JIMMY LITTLE,

Grievant,

v. **Docket No. 04-DEP-374**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

D E C I S I O N

Jimmy Little ("Grievant"), employed by the Department of Environmental Protection ("DEP") as an Environmental Technician I, filed a level one grievance on February 17, 2004, in which he alleged that his supervisor failed to follow the Employee Performance Appraisal Rating instructions and failed to provide him access to the DEP Handbook. For relief, Grievant requested that his February 3, 2004, performance appraisal be removed and his evaluation be redone, and that the Handbook be made available to him at a central location.

On July 9, 2004, Grievant filed a second grievance in which he alleged that he had suffered harassment, retaliation, and discrimination, and that false statements were included in his June 2004 performance evaluation. For relief, Grievant requested the harassment and "discrediting" cease, and the evaluation be removed from his personnel file.

The grievances were denied at all lower levels, and were consolidated upon appeal to level four on October 21, 2004, and March 11, 2005, respectively. (See footnote 1) An evidentiary hearing was conducted on April 25, 2005, in the Grievance Board's Charleston office. Grievant was represented by Fred Tucker of the West Virginia State Employees Union - United Mine Workers of America, and DEP was represented by Doren Burrell, Esq.,Assistant Attorney General. Mr. Tucker filed a post-hearing brief on May 26, 2005. For administrative reasons, the grievance was transferred to the undersigned for disposition under cover letter dated May 4, 2006.

After reviewing the lower-level record, and the audio recording of the level four hearing, the following findings of fact are derived from a preponderance of the credible evidence.

Findings of Fact

1. Grievant has been employed by DEP since February 2003, and has held the classification title of Environmental Technician I at all times pertinent to this grievance.

2. The duties of an Environmental Technician I involve routine environmental quality testing and/or treating environmentally regulated field sites to insure compliance with State and Federal regulations. More specifically, they conduct routine field laboratory analysis of designated sites on a prescribed schedule; treat sites appropriately to insure compliance with permit requirements; maintain records of tests performed and inventory of supplies; and perform preventive maintenance checks and services on equipment, vehicles and facilities.

3. On March 5, 2003, Environmental Resources Specialist Supervisor Roger Green completed an initial performance review during which he advised Grievant of his responsibilities, duties, performance standards and expectations for the upcoming year. Grievant signed the appraisal form acknowledging that he participated in a discussion of his duties, etc., and how they would be used to measure his work-related performance for the rating period. 4. On July 16, 2003, Mr. Green completed Grievant's interim performance appraisal, rating him “Fair, but needs improvement.” Specific development needs listed by Mr. Green were: improved communication and documentation on daily activity report; additional familiarity with purchasing procedures; records to stay on site and not at residence; and, additional familiarity with the operation of pumps. Under “General Comments,” Mr. Green noted that “Jimmy is still within the six month probationary period and is continuing to learn the aspects of this position.”

5. On October 24, 2003, Grievant met with Charles J. Miller, Assistant Director of the Office of Special Reclamation, and Mr. Green's immediate supervisor. At this time, many issues of concern to Grievant were discussed. The following week, Mr. Miller, Grievant, and Mr. Green met to clarify issues and details relating to Grievant's duties and his interaction with Mr. Green and the other technicians.

6. On February 3, 2004, Mr. Green completed Grievant's Annual Employee Performance Appraisal. Mr. Green rated Grievant as “Does Not Meet Expectations” (“DNME”) in thirteen of the twenty-three factors and standards included in the review. Those factors, and Mr. Green's “comments” are as follows:

“<u>Maintains Flexibility</u>”

Adapts to new situations in a positive manner.

Displays an openness to learning and applying new skills.

Works well with others to achieve organization's goals.

Comments: Jimmy needs to be more open to learning. Has a problem with injecting his past experiences instead of listening when instruction is being given and at times is argumentative. Jimmy showed resourcefulness in alerting Mining and Reclamation to anon-going pollution problem during the holidays. Needs to keep co-workers better informed of his activities.

"Demonstrates Credibility"

Acts independently while keeping supervisor informed

Performs work according to current guidelines and directives

Comments: Jimmy needs to communicate more directly with supervisor and not so much with the Office Assistants.

"Quantity of Work"

Work output matches the expectations established

Employee consistently meets deadlines.

Comments: Improvement needed in submittal of paperwork to Oak Hill.

"Quality of Work"

Work is organized and presented professionally.

Work product is thorough and complete.

Work product is free of flaws and errors.

Comments: Jimmy's documentation is at times misleading and misunderstood. Only tech to have caustic valve 'turned off' by someone unknown and daily report not clear on treatment results.

"Availability for Work"

Employee's attendance supports the expected level of work.

Employee's presence can be relied upon for planning purposes.

Employee is a dependable team member.

Comments: Jimmy needs to develop a personal contingency plan for times of required overtime.

7. On June 29, 2004, Mr. Green completed an Interim Employee Performance Appraisal rating Grievant as DNME. Two areas noted as needing improvement were Grievant's interpersonal relations with the other technicians, and advance approval of all overtime and schedule adjustments.

Discussion

Grievant argues that his mid-year and annual evaluations were flawed in a number of ways, and that he has suffered harassment, discrimination, and a hostile work environment. DEP asserts that the performance evaluations were properly completed, and denies the remaining charges. 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., 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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

A. February 2004 Evaluation

Grievant asserts that the February 2004 evaluation was completed contrary to the Rating Instructions and Division of Personnel Policy because: 1) he was not given the opportunity to complete a self-evaluation; 2) the comments were a surprise to him; 3) the Manager had not reviewed the evaluation prior to the employee interview; 5) the interviewwas interrupted by another employee; and, 6) the evaluator's judgement was not supported by fact.

DEP responses to the six charges are that: 1) self-evaluation is not required; 2) there should have been no surprise since Grievant's mid-year evaluation in July rated him as “fair, needs improvement”, and was a topic discussed at the October 30 meeting with Mr. Green and Mr. Miller; 3) Mr. Green

discussed the evaluation with Mr. Miller on January 30, 2004; 4) a co-worker opened the door of the office to inquire whether Grievant's evaluation was complete, but he did not enter, and withdrew immediately; 5) Grievant was given ample opportunity to respond to the evaluation; and, 6) Grievant was shown documentation supporting the evaluation, including work reports which were confusing as to the treatment conducted, and were filed late, as well as an incomplete purchase request.

DEP Employee Performance Appraisal Rating Instructions states that a copy of the evaluation form is to be provided for self-evaluation, but notes that self-evaluation is to be encouraged but not required. The document further directs that the comments should come as no surprise to the employee and be supported by fact. The completed form is to be reviewed with the preparer's supervisor prior to the employee interview, which should be conducted privately and without interruption. Employee input is to be allowed during the discussion of evaluation. These instructions mirror the requirements set forth in the Division of Personnel Employee Performance Appraisal Policy.

DEP concedes that Grievant was not given an opportunity to complete a self- evaluation. However, while this step may provide the employee with some insight as to where he might improve, and/or serve as discussion points, it does not override thesupervisor's evaluation, and the failure to provide the self-evaluation does not invalidate the document.

Grievant's complaint that the evaluation came as a surprise is without merit. The mid-year evaluation clearly put him on notice of performance deficiencies. Similarly, Mr. Green provided Grievant documentation to substantiate the “does not meet expectations” ratings. Grievant also was given input into the evaluation. Although he may have felt rushed, he did have adequate time to complete the section allotted for employee comments.

Grievant's evaluation conference was interrupted when a co-worker opened the door. The co-worker did not overhear the conversation, and the interruption was minimal. There is no indication that the disruption caused Grievant any harm. Finally, the fact that the evaluation form did not include the signature of Mr. Green's supervisor is likely attributed to geographic factors. In any case, Mr. Miller confirmed he had discussed the matter with Mr. Green earlier, and his failure to sign the document before the conference does not invalidate the evaluation.

B. June 29, 2004 Evaluation

Harassment

Grievant argues that he was subject to harassment, defined in *W. Va. Code* §29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellersv. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). "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). Similarly, repeated comments of a sexual nature by a supervisor have been found to constitute harassment. *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997). *See Tibbs v. Hancock County Bd. of Educ.*, Docket No. 98-15-016 (June 16, 1998). A single incident does not constitute harassment. *Id.; Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998). *Johnson v. Dep't of Health and Human Res.,* Docket No. 98-HHR-302 (Mar. 18, 1999).

Grievant has not demonstrated he has been subjected to harassment. He has not shown a pattern of repeated and continual treatment, or that he has been treated in a manner that is contrary to law. In support of this claim, Grievant alleges that Mr. Green was playing cat-and-mouse with him while he was ordering a toolbox. Purchase of the item took place over a period of several months, because Grievant did not correctly complete the paperwork. Grievant opined that Mr. Green was at fault for not providing all the information he needed the first time, rather than having him revise the purchase order a number of times. Certainly, there was more than the usual delay in accomplishing the purchase, but the evidence does not support a finding that Mr. Green acted with an intent to annoy, disturb, or irritate Grievant.

<u>Discrimination</u> *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." The legal test for discrimination claims raised under the grievance procedure statutes, as set forth in *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), requires a grievant to establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant bases this claim on the fact that Mr. Green received information from the other Technicians regarding his work performance, but did not solicit information from him regarding their performance. It appears that any information Mr. Green received from the other Technicians was due in whole or in part to Grievant himself. It was Grievant who spoke with Mr. Green and Mr. Miller concerning his co-workers. It was Grievant who did not record certain test results to prove that his co-workers were tracking him and/or intentionally recording different results. While Grievant's working relationship was strained, no discrimination was established.

Retaliation Grievant alleges that he has also been subject to retaliation. 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 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.* Grievant promptly filed a grievance following the year-end review, and certainly DEP was aware of that fact. Approximately three months later, an interim evaluation rated Grievant's performance as unsatisfactory. However, DEP has proven that the evaluation was a reflection of Grievant's performance. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. Just because a grievant did not like the information he received, does not mean it was inappropriate or constitutes harassment. *Rider v. Bd. of Trustees/Marshall Univer*., Docket No. 99-BOT- 348 (Apr. 7, 2000).

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 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., 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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). 2. *W. Va. Code* §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."

3. What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997).

4. Grievant has failed to prove that he has been subjected to harassment. He has not shown a pattern of repeated and continual treatment, or that he has been treated in a manner that is contrary to law.

5. *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."

6. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

7. Grievant failed to demonstrate he was treated differently than other similarly situated employees, and that DEP had engaged in discrimination. 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."

9. 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).

10. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. Just because a grievant did not like the information he received, does not mean it was inappropriate or constitutes harassment. *Rider v. Bd. of Trustees/Marshall Univer*., Docket No. 99-BOT- 348 (Apr. 7, 2000). 11. Technical or clerical errors made on a performance evaluation which do not affect the outcome of the review, and otherwise cause no harm to the employee, are an insufficient basis for its retraction.

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.

DATE: JUNE 15, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The issue of the employee handbook was resolved at level two.