THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLEN LEE COOK,
Grievant,

v. **Docket No. 2009-0661-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Glen Cook, filed this grievance against his employer, the Division of Natural Resources, on November 10, 2008, asserting that the Respondent's employees' grievance procedure is discriminatory. As relief, Grievant seeks that Respondent "[C]ease harassment, discrimination and reprisals, award due compensation, change Grievance Rules to fair and equitable standards for all employees and stop intimidating and discouraging employees for standing up for equal rights."

This grievance was denied at level one on December 16, 2008, by correspondence from Director Frank Jezioro. A level two mediation session was conducted on February 27, 2009, at the Grievance Board's office location in Elkins, West Virginia. A level three hearing was conducted before the undersigned Administrative Law Judge on July 17, 2009, in Elkins, West Virginia. Grievant appeared pro se. Respondent appeared by William R. Valentino, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on September 1, 2009.

Synopsis

Grievant is a Conservation Officer employed by the Division of Natural Resources. On September 2, 2008, the Division of Natural Resources ("DNR") implemented an employee grievance procedure. The policy applies to all employees, and was adopted to make certain that each employee is treated equally in the grievance process. Grievant asserts that new policy acts to discourage employees from filing grievances and discriminates against Grievant. Grievant also claims the new policy was enacted by his employer as a means of reprisal and for the purpose of harassment. Grievant failed to establish that he was treated differently from similarly situated employees. In addition, Grievant did not prove that he was the victim of reprisal or harassment.

The following Findings of Fact are made based upon the evidence developed at levels one and three:

Findings of Fact

1. Grievant is employed by the DNR as a Conservation Officer.

2. On September 2, 2008, Frank Jezioro, Director of the DNR, adopted a new policy regarding the grievance procedure. Level Three, Joint Exhibit 1. The policy was adopted to ensure the fair treatment of all DNR employees in the grievance process.

3. The policy closely mirrors WEST VIRGINIA CODE §§ 6C-2-1, et seq., which established the Public Employees Grievance Board.

4. This policy was enacted for DNR employees as they "are entitled to utilize the employee grievance system as a means for the resolution of employment grievances in a

fair, efficient, cost-effective and consistent manner that will maintain good employee morale, enhance job performance and better serve the citizens of the State of West Virginia. It is the policy of the Division of Natural Resources to establish guidelines for supervisors and staff in the application of these procedures to the Division of Natural Resources. All parties to grievances shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure."

5. The policy also sets out that employees subpoenaed by the grievant must obtain appearance fees and mileage allowed by law from the grievant.

Discussion

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant asserts the grievance rules adopted on September 2, 2008, are discriminatory in nature as not all Division employees are required to travel the same distance at personal expense for grievance proceedings, and that only those employees participating in the grievance procedure on behalf of the grievant are required to come in personal vehicles and at their own expense or at the expense of the grievant. DNR counters that while Grievant has made claims that the policy results in discrimination and unfair treatment of both himself and other employees, he has failed to prove by a preponderance of the evidence that he has suffered any real harm.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant has failed to establish by a preponderance of the evidence that he was treated differently from any other similarly situated employee. In fact, Grievant did not identify any other employee of the DNR which would point to any difference in treatment.

To the contrary, the record of this case supports a finding that the DNR policy was created to make certain that all employees enjoy equal treatment. The policy concerning the grievance procedure for DNR applies to all employees, and is not discriminatory.

Grievant asserts that all the perceived adverse action by his employer is the result of his prior complaint regarding a supervisor and his many prior grievances. In short, the new policy is an act of retaliation because it creates a hardship not only on Grievant, but to certain employees who are representatives or witnesses participating in the grievance procedure on behalf of Grievant, particularly those who are forced to travel great distances.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative 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 the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
>
> (2) that he 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; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *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).

There has been no evidence presented that the adoption of the policy occurred in response to an action taken by the Grievant. The record of this case demonstrates Director Jezioro implemented the policy in an effort to ensure fair treatment of all DNR employees. Grievant presented no evidence that Director Jezioro acted in any retaliatory fashion against Grievant or even considered Grievant's tenure with the agency when adopting the policy. Grievant failed to prove that he has been the object of retaliation by the DNR.

Turning to Grievant's claim of harassment, W. VA. CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior 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). Grievant introduced no evidence that he suffered any repeated disturbance, irritation or annoyance that is contrary to law, policy or profession. Grievant failed to offer any evidence which would support the charge of harassment.

The central theme to Grievant's case is a philosophical disagreement with his employer's policy, which is not grievable. Further, Grievant did not demonstrate how the

new policy on the grievance procedure impacted him. A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. *McDonald v. Hancock County Bd. of Educ.*, Docket No. 15-88-055-3 (Sept. 30, 1988). "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).[1] *See Ball v. Dept. of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dept. of Transp/Division of Highways*, Docket No. 96-DOH-247 (Aug. 29,1997).

Grievant makes many assertions that the policy results in discrimination and unfair treatment to himself and other employees; however, he failed to demonstrate that he has suffered any harm from the policy. In other words, Grievant only anticipates accepting responsibility for witness and mileage fees without offering any proof of actual incurred expense. The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees . . ." *Wilds v. W. Va. Dept. of Highways*, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003). When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Bragg v. Dep't*

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[1]W. VA. CODE § 6C-2-2(i)(1)(v) similarly states a grievance includes "[a]ny action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee, or the health and safety of the employee."

of Health & Human Res., Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.21(2008).

Finally, Grievant's claims for monetary damages are unavailable. The Grievance Board does not award tort like damages. *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't. of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. In order to establish a discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant did not demonstrate that he had been discriminated against by Respondent.

4. W. VA. CODE § 6C-2-2(l) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior 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).

5. Grievant has not demonstrated he was subjected to harassment under the facts of this grievance.

6. To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he 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; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *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).

7. Grievant failed to demonstrate that he has suffered any retaliation or reprisal.

8. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003). When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.21(2008).

9. Grievant's request for a ruling on whether DNR could adopt a policy requiring that Grievant is responsible for witness and mileage fees of his subpoenaed witnesses without offering any proof of actual incurred expense is a request for an advisory opinion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: December 28, 2009

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Ronald L. Reece
Administrative Law Judge