THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JANIS ROBINSON and

JOYCE ANDERSON,

Grievants,

v. Docket No.06-HE-416

WEST VIRGINIA UNIVERSITY,

Respondent.

DISMISSAL ORDER

Grievants, Janis Robinson and Joyce Anderson, are employed by West Virginia University ("WVU") in the Student Affairs Business Office. The Statement of Grievance filed on August 22, 2006, reads:

> **Classified Employees Handbook - Page 9 - Employees are expected to behave in a civil, professional manner; to comply with State and Federal laws and regulations, to treat each other with respect. Our supervisor, Rocio Hernandez-Poe, has created a hostile work environment that is affecting our work performance and our health.** (See footnote 1)

The relief sought:

> **We would like to see Rocio be mandated to get immediate professional counseling, and to provide us with an outline of treatment plan, progress reports, and a letter of documentation in her file. And - to retain our current positions under the direction of another supervisor.**

This grievance was denied at Levels II and III, and appealed to Level IV on November 9, 2006. Respondent filed a Motion to Dismiss on December 4, 2006. An unsuccessful mediation was held on February 6, 2007. Chief Administrative Law Judge Paul Marteney conducted a

non-recorded, pre-hearing conference on March 5, 2007. Itappeared from his notes that the Motion to Dismiss would become mature for decision one week after he received the Level III transcript. The transcript was received March 23, 2007. Shortly thereafter, Judge Marteney resigned from the Grievance Board.

On September 7, 2007, the Grievance Board notified the parties that the case had been reassigned to the undersigned Administrative Law Judge, but the date on which the case became mature for decision should not change. After a review of the record, the undersigned Administrative Law Judge scheduled a pre-hearing conference on October 2, 2007, to clarify Grievants' position on the Motion to Dismiss, as no response had been received. After this pre-hearing conference, by Order dated October 3, 2007, Grievants were given until October 12, 2007, to respond to the Motion to Dismiss. No response has been received, and this case became mature on October 12, 2007.

Grievants were represented below by Stephen Reiner, and WVU is represented by Elaine Skorich, Assistant Attorney General.

Synopsis

Respondent's Motion to Dismiss is based on the assertion that the relief sought does not state a "claim upon which relief can be granted." 156 C.S.R. 1 § 6.11. Respondent maintains the undersigned Administrative Law Judge is without authority to direct Grievants' supervisor to attend counseling, provide Grievants reports on the progress of this therapy, and place Grievants under a different supervisor.

As Grievants have not responded to this Motion, their position on these issues is unknown.

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

Findings of Fact

1. Grievants are employed in the Student Affairs Business Office, and Ms. Hernandez-Poe is their supervisor.

2. Over the past years, the Student Affairs Business Office had several supervisors who

have not provided adequate supervision for the employees. Ms. Hernandez-Poe was selected to "whip the office into shape" and decrease the number of errors that occur in the office.

3. Grievants do not like the way Ms. Hernandez-Poe runs the office and the way she discusses their numerous errors with them.

4. Ms. Hernandez-Poe agrees she has a loud voice. She is clearly frustrated by the mistakes made by Grievants because they repeatedly make the same errors on the same issues.

5. Since the filing of the grievance, Grievants believe Ms. Hernandez-Poe management style has changed for the better.

Discussion

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If this case were at Level IV for hearing, Grievants would have the burden of proving their grievance by a preponderance of the evidence as it is a non-disciplinary grievance. *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 footnote 2) *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). Here, the issue before the undersigned Administrative Law Judge is Respondent's Motion to Dismiss. Accordingly, the burden of proof is on Respondent to demonstrate the Motion should be granted by a preponderance of the evidence.

W. Va. Code § 29-6A-2(i) defines a grievance as:

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

Claims of hostile work environment are considered grievable by the Grievance Board. *Corley*

***v. Workforce W. Va.*, Docket No. 06-BEP-079 (Oct. 30, 2006); *Williams v. Div. of Motor Vehicles*, Docket No. 05-DMV-174 (Feb. 31, 2006).**

W. Va. Code § 29-6A-5(b) states that administrative law judges

> **may . . . provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article. . . .Addtionally, "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 6.11.**

Grievants have, in essence, requested disciplinary-like, adverse action be taken against Ms. Hernandez-Poe, for allegedly creating a hostile work environment. Grievants assert her behavior is unacceptable, therapy is required, and they have the right to have written reports on the progress of her therapy.

Generally speaking, the Grievance Board does not have the authority to order an agency to impose discipline on an employee, and relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996). A decision concerning disciplinary action resides with the employer. This Grievance Board may award relief against the employer based upon conduct of which the employer is aware, and which it in effect "condones.*" White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (Mar. 30, 1994). "However, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.*, Docket No. 91-54-497 (May 14, 1992)." *Rice v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-288 (Apr. 30, 1997). *See Coster v. W. Va. Div. of Corr.*, Docket No. 98-CORR-506 (Feb. 24, 1999). *But see Grant & Grant v. Cabell County Bd. of Educ.*, Docket No. 06-06-012 (Oct. 17, 2006)(Grievance Board ordered employer to disciplinesupervisor for retaliation under W. Va. Code § 18-29-3 (h). This Code section required discipline for retaliation stating, in pertinent part, "any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.")

Additionally, while at times an employer may request an employee submit to psychological testing and assessment, this request must be related to the employee's duties and

performance, and it is a request made by management. *See Adkins v. Div. of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005). Even if this assessment is requested and performed, there are no provisions for employees to have access to another employee's medical records and reports.

As for Grievants' request to be placed under a different supervisor, this is a management decision. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). *See Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). Even if Grievants were to demonstrate Ms. Hernandez-Poe created a hostile work environment, the relief granted for this action would be to order the supervisor to cease and desist. The Grievance Board cannot usurp WVU's authority to manage its workplace and to assign its employees as it sees fit. Accordingly, the undersigned Administrative Law Judge is without authority to grant this requested relief.

Grievants have requested relief that is "wholly unavailable" to them. This issue was raised at the Level III hearing and in two pre-hearing conferences. Although given theopportunity respond to this issue, Grievants have elected not to reply. In this set of circumstances, after an examination of the relief sought, the undersigned Administrative Law Judge concludes this grievance must be DISMISSED.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A grievance not involving a disciplinary action against Grievants, places the burden of proof on them to prove their grievance by a preponderance of the evidence*. 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. When the issue is a respondent's Motion to Dismiss, the burden of proof is on the respondent to demonstrate this Motion to Dismiss should be granted by a preponderance of the evidence. *Goodall/Phillips v. Workforce W. Va.*, Docket No. 06- WWV-246 (Aug. 30, 2007).

3. W. Va. Code § 29-6A-5(b) states that administrative law judges

> **may . . . provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article. . . . 4. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 6.11.**

5. Generally speaking, the Grievance Board does not have the authority to order an agency to impose discipline on an employee, and relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996). A decision concerning disciplinary action resides with the employer.

6. "This Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.*, Docket No. 91-54-497 (May 14, 1992)." *Rice v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-288 (Apr. 30, 1997). *See Coster v. W. Va. Div. of Corr.*, Docket No. 98-CORR-506 (Feb. 24, 1999).

7. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). *See Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). 8. The relief sought by Grievants is "wholly unavailable" from the Grievance Board. The Grievance Board is without authority to order disciplinary action against an employee or to mandate counseling with reports of this counseling released to supervisees. The Grievance Board may not require an employer to place employees under another supervisor. This is a management decision.

Accordingly, this grievance is DISMISSED.

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. *See* W. Va. Code § 29-6A-7 (*See Footnote 2, supra; repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2008

Footnote: 1

Grievants were directed to submit the medical records referred to during the Level III hearing, but did not.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees,and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.