THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JEFF LILLY,

Grievant,

v.

DOCKET NO. 07-DOH-387 (See footnote 1)

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Jeff Lilly, former County Administrator for Raleigh County, filed three grievances against his employer, the Department of Transportation/Division of Highways, contesting two written reprimands, and his reassignment to the District Office.

Grievance 1 - June 29, 2006 - Written Reprimand

The first grievance was filed on June 29, 2006. In addition to contesting the first written reprimand, Grievant alleged he was “being harassed and prevented from performing my job.” As relief, Grievant sought to have the written reprimand removed from his file, and to have “the

harassment to stop and I want to be allowed to operate my Organization within the policies of the WVDOH and serve the traveling public as I have been doing for the last 9 years in my present position." After a conference at level one onJuly 5, 2006, Grievant's supervisor responded on that date that he had no authority to grant the relief requested. Grievant appealed to level two on July 5, 2006, where a conference was held on July 10, 2006. A level two decision was issued denying the grievance, and Grievant appealed to level three on July 31, 2006.

Grievance 2 - September 21, 2006 - Removal as Raleigh County Highway Administrator

The second grievance was filed on September 21, 2006. The statement of grievance reads, in part:

> Retaliation, harassment, discrimination, violation of the whistle blowers law (See footnote 2) by District Ten District Manager John McBrayer. I was told that I was to be temporarily reassigned to the District Ten Headquarters with[out] explanation of what work I was to be doing and to report to Wilson Butt as my Supervisor for two weeks and then it would be decided what is to happen to me further.

The relief sought by Grievant in this grievance was:

> If possible, to see that Mr. McBrayer be moved back to a position in our Central Office in Kanawha County, which is his home county, and which he is more capable of handling based on his education, experience and personality. To stop the retaliation, harassment, and discrimination andallow me the opportunity to do my job in a good healthy, productive work environment from this point forward. . . . I would like to be treated fairly and not be singled out.

This grievance was filed after Grievant was temporarily removed from his position as Raleigh County Administrator because of his role in a September 15, 2006 meeting with other county administrators and one of their supervisors, to discuss problems in the District, in particular, problems with the District Manager, John McBrayer. Grievant's supervisor responded at level one on September 28, 2006, that it was beyond the scope of his authority to award the relief requested. Grievant appealed to level two on October 2, 2006, where a conference was held on October 6, 2006. A level two decision denying the grievance was issued on October 16, 2006, and Grievant appealed to level three on October 20, 2006.

Grievance 3 - December 4, 2006 - Second Written Reprimand

The last grievance was filed on December 4, 2006, challenging a second written reprimand which Grievant received for his role in and attendance at the meeting on September 15, 2006. The statement of grievance also alleges:

> I believe that I have been singled out in this instance[.] [T]here were others equal to my rank and position to me in attendance and one person of superior rank was at the meeting and no one to my knowledge has had any disciplinary action taken against any of the others present. There certainly have been no other reassignments of location and duties as has been the case in my situation.

In addition to requesting that the written reprimand be removed from his record, Grievant sought as relief, “to be reassigned to my previous position as Raleigh County Highway Administrator[,] to stop harassing me and to stop any further retaliation by Mr. McBrayer.” The grievance was denied at level one on December 8, 2006, and Grievant appealed tolevel two on December 14, 2006. After a level two conference on December 20, 2006, a decision denying the grievance was issued on that date. Grievant appealed to level three on December 21, 2006, where the three grievances were consolidated with the grievance of another employee. Two days of hearing were held at level three on February 8, and April 23, 2007. A level three decision was issued on August 22, 2007, denying the grievances.

Grievant appealed to level four on August 27, 2007. After a level four hearing was scheduled, the parties agreed to submit these grievances for decision based upon the record developed at level three. Grievant was represented by John W. Feuchtenberger, Esquire, and Respondent was represented by Carrie A. Dysart, Esquire, at level four. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on April 1, 2008. This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons on May 7, 2008.

Synopsis

Grievant received the first written reprimand addressed in this grievance, for insubordination, when he did not call the Assistant District Engineer to discuss the repair of Route 40 and get specific verbal approval, before using 505 tons of hot mix asphalt to repair this road, using DOH personnel, rather than contracting the work out. Respondent did not demonstrate Grievant knew he needed to call the Assistant District Engineer before this work was done in house.

Grievant received the second written reprimand and was removed as the Raleigh County Highway Administrator for his role in organizing a meeting of other supervisors to discuss problems in District 10, specifically problems with the District Manager. Respondent did not demonstrate a violation of any directive that supervisors were not to meet without approval, or misuse of a state vehicle. Grievant did exhibit disruptive behavior for which a written reprimand was appropriate to make him aware of the behavior, and that he should correct it. Grievant could not be removed as Raleigh County Administrator simply because he was openly non-supportive of the District Manager, when he was otherwise competently performing his job duties.

The following Findings of Fact are made based upon the evidence developed at level three.

Findings of Fact

1. Grievant is employed by the Department of Transportation/Division of Highways ("DOH"), as a Highway Administrator II. Grievant has been the Raleigh County Highway Administrator (County Maintenance Supervisor), for nine years. Raleigh County is in District 10.

2. John McBrayer has been the District Manager for District 10 since June 1, 2005. Mr. McBrayer has worked for DOH for 22 years, but had never been a supervisor before taking this position. Eugene Tuckwiller is the Assistant District Engineer of Maintenance for District 10, and reports to Mr. McBrayer. There are three Maintenance Assistants who supervise the various County Maintenance Supervisors in District 10 on a rotating basis: Rick White, Ron Frey, and Kenneth Jenkins.

3. Grievant wanted the District Manager job. After Mr. McBrayer was placed in this job, Grievant met with staff in the Governor's Office and complained because he believed he should have gotten the job.

Findings of Fact Related to Grievance 1

4. On June 26, 2006, Grievant received a written reprimand from Mr. Tuckwiller. The reprimand states it is

> for failure to follow the Division of Highways' current policy regarding the placement of significant amounts of hot mix asphalt by state forces.
>
> Although you had previously been directed to limit the amount of hot mix asphalt

> placed by state forces in Raleigh County, on June 5 and 6, 2006, you allowed an unacceptable amount of hot mix asphalt (over 500 tons) to be placed on Raleigh County Route 40 by employees under your supervision.

5. The current practice of DOH is to contract out large paving jobs. There is no written policy which states that large paving jobs are to be contracted out, nor has anyone in DOH's administration defined what constitutes a "large" paving job. (See footnote 3) Grievant did not understand that this new practice applied to skip-patching work. He believed that paving jobs under about 200 tons should generally not be contracted out.

6. Route 40 is used to access the Beckley Gun Club. On February 2, 2006, Bill Miller, who is apparently a member of the Gun Club, sent Delegate Ron Thompson an email seeking his help in getting this road paved, noting that, "Jeff Lilly informs me that there is no money in the budget to do this." 7. On February 10, 2006, Vick Fitzwater, who apparently works for DOH, and Rick White looked at Route 40. The results of this review were documented on a "Citizen's Request for Assistance" form. Under action to be taken, the form states:

> Project site was reviewed 2-10-06 by Vick Fitzwater and myself. Raleigh County Maintenance work force has graded and placed 3,575 tons and weather permitting crusher run will be added next week. A cost estimate will be worked up for HMA replacement. Projected cost is $45,000.00. I contacted Bill Miller Monday 2-13-06 and he also had reviewed area 2-10-06. After informing Mr. Miller a top course of crusher run would be placed within the next week bar[r]ing SRIC event, he was pleased and said he was personally working to obtain funding for the Road ($150,000.00)

8. On April 5, 2006, Mr. McBrayer sent Boyd Dotson, a DOH employee in the main office, a memo, copied to Grievant, which stated, with regard to Route 40, "As Mr. Lilly has previously explained to Mr. Miller, this road is scheduled for asphalt repairs in accordance with our Core Maintenance Plan. At this time, that is the only activity scheduled for this route, other than mowing." Grievant understood this to mean that he was to go forward with repairs to Route 40.

9. Roger Fisher, a crew supervisor for DOH in Raleigh County, prepared a Maintenance Schedule Worksheet which lists a "skip-patching activity" to be performed on Route 40 and Route 3/90, using an estimated 418 tons of hot mix asphalt. Skip-patching refers to patching the road where it is in bad shape. Patching a half mile of roadway, using 418 tons of hot mix asphalt may be considered skip-patching, depending on the condition of the road. Mr. Jenkins was acting as the Maintenance Assistant for Raleigh County at this time, and this Worksheet was submitted to him two

weeks before the work was to be done. The proposed work was approved by Mr. Jenkins and Mr. Tuckwiller. 10. At the direction of Grievant, about one half mile of Route 40 was repaired on June 5 and 6, 2006. This job required approximately 505 tons of hot mix asphalt. The cost for this repair was around $28,000.00.

11. Mr. McBrayer was aware work was being performed on Route 40 on June 5, 2006, and drove by the work site. Mr. McBrayer did not know whether approval had been given for this work, but he did not ask Grievant, nor did he take any action to stop the work on this site. Mr. McBrayer talked to Mr. Tuckwiller on June 6, 2006, and again visited the work site, this time taking Mr. Jenkins with him.

12. After looking at the work himself, Mr. McBrayer was not confident that the work on Route 40 constituted a "large" project. (See footnote 4)

13. Mr. Tuckwiller visited the work site shortly after the work had been completed. He did not view the work as skip-patching.

14. Mr. Tuckwiller and Mr. McBrayer met with Grievant regarding the repair to Route 40. Grievant explained why he had decided to do this work. After this meeting, Mr. Tuckwiller did not believe a written reprimand was necessary. He "thought Mr. Lilly explained what he did and why he did it. At that point, I thought that the explanation probably was sufficient." (Level three Tr. April 23, 2007, at page 49.) Mr. Tuckwiller believed there "certainly was a possibility" that Mr. Lilly misunderstood what constituted a "large" amount of asphalt. (Id.)

Findings of Fact Related to Grievances 2 and 3

15. Sometime prior to September 15, 2006, Mr. McBrayer told the county administrators in District 10, "I didn't have a problem with them getting together, [but] meetings should go through the district and be approved before they took place." Level three transcript, April 23, 2006, p. 74. The county administrators had been meeting with local politicians periodically, and after attending one of these meetings, Mr. McBrayer told the county administrators "there would be no more of those type meetings unless they was [sic] given consent from the district." Level three transcript, April 23, 2006, pp. 96-97.

16. Grievant and some of the other county administrators in District 10 did not believe they had been directed by Mr. McBrayer to obtain his approval before they could meet. They believed they

were not to meet with politicians without approval.

17. Chuck Runyon, who works in some capacity for the Commissioner of the Department of Highways, was providing training to the supervisors and some staff in District 10 in early September, 2006. Mr. Runyon and Grievant were talking about the low morale in the District, and Mr. Runyon told Grievant he was "'about the seventh person that said something to me about that.'" Level three transcript, April 23, 2007, p. 173. Mr. Runyon told Grievant he could set up a meeting with the Commissioner, but that "you guys" needed to talk and get their presentation in order. Grievant talked to Earl Crigger, Highway Administrator for McDowell County, that day about such a meeting, and Mr. Crigger agreed they needed a group meeting before going to the Commissioner.

18. Mr. Runyon called Mr. Crigger sometime during the week of September 15, 2006. He asked Mr. Crigger if he wanted to have a meeting in Charleston with DOH Commissioner Mattox and DOH Deputy Secretary Paul Turman, to discuss Mr. McBrayer. Mr. Crigger told Mr. Runyon he had "'grievances'" with Mr. McBrayer, but he did not want to go to a meeting in front of the Commissioner. Mr. Runyon told Mr. Crigger to call Mr. Turman the next morning, and he did so. Mr. Turman told Mr. Crigger there was going to be a meeting later in the week, and he wanted him to go and report back to him about the meeting. Mr. Crigger told Mr. Turman he would like to take Rick White with him to the meeting as a witness. Mr. Crigger asked Mr. White to go to the meeting. Grievant also called Mr. Crigger and told him there was going to be a meeting of the county administrators at Twin Falls State Park on September 15, 2006, which is the meeting Mr. Turman was referring to.

19. Mr. White told Mr. McBrayer he had been asked to attend a meeting on September 15, 2006, at Twin Falls State Park, to discuss having Mr. McBrayer removed as District Manager. He told Mr. McBrayer about the meeting because he was not going to attend a meeting with that topic without someone's knowledge. Mr. McBrayer authorized Mr. White to attend the meeting, because "I just wanted to know what their problems were." (See footnote 5) Level three transcript, April 23, 2006, p. 75.

20. Mr. White believed it was improper for the county administrators to meet to discuss having Mr. McBrayer removed from his position. Although Mr. White supervises Grievant and Mr. Crigger on a rotational basis, he did not tell either of them that this meeting was improper.

21. Grievant invited several supervisory personnel, at his level or higher, to the meeting at Twin Falls State Park. 22. Grievant, Oliver Stewart, County Administrator for Wyoming County, Mr.

White, and Mr. Crigger met at Twin Falls State Park around 9:00 a.m. on September 15, 2006. (See footnote 6) They discussed problems in District 10, and having Mr. McBrayer removed as the District Manager. Grievant suggested they write a letter to Commissioner Mattox asking that Mr. McBrayer be removed, but no one wanted to sign a letter.

23. Mr. McBrayer and Wilson Butt, an administrator in the District 10 office, arrived at the meeting at Twin Falls State Park around 10:00 a.m. Grievant, Mr. Stewart, Mr. White and Mr. Crigger were eating breakfast. Mr. McBrayer appeared to be upset, and asked what they were doing. He then proceeded to interview each person in private. Mr. McBrayer took notes, and then asked each person to sign the notes. Grievant refused to do so.

24. Grievant, Mr. Crigger, and one or more of the other attendees drove a state vehicle to the meeting at Twin Falls State Park. Although Grievant had pre-approval to work overtime on September 15, 2006, after Mr. McBrayer questioned this, he did not turn in a request for overtime. He had already put in his 40 hours for the week. Mr. Crigger was paid for working eight hours on September 15, 2006, which included the time he was attending the meeting, and he was not disciplined for driving a state vehicle to the meeting.

25. Mr. Crigger called Mr. Turman the following week and reported on the meeting. When Mr. Turman asked him if he had a problem with Mr. McBrayer, Mr. Crigger told him no. 26. The Monday following the September 15, 2006 meeting, Mr. McBrayer temporarily removed Grievant from his position as the County Administrator in Raleigh County, pending an investigation, and assigned him to assist Mr. Butt in the District Office. Grievant was no longer allowed use of a state vehicle, his turnpike pass was taken from him, his computer privileges were removed, and his leave usage was placed in “non- approved status.”

27. On November 27, 2006, Grievant received a written reprimand, which states as follows:

> On 9-15-06, you asked several supervisors to come to the Twin Falls State Park to discuss ways to “get rid” of John McBrayer. There are supervisors that will attest to this. This, in my opinion, is an act of gross insubordination. You had requested to work [overtime] on that day to do core maintenance work. From statements from other supervisors that were present at the meeting, it is clear that you called this meeting for the sole purpose to provide yourself with an opportunity to muster support for your own self- serving interest. John McBrayer and Wilson Butt showed up at this meeting and talked to each person present. You stated you were there to discuss problems you were having with District personnel. You chose to not turn time in for that day. This meeting was inappropriate and was not a legitimate work activity and was not related to Core Maintena[n]ce. You also drove your state car to this meeting. This is considered unauthorized use of state vehicle. Given all of the above, I am reassigning you from the position of Raleigh Co. Administrator to other duties within the maintenance organization. You have previously been reprimanded for infractions

constituting insubordination.

28. Grievant was permanently removed as Raleigh County Administrator, and has been assigned to report to Mr. Tuckwiller in the District Office. His classification remains Highway Administrator II, and he did not receive a pay cut.

29. Mr. McBrayer removed Grievant from his position as Raleigh County Administrator because he initiated the September 15, 2006 meeting, he personally called several people to tell them about the meeting, and when Mr. McBrayer reviewed Grievant'spersonnel file, he became aware Grievant had prior reprimands related to improper requests for and approval of overtime.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; (See footnote 7) *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievance 1 - June 29, 2006 - Written Reprimand

Respondent did not attach a label to the alleged conduct which resulted in the first written reprimand, but the allegations are that Grievant did something he had been told not to do. This would be a charge of insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha CountyBd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. In other words, there must be not only a refusal to obey a

reasonable and valid order, but the refusal must be wilful. *Id*. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

"As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directivesof his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988).

Grievant was reprimanded for his use of DOH employees to repair Route 40, using 505 tons of hot mix asphalt, without first discussing this repair work with Mr. Tuckwiller. The first problem with this charge is that no one, including Mr. McBrayer, knew what constituted a “large” project which required some specific approval. Even after viewing the work, Mr. McBrayer was not sure it was a large project which required approval. Mr. McBrayer did not give clear instructions to his employees regarding this matter. The second problem is that the Maintenance Schedule Worksheet, which showed 418 tons of hot mix asphalt would be used to do skip-patching on Routes 40 and Route 3/90, was submitted to Mr. Jenkins and Mr. Tuckwiller and approved by them. The Maintenance Schedule Worksheet did not show a breakdown of how much of this would be devoted to Route 40, but apparently Mr. Tuckwiller had no problem with the use of 418 tons of hot mix asphalt. If it really was a concern, he should have called Grievant himself and talked to him about it. As it turned out, the work on Route 40 itself took all of the 418 tons, plus about 20% more hot mix asphalt. Mr. McBrayer had himself authorized asphalt repair work on Route 40, he was aware DOH employees were repairing Route 40, and viewed the work while it was being done, yet declined to ask Grievant about the project, and took no action to stop it. Finally, after meeting with Grievant, Mr. Tuckwiller did not view

Grievant's action as insubordination, but rather a possible misunderstanding. Respondent did not demonstrate Grievant wilfully disobeyed or ignored clear instructions. The first written reprimand will be overturned.

Grievances 2 and 3 - Written Reprimand and Removal as County Administrator

The second written reprimand charges Grievant with gross insubordination. “The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).” *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

Mr. McBrayer testified that he expected criticism. The problem he had with Grievant's conduct was that he had “solicited . . . the majority of the Maintenance managers . . . to go to an unauthorized meeting.” Level three transcript, April 23, 2007, pp. 119-120. He stated he would not have viewed it the same had Grievant only talked to a couple of people. Grievant's action in initiating a meeting to discuss problems with the District Manager, and to muster support for going to the DOH Commissioner about his supervisor, certainly demonstrated disloyalty. However, Mr. Runyon had encouraged Grievant to initiate such a meeting.

Breaking down the specific charges stated in the written reprimand, part of the charge against Grievant was that he had attended an unauthorized meeting using his state vehicle. Both the District Manager and the Deputy Secretary were aware of the meeting, and rather than taking some action to stop the meeting, both sent representatives to report back to them, neither of whom was disciplined. One of these representatives, Mr. White,acted as Grievant's supervisor on a rotating basis. Mr. McBrayer testified he told Mr. White to go to the meeting, because he just wanted to know what their problems were.

To the extent Respondent contends that meetings of county administrators had to be approved by Mr. Tuckwiller or Mr. McBrayer, this was not made clear to Grievant. Grievant cannot be punished for his role in organizing a meeting of county administrators and other supervisors, without approval, or attending the meeting, as Grievant was not aware that approval was required. Further, Mr. McBrayer had knowledge of this meeting, and gave his approval of the meeting when he told Mr. White to

attend.

Grievant was also charged with unauthorized use of a state vehicle. Respondent did not offer any policy or cite to any rule or regulation to support the allegation of unauthorized use of a state vehicle, and did not punish Mr. Crigger for driving a state vehicle to the meeting.

The remaining question is whether Grievant could be reprimanded for asking some of his peers to join him in going to the Commissioner with their complaints about Mr. McBrayer. As this is what also led to Grievant's transfer, the propriety of these penalties should be discussed together, and the applicable legal standard will be addressed first.

Certainly, Grievant could be transferred from his position. State agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. *Bever v. Dep't of Health & Human Res.*, Docket No. 96-HHR-258 (Dec. 31, 1996); *Goodnight v. W. Va. Div. of Human Serv.*,Docket No. 91-DHS-111 (May 31, 1991). However, “it has been recognized by this Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989).” *Cayton v. Dep't of Transp.,* Docket No. 02-DOH-098 (July 11, 2003). Such a transfer may be found to be a transfer in lieu of other methods of discipline. *Id.* The undersigned concludes that Grievant's transfer to the District Office was disciplinary, in that it was punishment for alleged misconduct, and the burden of proof will rest with Respondent.

So, can a supervisor be reprimanded and transferred from his supervisory position because he disagrees with management, criticizes his supervisor in front of other supervisors and those above his supervisor, and attempts to raise support from other supervisors to complain to the Commissioner about his supervisor? (See footnote 8)

Grievant had been the Raleigh County Administrator for nine years, and had received good evaluations. County administrator positions are sought after positions. At one time they were political appointments. Now, however, vacancies are filled through a selection process. *Wiley v. W. Va. Dep't of Transp.*, Docket No. 99-DOH-109 (Aug. 3,1999). County administrators, while at-will employees,

likewise cannot be removed from their positions for political reasons. *Id.* Grievant's removal from this position was a severe punishment for his criticism of Mr. McBrayer, who was appointed to his position. Grievant confined his complaints to those who were at his same level, and those who supervised him, some of whom also initially had their own complaints about Mr. McBrayer, but have now decided it is best not to voice their concerns. (See footnote 9)

The undersigned has the authority to mitigate the punishment imposed by the employer in situations where a finding is made that “the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Further, while it is understandable that Mr. McBrayer would want people in the county administrator positions who support him, Mr. McBrayer cannot remove individualsfrom these positions simply because they do not support him, when they are otherwise competently performing their job duties. *See Wiley, supra.* The undersigned concludes that it was appropriate for Grievant to be cautioned about his disruptive behavior via a written reprimand, but removing him as the Raleigh County Highway Administrator was an extreme punishment for this behavior.

In his various grievance statements, Grievant made allegations of retaliation (reprisal), harassment, and discrimination which must also be addressed, even though Grievant did not provide argument in support of these claims. 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 did not provide a causal connection between the filing of the first grievance and the second written reprimand and his removal as county administrator. It is clear that both of these disciplinary actions were a result of Grievant's activities surrounding the September 15, 2006 meeting.

West Virginia 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." "The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., Nos. 32163 and 33296 (W. Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005)." *Harvey-Gallup v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(J) (Feb. 21, 2008).

Grievant was treated differently from Mr. Crigger. Mr. Crigger is also a county administrator, he also attended the September 15, 2006 meeting, and he also drove his state vehicle to this meeting, yet he was not disciplined. However, Grievant's reprimand also was based upon his disruptive behavior. Although Mr. Crigger did have some complaints with Mr. McBrayer, he quickly backed off any open criticism of him. The evidence presented showed that Grievant was the primary organizer of this meeting, and Mr. Crigger was asked by the Deputy Secretary to attend the meeting and report back to him. Mr. Crigger and Grievant were not in the same situation with regard to this meeting.

W. Va. Code § 29-6A-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). A single incident does not constitute harassment. *Id.; Johnsonv. 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).

The first written reprimand is a single incident, and cannot, standing alone, constitute harassment. Grievant presented no evidence other than the three disciplinary actions to support his claim of harassment. The second reprimand and the transfer were a response to Grievant's disruptive behavior, and his opposition to Mr. McBrayer. Mr. McBrayer's reaction to Grievant's behavior, while

extreme, does not fall within the definition of harassment.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). 3. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id*.

4. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

5. An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

6. “The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic*

Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jaggers- Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004). 7. "[I]t has been recognized by this Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89- CORR-105 (Aug. 29, 1989)." *Cayton v. Dep't of Transp.,* Docket No. 02-DOH-098 (July 11, 2003). Such a transfer may be found to be a transfer in lieu of other methods of discipline. *Id.*

8. Grievant's transfer to the District Office was disciplinary, in that it was punishment for alleged misconduct, and the burden is on Respondent to prove the charges which resulted in the transfer.

9. Respondent did not demonstrate Grievant was insubordinate when he directed that Route 40 be repaired using DOH personnel, without first talking to the Assistant District Engineer and getting his approval.

10. Respondent demonstrated Grievant engaged in disruptive behavior, for which a written reprimand was appropriate to make him aware that this behavior should be corrected.

11. Grievant's removal from his position as Raleigh County Highway Administrator was too severe a punishment for his criticism of Mr. McBrayer. Mr. McBrayer cannot remove those who don't support him from these positions, when they are otherwise competently performing their job duties. *See Wiley v. W. Va. Dep't of Transp.*, Docket No. 99-DOH-109 (Aug. 3, 1999) 12. 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."

13. 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).

14. Grievant did not provide a causal connection between the filing of the first grievance and the second written reprimand and his removal as county administrator. He has not shown Respondent engaged in reprisal. 15. West Virginia 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."

16. Grievant was treated differently from Mr. Crigger. However, Grievant's reprimand also was based upon his disruptive behavior. Mr. Crigger and Grievant were not in the same situation with regard to their roles preceding the September 15, 2006 meeting.

17. W. Va. Code § 29-6A-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). 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).

18. The first written reprimand is a single incident, and cannot, standing alone constitute harassment. Grievant presented no evidence other than the three disciplinary actions to support his claim of harassment. The second reprimand and the transfer werea response to Grievant's disruptive behavior, and his opposition to Mr. McBrayer. Mr. McBrayer's reaction to Grievant's behavior, while extreme, does not fall within the definition of harassment.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART.** Respondent is **ORDERED** to remove the first written reprimand regarding the use of 505 tons of hot mix asphalt to repair Route 40 from all personnel files maintained on Grievant. Respondent is **FURTHER ORDERED** to return Grievant to his position as Raleigh County Highway Administrator, with all the benefits accorded to other individuals in these positions.

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 (repealed, *See Footnote 7, supra)*. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: June 30, 2008

Footnote: 1

Grievant appealed three grievances to level four, which were assigned Docket Numbers 07-DOH-387, 07-DOH-388, and 07-DOH-389. These grievances were consolidated at level three. Although two of the grievances involve separate

written reprimands, and the third is a reprisal grievance, these grievances are so interrelated that they should be consolidated. It is ORDERED that Docket Numbers 07-DOH-388, and 07- DOH-389 be consolidated into Docket Number 07-DOH-387.

Footnote: 2

Grievant did not address this claim either at the level three hearing, or in his written argument filed at level four, and it is deemed abandoned. The whistle-blower law, codified at W. Va. Code § 6C-1-3(a), provides as follows:

> *No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.*

Were this claim to be addressed, Grievant's issues with the District Manager, which he intended to take to the Commissioner of the Division of Highways, do not rise to the level of a report of wrongdoing or waste.

Footnote: 3

Mr. McBrayer was asked at the level three hearing on April 23, 2007, by DOH counsel "when you say 'large amount,' what does that mean?" Mr. McBrayer responded, "Well, anything over _ and actually, you know, I can say an amount, ***but we've never really established that.*** *At one meeting we talked about 100 ton and anything above that being discussed with the Maintenance Engineer." (Emphasis added.) Mr. McBrayer did not recall when this meeting occurred, but he believed it had been made clear "that anything of any size should go through the Maintenance Engineer . . . you should call Eugene and discuss it with him." Level three transcript, April 23, 2007, at pp. 59 and 60.*

Footnote: 4

After Mr. Tuckwiller looked at the work that had been done, Mr. McBrayer asked him, "'Well, what do you think? Is that too much blacktop to be putting down under the direction they've been given?' He said 'yeah.' He agreed with me.'" Level three transcript, April 23, 2007, p. 65.

Footnote: 5

Mr. McBrayer testified that Mr. White told him the purpose of the meeting was to "discuss getting rid of me." Level three transcript, April 23, 2006, p. 75.

Footnote: 6

Neither Mr. Crigger nor Mr. White was disciplined for attending this meeting. Mr. Stewart received a written reprimand and a five day suspension (which was not upheld at level three) for attending the meeting, and for other reasons.

Footnote: 7

In 2007, the Legislature in S.B. 442 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 being 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.

Footnote: 8

Mr. McBrayer also testified that he reviewed Grievant's personnel file and found some requests for overtime in the file which he found objectionable, and previous reprimands which he had not been aware of, and that these items also played a part in this decision. The only evidence placed into the record about previous discipline were a verbal and written reprimand from May and August 2005, for Grievant's failure to follow the overtime policy, a problem which apparently has been corrected. This is not a major infraction, and the problem has been corrected. This information offers no additional support for Mr. McBrayer's decision. If anything, this information calls the decision into question.

Footnote: 9

Mr. Crigger initially told Mr. Runyon that he had "grievances" with Mr. McBrayer, but when he reported to Mr. Turman after the September 15, 2006 meeting, he told him he had no problem with Mr. McBrayer. Those in attendance at that meeting declined to put their names on a written document complaining about Mr. McBrayer.