EARLENE JOHNSON,

Grievant,

v. DOCKET NO. 98-HHR-302

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU FOR CHILD

SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

This grievance was filed by Grievant, Earlene Johnson, against Respondent, West Virginia Department of Health and Human Resources/Bureau for Child Support Enforcement ("HHR"), on or about December 23, 1997, alleging:

> I was given a form of disciplinary action that includes accusations because of prejudice and discrimination of my superiors. I feel this was an act of retaliation, reprisal, and revenge and this has damaged my stature and credibility with the agency.

As relief she sought:

> Any damages related to my career and my health, etc. Restored to my previous stature with the agency. No further harassment or retaliation. Punitive damages. All attorney's fees. (See footnote 1) Grievant's supervisor, Lacora Ford, responded on January 5, 1998, explaining that she had not given Grievant a verbal reprimand on December 18, 1997, as Grievant believed, nor had she imposed any disciplinary action against Grievant. She stated in regard to the December 18, 1997 incident:
>
> This was a conference to discuss an office incident of which management thought you should be aware, and to discuss a problem with a case. At no time were you accused of any improprieties, nor were you treated differently than any other staff member.

Grievant appealed to Level II on January 6, 1998. A Level II conference was held on January 8, 1998, with Grievant, Jo Ellen "Jody" Holtzworth, Regional Manager for Region III (Cabell, Wayne and Putnam Counties), and Kelly Winguard, attorney, in attendance. A Level II decision was issued on January 15, 1998, which states as follows:

> At the conclusion of your conference, you and all in attendance agreed that all misunderstandings had been resolved. I asked if you had any unresolved misunderstandings at that time and you stated that you would have to think about it, but there was nothing that you could think of at that time that had not been resolved.
>
> In your grievance, you stated that you wanted to be restored to your previous stature with the agency and wanted no further harassment or retaliation. During the conference, you indicated you understood that no harassment or retaliatory act had been committed against you. Since all misunderstandings have been resolved, no form of disciplinary action has been taken, and there has been no change in your status in any way, your grievance must be denied because I cannot restore something that has not been altered. On January 20, 1998, Grievant appealed to Level III. A Level III hearing was held on July 22, 1998. Ms. Holtzworth testified at the Level III hearing that at the end of the Level II conference, she asked Grievant "if she felt like the matters had been resolved to her satisfaction and she said yes, for what she could think of right at that point, and that's the way we ended it. . . . I thought that we had resolved it."

Grievant testified at the Level III hearing that she did not know what relief could be granted which would restore her reputation and what she had worked to achieve for 15 years.

A Level III decision denying the grievance was issued on August 10, 1998. The decision concluded that no disciplinary action had been taken against Grievant.

Grievant appealed to Level IV on August 14, 1998. A Level IV hearing was held on October 26, 1998, at HHR's offices in Huntington, West Virginia. Grievant requested a second day of hearing so she could call Kelly Winguard, the attorney she had worked for, as a witness. Ms. Winguard is now a Family Law Master, and could not attend the first hearing due to her schedule. A second day of hearing was held on January 27, 1999, the first date available to all parties and Ms. Winguard. This grievance became mature for decision on March 2, 1999, upon receipt of the parties' post-hearing written arguments. (See footnote 2)

Grievant maintains that the Management Team of the Child Support Enforcement Office in Cabell County falsely accused her of writing a letter to Jim Boomer, General Counsel, about Ms. Winguard, of telling Sharon Winkler-Serena what a co-worker had said about her, and of placing a document in a co-worker's mail slot. She characterized this asa pattern of being blamed for things and harassment. The third incident occurred in March 1998, after Grievant had appealed to Level III. Grievant also complained that Ms. Winguard had attempted to intimidate her at the Level II conference. The Management Team consists of Ms. Holtzworth, the Team Leaders for Region III, and the attorneys for Region III.

At the Level IV hearing, Respondent began by denying that any disciplinary action had been

taken against Grievant. Grievant maintained she had received a verbal reprimand from her supervisor when she called her into her office and talked to her about rumors in the office that she had told Ms. Winkler-Serena what another employee had said about her. Grievant characterized what occurred as an accusation. Ms. Holtzworth stated Grievant was not verbally reprimanded, nor was any other disciplinary action taken. Ms. Ford also testified that Grievant had not been given a verbal or written reprimand. No verbal reprimand, or any other disciplinary action, has been placed in Grievant's personnel file as a result of this incident. The undersigned ruled at the hearing that no disciplinary action had been taken against Grievant, and she would have to proceed with the burden of proof. That ruling stands.

Discussion

Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant argued the alleged actions by the Management Team were acts of retaliation and reprisal. W. Va. Code § 29-6A-2(p) defines reprisal 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." The record does not reflect that Grievant had ever filed a grievance before this one, nor did Grievant indicate there was any other type of protected activity in which she had ever engaged. Accordingly, she was not the subject of reprisal. Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998).

Grievant's allegations of retaliation are directed toward Ms. Winguard, not the "Management Team." Apparently, Grievant believes Ms. Winguard tried to make her life miserable, because she was angry at her, believing Grievant had written a negative letter to her supervisor about her. After that point, there was no rescuing their relationship, and it may be that Grievant could do nothing right in Ms. Winguard's eyes, and Grievant became concerned about whether Ms. Winguard would cause her to lose her job. It appears Ms. Winguard was watching Grievant from that point, either because she no longer trusted her, or she was gathering evidence to support her conclusions. Ms. Winguard did nothing to reassure Grievant that this was not the case, and it appears most likely that she made subtle comments and gestures which were intended to relate to Grievant that she was watching her and did not trust her, although other observers did not pick up on this subtle communication. Even

though Ms. Winguard is no longer an HHR employee, Grievant apparently remains concerned that Ms. Winguard's bias against her, if any, has been transferred to the rest of the Management Team and to the staff. Grievant did not demonstrate that any other member of the Management Team, or the Team as a unit, was out to get her, or that any member of the Management Team did anything which would have caused any staff member to treat Grievant differently.

Grievant argues she has been harassed. W. Va. Code § 29-6A-2(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." "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. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

The first incident occurred on December 1, 1997. Grievant testified Ms. Winguard had "been ugly" toward her, and she went into her office to ask her why. She stated Ms. Winguard told her an anonymous letter had been sent to her supervisor, Mr. Boomer, which had pointed out her bad judgment. She told Grievant she believed she had written the letter, and she was "pissed off" about it. Grievant denied writing the letter. Ms. Winguard did not tell Grievant why she thought she had written the letter. Grievant felt this created a very difficult working relationship. Only Grievant and Ms. Winguard were present. Grievant presented no testimony that anyone other than Ms. Winguard hadaccused her of writing the letter. Ms. Winguard denied accusing Grievant of writing the letter, and stated she did not know who had written it. She testified she told Grievant others in the office believed she had written it. Grievant did not go to her supervisor about this incident.

Ms. Holtzworth testified that she spoke to all staff about this letter in a group meeting, explaining the need to go through the chain of command and to be specific in their complaints. She did not speak to Grievant individually about this, or accuse her of writing the letter.

A former staff member, Angela Wellman, testified that all staff were accused of writing this letter, but that she had heard a rumor that Ms. Winguard believed Grievant had written it. She testified she did not hear this rumor from a member of the Management Team. Other staff members who testified

did not feel they had been accused of writing the letter. Two staff members testified they had not heard Ms. Winguard or any other member of the Management Team accuse Grievant of writing this letter. No one testified they had heard either Ms. Winguard or any other member of the Management Team accuse Grievant of writing this letter.

It is obvious that only Ms. Winguard's actions toward Grievant are at issue in this incident. Grievant produced no evidence that any other member of the Management Team, or the Team as a unit, was involved in, or even aware of, Ms. Winguard's accusation against Grievant, or that any staff members were aware of Ms. Winguard's accusation. Ms. Winguard is no longer employed by HHR. The best remedy that would be available to Grievant through the grievance procedure, were Ms. Winguard's actions toward Grievant found to be harassment, is not available in this case, as Ms. Winguard isno longer an employee. It is time for Grievant to put her problems with Ms. Winguard behind her.

The second incident described by Grievant was the message passed on to Ms. Winkler-Serena, Community Services Manager. Ms. Winkler-Serena testified she had been told that Darlene Cremeans had made critical comments about her failure to maintain a proper temperature in the building where an employee was suffering from some health problems, and called her "mean spirited" in an employee meeting. She testified Grievant did not tell her this, and she had never heard anyone say Grievant was the one who had told her. She stated she talked to Ms. Holtzworth about this, and asked her to follow up on it, which she did. She did not identify who had told her.

Grievant testified that on December 18, 1997, her supervisor, Lacora Ford, asked her to come into her office. She stated Ms. Ford told her Ms. Holtzworth wanted her to talk to her, because she knew she was the one who told Ms. Winkler-Serena of Ms. Cremeans' comments about her. Grievant related no additional detail regarding this conference. She denied that Ms. Ford had called her in to discuss a file, and then brought this up during that time. Grievant stated she was upset and shocked by this.

Grievant stated she had been treated differently since this happened and she felt damaged, in that she had been labeled "a gossip," was consumed with trying to understand what she had done which had created these misconceptions, she was embarrassed and hurt by the accusation, and felt her reputation had been damaged. She stated she had always tried very hard to maintain a professional demeanor. She stated she had been made to suffer the stigma attached to filing a

grievance to defend her character. She stated people who file grievances are treated differently from otheremployees, although she related no instance of this actually happening to her. She further stated she believed that by filing a grievance she had pressured her supervisor to give her a better evaluation than she would have otherwise received.

Ms. Ford denied she had told Grievant Ms. Holtzworth knew she was the one who had told Ms. Winkler-Serena what Ms. Cremeans had said. She testified she told Grievant she had been asked to speak with her to let her know that one of her co-workers had told the Management Team that Grievant told Ms. Winkler-Serena, and that she had mentioned Ms. Cremeans' comments to some co-workers. She stated she told Grievant the Management Team wanted her to know what her co-workers were saying about her. She testified Grievant had stated she was being accused, but she had tried to assure her she was not, and she did not ask Grievant if the rumor was true. She admitted she had told Grievant if she ever had a problem that she needed to go through the chain of command, beginning with her. Ms. Ford did not believe her relationship with Grievant had changed, she stated she treats Grievant the same as she always has, and Grievant is a good worker.

Ms. Holtzworth testified she did not intend to accuse Grievant. She stated her intent was to let Grievant know what was being said about her so they could talk about it, or she could confront her accusers, but she did not think Grievant had told Ms. Winkler-Serena what had been said about her. She testified later, at Level IV, however, that she did think Grievant was the one who had told Ms. Winkler-Serena because of the rumors that she had done so, and that she also wanted Grievant to know what was being said so she would be prepared if someone asked her about this. She stated Ms. Ford told her Grievant had said she did not do it, and she believed Grievant. She testified that Ms. Winkler-Serena had come to her about this matter because she was concerned about what had been saidabout her, but that she would not disclose who had told her, and she does not know who told Ms. Winkler-Serena. She stated Grievant is a good worker, and she has no problems with her work. She stated she had told Grievant she was very sorry if she had misconstrued her intention.

Grievant attempted to show Ms. Ford and Ms. Holtzworth were lying about this incident, and that she was treated differently by management and staff after this incident. Beverly Kitchen, a staff member in the office, testified she had observed Ms. Holtzworth, Ms. Cremeans, Ms. Ford, and Ms. Winguard walk the opposite way when they saw Grievant, and that several employees treat Grievant differently. One of the employees named by Ms. Kitchen was obviously very upset that he had been

called to testify, and stated he had stopped talking to Grievant long before December 1997. A second employee named by Ms. Kitchen stated the reason some of Grievant's co-workers were unfriendly toward Grievant was that she had harassed them. She stated Grievant asked her why she had not been asked to sign a going away card for Melissa Stadler, a co- worker, and she told Grievant, "Earlene, everyone knows there's no love lost between you and Melissa, so why would you want to sign her card?" She stated the office rumor was that Grievant had set-up Ms. Stadler.

It is apparent that whatever bad feelings exist in the office toward Grievant, the described incident is not the cause. No member of the Management Team took any action designed to injure Grievant's relationships with her co-workers. It is equally apparent that the undersigned cannot make the co-workers in the office like each other.

The undersigned is not convinced that Ms. Ford's actions were "contrary to the demeanor expected by law, policy and profession." See Bennett v. W. Va. Dep't of Healthand Human Resources, Docket No. 96-HHR-149 (July 31, 1997). Obviously, the rumors which run through this office have caused hard feelings, and management felt the need to get involved.

The undersigned saw no evidence that the remaining members of the Management Team hold a grudge against Grievant as a result of Ms. Winguard's feelings, even after Grievant accused them of lying in their testimony. Ms. Holtzworth apologized to Grievant, and asked her what else they could do. Grievant could not tell Ms. Holtzworth or the undersigned what else she wanted. Ms. Holtzworth did everything she could to attempt to resolve this grievance at the lowest level possible. Perhaps Grievant simply wanted the opportunity to testify under oath that she was not the one who "squealed" in order to attempt to repair her working relationships, or she just wanted to keep the pressure on management because she no longer trusts them. The issue of trust is one Grievant will have to work through on her own, and with her supervisors. Unfortunately mutual trust is not one of the remedies which can be granted in a decision. It must be earned.

The third incident occurred during the grievance procedure, and the fourth incident about which Grievant was complaining occurred on March 27, 1998, well after this grievance was filed. Grievant was advised at the Level IV hearing that matters regarding her treatment during the grievance process and after the grievance was filed are separate grievable events, and must be taken up in a new grievance. However, even if these matters were addressed in this grievance, again, Grievant's complaint was with Ms. Winguard's actions, and she is no longer employed by HHR. There was no

evidence that anything which occurred was ever related to Grievant's co-workers, or that any remainingmember of management acted inappropriately toward her either during these two events or as a result of them.

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed 15 years by the Department of Health and Human Resources ("HHR") as a Legal Assistant for the Bureau for Child Support Enforcement in Huntington.

2. No disciplinary action was placed in Grievant's personnel file, nor did her supervisor intend to discipline her.

3. On December 1, 1997, Kelly Winguard, Grievant's supervising attorney, made statements to Grievant which led her to believe she was accusing Grievant of writing a letter to Ms. Winguard's supervisor criticizing her work. Ms. Winguard did not tell any other HHR employee she thought Grievant had written this letter, no one else was present when this accusation was made, and Grievant did not report this incident to her supervisor.

4. Grievant did not write the letter to Mr. Boomer.

5. On December 18, 1997, Grievant's supervisor, Lacora Ford, called her into her office and told her other employees were saying she was the one who had told Sharon Winkler-Serena that Darlene Cremeans had made critical comments about her in an employee meeting. Grievant believed Ms. Ford was accusing her of this, even though Ms. Ford assured her she was not.

6. Grievant did not tell Ms. Winkler-Serena what Ms. Cremeans had said about her. 7. Jody Holtzworth, Regional Manager for Region III, told Grievant she did not intend Ms. Ford's discussion with her to be taken as an accusation, and she was sorry if she took it this way. She does not believe Grievant told Ms. Winkler-Serena what Ms. Cremeans had said about her.

8. Ms. Winguard made statements to Grievant at her Level II conference, and reacted to Grievant's responses to questions asked of her in a meeting in March 1998, in a manner which Grievant found intimidating and offensive.

9. Ms. Winguard is no longer a HHR employee.

10. Grievant had not previously filed a grievance or engaged in other protected activity.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant was not given a verbal reprimand, nor was any other disciplinary action taken against her.

2. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

3. Harassment is defined as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 29-6A-2(l). "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. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

4. Grievant was not harassed by the Management Team, nor did anyone on the Management Team retaliate against her.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 18, 1999

Footnote: 1

Grievant offered no evidence that her career or health had suffered in any way, although her feelings were hurt. She likewise offered no evidence that she had incurred any attorney fees, however, the Grievance Board has no authority to award them anyway. The Grievance Board has also declined to award a grievant tort-like damages for pain and suffering or mental anguish, as this is not an appropriate forum for such damages. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997).

Footnote: 2

Grievant was represented by her sister, Mauna Frye, and Respondent was represented by B. Allen Campbell, Esquire.