WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES D. HENDRIX,
Grievant,

v. **Docket No. 2010-1229-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant Charles D. Hendrix filed a grievance on March 11, 2010, against his employer, Division of Highways ("DOH"). His statement of grievance reads, "Verbal reprimand without good cause." For relief, Grievant seeks, "Expunge record and otherwise to be made whole."

A level one hearing was held on May 19, 2010. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America Local 170, and Respondent was represented by Robert Miller, Esq. On August 13, 2010, the level one Grievance Evaluator issued a written decision granting the grievance. On August 19, 2010, Grievant's Representative appealed the grievance to level two. Respondent filed a Motion to Dismiss on November 1, 2010. A phone conference was held on November 4, 2010, to hear arguments from Mr. Simmons and Mr. Miller concerning the Motion to Dismiss. The parties declined to file additional written arguments making this issue ripe for decision.

Synopsis

Respondent asserts that since the grievance was granted at level one, there is no issue to appeal.

Grievant avers that during the level one hearing, testimony was elicited that caused Mr. Simmons to believe Grievant worked in a hostile working environment. Grievant argues this issue can be decided on, as he stated he wished "to be made whole" in his requested relief.

Because the grievance was granted at level one, Grievant did not receive an adverse decision, and therefore, no appeal would lie. A hostile work environment is a separate and distinct claim. Therefore, this grievance must be DISMISSED.

Findings of Fact

1. On March 3, 2010, Grievant filed a grievance regarding a verbal reprimand. Grievant's relief requested stated, "Expunge record and otherwise to be made whole."

2. A level one hearing was held. Grievant was represented by Mr. Simmons, and Respondent was represented by Mr. Miller.

3. A level one decision was issued on August 13, 2010, granting the grievance and ordering that the document prepared to memorialize the verbal reprimand be removed from Grievant's file.

4. Grievant appealed the level one decision to the Grievance Board.

5. On November 1, 2010, Respondent filed a Motion to Dismiss.

Decision

W. VA. CODE 6C-2-4(b)(1) states, "Within ten days of receiving an *adverse* written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration." (Emphasis added).

156 C.S.R. 1 § 4.4 states:

> Chief Administrator's Decisions -- Level one decisions shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and, unless the time frame is waived by all parties, shall be issued within fifteen days of the conference or hearing to the Board, the parties, and any representative(s) named in the grievance. If the grievant is denied the relief sought, the decision shall inform the grievant that an appeal must be filed with the Board within ten days of receipt, and shall include the name and address of the Board. The chief administrator is required to send the level one decision to the Board, as well as a copy of the Cost Report Form.

Grievant filed a grievance form asserting the verbal reprimand he received was without good case. It is this very specific issue that Respondent came prepared to argue. The statement of grievance and the relief requested serves to place Respondent, as well as the Chief Administrator and/or Administrative Law Judge, on notice of what issues will be addressed.

It is also common practice for grievants to request "to be made whole" in conjunction with very specific relief, as was done in this case. However, a request "to be made whole" will not be sufficient to address a separate issue not raised in the statement of grievance. If the Grievance Board were to allow that, instead of the process being fair and expedient, it would become a process of ambush and repeated continuances for Respondents to prepare to defend the claims that arise during various testimony.

The level one decision granted this grievance and provided the relief that Grievant seeks. Since the lower level ruling is not adverse to Grievant, this appeal must be dismissed.

Conclusions of Law

1. W. VA. CODE § 6C-2-4(b)(1) allows a grievant to appeal an adverse decision.

2. 156 C.S.R. 1 § 4.4 allows a grievant to appeal when he/she did not receive the relief being sought.

3. The level one decision granting this grievance and awarding Grievant the specific relief he seeks, is not an adverse decision.

Accordingly, this grievance is dismissed.

Any party may appeal this Dismissal to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *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 (2008).

DATE: November 12, 2010

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Wendy A. Elswick
Administrative Law Judge