THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MELVIN POORE,

Grievant,

v. **Docket No. 06-HE-475**

Sue Keller

Senior Administrative Law Judge

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

D E C I S I O N

Melvin Poore ("Grievant"), employed by West Virginia State University ("WVSU") as a Shipping/Receiving Assistant, filed a level one grievance on November 14, 2006, in which he alleged Employees duties do not correspond with job PIQ or classification. Employee is subject to harassment and arbitrary treatment by supervisor. Violation of WV State Code 29-6a-2 [sic], BOG Policy 12, BOG 17 and any other policy that my [sic] be applicable. Pay grade violates original letter of appt.

For relief, Grievant requested that his pay grade be consistent with that stated in his original letter of appointment, an adjustment to his pay grade and classification consistent with his duties, and to be made whole in every way.

Grievant's immediate supervisor lacked authority to grant the relief requested, but raised the issue of whether the grievance was timely filed. The parties agreed to waive consideration at level two, and upon appeal to level three Grievant withdrew the classification issue. The remaining issue of harassment was denied, and appeal to level four was made on December 20, 2006. Grievant's AFT representative Christine Barr, and Assistant Attorney General Elaine L. Skorich, agreed to submit the grievance for decisionbased upon the lower-level record, supplemented with proposed findings of fact and conclusions of law filed on February 20, 2007. The grievance was subsequently transferred

to the undersigned on or about March 5, 2007.

Synopsis

___At hearing, Grievant failed to provide any examples of the alleged harassment after October 2005; therefore, the grievance was not timely filed. Even if timely, the evidence does not establish that Grievant was subject to harassment or arbitrary action by his supervisor.

The following facts have been derived from a preponderance of the credible evidence made part of the level three record.

Findings of Fact

1. Grievant has been employed by WVSU for approximately five years, and has been classified as a Shipping/Receiving Assistant for the past three years. Grievant's primary duty is to pick up and deliver items throughout the campus and surrounding area.

2. In August 2005, Grievant was advised by a local retailer that another warehouse employee was making unwelcome sexual comments to his female employees and asked if something could be done to stop comments.

3. Grievant reported the incident to his supervisor Tom Weaver. Because he perceived Mr. Weaver to be nonresponsive, Grievant proceeded to report the event to Dr. Epps. In fact, Mr. Weaver had promptly telephoned the local businessman to assure him that the behavior would not occur again. Mr. Weaver was upset that Grievant had gone to his supervisor about the matter. (See footnote 1)

4. From that time forward, Grievant interpreted Mr. Weaver's comments to be threatening or harassing.

5. After Mr. Weaver turned and bumped Grievant with his shoulder at work, Grievant filed assault charges, which resulted in an order being issued to Mr. Weaver to have no contact with Grievant.

6. Procedures had to be revised at the warehouse during the period of time that Mr. Weaver was not allowed to contact Grievant. Grievant interpreted these changes to be harassment and arbitrary. 7. Mr. Weaver was exonerated after a trial on the assault charges. Grievant believes that Philip Judd, Director of the Physical Plant, arranged for this outcome by contacting the Magistrate before the trial.

8. Grievant has also filed a complaint with the Human Rights Commission regarding Mr.

Weaver.

9. Grievant did not cite any incidents of the alleged harassment/arbitrary behavior after October 2005.

10. A level one grievance was filed on November 14, 2006.

11. At level one, WVSU raised the issue of whether the grievance was timely filed, and renewed the claim at the level three hearing.

Discussion

Initially, WVSU raises the procedural issue of whether this grievance is timely filed. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997). Pursuant to *W. Va. Code* § 29-6A-3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." The level one Decision raised the issue of timeliness, and it was raised again at the level three hearing. Accordingly, the undersigned finds the timeliness defense was properly raised.

As to whether the grievance was timely filed, *W. Va. Code* § 29-6A-4(a) provides: Within 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, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *Kessler, supra. See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant offers no examples of harassment or arbitrary actions by Mr. Weaver after October 2005. While the working relationship appears to remain tense, the specific allegations made by

Grievant are untimely raised. Grievant was very aware of the situation with Mr. Weaver, as evidenced by his testimony regarding the fact that he began keeping notes on various actions beginning in August 2005. This grievance was not filed until a year after the last alleged incident, long after the statutory time lines had expired. Even if the grievance had been timely filed, Grievant failed to prove any wrongdoing by Mr. Weaver. As the complaint 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*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true thannot." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues Mr. Weaver's treatment of him constitutes a pattern of harassment. *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." 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). "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.; Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998).

Grievant also claims that he has been treated in an arbitrary manner. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausiblethat it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th

Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). The evidence establishes that this unfortunate situation began when Grievant misinterpreted Mr. Weaver's response to information he had been provided. Mr. Weaver was understandably unhappy that Grievant decided to report the matter to the next level supervisor. Since that time, Grievant has interpreted every possible misstep by Mr. Weaver as a personal affront. Many of the complaints, including mislabeled items which were delivered to the wrong location, or inadequate directions to an unusual location appear to be simple mistakes with minor repercussions. Changes in scheduling were implemented to increase efficiency. The failure of Mr. Weaver to deliver non-priority packages when Grievant was absent was not an unusual business procedure. In summary, Grievant has failed to establish that he was subject to harassment, or that WVSU has acted in an arbitrary and capricious manner regarding his employment. 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. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997).

2. *W. Va. Code* § 29-6A-4(a) requires that a grievance be filed within 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.

3. The running of the relevant time period is ordinarily deemed to begin when the employee is

unequivocally notified of the decision being challenged. *Kessler, supra. See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Pursuant to *W. Va. Code* § 29-6A-3(a)(2), WVSU properly raised the timeliness defense at or before the level two hearing.

5. WVSU has proven that the grievance was not timely filed, and Grievant failed to demonstrate a proper basis for the failure to comply with the statutory time lines.

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" 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: MARCH 29, 2007

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Neither Dr. Epps' title nor position were made part of the record.