THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLEN LEE COOK,
Grievant,

v. **Docket No. 2009-0875-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Glen Cook, filed this grievance against his employer, the Division of Natural Resources, on January 12, 2009, challenging a letter of reprimand. As relief, Grievant seeks that Respondent "[C]ease harassment, discrimination and reprisals against me; rescind the disciplinary action which they attached to my request for reassignment/transfer back home; disciplinary action, compensation and punitive damages against the Division of Natural Resources and supervisors/representatives of the Division of Natural Resources who have been involved in these actions against me."

This grievance was denied at level one on February 5, 2009, by correspondence from Director Frank Jezioro. A level two mediation session was conducted on April 20, 2009, at the Grievance Board's office location in Elkins, West Virginia. Thereafter, 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 last of the parties' proposed findings of fact and conclusions of law on September 21, 2009.

Synopsis

Grievant is a Conservation Officer employed by the Division of Natural Resources. At all times relevant to this grievance he was assigned to Randolph County. Following an internal investigation regarding various Randolph County citizen complaints against Grievant and a predetermination meeting, Respondent determined that the appropriate disciplinary action was reassignment and a letter of reprimand. Respondent made the decision to reassign Grievant from Randolph County to Hardy County. The reprimand letter set out that this action was a final measure in the attempt to reinforce to Grievant his obligation to behave in a manner that is suitable to be a representative of the Division of Natural Resources. Grievant had previously requested the reassignment to Hardy County. Grievant sought to remain in Hardy County, but to have all disciplinary action related to the reassignment rescinded. Grievant also claimed he was the victim of harassment, discrimination, and reprisal. Grievant's conduct was inappropriate, and the penalty of a written reprimand was appropriate. In addition, Grievant did not prove that he was the victim of harassment, discrimination or reprisal. This grievance is denied.

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 Division of Natural Resources ("DNR") as a Conservation Officer. Grievant was assigned to Randolph County prior to his reassignment to Hardy County.

2. Between May and October 2008, the DNR received three citizen complaints

against Grievant. All of the complaints involved, among other things, allegations of unprofessional conduct.

3. DNR's law enforcement section, through its internal investigative team known as the Professional Standards Unit ("PSU"), investigated the complaints.

4. After an investigation, PSU authors a report stating whether the charges have been "sustained" or proved to the investigating officer, or whether the charges have not been "sustained" or proved (in which case a notation of "exonerated" is reported).

5. Summaries of the three citizen complaints are as follows:

> On or about May 12, 2008, Alva Nelson filed a complaint alleging that Grievant pointed his service weapon at his nine year old son in the course of an investigation in the field. It was then ascertained that, in the course of this field investigation, Grievant detained Mr. Nelson for an excessive period of time while attempting to find evidence of additional crimes without any reasonable suspicion or probable cause. It was also reported that Grievant exceeded his statutory authority in making an arrest of Mr. Nelson. The PSU investigator exonerated Grievant on the complaint of pointing his weapon at the nine year old child, the other allegations were sustained.
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> On or about July 16, 2008, Terry Sutter filed a complaint regarding a series of encounters that occurred June 15, 16, and 17, 2008. Grievant was accused of using abusive language and profanity, filing a false or misleading report and engaging in harassing behavior of Mr. Sutter. The PSU investigation revealed that the allegations of abusive language and filing a false or misleading report were sustained. It was also reported that, contrary to a lawful order of the DNR, Grievant included the social security number of the accused on his citation. It was sustained that Grievant mishandled impounded evidence.
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> On or about October 7, 2008, Melissa Anello filed a complaint regarding Grievant's seizure of her outdoor camera from the boundaries of her private property. Grievant was accused of taking the camera and then downloading the pictures contained on it for the purpose of establishing that Mr. Anello had committed a crime. Grievant did not obtain a search warrant prior to the seizure of the evidence. Grievant was exonerated on the complaint by PSU; however, it was noted in the report that Grievant's failure to properly obtain a search warrant would likely result in the suppression of the evidence.

6. Colonel David Murphy, Chief of DNR's law enforcement section, is responsible for the conduct and community relations of the officers.

7. Col. Murphy determined that the conduct displayed by Grievant in each citizen complaint exhibited a clear lack of professionalism.

8. DNR reassigned Grievant to Hardy County. This reassignment was based, in part, on Grievant's request to be reassigned to his home county due to the illness of a family member. Col. Murphy communicated to Grievant that the reassignment was to be viewed as disciplinary in nature, and that he did not expect to receive any additional sustained allegations of misconduct.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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).

There is no dispute in this grievance that the transfer of Grievant was disciplinary in nature because of instances of unprofessional conduct. Grievant's position in this case is somewhat difficult to ascertain since it is also undisputed that he requested the transfer to his home county; however, Grievant did attack the validity of the PSU reports at level three in an effort to demonstrate that DNR did not meet their burden of proof. In any event, the disciplinary letter in the instant case does communicate that any more complaints of misconduct that are sustained will subject Grievant to termination from his employment.

The December 18, 2008, letter advised Grievant that Col. Murphy did not believe that termination of his employment was necessarily warranted at that time, and further stated:

> The State of West Virginia and its agencies have reason to expect their employees observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your conduct is sufficient to cause me to conclude that you breached this duty to the Division and the State of West Virginia and that this reassignment is warranted. You are a Conservation Officer with over twenty years of experience, and as a senior officer, and a police officer, you must be held to a higher standard of conduct.
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> So that there is no confusion, any sustained allegations of a repeat of such behavior as you have demonstrated in this matter, or any other sustained violation of General Orders, will result in your dismissal.

The West Virginia Supreme Court of Appeals has recognized that 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. *Craig v. Div. of Natural Res.*,

Docket No. 05-DNR-030 (July 20, 2005); *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). The West Virginia Division of Personnel (DOP) Administrative Rule, § 3.91 defines transfer as "[t]he movement of an employee to a different subdivision or geographic location of the same or a different agency." A state agency is permitted to transfer an employee from one geographic location to another, within the same agency, at any time. The Administrative Rule states in Section 11.6(a) that "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time."

As to transfer of employees in lieu of other methods of discipline, such as suspensions without pay, demotions or even dismissal, this Grievance Board has recognized that a transfer--justified by the employee's misconduct--is a viable option for an employer. *See Cayton v. Dep't of Transp.*, Docket No. 02-DOH-098 (July 11, 2003). In *Cayton*, *supra*, the employer's decision was analyzed pursuant to the arbitrary and capricious standard, and it was held that the action was justified. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-

HHR-322 (June 27, 1997). 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." *Id.* (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]. *See generally*, *Harrison v. Ginsberg*, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

Under the facts and circumstances of this case, the undersigned cannot find that the DNR acted arbitrarily and capriciously in its decision to reprimand Grievant and reassign him as a disciplinary measure. The citizen complaints, all involving unprofessional behavior on the part of Grievant, support the DNR's effort to remove Grievant from Randolph County. In addition, the DNR reassigned Grievant to Hardy County based upon Grievant's hardship request. DNR's actions were an attempt to balance the needs of the agency to impose appropriate discipline and the needs of the Grievant in his time of hardship. Accordingly, Respondent has justified its decision to transfer Grievant.

Grievant's claims of harassment, discrimination and reprisals are not about discipline; therefore, Grievant has the burden of proving his assertions 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).

Concerning 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 evidence which would support the allegation of harassment.

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);
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> (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. The evidence of the case supports a finding that Respondent took reasonable steps to accommodate Grievant's request for reassignment to his home county.

Turning to Grievant's claim of reprisal, 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

(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).

Grievant makes the assertion that all perceived adverse action against him by the Respondent is the result of his prior complaint regarding a superior officer and his prior grievances. Grievant did not establish that any officer that investigated the citizen complaints possessed any retaliatory motive or any ulterior motive for their reported findings. The record established just the opposite, that the PSU investigators and Col. Murphy acted appropriately to respond to a number of complaints filed by citizens of Randolph County. Accordingly, Grievant failed to prove that he has been the object of retaliation by the DNR.

Finally, Grievant's claim for compensatory and punitive damages is unavailable. First, compensatory damages are not at issue in this case since this is a method of discipline which does not result in any loss of pay. Second, Grievant's claim for punitive damages is 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. 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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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. State agencies have the authority to transfer an employee from one official headquarters to another. *Craig v. Div. of Natural Res.*, Docket No. 05-DNR-030 (July 20, 2005); *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).

3. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93- HHR-322 (June 27, 1997).

4. Respondent's decision to transfer Grievant to Hardy County was justified under the circumstances, and it was not arbitrary and capricious.

5. Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct as alleged in the citizen complaints. The issuance of a written reprimand was proper.

6. Grievant's claims of harassment, discrimination and reprisals are not about discipline; therefore, Grievant has the burden of proving his assertions 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).

7. 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).

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

9. 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).

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

11. 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).

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

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: January 22, 2010

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Ronald L. Reece
Administrative Law Judge