

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MEMORI J. DOBBS,

Grievant,

v.

Docket No. 2024-0344-PCTC

PIERPONT COMMUNITY AND TECHNICAL COLLEGE,

Respondent.

DISMISSAL ORDER

Grievant, Memori J. Dobbs, is employed by Respondent, Pierpont Community and Technical College. On October 10, 2023, Grievant filed this grievance against Respondent, stating:

I am being forced to file this grievance because Human Resources and the administration have failed to address a serious personnel issue wherein a Pierpont employee threatened my personal safety.

On September 21, 2023, while speaking with a co-worker, Lisa Phillips, in the Pierpont in the campus parking lot, John Davis was driving his personal vehicle, a truck, toward the campus exit. His vehicle was in the far-right lane as Ms. Phillips and I stood on the opposite side of his lane of egress. Instead of continuing his route toward the exit, he drove his vehicle across the center line toward the area where we were talking. Had Ms. Phillips not moved me, he would have struck my arm. This act was intentional and criminal as his actions put me in apprehension of fear—an assault—of bodily harm.

I filed a formal complaint on September 21, 2023. Additionally, I made requests to obtain the investigation report, the digital video and to have this perpetrator of this action properly disciplined. These requests have been met with indifference and incompetence. The HR Director asked me how the perpetrator should be disciplined. I told him that I expected them to follow the personnel policy for serious offenses. Moreover, Pierpont administrators have done nothing to address my personal safety concerns.

As relief, Grievant requests:

That Pierpont HR share with me and the City of Fairmont Police, Officer Hill the respite of the investigation and all relevant videotape of this incident, ... take affirmative steps to ensure my personal safety, and properly discipline the perpetrator in accordance with the serious offenses published policy of Pierpont Community and Technical College.¹

A level one conference was held on October 18, 2023. A level one decision denying the grievance was issued on November 16, 2023. Grievant appealed to level two of the grievance process on November 29, 2023, and to level three on February 9, 2024. On February 22, 2024, Respondent filed a motion to dismiss for failure to state a claim upon which relief could be granted. On February 29, 2024, Grievant filed a response claiming favoritism and discrimination. On March 1, 2024, Respondent amended its motion to dismiss, arguing that the favoritism and discrimination claims were untimely. The undersigned timely scheduled a hearing on the motion to dismiss.² The hearing was held by videoconference before the undersigned on March 28, 2024. Grievant appeared and was represented by Katherine Dooley, Esq. Respondent appeared by Kristi McWhirter, Assistant Attorney General. This matter matured on April 30, 2024. Each party submitted Proposed Findings of Fact and Conclusions of Law.

¹This relief incorporates the slight variation found in the level three appeal.

²W. VA. CODE § 6C-2-3(c)(2) provides a short time frame for a ruling on a motion to dismiss, stating: "Motion to dismiss. -- Any party may, at any time, file a motion to dismiss asserting that the board lacks jurisdiction under §6C-2-2(i) of this code, that the grievant has otherwise failed to state a claim under this article upon which relief may be granted, or that the grievance was not timely filed. Upon filing of such a motion, the chief administrator or administrative law judge shall immediately hold in abeyance all other proceedings, and within 10 days of receipt of filing, issue a ruling on the motion or schedule the motion for a hearing."

Synopsis

Grievant and Mr. Davis are employed by Respondent, Pierpont Community and Technical College. Grievant alleged that Mr. Davis intentionally swerved his truck towards Grievant to scare or strike her. Grievant asked Respondent to take disciplinary action to ensure her safety. Respondent only gave Mr. Davis a written reprimand. Grievant claimed harassment and favoritism but failed to allege the necessary elements. While the Grievance Board can generally order that Respondent take necessary action to ensure Grievant's safety, there has been no incident since the reprimand to show further action is necessary. Accordingly, this grievance is Dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant and Mr. Davis are employed by Respondent, Pierpont Community and Technical College, and were so employed during the events leading to this grievance.
2. Grievant alleges that as she stood in the workplace parking lot on September 21, 2023, Mr. Davis intentionally swerved his truck towards her to scare or strike her.
3. Grievant was upset and shaken, and asked Respondent to take disciplinary action to ensure her safety, including suspending Mr. Davis.
4. Respondent issued Mr. Davis a written reprimand.
5. There was no other incident between Grievant and Mr. Davis before or after the reprimand.
6. Respondent refused to take any further action against Mr. Davis.

Discussion

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3. “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant claims that coworker Davis intentionally swerved his truck towards her to scare or strike her. Grievant asserts harassment and favoritism because Respondent simply issued Mr. Davis a written reprimand instead of suspending him and refused her request for investigative materials. Grievant requests harsher discipline, along with the incident recording and investigative report. Grievant contends that Respondent failed to follow its policies in only lightly disciplining Mr. Davis and that it had a duty to secure the

incident recording. Grievant argues that anything which interferes with Grievant's effective job performance is grievable and that it would take little effort for Respondent to ensure that Mr. Davis avoids Grievant. Grievant does not allege any other incident by Mr. Davis towards Grievant.

Respondent counters that, regardless of untimeliness, this matter must be dismissed because Grievant does not set forth a cause of action upon which relief can be granted and does not request relief that the Grievance Board can grant Grievant. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-6-11.

"The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). West Virginia Code § 6C-2-2(i)(1) defines "grievance" as "a claim by an employee alleging a violation, a misapplication, or a misinterpretation of the statutes, policies, rules, or written agreements applicable to the employee including: (i) Any violation, misapplication, or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status, or discrimination; (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer; (iii) Any specifically identified incident of harassment; (iv) Any specifically identified incident of favoritism; or (v) Any 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."

For purposes of the grievance process, harassment necessitates multiple incidents. "'Harassment' means repeated or continual disturbance, irritation, or annoyance of an employee that is contrary to the behavior expected by law, policy, and profession." W. VA. CODE § 6C-2-2(l). Because Grievant only cites one incident, Grievant does not properly allege harassment. Nevertheless, even if the alleged conduct had been harassment, Grievant does not allege that the conduct continued after Mr. Davis was issued the written reprimand. Further, as for the grounds of interfering with safety, Respondent did act to ensure Grievant's safety by issuing Mr. Davis a written reprimand. The Grievance Board cannot second guess whether the written reprimand is sufficient to ensure Grievant's safety since there has been no further incident.

As for claims of favoritism and discrimination, Respondent argues that these were untimely since they were raised for the first time on February 29, 2024. Respondent contends Mr. Davis received and that Grievant was notified of the written reprimand in October 2023. Yet, Respondent failed to submit any evidence thereof at the evidentiary hearing on its motion to dismiss. Respondent has the burden of proving its motion to dismiss but failed to prove that any of Grievant's claims were untimely.

Favoritism and discrimination necessitate that Respondent treat Grievant differently than a similarly situated employee. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional, or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Discrimination is the converse of favoritism and "means 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 favoritism or discrimination claim asserted under the grievance statutes, an employee must prove that he or she has been treated differently from one or more similarly-situated employee(s), that the different treatment is not related to the actual job responsibilities of the employees, and 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 does not properly compare herself to Mr. Davis in that she does not allege she was accused of, let alone disciplined for, attempting to strike a coworker. Thus, Grievant cannot meet the elements of favoritism or discrimination.

Relief is only possible if Grievant makes a claim upon which relief can be granted. Because Grievant has not alleged the necessary elements for a proper cause of action before the Grievance Board, any decision on the merits of this grievance, including the validity of the relief requested, would be advisory. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991)." *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000). Respondent proved that Grievant did not state a claim on which relief can be granted. Thus, this grievance must be dismissed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3. “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*
2. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-6-11.
3. Respondent proved by a preponderance of evidence that Grievant failed to state a claim on which relief can be granted.

Accordingly, this grievance is **DISMISSED**.

“An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: June 11, 2024

Joshua S. Fraenkel
Administrative Law Judge