MICHAEL WAMSLEY,

Grievant,

v. **Docket No. 00-DOH-316**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Michael Wamsley, employed by the West Virginia Department of Transportation/Division of Highways (DOH or Respondent) as an Equipment Operator III filed a level one grievance on May 19, 1999, in which he alleged religious discrimination and harassment. For relief, he requested "to pull ditches on all blacktop roads, and to do shouldering. To be treated as past senior Opr. III." The grievance was denied at all lower levels and appeal was made to level four on October 2, 2000. The parties agreed to submit the matter for decision based on an extensive lower-level record, supplemented with proposed findings of fact and conclusions of law. The matter became mature for decision on March 8, 2001, the due date for final submissions. (See footnote 1) Grievant has been represented throughout these proceedings by John A. Grafton, Esq., and Respondent by Nedra Koval, Esq.

The following findings of fact are derived from the record in its entirety.

Findings of Fact

1. Grievant has been regularly employed by Respondent in District Eight, Tucker County, and assigned to the Thomas substation since August 16, 1988. Initially, Grievant was classified as a Truck Driver. 2. Approximately three months after Grievant was hired, Respondent hired Ernest Sherman, who had considerable experience operating a grader and other heavy equipment. Mr. Sherman was also assigned to the Thomas substation as a Truck Driver.

3. Grievant was upgraded to Transportation Worker - Equipment Operator III (EOIII), in 1995. Mr. Sherman had been upgraded to EOIII in 1989. Both employees were relocated to the county headquarters in Parsons.

4. Lowell Moore was Respondent's Tucker County Administrator in May 1999, when this grievance was filed. Grievant had applied for the County Administrator position at the same time as Mr. Moore.

5. While in Respondent's employ, Grievant pursued training to become a minister. At times, he would bring religious materials to work and read them during slow periods, or during breaks. Grievant has also discussed religious issues with coworkers. Respondent allows Grievant to take annual leave to fulfill ministerial duties such as funerals.

6. On or about April 21, 1999, Mr. Moore called Grievant into his office, read Biblical verses to him, and told him that he was not living what he preached. During the grievance process Mr. Moore acknowledged this action was inappropriate, and affirmed that it would not occur in the future.

7. During the winter months Grievant is generally assigned to work on primary roads. During the summer months Grievant is generally assigned to work on secondary roads. The reasons for the seasonal difference in assignments are that the quality of Grievant's work is not consistently good, and when he needs time off work to attend ministerial functions the entire crew must be reassigned.

8. Mr. Moore has reminded Grievant several times to be careful of the delineators, reflective markers placed on the berm of the road to assist motorists. Grievant has knocked some delineators down when plowing snow.

9. Mr. Moore once directed Grievant over the radio to “lighten up” on the ditches. The call had been made in response to a complaint made about the deepness of the ditches, and Grievant had been previously known to cut the ditches somewhat too severely.

10. Once, during morning roll call, while Mr. Moore was issuing work assignments he advised Grievant that he needed to pay attention to what was being said.

11. Grading assignments are not made on the basis of seniority, but rather on what equipment is available, and the skills of the operators.

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 Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A- 6; Howell v. W. Va. Dep't of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a

contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dep't of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra. W. Va. Code §29-6A-2(d) defines discrimination 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." An employee seeking to establish discrimination must first establish a prima facie case under W. Va. Code §18-29-2(m) by demonstrating the following:

(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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

While Grievant is similarly situated to Mr. Sherman, and perceives there to be some preference in assignments on primary roads, he has failed to establish any treatment which is detrimental to him. He has not proven, and did not actually allege that he has sufferedany harm as a consequence of the assignments. Therefore, Grievant has failed to establish a prima facie case of discrimination.

Religious discrimination has been addressed by the Grievance Board in Hudok v. Randolph County Board of Education, Docket No. 99-42-092 (May 6, 1999). To establish a prima facie case of religious discrimination, an employee must establish:

(a) that he has a bona fide religious belief and conflict with an employment requirement or duty;

(b) that he informed his employer of the belief and conflict; and,

(c) the employer nonetheless subjected him to discriminatory treatment because of his inability to fulfill the job requirements.

The incident in this case does not involve a bona fide religious belief which was in conflict with an employment requirement or duty. While Mr. Moore's reading Biblical passages was inappropriate, it does not constitute religious discrimination.

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).

Grievant has identified four incidents he considers to be harassment. First, was Mr. Moore's reading passages from the Bible, and advising Grievant that he was not living what he preached. As previously noted, the action has been acknowledged by Mr. Moore as inappropriate, and should not occur again. Second, Mr. Moore has advised Grievantseveral times to be careful of the delineators. Grievant has admitted that he has “hit one or two a time or two. . . .” Under these circumstances, reminding Grievant to be careful does not appear to be without cause. Third, Mr. Moore directed Grievant by radio to “lighten up” on the ditches. This comment was in response to a complaint, and in light of Grievant's prior practice of cutting the ditches too deep. Although the ditches were satisfactory in this instance, it does not appear that the reminder was made simply to annoy or irritate Grievant. Fourth, during morning roll call Mr. Moore directed Grievant to pay attention to some information. Grievant testified at level two that he was standing outside the door and heard what was going on. Since Grievant was not in the room, and Mr. Moore specifically wanted him to be aware of certain information, the comment was justifiable. In conclusion, these comments made over an undefined period of time do not constitute a repeated or continual disturbance, irritation, or annoyance. Neither has Mr. Moore's conduct relating to Grievant been contrary to the demeanor expected of a supervisor. Therefore, Grievant has failed to prove the claim of harassment.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dep't of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990). 2. W. Va. Code §29-6A-2(d) defines discrimination 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." An employee seeking to establish discrimination must first establish a prima facie case under W. Va. Code §18-29-2(m) by demonstrating the following:

(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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant failed to establish a prima facie case of discrimination because he did not prove that Respondent hastreated him detrimentally that it has not other employees, in a significant particular.

4. To establish a prima facie case of religious discrimination a grievant must prove:

(a) that he has a bona fide religious belief and conflict with an employment requirement or duty;

(b) that he informed his employer of the belief and conflict;
and,

(c) the employer nonetheless subjected him to discriminatory treatment because of his inability to fulfill the job requirements.

5. Grievant has failed to establish a prima facie case of religious discrimination because he failed to prove that he held a bona fide religious belief which was in conflict with an employment requirement or duty.

6. 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).

7. Grievant has failed to establish that he has been subjected to “repeated or continual disturbance, irritation or annoyance . . . contrary to the demeanor expected by law, policy and profession.”

8. Grievant has failed to prove that he is entitled to any specific assignments, or that he has been denied any specific assignments as a result of discrimination or harassment.

Accordingly, the 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. 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 §29- 5A-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.

Date: March 29, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant elected to not file proposals at either level three or level four.