JOHN COLLINS,

Grievant,

v.

DOCKET NO. 02-DOH-276

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 West Virginia Department of Transportation/Division of Highways ("Highways"), on July 3, 2002:

> Discrimination. Wilson Braley, District Two Engineer, has discriminated against me in previous grievances filed.

That same day, Grievant filed another grievance:

> Discrimination, Retaliation and Harassment. Wilson Braley has been doing all the above to me with his answers on my grievances. I feel as though he is not doing his job, and by not doing so, bringing undo hardship on me and mental anguish.
>
> Relief sought: To fix this problem immediately and be reimbursed all cost of this grievance.

The grievances were filed at level three because Grievant alleged discrimination by the level two evaluator. The grievances were consolidated by agreement of the parties and a level three hearing was held on July 18, 2002. The grievances were denied byGrievance Evaluator Brenda Craig Ellis by decision dated August 26, 2002. Grievant appealed to level four on September 3, 2002, and a level

four hearing was held in the Grievance Board's Charleston, West Virginia, office on March 13 and June 9, 2003, at which time this case became mature for decision. Grievant was represented by Roger Sowards, and Highways was represented by Barbara Baxter, Esq.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

February 21, 2002 response to a grievance filed by John Collins on February 5, 2002.

Ex. 2 -

January 30, 2002 level two response to a grievance filed by John Collins on January 8, 2002.

Ex. 3 -

Notice of Warning to John Collins approved on April 16, 2002.

Ex. 4 -

June 6, 2002 level two response to John Collins' grievance filed on May 8, 2002.

Ex. 5 -

June 6, 2002 level two response to John Collins' grievance filed on May 7, 2002.

Ex. 6 -

John Collins' grievance filed on May 8, 2002.

Ex. 7 -

June 6, 2002 level two response to John Collins' grievance filed on April 10, 2002.

Level Three Highways' Exhibits

None.

Level Four Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of James Roberts, Wilson Braley, and Roger McCarty.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1 . Grievant is employed by Highways in Lincoln County, District Two.

2. Grievant has filed many grievances in the past, most of them claiming that his former supervisor, Larry Pauley, discriminated, harassed, and/or retaliated against him in some form or another.

3. Wilson Braley, District Two Engineer, has delegated level two grievance evaluator duties to James Roberts, Administrative Service Manager I. Following level two conferences, Mr. Roberts consults with Mr. Braley before writing the level two decisions.

4. Barbara King is Mr. Braley's secretary. She does not sit in level two conferences or make level two decisions.

5. Grievant has appealed all of the grievances in which he did not get a favorable response at level two through level four of the grievance process. He has received level four decisions in those cases, some or all of which Grievant has appealed to Circuit Court.

6. Roger McCarty is a Highways employee who also filed a grievance. Off the record at his level three hearing, Mr. McCarty mentioned he would have to bring in some credible witnesses from Lincoln County to support his grievance at level four. Mr. Braley laughed and jokingly said something like, “that might be hard to do.”

DISCUSSION

In a non-disciplinary grievance, the Grievant has the burden of proving the allegations in his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-

DOH-287 (Jan. 22, 1996). Grievant claims Mr. Braley'sresponses to his grievances at level two constitute discrimination, harassment, and retaliation, primarily because they tended to “side” with Larry Pauley.

Highways asserts Grievant has failed to state a grievable event, and is merely attempting to re-try his grievances again at level four, and has moved to dismiss this grievance. Alternatively, Highways denies Grievant's allegations.

Grievant claims the fact that Mr. Braley does not sit in on the level two conferences is evidence to support his claims. Grievant claims that Mr. Braley's secretary, Barbara King, somehow exerts influence over Mr. Roberts and/or Mr. Braley with respect to the grievance process, because she once said she did not understand what Grievant was asking for in one of his grievances. Grievant claims Mr. Braley and Mr. Pauley are together “in a web” designed to discriminate against him, harass him, and retaliate against him. Grievant claims all of these actions stem from one of his earliest grievances, wherein he was awarded four hours of overtime. Grievant has made all of these claims again and again in virtually every grievance he has brought before the Grievance Board, and in every instance, his claims have been denied.

The crux of this grievance is that Mr. Roberts, in conjunction with Mr. Braley, denied Grievant's prior grievances. Grievant now claims that act, in and of itself, is indicative of Highways' discriminatory treatment of him. The grievances Grievant complains about have all been denied up through and including level four of the grievance process, and most of them have since been appealed to Circuit Court. Grievant has had ample opportunity over and over again to address these claims against Highways. This grievance is just one more attempt to re-try all of the issues that have gone before in Grievant's history in District 2. Any problems Grievant had with the grievance process as it was applied to his priorgrievances could have been, and probably were, already addressed in his appeals of those grievances. Indeed, the simple fact that an appeal was made indicates Grievant was unhappy with the way the level two, and then level three, grievance evaluators decided his grievances.

W. Va. Code § 29-6A-4(b) provides at level two that:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within

five days of the conference. (Emphasis added).

Mr. Braley appointed Mr. Roberts as his designee in accordance with the statute. There was nothing improper in Mr. Roberts sitting in on Grievant's level two conferences. There also is nothing improper about Mr. Roberts consulting with Mr. Braley prior to issuing his level two decisions, as he is acting as Mr. Braley's designee.

Barbara King is Mr. Braley's secretary, and she receives and opens Mr. Braley's mail, including grievance forms. Apparently, after receiving one of Grievant's forms, she stated to Mr. Roberts and Mr. Braley that she did not understand what Grievant was asking for in the grievance. Subsequently, the grievance form was sent back to Grievant indicating that it was unclear what he wanted, and hence was denied. Grievant uses this example to assert that Ms. King exerted influence over Mr. Roberts and Mr. Braley on his grievances. This evidence does not demonstrate any such thing. It merely states a fact, which is that, on at least one of Grievant's forms, it was unclear what he was asking. Just because Ms. King made that statement does not mean she dictated to Mr. Roberts or Mr. Braley how they should respond to the grievance. 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to establish a prima facie case of discrimination. He has failed to identify one other employee who has been treated differently than he has with respect to the grievance process at level two. Indeed, Mr. Roberts testified he serves as the level two grievance evaluator in all other level two grievances brought through Mr. Braley's office, and handles those grievances in the same manner. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." An administrator's responses as a grievance evaluator in a grievance proceeding cannot be construed as “harassment” under the statute.

Grievant also presented the testimony of Roger McCarty, another Highways employee, who testified that in one of his own grievance hearings, off the record, he and Mr. Braley joked that it might be hard to find credible witnesses in Lincoln County. There was no specific mention of Grievant in this joke, and no other evidence to demonstrate that this statement is indicative that Mr. Braley's responses to Grievant's complaints are intended as harassment.

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 reprisal 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.

For the reasons stated above, Grievant cannot make a prima facie case of reprisal with respect to all of the level two responses by Mr. Roberts and Mr. Braley. The act of issuing a level two response to a grievance is not the type of “adverse action” foreseen in the statutory definition of reprisal. It is simply part and parcel to the grievance process itself, and cannot form the basis of a separate grievance based upon reprisal.

The doctrine of res judicata may be applied by an administrative law judge to prevent the 'relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.'" Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, 376 S.E.2d 639, 646 (1988). See Ellis v. Mingo County Bd. of Educ., Docket No. 96-29-366 (Apr. 16, 2000). The doctrine of res judicata requires the following four conditions to be the same: (1)

identity in the thing sued for;

(2)

identity of the cause of action;

(3)

identity of persons, and of parties to the action;

(4)

identity of the quality in the persons for or against whom the claim is made.

Syl. Pt. 2, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). Further, "[t]he indenticality of issues litigated is the key component to application of administrative res judicata. . . . " Liller at 646. A final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary 678 (Abridged 5th Ed. 1983). See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095, (Feb. 28, 1997); Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dep't of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991).

As mentioned before, Grievant appealed all of the grievances he complains of in this grievance, and raised the issues of discrimination, harassment, and retaliation in most, if not all, of them. The undersigned has no interest in revisiting those decisions now, and finds the issues are barred from relitigation by the doctrine of res judicata.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the Grievant has the burden of proving the allegations in his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. W. Va. Code § 29-6A-4(b) provides at level two that:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

3. Wilson Braley, District Two Engineer, as the administrator of his division, has the statutory

authority to appoint a designee, in this case Mr. Roberts, to conduct level two conferences. Grievant has failed to demonstrate a flaw in those proceedings.

4. 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burdenshifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5. Grievant has failed to establish a prima facie case of discrimination.

6. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." An administrator's responses as a grievance evaluator in a grievance proceeding cannot be construed as “harassment” under the statute.

7. Grievant has failed to prove harassment by a preponderance of the evidence.

8. 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:

(a)

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

(b)

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

(c)

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

(d)

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

(e)

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).

9. Grievant has failed to prove a case of retaliation or reprisal.

10. The doctrine of res judicata may be applied by an administrative law judge to prevent the 'relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.'" Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, 376 S.E.2d 639, 646 (1988). See Ellis v. Mingo County Bd. of Educ., Docket No. 96-29-366 (Apr. 16, 2000).

11. Grievants's claims in this grievance have been heard and decided in prior grievances, and are barred from relitigation by the principles of res judicata.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: June 27, 2003