CHARLES HAMILTON,

Grievant,

v. DOCKET NO. 01-BEP-374

BUREAU OF EMPLOYMENT PROGRAMS/
LEGAL SERVICES DIVISION,

Respondent.

D E C I S I O N

This grievance was filed by Grievant, Charles Hamilton, against Respondent, the Bureau of Employment Programs/Legal Services Division ("BEP"), on or about April 26, 2001, alleging, “retaliation for proceeding with level three grievance hearing beginning April 18, 2001.” As relief, Grievant asked that the retaliation stop; and at the Level III hearing, he asked that certain individuals be disciplined. The parties agreed that this grievance could be decided on the record developed at Level III, and the matter became mature for decision upon receipt of Respondent's written argument on July 17, 2001. Grievant declined to submit written argument. (See footnote 1)

Grievant initially alleged seven separate instances of retaliation occurred after he filed a grievance challenging a seven day suspension imposed upon him. Grievant specifically withdrew his claim that his paralegal's grievance was not being processed in a timely manner in retaliation against him, when he learned at the Level III hearing that she had withdrawn her grievance. The undersigned concludes from review of the evidence presented by Grievant, and the statements made by Grievant at the Level III hearing, that he is pursuing only three or four of the seven alleged incidents.

The first incident involved David Ansell, an Attorney in Grievant's work unit, who Grievant has alleged told him on two occasions that he had better drop his grievance or things were going to get a lot worse for him in the unit. Grievant alleged that Mr. Ansell also told him he had heard he was going to be dismissed, and then said he was giving him another opportunity to drop the grievance.

Second, Grievant alleged that William Rardin, an Attorney employed by BEP, told him he wanted

him to continue the hearing set on his suspension grievance, and then Mr. Rardin talked to another employee, Tammy Ramsey, and she would agree to waiving the statutory timelines for processing her grievance, which involved Grievant, if he would agree to a continuance of the hearing on his suspension grievance. Grievant insisted that asking Ms. Ramsey to waive the statutory timelines was improper. The retaliatory conduct toward Grievant involved in this allegation is not apparent to the undersigned, although it may be Grievant is asserting Mr. Rardin attempted to coerce him into continuing his hearing. As will be set forth in the Findings of Fact below, the evidence presented did not support Grievant's unsworn rendition of his conversation with Mr. Rardin. Mr. Rardin simply asked Grievant if he wanted to engage in mediation. It was Grievant who brought up putting Ms. Ramsey's grievance on hold during the conversation as a condition of mediation, not Mr. Rardin. This allegation merits no further discussion.

Third, Grievant alleged retaliation when his paralegal was transferred, and he was left without a paralegal. Grievant alleged his supervisor knew the work he would assign to a paralegal was not getting done, but he continued to assign him cases without providing sufficient support staff. It is unclear whether Grievant is pursuing the claim thathe was retaliated against when his secretary was on sick leave for three days, and he allegedly had no secretarial support, so this issue will also be briefly addressed in the Findings of Fact.

The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant is employed by BEP as an Attorney in the Revenue Recovery Unit. At the time of the Level III hearing, Richard Stephenson had recently been assigned to supervise the Revenue Recovery Unit. Mr. Stephenson's supervisor is William Ballard, Director of Litigation in BEP's Legal Services Division. Mr. Ballard was Grievant's direct supervisor in March of 2001.

2. On March 16, 2001, Grievant was suspended without pay for seven days. He grieved the suspension on March 19, 2001.

3. David Ansell is also an Attorney in the Revenue Recovery Unit. He does not supervise Grievant. Grievant subpoenaed Mr. Ansell to testify at the Level III hearing on his suspension grievance. Mr. Ansell and Grievant had not spoken to each other for some time, and were not friends. The day before the hearing, Mr. Ansell took it upon himself to go to Grievant's office and offer his

opinion about the grievance. Mr. Ansell told Grievant he did not want to testify, because he did not want to rehash the problem he and Grievant had had many months before, and he did not want to make unkind statements about Grievant. He asked Grievant why not drop the grievance, rather than stir everything up in the office and get the office against him. He told Grievant he did not believe Grievant would win, and he would not be helping himself. When Grievant responded that he did not want to drop it, Mr. Ansell told him he thought he was making a mistake. Mr. Ansell also pointed out to Grievant that the office had new supervisory staff, and said, “what if they want to fire you as a result of all this?” Mr. Ansell had not spoken to any supervisory staffabout Grievant or his grievance, and had no factual basis for thinking that Grievant would be fired.

4. The day before the Level III hearing on Grievant's suspension grievance, William Rardin, an attorney with BEP, who was representing BEP in Grievant's suspension grievance, asked Grievant if he would be interested in mediating that grievance. Grievant responded that he would not be interested unless his other grievances, and a grievance filed by his paralegal at that time, Tammy Ramsey, were put on hold. Mr. Rardin and Mr. Ballard asked Ms. Ramsey if she would be willing to agree to waive the statutory time periods for processing her grievance, and she agreed to this. When Mr. Rardin told Grievant Ms. Ramsey had agreed to put her grievance on hold, Grievant said he was not interested in mediating.

5. Grievant's secretary was on sick leave on April 18, 19, and 20, 2001. (See footnote 2) Grievant's work was assigned to other support staff during this time, and his work was completed by other support staff.

6. On May 7, 2001, at Ms. Ramsey's request and due to her desire not to work for Grievant, she was removed from Grievant's supervision and assigned to assist Mr. Stephenson. Ms. Ramsey's position was posted, and Grievant did not have a paralegal assigned to him after Ms. Ramsey was transferred. Mr. Ballard continued to assign Grievant one case a week. Mr. Ballard told Grievant he was to take his paralegal assignments to Janie Beane-Pritt, or to him, while they were in the process of filling the vacancy, and this work would be assigned to a paralegal in the office. (See footnote 3)

Discussion

Grievant bears the burden of proving his 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 has alleged 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." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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

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

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasonsare merely pretextual. Webb, supra.

W. Va. Code § 29-6A-3(h) provides that “[n]o reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.”

Although Grievant did not prove Mr. Ansell made all the statements Grievant attributed to him, it

is clear that Mr. Ansell's comments were inappropriate, and were intended to cause Grievant to reconsider whether he should pursue his grievance. While the intent in the comments may well have been to promote office harmony, rather than to intimidate Grievant, Mr. Ansell should never have suggested to Grievant that if he continued to pursue his grievance, his office relationships would suffer. It is also clear, however, that Mr. Ansell acted on his own, simply as a co-worker of Grievant's offering his opinion, when he approached Grievant. The undersigned concludes that this is not the type of conduct which falls within the definition of reprisal.

As to Grievant's alleged problems obtaining paralegal and secretarial support, Grievant did not demonstrate that his work was not getting done, or that he otherwise was harmed in any way. Grievant pointed out that Ms. Beane-Pritt is not comfortable in his presence, and suggested it was not appropriate for him to take work to her. Mr. Ballard stated that he expected Grievant to be professional enough to walk into Ms. Beane-Pritt's office and put a file on her desk with written instructions on it without any problem, or if he did not want to do this, he could bring the file to him. Grievant then questioned why he should have to give the file back to Mr. Ballard to have the paralegal perform her assignments, and why Mr. Ballard couldn't just give the file to the paralegal to start with. Mr. Ballard's response was that he could certainly do this, but he thought Grievant would like to know what cases were being assigned to him, and there are some secretarial dutieswhich need to be taken care of initially with each file. Grievant stated, “I wish we had talked about this four weeks ago because as you know I've been getting a new case every week . . ..” Mr. Ballard responded:

> We did talk about it four weeks ago. I told you what to do. You told me in that conversation, not to worry about it that you could handle all this stuff yourself. You'd even been doing some typing, and I said, Chuck, you don't have to do that. I'll get this stuff taken care of for you, and you said don't worry about it, everything's fine. You know, this is okay. We'll get along. I've gotten along before. I can survive, and I said, Chuck, whatever you want to do, you can do, but we'll get you the help. We'll get the work done for you.

Grievant did not dispute any of this, but then suggested that Mr. Ballard should not have kept assigning him cases.

Grievant did not testify, and presented no evidence that his work was not getting done. Mr. Ballard was not aware that paralegal assignments were not being completed for Grievant. It is quite obvious that if Grievant is not receiving paralegal support, it is his own fault. His paralegal was

transferred, not in retaliation for his grievance, but because she did not want to work with him any longer. Mr. Ballard continued to assign Grievant cases, not in retaliation for filing a grievance, but because it is Grievant's job to handle the cases which continue to roll into the unit. Mr. Ballard provided Grievant with a way to receive paralegal support while the vacancy was being filled. Grievant was not told to take his work to Ms. Beane-Pritt in retaliation for filing a grievance, but because, as Mr. Ballard testified, she knows who is available to do the work which needs to be done. Mr. Ballard also gave Grievant the option of giving the paralegal assignments to him. Apparently, Grievant chose not to do this. Grievant was not treated in an adverse manner with regard to his paralegal's transfer, and none of this was in retaliation for filing a grievance.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his 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).

2. 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." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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3. Grievant demonstrated that David Ansell made inappropriate comments to him regarding his grievance. However, Mr. Ansell was acting solely on his own behalf as a co-worker, and his comments did not amount to retaliation.

4. As Grievant did not produce evidence to support his other claims, he failed to demonstrate he was retaliated against by his employer.

Accordingly, this grievance is **DENIED**.

Any party 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 24, 2001

Footnote: 1

The parties agreed that the grievance could be filed at Level II. It was denied at that level on May 10, 2001. Grievant proceeded to Level III where a hearing was held on May 21 and 25, 2001. A Level III Decision denying the grievance was issued on May 31, 2001. Grievant appealed to Level IV on May 31, 2001. Grievant represented himself, and Respondent was represented by Larry M. Bonham, Esquire.

Footnote: 2

Grievant's secretary was also on sick leave from May 1 through May 15, 2001. As Respondent pointed out, however, this occurred after the grievance was filed. Further, Grievant did not demonstrate he was denied secretarial support during this time, or that his work was not being completed.

Footnote: 3

There was some indication in the record that this transfer occurred on April 30, 2001, although a memorandum made a part of the record, dated May 4, 2001, states the effective date is May 7. It is not clear whether Grievant knew of this transfer at the time thegrievance was filed. Respondent did not suggest that this decision was not made known to Grievant until after the grievance was filed, and it will be addressed.