JOHN COLLINS,

Grievant,

v. **Docket No. 02-DOH-231**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, John Collins, filed this grievance against his employer, the Division of Highways ("DOH"), on May 8, 2002. Grievant alleges:

> **Retaliation, against Larry Pauley. Larry Pauley is retaliating against me, "John Collins" for past grievances I have filed, is harassing me, writing me up & placing me in unfair & poor working conditions. I feel as though he "Larry Pauley" is try[ing] to have me fired.**
>
> **Relief Sought: The retaliation & harassment to stop immediately and all legal fees to be paid, & some type of assurance it will not happen in the future.** (See footnote 1)

This grievance was filed directly to Level II and denied at that level. A Level III hearing was held on July 1, 2002, and the grievance was denied on July 22, 2002. Grievant appealed to Level IV on July 29, 2002, and a Level IV hearing was held on January 2 and 3, 2003. (See footnote 2) **This case became mature for decision at that time, as the parties elected not to submit proposed findings of fact and conclusions of law.**

Issues and Arguments

Grievant asserted Mr. Larry Pauley, his supervisor, constantly harassed him at work, and Wilson Braley, District Engineer, supported this behavior by denying his grievances. The specific instances of harassment Grievant presented were: 1) Mr. Pauley required Grievant to flag in an unsafe situation; and 2) Mr. Pauley required Grievant to flag in the rain, while other

employees did not. (See footnote 3) Although other general statements of maltreatment were made, these two allegations were the only specific incidences addressed by the parties. (See footnote 4)

Grievant also asserted Mr. Pauley made negative statements about him and was trying to fire him. Respondent objected to this allegation as it had already been addressed in another Level IV hearing and a decision had been issued. Since the parties did not remember the Docket Number of this grievance, Grievant was allowed to present this testimony with the proviso that if this issue had already been the subject of a Level IV Decision it would not be addressed again. The undersigned Administrative Law Judge reviewed Grievant's prior Level IV decisions and found some of these general issues had been addressed and denied, but not in the detail addressed in this Level IV hearing. See Collins v. Dep't of Transp./Div. of Highways, Docket No. 02-DOH-230 (Sept. 19, 2002). Accordingly, these general allegations will be discussed.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by DOH as a Craftsworker II in Lincoln County, District Two. Larry Pauley was employed as the County Administrator at the time this grievance was filed and was Grievant's supervisor. (See footnote 5)

2. In the past year, Grievant has filed numerous grievances.

3. Sometime during the Spring of 2002, Grievant was told to flag in the rain while temporary workers did not have to engage in this activity. (See footnote 6)

4. Grievant is certified to flag. The temporary workers were not.

5. Sometime in April 2002, Grievant was working on the road as a Flagman. At first there were two men flagging, but one of them was required to leave. This left Grievant flagging by himself, and he believed this was unsafe.

6. Bill Topping was the Crew Leader for this group of men, he was the employee who had to leave, and he had been the other flagger. In the morning before hewent out on the job, he was instructed by Mr. Pauley to place Randy Adkins in charge before he left. Apparently,

Mr. Topping forgot to do this.

7. Mr. Pauley was unaware Grievant had been flagging by himself until the men returned to the garage that evening.

8. The next day Mr. Pauley would not allow this crew to work on the road, as they did not have enough flaggers for safety.

9. Some employees in Grievant's district have stated it would be a better place to work if Grievant were not there because he has filed so many grievances, and people have been upset by the friction this has caused. Many have gossiped that Grievant might get fired for his actions. Mark Terry, a co-worker, suggested to Grievant that he try talking to Mr. Pauley instead of filing grievances. Test. Adams, Level III Hearing. See Collins, Docket No. 02-DOH-230, supra.

10. Mr. Pauley has not stated he was going or is trying to fire Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving this 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23- 174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant asserts he has been subjected to a continuing pattern of harassment and reprisal. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

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 adverseaction. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has filed multiple grievances recently. However, he has not demonstrated he has been subsequently treated adversely. In the specific incidences alleged by Grievant, he has not shown he was treated adversely. The first incident was why Grievant had to flag in the rain when the temporary workers did not. The answer was simple, Grievant was certified, the temporary workers were not.

In the second alleged incident, Grievant asserted Mr. Pauley intentionally assigned him to an unsafe flagging situation. This is simply not true. Mr. Pauley did not know the situation occurred until after the fact, and he made certain the same situation did not occur the following day. As for the comments that Mr. Pauley was trying to fire him and had said so,

Grievant did not establish this was true.

Grievant was the source of much gossip at work. He had filed numerous grievances, at least ten within eight months, and some employees did not like all the friction that resulted from the frequent hearings and conflict. Apparently many believed Grievant would end up fired, and some would not have minded if this had occurred. Grievant's assertions Mr. Pauley was trying to fire him and gave him all the dirty jobs are his beliefs, and these contentions were not substantiated by evidence. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Even if Grievant had established a prima facie case, Respondent has rebutted the presumption of retaliation by offering legitimate, non-retaliatory reasons for the alleged adverse action. Grievant flagged because he was certified, and Mr. Pauley did not create an unsafe flagging situation for Grievant. No basis exists for finding Respondent's actions were motivated by any retaliatory rationale.

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).

Harassment requires repeated or continual actions, and Grievant did not establish his allegations of harassment. Other examples Grievant wished to use as harassment have already been denied by this Grievance Board. Certainly it is clear Grievant is unhappy, and he believes Mr. Pauley was "out to get him," but as previously stated, beliefs without evidence do not establish facts. (See footnote 7) **Grievant has not demonstrated "repeated or continual disturbance, irritation or annoyance . . . contrary to the demeanor expected by law, policy and**

profession." The above-discussion will be supplemented by the following 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 Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3. 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. See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

4. 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 reasons are merely pretextual. Webb, supra.

5. Grievant has not established a prima facie case of retaliation or reprisal as he has not been treated adversely.

6. W. Va. Code § 18-29-2(n) 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). 7. Grievant has not demonstrated a continuing pattern of harassment. No unreasonable performance expectations were demonstrated, and Grievant has not been criticized for his work.

8. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT- 359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

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." 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 Board with the civil action number so that the record can be prepared

and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 30, 2003

Footnote: 1

Grievant did not have any legal fees.

Footnote: 2

Grievant was represented by Roger Sowards, a co-worker, and Respondent was represented by its Attorney Barbara Baxter.

Footnote: 3

Grievant also asserted he had been harassed in September, 2002. Since this grievance was filed in May, 2002, that incident could not have been part of the reason for filing this grievance, and, of course, this requested change in the Statement of Grievance was a surprise to Respondent. Respondent objected to this change in the grievance as it was not prepared to defend this issue on such short notice. This allegation was not discussed further. Grievant indicated he would filed a grievance on this issue as soon as possible.

Footnote: 4

Grievant also wished to include his written reprimand as an example of harassment and retaliation. Grievant had grieved this written reprimand in Collins v. Department of Transportation/Division of Highways, Docket No. 02-DOH-228 (Sept. 19, 2002). Administrative Law Judge Mary Jo Swartz denied the grievance saying this discipline was appropriate. The undersigned Administrative Law Judge explained to Grievant that an appropriately given written reprimand could not be used as an example of harassment or retaliation.

Footnote: 5

Mr. Pauley has been transferred, and he no longer works in this position.

Footnote: 6

Grievant was unclear about dates.

Footnote: 7

It is noted that Mr. Pauley is no longer Grievant's supervisor, but Grievant wished to continue with the grievance as he fears Mr. Pauley could return to District II.