THOMAS DUDLEY,

Grievant,

v. **Docket No. 01-BSS-092**

BUREAU OF SENIOR SERVICES,

Respondent.

DECISION

Thomas Dudley ("Grievant") initiated this grievance on July 18, 2000, alleging as follows:

> This grievance is based on three areas of concern:
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> a functional demotion in job duties and responsibilities thereby denying previously committed financial increases as well as future increases;
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> discrimination in that I have not been treated in the same manner as other Bureau employees including but not limited to leave policies, work environment and financial favoritism; and
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> treated me in such a manner as to procedurally harass me to resign my position.

As relief, Grievant seeks a "pay increase consistent with other staff that hold similar titles and have been employed . . . an equal amount of time" along with being "treated like other employees in regards to work environment and communications." After denials at levels one and two, a level three hearing was held on August 10 and September 28, 2000. The grievance was denied in a written level

three decision dated February 12, 2001. Grievant appealed to level four on March 14, 2001, and the parties agreed that this matter could be submitted for a decision based upon the record developed below. Fact/lawproposals were submitted by May 29, 2001. (See footnote 1) In order to expedite the level four decision, this grievance was reassigned to the undersigned administrative law judge on June 12, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as Manager of Research and Development. He has been employed by the Bureau of Senior Services ("BSS") and its predecessor agencies for approximately fifteen years.

2. Grievant's primary job duties involve management of the BSS Resource Center, which is a specialty library, offering data and resource materials relevant to senior citizen-related issues. Grievant also performs related duties, such as grant research and applications, serving as liaison to the state's medical schools, performing population data analysis and providing technical assistance to the Commissioner of BSS.

3. From March of 1997 until February of 1999, Patricia Bradford served as Commissioner of BSS.

4. For all time periods relevant to this grievance, Grievant's immediate supervisor has been James M. Shock, Deputy Commissioner of Fiscal Operations.

5. At a meeting with Commissioner Bradford and Mr. Shock on July 15, 1998, Grievant was told that it was likely he would receive a pay increase sometime during the fall of 1998. The reason for the raise was an increase in Grievant's responsibilities and apromotion. The exact nature of the proposed promotion was not specified anywhere in the record.

6. In a memorandum to Mr. Shock dated March 18, 1999, Grievant asked why no action had been taken to effectuate his pay raise. In response, Mr. Shock stated that, during the fall of 1998, "[m]any financial issues did not allow for further merit increases . . . at that time." Mr. Shock further stated that Grievant's request would be raised with the new commissioner, who had not yet been appointed.

7. Grievant has not been awarded a merit pay increase since early 1998.

8. Grievant was off work due to an injury from December 7, 1999, to April 6, 2000. Reports from his physician during this time period stated that Grievant was totally disabled and unable to perform even light duty.

9. In 1998 and 1999,Grievant was involved in the initial stages of the Senior Technology Initiative, a project supported by funding from Microsoft Corporation, which was to provide computer equipment and training to senior citizens across the state. During the spring of 2000--while Grievant was on medical leave--responsibility for this project was transferred to the governor's office, because the research portion of the project had essentially been concluded. BSS is only involved in the Senior Technology Initiative when called upon for assistance by the governor's office, but Grievant has not been asked to work on the project since late 1999.

10. In March of 1999, a new Commissioner of BSS, Gaylene Miller, was appointed by the governor.

11. After assuming her new role as Commissioner, Ms. Miller informed all employees of BSS that she would be handling all dealings with the West VirginiaLegislature, and that employees should not communicate with the governor's office without her prior approval.

12. Prior to Ms. Miller's appointment, Grievant frequently communicated with the Legislature and the governor's office on behalf of BSS, as part of his assigned duties. During the 2000 legislative session, Grievant was on medical leave and physically unable to perform those duties.

13. Prior to 1999, Grievant's office was located in the basement of the main capitol building (“MB-47"), where the actual BSS library and reference materials are located. Commissioner Miller decided in the spring of 1999 to move Grievant to the Holly Grove Mansion, so that all management employees would be working in the same location. At Holly Grove, Grievant shares an office with another employee.

14. After assuming her duties as Commissioner, Ms. Miller also directed that the parking spaces at Holly Grove be reconfigured, which resulted in the loss of three parking spaces, including Grievant's. Grievant was offered a temporary space at Holly Grove until a permanent space became available in the capitol parking building, for which Grievant must pay a monthly fee of $15.

15. Prior to going on medical leave, Grievant was involved in setting up BSS's Internet website. Because this was a high priority project, those responsibilities were assigned to another employee during Grievant's extended absence.

16. Prior to his extended absence, Grievant worked on a project called the “Long Term Care Fellowship.” During Grievant's absence, Deputy Commissioner William Lytton was contacted by the director of the fellowship concerning a presentation Grievant was to make at an upcoming conference. Due to Grievant's injury, a discussion occurredregarding sending another individual from BSS. Ultimately, no one from BSS attended the conference. However, during the conversation, the director expressed a preference for having an individual involved in the program aspect of the agency's services involved in the fellowship, rather than a research person. Since that time, Mr. Lytton has assumed responsibility for participation in that fellowship.

17. Grievant was involved in the initial stages of the “Retiree Attraction Program,” a project developed by BSS, the state tourism office, and Economic Development, the objective of which was to try to attract retirees from across the country to West Virginia. During Grievant's medical leave, these duties were assigned to another employee. However, due to some expected funding that did not come about, BSS's involvement in this project has been very limited, and the other two agencies have assumed the bulk of those responsibilities.

18. Grievant was previously involved to varying degrees in the foster grandparent program, the Governor's Summit on Aging, CORE, (See footnote 2) and the BSS Advisory Council. These are all programs which involve many employees, often from various state agencies. Upon assuming her duties, Commissioner Miller made changes in the assignments to these projects, which is within her authority.

19. In July of 2000, Grievant was assigned two new projects, the Governor's Senior Citizen Prescription Drug Program and an appointment to represent BSS before the West Virginia Health Care Review Administration. Grievant testified at the level threehearing in this grievance that the prescription drug program had taken up virtually all of his time for approximately two months.

20. Bobby Reynolds (See footnote 3) , a BSS employee, received a merit increase, effective January 1, 2000. She received this increase as a result of her exemplary work with the Foster Grandparent Program and the Governor's Summit. Ms. Reynolds' merit raise had been approved in the fall of 1999, prior to Grievant's injury.

21. Deputy Commissioner Lytton received a merit increase on September 1, 1999. He does not perform any of the same duties as Grievant.

22. Jan Bowen, Director of the Older Americans Act Programs, received a merit increase in

September of 1999.

23. During his medical leave, Grievant offered to perform some duties from home. Because his physician's reports indicated that Grievant was totally disabled and unable to perform light duty, Commissioner Miller declined to allow Grievant to work until he returned with a release from his physician.

24. Kathy Saul, a BSS employee involved in the Foster Grandparent Program, was allowed to work at home on a few occasions. She was permitted to do this because she needed to complete tasks which were time-sensitive. She was not on any type of medical or sick leave at the time she was permitted to do this.

25. Shortly after his return to work after medical leave, Grievant began experiencing computer problems. After ongoing efforts to correct the problem for severalmonths, by the fall of 2000, Grievant had received a brand new, state-of-the-art Gateway computer to replace his old one.

26. On March 2, 2000, and on April 28, 2000, Grievant was contacted by letter from Debbie Kittinger of the BSS payroll office regarding the status of his sick leave. Because Grievant's sick leave was about to run out and he had not been released by his doctor, Ms. Kittinger advised Grievant he may have to request annual leave to remain on the payroll for the duration of his absence.

27. Grievant's assistant, Kathy Richardson, applied for a new position within BSS, which she accepted. She was replaced by Ruth Burgess, and Grievant was involved in Ms. Burgess' selection.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employee has not met his burden of persuasion. Dixon v. W. Va. Div. of Corrections, Docket No. 98-CORR-243 (Aug. 24, 1998). See

Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

Grievant has made numerous allegations in this grievance and introduced approximately 90 pages of documents into the record. Although Grievant's documentation--which includes numerous listings of monthly job duties, communications with other employees regarding various issues, and miscellaneous memos--covers a variety of topics, the undersigned will attempt to address Grievant's concerns within the context of the three major areas he outlined in his grievance statement: functional demotion as related to job duties and merit pay; discrimination with regard to leave, work environment and pay; and procedural harassment.

Functional Demotion

It has been recognized by this Grievance Board that a “functional demotion” may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. Gillespie v. W. Va. Dep't of Corrections, 89-CORR-105 (Aug. 29, 1989). Grievant contends that there has been an erosion of his responsibilities over the past two years, citing the several projects from which he has been removed.

As the above findings of fact show, Respondent has provided reasonable explanations for all of the reassignments which have taken place. Overall, it is quite obvious that many of the changes have occurred simply because a new commissioner took over and is “doing things her own way,” which is unquestionably within her authority. Grievant has failed to prove that these changes were directed at him personally, and it appears that Commissioner Miller made numerous changes throughout the agency, affecting many people. Other projects were reassigned and altered while Grievant wasabsent for five months, which would be expected when a management employee with numerous responsibilities is absent for an extended period of time. Grievant complains that none of these projects were returned to him, but the evidence indicates that Grievant still participates in providing information for BSS's website, and that the other projects have concluded or been taken over by other agencies. In addition, Grievant has, in fact, been given other assignments since his return from leave, including the prescription drug program, which Grievant himself stated has “eaten every available minute” of his time since the assignment.

Unfortunately, it appears that many of the changes which have occurred at BSS have occurred simply due to the change in management and Grievant's absence, two factors which are beyond

Grievant's control. It is understandable that Grievant is frustrated, but any employee in his situation would likely encounter similar circumstances when these types of events take place. Nevertheless, Grievant has not proven that a “functional demotion” has occurred. There is no evidence which would establish that Grievant's future, financially or advancement-related, has been adversely impacted by the changes which have been made during the last two or three years at BSS. Grievant has not claimed he is working out of his assigned job classification or that his classification has been changed in any way.

Discrimination and Merit Increases

In accordance with the rules of the West Virginia Division of Personnel (DOP), salary advancements must be based on merit as indicated by performance evaluations and other recorded measures of performance, such as quantity of work, quality of work, andattendance. W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 5.08(a) (1998). See Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995). However, an employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly-established policies or directives. Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR- 092 (July 27, 1998); Morris, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94- DOH-555 (Mar. 20, 1995); Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS-051 (May 16, 1989).

As to merit increases, Grievant is understandably disappointed that a salary increase was discussed with him in 1998, and that increase never occurred. However, former Commissioner Bradford testified that it was her understanding that the salary increase was to take place in conjunction with a promotion which had been discussed, and she placed the decision in Mr. Shock's hands. Grievant's promotion never occurred, which has not been explained, and the administration changed. Nevertheless, simply because a possible salary increase was discussed, without further evidence, does not entitle Grievant to relief. Mr. Shock testified that the increase had not been promised, but that Grievant was told he would receive the increase if finances permitted.

As to the other employees who have received salary increases over the past two years, Grievant contends that they were rewarded for taking over duties previously assigned to him, while he received no increase. The evidence presented simply does notsupport this contention. In fact, the

employees discussed, specifically Bobby Reynolds and Jan Bowen, either received or had their raises approved before Grievant ever suffered an injury. In addition, their salary increases have been specifically related to exemplary work they did on certain projects. Grievant has failed to prove these decisions were arbitrary and capricious or based on any improper consideration.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievants may still prevail by establishing that the rationale given by the employer is "mere pretext". Id. Likewise, with regard to merit increases, the evidence establishes that the raises discussed were directly related to the job duties of the particular employees, so Grievant has not established a prima facie case of discrimination with regard to that issue.

Grievant further contends that he has suffered discrimination with regard to leave and “work environment.” The evidence established that Grievant was not similarly situated to Kathy Saul, who was allowed to work at home to complete time-sensitive tasks. She was not on sick or medical leave, while Grievant was on medical leave with physician's orders not to engage in even light duty work. Grievant also contends he was discriminated against as to his computer problems, work location, and parking. The evidence shows that Grievant received ongoing assistance with his computer problem, ultimately receiving a brand new computer. Also, Grievant was moved to Holly Grove so that he would be working in the same building as all other BSS management employees, and he is not the only member of management who shares an office with support staff. Accordingly, Grievant has not

established a prima facie case of discrimination regarding these issues.

While it is true that some employees were affected by the parking changes at Holly Grove while others were not, Respondent has provided legitimate explanations for its actions. The realignment was ordered by the administration, and some spaces were going to be lost. Grievant was offered a temporary spot, which he declined. He has failed to prove Respondent's actions regarding the parking spaces were discriminatory.

___Grievant also raised the issue of his assistant's job change. However, the undersigned does not understand how this relates to any of the allegations raised in this grievance. Ms. Richardson applied for a new position of her own volition, and Grievant wasallowed to participate in the selection of her replacement. He has failed to prove how this resulted from any improper conduct or motive on the part of Respondent.

Harassment

Finally, Grievant argues that he has been subjected to “procedural harassment,” the purpose of which is to get him to resign from his position. 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." In order establish harassment, a grievant must show a pattern of conduct, rather than a single improper act. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991).

As discussed above, the several changes that occurred in Grievant's job assignments have been rationally explained by Respondent. There has been no showing that any of these actions were directed toward an attempt to get Grievant to resign. If that were the case, Grievant would not have been given new responsibilities during the summer of 2000 after his return from medical leave. As Respondent has argued, all of the changes which have taken place at BSS occurred for legitimate business reasons, and there is no evidence that they were personally directed toward Grievant.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance

Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. A “functional demotion” may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. Gillespie v. W. Va. Dep't of Corrections, 89-CORR-105 (Aug. 29, 1989).

3. Grievant has failed to prove by a preponderance of the evidence that he has been subjected to a functional demotion.

4. An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly- established policies or directives. Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998); Morris, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Terry v. W. Va. Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS-051 (May 16, 1989).

5. The evidence in this case does not show that the merit raise decisions made by Respondent were unreasonable, arbitrary or capricious, or contrary to law or policy.

6. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievants may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

7. Grievant has failed to establish a prima facie case of discrimination regarding salary issues, leave policies, and work environment, and he has not proven that his parking space was removed as a result of discriminatory motive.

8. 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."

9. Grievant has failed to prove that he has been subjected to harassment by his employer.

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 grievanceoccurred, 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 16, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself, and Respondent was represented by Assistant Attorney General Jeffrey G. Blaydes.

Footnote: 2

Mr. Lytton attempted to give a brief explanation of what CORE is during his testimony at level three, but the undersigned is still unclear on whether it is a BSS entity or a state entity.

Footnote: 3

Ms. Reynolds' job title is not reflected in the record.