims would be raised at level four based upon discrimination and favoritism, those arguments will not be addressed. A grievant may not raise new arguments or allegations in post-hearing submissions after the record has been closed. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). Only harassment, which was stated on the level four grievance form, and reprisal, which was alleged at the lower levels, are issues properly before this Grievance Board.

The basic flaw in Grievant's case is that there is little to no evidence to support hisallegations that, because he had filed past grievances, he was not allowed to operate his grader. First of all, DOH policy does not address how decisions are to be made as to which pieces of equipment are to be used in any given situation. Clearly, this is left to the discretion of the County Superintendent and the supervisors planning the various projects. While each type of project may require specific equipment to be used for the various aspects of the work, there is no procedure in place dictating how the choice is to be made as to which particular operator will be allowed to use his machine. Assuming that logic would dictate that supervisors attempt to distribute work to employees as equally as possible, it does not appear in this case that this was not done. While Grievant's grader was operated the least of all four graders in the county, it was only operated 52 hours less than Mr. Cayton's within the pertinent eight-month period. There is no significant or glaring disparity between the hours of usage for the four graders.

In addition, the specific examples given by Grievant as examples of reprisal have not been proven to have been based upon any improper motive or action on Mr. Cayton's or DOH's part. While Grievant's grader may not have been used during the period of November, 1996, through February, 1997, all but one other grader were also not used very much. Moreover, if Mr. Cayton's decision not to use Grievant's grader was based upon his general dislike of and need to retaliate against employees who file grievances, as Grievant alleges, he would not have selected Mr. Williams, who

had filed four grievances, to do the most work during this time period.

Similarly, Grievant has cited a specific incident during which Mr. Williams was allowed to operate a grader and Grievant had to shovel blacktop. However, there is no evidence indicating when this incident occurred or the circumstances surrounding it, and Mr. Cayton did not remember it. Therefore, there could have been a variety of reasons for this decision, and Grievant has notproven any illicit motive behind it.

"Reprisal" is defined by W. Va. Code §29-6A-2(p) as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

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

(2) that he/she was subsequently treated in an adverse manner by the employer or 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.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543-544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Grievant has not established reprisal in this case. The only other grievance he has mentioned is one he filed in February of 1997, which was at the end of the time period which Grievant is alleging he was the victim of Mr. Cayton's retaliation. Therefore, there can be no connection between the alleged retaliatory conduct and Grievant's participation in the grievance process.

"Harassment" is defined by W. Va. Code §29-6A-2(l) as "repeated or continual disturbance,

irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." The only incident which could even theoretically support a harassment claimis the one in which Mr. Cayton said "boo hoo hoo hoo hoo" with regard to Grievant. While such behavior is not to be condoned, and in fact, Mr. Cayton received a disciplinary letter because of it, one isolated incident of this type does not rise to the level of harassment. Once DOH took action to correct Mr. Cayton's behavior, the evidence does not indicate that any such similar incidents continued to occur.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant bears the burden of proving his claims by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. "Reprisal" is defined by W. Va. Code §29-6A-2(p) as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

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W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

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

5. Grievant has not proven by a preponderance of the evidence that DOH engaged in reprisal or harassment in this case.

Accordingly, this grievance is **DENIED**.

Any party 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.

Date: February 17, 1998 _____

V. DENISE MANNING

Administrative Law Judge