THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CHARLIE ADKINS, JR.,

Grievant,

v. **Docket No. 06-DOH-086**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant filed this grievance against his employer, Division of Highways, on September 27, 2005, alleging:

Retaliation: (a) Transfeured [sic] to night. (b) Taking of my new state truck. (c) Transfured [sic] back to dayshift [sic]. (d) Loss of income over approx. the last 5 years. (e) Setup for having a camcorder. (f) Harrassment [sic] and harrassment [sic] over the last 5 years. (g) Insinuation about my sexual preference. (See footnote 1) (h) Humilliation [sic]. (I) Unbelivable [sic] stress over the last 5 years. (j) Deffation [sic] of Character and deffation [sic] of character over the last 5 years. (k) The same day as the level 3 grievance you made me a supervisor. I called Rick Welman on my cell phone and asked him if Chris was my boss? Rick said Charlie those jobs are your [sic]. I don't want to be a supervisor if I have not earned it. I know I have already [sic] earned it. I don't want it this way. I feel this is part of a coverup and a bribe.

For relief, Grievant seeks:

(1) That if this is happening to any other within the entire State Department that it STOPS! (See footnote 2) (2) A calculated amount (a) of income loss (b) for mental anguish ©) for the time that it took for me to prepair [sic] my defence [sic] (d) for defamation of character (e) unbelievable emotional stress (f) reinverment [sic] of all funds including lawyer fees, court costs, paying of witness, and or any costs that has been or will be incured [sic] from the time all this started which was the first grievance I filed 5 yrs ago and Ilost my position as blacktop inspector which I was for approx. 15 yrs. (See footnote 3) (3) The promotions, raises, advancements, and or positions I should have earned from the time I filed the first grievance approx. 5 yrs. ago when this all started. (4) That the FRAUD, BLACKMAIL, CONSPREICY [sic], SETUPS, COVERUPS, BRIBES, Stops! Defanition [sic]: Blackmail consists of two things, each indiputably [sic] legal on there [sic] own; yet, when combined in a single act, the result is considered a crime. What are the two things? First there is either a threat of an offer. In the former case, it is, typically, to publicize an embarrassing secret; in the latter, it is to remain silent about the information. Second, there is a demand or a request for funds or other valuable considerations. When put together, there is a threat that unless paid off, the secret will be told. Conspirecy [sic], Setups, Defamation of carchater [sic], Hummilation [sic] by Supervisor's [sic]. The using of other's [sic] to try and get rid of good, hard working personal [sic]. (5) That the Shadow Control STOPS! Deanition [sic]: Shadow control therefore consists largely of the placement of shadow agents in key positions in all of the institutions that are to be controlled. (6) Be made whole in every way. (7) Truthful and Fair evaulation [sic]. Stop creating fear before and after filing a grievance and stop the repercussions for doing so. Example: (Transfuring [sic] others and myself around in location for perposes [sic] of comminting [sic] different crimes. Reducing income. Taking away things I and others like. Example: taking my 2002 Ford F-150 State Truck and giving me a junk. (9) Stop the back filing. (See footnote 4) (10) If after over 20 years of service and being a supervisor over multi million [sic] dollar redural [sic] projects I have no earned being a supervisor don't make me one after I file a grievance and you know you were wrong for what you have done. (11) I never want vised [sic] again! (See footnote 5)

This grievance was denied at the lower levels. At Level IV, Grievant decided to submit this case on the Level III record. (See footnote 6) Grievant has represented himself throughout the grievance. Respondent was represented at the lower levels by Robert Miller, Esq., but wasrepresented at Level IV by Barbara Baxter, Esq. This case became mature for decision on July 11, 2006, upon the

submission of proposed findings of fact and conclusions of law. (See footnote 7)

Issues and Arguments

Grievant makes a number of allegations in his statement of grievance. However, the allegations fall in three main categories: (1) timeliness, (2) retaliation, and (3) harassment. Grievant alleges there are specific instances of conduct by Respondent that indicate Grievant has been the victim of retaliation and harassment for a number of years. Respondent asserts Grievant has not proven his claims, some of which were filed outside the statutorily imposed time frame. Respondent also argues that, if it is found Grievant established a prima facie case of retaliation, Respondent has sufficiently rebutted that presumption by showing legitimate reasons for any adverse action.

Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant has been employed by DOH assigned to District Two as a Transportation Engineering Technician in the Materials Division of the Construction Department, at all times pertinent to this grievance.

2. In September, 2000, Grievant filed a grievance against Phillip Manley, his supervisor at the time, alleging Mr. Manley assaulted him. The grievance was denied. *Adkins v. Div. of Highways*, Docket No. 01-DOH-446 (Dec. 27, 2001).

3. Sometime after filing that grievance in 2000, Grievant lost his position asblack top inspector. (See footnote 8)

4. During the summer of 2004, Grievant and Mike Gillium, Grievant's supervisor at the time, argued about a female stopping and talking to Grievant while he was at work.

5. Mr. Gillium told Grievant to sign out and go home even though Grievant had not worked 40 hours. Grievant did not go home.

6. Two to three weeks earlier, Mr. Gillium had docked Grievant's pay by 15 minutes. (See footnote 9)

7. There was a personality conflict between Mr. Gillium and Grievant.

8. In 2004, Grievant had a conflict with a contractor on the Matewan Water Project.

9. Grievant was transferred to Lincoln County. (See footnote 10)

10. On April 13, 2005, Grievant filed another grievance about treatment received from Steve

McNeely, his supervisor at the time. That grievance was denied. *Adkins v. Div. of Highways*, Docket No. 06-DOH-006 (July 25, 2006).

11. Respondent provided Grievant with a work truck. At some point, Grievant's 2-wheel drive truck was exchanged for a 4-wheel drive truck because Grievant was working at a mountaintop site, and a 4-wheel drive truck was required to reach the work site. (See footnote 11) 12. On August 28, 2005, Grievant signed a document entitled "Disclosure Agreement & Waiver." This document stated permission was required before a person was allowed to take pictures of the work site. Respondent's Exhibit 1.

13. Grievant had been instructed not to use the video camera unless his supervisor approved it. Specifically Grievant's supervisor gave him a verbal reprimand for taking pictures of the men coming out of bathrooms, getting off of vehicles and working.

14. Grievant also tape-recorded conversations that took place on the Mate Creek Energy project.

15. Grievant received a written reprimand for using a video camera on the King Coal Highway project during the week of September 6-9, 2005. Grievant's Exhibit 1.

16. Respondent asserted the defense of timeliness at Level I.

Discussion

The discussion below addresses each of the three issues separately.

I. Timeliness

A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." *W. Va. Code* § 29-6A-4(a).

Grievant alleges (1) he has lost income over approximately the last five years, (2) he has been harassed over the last five years, (3) he has suffered stress over the last five years, and (4) he has suffered defamation of character over the last five years. Clearly,these allegations are time barred. The statute allows for filing a grievance within ten days of the grievable event or within ten days of becoming apprised of the event. Because the allegations reference events that occurred outside the statutory time frame for filing a grievance, those claims are time barred.

II. Retaliation

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).

Grievant alleges Respondent engaged in activities that amount to retaliation. To demonstrate a *prima facie* case of reprisal as defined by *W. Va. Code* § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
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> that he was subsequently treated in an adverse manner by the employer or an agent;
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> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
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> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
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> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003). *See W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Webb v. Mason County Bd. of Educ*., Docket No. 89-26-56 (Sept. 29, 1989). *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." *Rainey v. Dep't of Admin./Pub. Employees Ins. Agency*, Docket No. 04-ADMN-174 (Sept. 3, 2004).

Grievant has established a *prima facie* case of reprisal by showing he was given a verbal and written reprimand within five months of filing a grievance against Respondent. Respondent, however, rebuts the presumption of retaliation by offering legitimate, non- retaliatory reasons for the adverse action. First, Grievant was verbally reprimanded about bringing a video camera to a work site. When the verbal reprimand did not hinder Grievant from bringing a camera to work, the written reprimand served as an additional warning. Grievant was reprimanded for bringing a camera because there was a prohibition against it, and Grievant was aware of the prohibition. Also, the camera was making employees uncomfortable because Grievant was filming his co-workers coming out of the restrooms,at work, and getting off the trucks. This is a legitimate, non-retaliatory reason for the reprimands.

Grievant also asserts having his 2-wheel drive truck exchanged for a 4-wheel drive truck was retaliation. This is not retaliation because Grievant is not entitled to have a state vehicle, and when supplied with a state vehicle, he is not permitted to choose which truck he believes is appropriate. Even though Grievant did not prove retaliation in this action, Respondent still offered a legitimate reason for exchanging Grievant's truck. Grievant needed the 4-wheel drive truck in order to arrive at the work site located on a mountain top. Grievant also alleges Respondent has retaliated against him by transferring him to night shift and then back to day shift. It is unclear over which transfer Grievant is alleging retaliation. Either way, Grievant did not prove these transfers were the result of retaliation. There was testimony that Grievant was transferred to various shifts as needed. This is permissible. “The Division of Personnel's Administrative Rule states in Section 11.6(a) that 'appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.' The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay.” *Jordan supra.*

Grievant also alleges he was set up for having a camcorder. However, this was not proven. It is clear Grievant was provided with and signed a written confidentiality agreement. Grievant alleged at

hearing that he did not read the agreement prior to signing it. The natural assumption, though, is that Grievant read the agreement, andacknowledged his agreement to abide by its terms when he signed it. There was no evidence of any conspiracy involving the camcorder. Grievant was verbally warned that he could not bring a camcorder on the premises without his supervisor's permission. Contrary to this instruction, Grievant continued to bring the camcorder. Grievant's fellow employees became uncomfortable because Grievant took pictures of the men coming out of the bathroom, working, and getting off their trucks. It is understandable that the employees would be concerned about this type of behavior. Grievant brought the camcorder onto the work site in violation of both the confidentiality agreement and the directives given by his supervisor.

III. Harassment

Grievant also alleges harassment. “Harassment” means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. *W. Va. Code* § 29-6A-2(l). There is no evidence in the record of harassment. Grievant has, by his own actions, brought about many of the negative consequences.

Because Grievant's harassment allegations hinge on witness credibility, the undersigned must make a credibility determination. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absenceof bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*, Docket No. 96-29-154 (Sept. 30, 1996).

Grievant lacks the ability to perceive events accurately. Grievant believes he has been harassed and appears to believe there is a statewide conspiracy. From his stated relief sought, Grievant believes there are shadow agents throughout state government. There was no evidence presented concerning these individuals. Grievant also believes employees are being transferred so crimes can be committed. Once again, there was no evidence presented concerning these alleged crimes.

Grievant persists in his belief that Respondent is part of a conspiracy. This is a skewed view of reality. For every specific incident Grievant has raised, DOH has provided a rational basis for its actions, but Grievant continues to attribute any adverse action to a conspiracy. Unfortunately, any negative consequences Grievant has suffered has been a direct result of his own actions.

The following conclusions of law support the above discussion:

Conclusions of Law

1. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance."*W. Va. Code* § 29-6A-4(a).

2. 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).

3. To demonstrate a *prima facie* case of reprisal as defined by *W. Va. Code* § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
>
> that he was subsequently treated in an adverse manner by the employer or an agent;
>
> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
>
> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
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> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003). *See W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Webb v. MasonCounty Bd. of Educ*., Docket No. 89-26-56 (Sept. 29, 1989). *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." *Rainey v. Dep't of Admin./Pub. Employees Ins. Agency*, Docket No. 04-ADMN-174 (Sept. 3, 2004).

5. “Harassment” means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. *W. Va. Code* § 29-6A-2(l).

6. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*,Docket No. 96-29-154 (Sept. 30, 1996).

7. Respondent met its burden in proving Grievant's claims from years prior are barred by time.

8. Grievant proved a *prima facie* case of retaliation. Respondent defeated Grievant's *prima facie* case by presenting legitimate reasons of the actions taken.

9. Respondent did not engage in retaliation.

10. Grievant failed to meet his burden of proof on the allegation of harassment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and 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: September 15, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

There is no evidence of this in the record.

Footnote: 2

The grievance only involves Mr. Adkins.

Footnote: 3

This remedy is not available from the Grievance Board.

Footnote: 4

The meaning of this is unclear.

Footnote: 5

The undersigned does not know what Grievant means by this request.

Footnote: 6

The lower level record reads more like a conversation between the Grievant and the witnesses. The hearing examiner attempted to correct this several times, but Grievant would lapse into his conversational style.

Footnote: 7

Proposed findings of fact and conclusions of law were only received from Respondent.

Footnote: 8

Given the difficulty the hearing examiner had the lower level getting Grievant to establish clear time lines, there is confusion over when specific events occurred.

Footnote: 9

The reason for this unclear.

Footnote: 10

It appears as if the transfer came after the conflict with the contractor on the water project. However, due to Grievant's inability to specify times, the undersigned cannot be sure when this occurred.

Footnote: 11

Once again, the specific date in which this occurred is unclear.