EDWARD B. COSTER, III,

Grievant,

v. **DOCKET NO. 98-CORR-506**

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

DECISION

Grievant, Edward B. Coster, III, alleges that he was wrongfully denied two vacation days in early November, 1998, and contends, in part:

> In short, in keeping with my charges in level four grievance of September there is a game being played on me by R. Littell, i.e. interfering with my child visitation. Court ordered visitation on vacation days are the only way I can see my children.
>
> I wish to grieve this as crass viciousness on the job and as low a level as any supervisor can sink to and still be in power.

As relief, he requests that Lt. Richard Littell receive a written reprimand. The grievance was denied by Grievant's supervisor, Lt. Littell, on November 15, 1998. Grievant appealed to level two, where a conference was held on November 24, 1998, at which time the grievance was denied. A level three hearing was held on December 9, 1998, followed by a written, undated decision which granted the grievance, in part, and denied it, in part. Grievant appealed to level four on December 19, 1998. A hearing was conducted in the Grievance Board's office in Wheeling, West Virginia, on February 17, 1999, (See footnote 1) and this matter became mature for consideration at the conclusion of that hearing. The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed as a correctional officer at the Northern Regional Jail and Correctional

Facility (NRJ) and is assigned to the midnight shift.

2. On October 24, 1998, Grievant requested two vacation days, specifically November 2 and November 3, 1998, in order to visit with his children.

3. NRJ Operational Procedure 1.29-3 states that, on midnight shift, only one correctional officer may be permitted to take annual leave.

4. Grievant's request for vacation was denied by his supervisor, Lt. Richard Littell, because Sgt. Ron O'Neil, also assigned to midnight shift, had already requested and received approval to take the same days as annual leave.

5. On the evening of October 30, 1998, Sgt. O'Neil phoned Lt. Littell at home to inform him that he would not be taking the previously requested vacation time on November 2 and 3, 1998.

6. Lt. Littell did not inform Grievant of Sgt. O'Neil's decision not to take the vacation time, and Grievant only discovered this upon his arrival at work on November 2, 1998.

Discussion

In order to prevail in a grievance of this nature, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health &Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant has not argued that any law, policy, regulation or agreement has been violated, but merely asserts that Lt. Littell should have informed him when Sgt. O'Neil decided not to take the vacation days. At level three, this grievance was granted with regard to Grievant's assertions that Lt. Littell's conduct was “not gentlemanly,” as follows:

> I believe Officer Coster's request was within reasonable limitations whereby, Lt. Littell could have notified him that due to Sgt. O'Neil's cancellation of leave, Officer Coster's leave had been approved. Lt. Littell had the day of November 1, 1998, to call Officer Coster and inform him.

However, the evaluator found that the denial of Grievant's leave was in accordance with NRJ policies, and also concluded that harassment had not been proven.

“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.” Grievant did not specifically allege harassment at level four, but his grievance

statement refers generally to a “game being played on him.” Therefore, giving Grievant the benefit of the doubt, the undersigned will address the issue of harassment. In accordance with the definition set forth above, a single incident cannot be deemed to be harassment, because there is no “repeated” or “continual” conduct. Aside from the incident regarding vacation time involved in this case, Grievant has introduced absolutely no evidence of other conduct which could constitute harassment. Accordingly, harassment has not been proven.

As the level three evaluator recognized, it would have been courteous for Lt. Littell to inform Grievant when Sgt. O'Neil canceled his leave request. However, there is nopolicy or other provision which would require Lt. Littell to do so, and Grievant has offered no evidence that this practice has been used at NRJ in the past. Operational Procedure 1.29-3, as set forth in Finding of Fact No. 3, clearly allows only one officer on midnight shift to take annual leave. In turn, Operational Procedure 1.29-1 requires that all applications for annual leave be submitted at least one week in advance. Therefore, even if Grievant had been informed of Sgt. O'Neil's cancellation, Lt. Littell could have denied the request, in accordance with the policy. The denial of leave was proper, and Grievant has not established any violation of policy.

Grievant has attempted to prove that Sgt. O'Neil was never scheduled to take vacation days on November 2 and 3 in the first place. He bases this contention on a conversation he had with Sgt. Peggy Rhine (See footnote 2) sometime after November 2, during which she reviewed the duty rosters and found that Sgt. O'Neil was not off work on November 2 and 3. This does not prove Grievant's allegation. The duty roster, as explained by Sgt. Littell, was altered after Sgt. O'Neil canceled his request for leave, appropriately reflecting that Sgt. O'Neil actually worked on those days. Lt. Littell testified that, as soon as he returned to work after Sgt. O'Neil's cancellation, he used white out to remove the marks on the duty roster which would have reflected that St. O'Neil was off on those days. Then, when Sgt. O'Neil worked on November 2 and 3, the roster was filled out to reflect that Sgt. O'Neil was present at work. Although the original duty roster was not introduced into evidence, the photocopy does reflect that the marks by Sgt. O'Neil's name are somewhat faint and smudged, indicating that they may have been placed over white out. Level III, Inst'l Ex. C. In addition, Sgt. Littell provided a copy of the monthly annual leave calendar for November, 1998, which was prepared prior to the beginning of the month, and it reflects that Sgt. O'Neil was scheduled for annual leave on November 2 through 4, 1998. Therefore, the undersigned finds there is ample credible evidence that

Sgt. O'Neil applied for and was approved for annual leave on those days.

The only relief requested by Grievant in this case is that Lt. Littell receive a written reprimand for his failure to notify Grievant regarding the vacation days. However, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992). Accordingly, in addition to failing to prove any violation on the part of Respondent, Grievant has not requested any relief which may be granted by this Grievance Board.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. “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.”

3. Grievant has not proven by a preponderance of the evidence thatRespondent engaged in harassment.

4. NRJ's denial of Grievant's request for leave on November 2 and 3, 1998, complied with applicable NRJ policies.

5. Grievant has not established any law, regulation, policy or written agreement was violated by Lt. Littell's failure to inform Grievant that another employee had canceled his vacation request.

6. The Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

Accordingly, this grievance is **DENIED**.

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, and 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 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 24, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by his father, Edward Coster, Sr., and Respondent was represented by counsel, Charles Houdyschell.

Footnote: 2

Sgt. Rhine's specific position or the reason she was called by Grievant were not specified in the record.