THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL E. SMITH,
Grievant,

v. **Docket No. 2012-0304-MAPS**

DIVISION OF CORRECTIONS/HUTTONSVILLE
CORRECTIONAL CENTER,
Respondent.

DECISION

Grievant, Michael E. Smith, filed this action against his employer, Huttonsville Correctional Center, on September 16, 2011, challenging Respondent's directive that he could not use earned holiday leave during his scheduled vacation. Grievant claims this directive was an act of discrimination and retaliation. Grievant seeks for relief reimbursement of eight hours annual leave, that no reprisal be taken against him, and all fees incurred be reimbursed to Grievant.

This grievance was denied at level one following a hearing conducted on October 7, 2011, by Terri J. Arthur, Hearing Examiner. Respondent's Commissioner, Jim Rubenstein, accepted the recommendations of the evaluator and communicated the same to Grievant by letter dated October 17, 2011. Grievant appealed to level two on November 1, 2011. A level two mediation session was conducted on March 23, 2012. Grievant appealed to level three on April 2, 2012. A level three hearing was noticed to be held on October 9, 2012, at the Randolph County Senior Center, Elkins, West Virginia, before the undersigned Administrative Law Judge. At the hearing, the parties agreed to submit the

case on the record developed at level one as well as submitted exhibits. Grievant appeared *pro se*. Respondent appeared by its counsel, John H. Boothroyd, 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 November 13, 2012.

Synopsis

Grievant is employed at the Huttonsville Correctional Center as a Correctional Unit Manager. He challenges Respondent's directive that he could not use earned holiday leave during his scheduled vacation. Grievant claims this directive was an act of discrimination and retaliation. The facts of this grievance did not demonstrate discrimination or reprisal. Accordingly, this grievance is denied.

The following findings of fact are based upon the record developed at level one.

Findings of Fact

1. Grievant is employed by Respondent at the Huttonsville Correctional Center as a Correctional Unit Manager. Grievant's supervisor is the Associate Warden of Programs, Diana "Robin" Miller.

2. Respondent's relevant policy on state legal holidays addressing holidays which are worked by employees indicates that such employees, if possible, will be given an alternative day off within ninety days. The alternate holiday observation date is to be scheduled as close as possible to the holiday. It is the responsibility of the supervisor to schedule an alternate day off, as soon as possible but within ninety days, for an employee who is scheduled to work on a holiday.

3. Unit Managers are allowed latitude to manage holiday leave so that the needs of each unit are properly staffed, run, and met. Ms. Miller only becomes involved in the scheduling of holidays when the business office of Huttonsville contacts her that an employee under her supervision has accumulated too many holidays.

4. On July 10, 2011, the business office sent such an e-mail to Ms. Miller and Grievant informing them that another employee, Renee Downing, had holidays not used for the dates of May 14, May 30, June 20, and July 4. Ms. Downing worked in Unit D and was supervised by Grievant.

5. On July 11, 2011, Ms. Miller sent an e-mail to Grievant informing him that Ms. Downing had several holidays backed up and that Grievant needed to schedule them.

6. Ms. Downing was not the only employee who Ms. Miller asked to schedule backed up holiday leave after she had been contacted by the business office. On July 7, 2011, Ms. Miller sent an e-mail to Albert Fordyce, Unit Manager for Unit F, that an employee under his supervision had a partial holiday from May and that he needed to schedule it to be taken off. On July 10, 2011, Ms. Miller also sent an e-mail informing another manager that an employee was carrying holidays from May, June, and July.

7. Upon receipt of the July 11, 2011, e-mail concerning Ms. Downing, Grievant informed Ms. Miller that the employee had already made plans to use the holidays before ninety days were up. Ms. Miller instructed Grievant that Ms. Downing was to use the holidays on days as close as possible to holidays per policy. Grievant asked Ms. Miller why an employee could not use a holiday on any day of their choosing as long as it was within ninety days of the holiday. Ms. Miller informed Grievant that the rule was to use the alternate date as close as possible to the actual holiday.

8. Grievant met with Ms. Miller later that day and disagreed with her interpretation of holiday leave. Grievant asked Ms. Miller if he was going to have to change his practice of working on West Virginia Day and the Fourth of July and using the holiday leave to cover part of his annual vacation taken in the first half of September.

9. Warden, Adrian Hoke, advised Grievant that he did not want employees to bank holidays. Warden Hoke disagreed that employees had the full ninety days to use a worked holiday.

10. Ms. Miller requested that Grievant provide her leave request slips for West Virginia Day and the Fourth of July. Grievant provided Ms. Miller two leave slips for his September vacation. In July of 2011, Grievant discussed the issue with the Warden and Deputy Warden. In the course of these conversations, Grievant was advised that he had to take the holidays before September 1, 2011.

11. Grievant used his West Virginia Day and Fourth of July holiday leave during the month of August 2011. Grievant used accrued annual leave and holiday leave for Labor Day to cover the leave taken for his September 2011 vacation.

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 Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally

requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that he was singled out and instructed by his supervisor to use holiday leave by a specific date. Grievant asserts this amounted to retaliation and discrimination by Respondent. W. VA. 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).

It is undisputed that Grievant filed a prior grievance challenging the Warden's interpretation of leave policy that holiday leave needed to be taken as soon as possible after the actual holiday, and should not be banked to use for future vacations. This grievance was not appealed after level two. The record indicates that Grievant approached Ms. Miller and volunteered the information that he had holiday leave he intended to use for

his September vacation. Ms. Miller advised Grievant to use the holiday leave prior to September 1, 2011. Grievant met with the Warden and, like Ms. Miller, Warden Hoke advised Grievant to use the holidays and not bank them for use during his vacation. It was then that Grievant filed the instant grievance. The undersigned cannot find that this constituted reprisal in light of the fact that the adverse manner in which Grievant claims he was treated occurred before the grievance was filed. The original grievance merely challenged the Warden's reading of operational procedure concerning holiday leave. In addition, it cannot be said that a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment existed under the undisputed facts of this case. Accordingly, Grievant did not meet his burden of establishing reprisal.

Turning to Grievant's claim of discrimination, 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 points to the treatment of another Unit Manager, Randy Shreve, in demonstrating his claim of discrimination. Mr. Shreve was allowed to hold his holiday leave past September 1, 2011. The record reflects that Ms. Miller was approached by Grievant and she informed the Grievant that if he had more assignments on the unit to accomplish, he could hold his holidays. Ms. Miller informed him that, in such a case, he could hold his holidays past September 1, 2011. When asked by Ms. Miller whether such a circumstance existed on the unit, Grievant was honest and told her there was not. Ms. Miller also asked Grievant whether there was any reason that he could not take his holidays before the September vacation. Grievant informed her that there was no reason he could not use them before his vacation. To the contrary, Mr. Shreve's unit was under staffed, and Ms. Miller had no knowledge that Mr. Shreve might be banking his holiday leave to use for a future vacation. Accordingly, it cannot be said that Grievant and Mr. Shreve were similarly situated. Unfortunately, no good deed goes unpunished. Grievant was honest about his leave and was forced to use it prior to his vacation. Hopefully, Respondent will acknowledge this integrity in his character and use it to his benefit in the future.

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 Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't*

of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. 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).

3. 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).

4. For the reasons more fully set out above, Grievant did not meet his burden of proof and establish that he was the victim of discrimination 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 (2008).

Date: December 12, 2012

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Ronald L. Reece
Administrative Law Judge