THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN HALL,
Grievant,

v. **Docket No. 2016-0780-MasED**

MASON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, John Hall, is employed by Respondent, Mason County Board of Education. On November 2, 2015, Grievant filed this grievance against Respondent stating,

> WV § 6C-2-3(i)(1)(1), (i),(ii), (iii) & (v); 6C-2-3 (1), State and County code of conduct policies. Thursday morning Maintenance Director directed grievant and five others to move lockers at Wahama High. Grievant used lead paint indicator test strips which indicated positive for lead paint dust in five different locations including the lockers they were directed to move. Grievant advised director that lead paint dust is still present. On Friday before working hours started, maintenance director advised grievant he would be directed to go back and clean area. Grievant advised if lead still present he would not be able to clean without equipment. Director responded with intimidation and bullying. Director then threatened grievant for informing coworkers of danger all before working hours had begun on Friday.

For relief, grievant seeks "[s]upervisor removed from chain of command, reprimanded, directed to anger management."

Following the December 17, 2015 level one hearing, an undated level one decision was rendered denying the grievance. Grievant appealed to level two on January 26, 2016. Grievant perfected the appeal to level three of the grievance process on May 2, 2016. A level three hearing was held on January 13, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by

counsel, Wes Toney, AFT-WV/AFL-CIO. Respondent was represented by counsel, Leslie K. Tyree. This matter became mature for decision on February 22, 2017, upon final receipt of Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant did not submit Proposed Findings of Fact and Conclusions of Law despite notice and opportunity.

Synopsis

Grievant is employed by Respondent in its Maintenance Department. Grievant alleged he had been harassed and subjected to a hostile work environment by the Director of Maintenance. Grievant proved that during two incidents, which occurred years apart, the Director of Maintenance inappropriately raised his voice and made forceful gestures. However, this conduct did not rise to the level of repeated or continual behavior necessary to prove harassment or severe or pervasive conduct necessary to create a hostile work environment. Accordingly, the grievance is denied.

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 is employed by Respondent in its Maintenance Department.[1]

2. Cameron Moffett is the Director of Maintenance.

3. On an unspecified date, as Grievant entered the main room of the department to sign in, Director Moffett instructed Grievant to move lockers at Wahama High School. Grievant refused this instruction, stating that the lockers were testing

[1] Grievant did not provide his job title in his grievance filing or in his level three testimony.

positive for the presence of lead paint dust. A lead abatement company had previously been hired to remove the lead paint, and Director Moffett had report findings from the company that the room was safe. Director Moffett believed Grievant was using test strips from a paint store that would not be as accurate as the company's testing methods. Director Moffett informed Grievant the room was safe and insisted Grievant go to the school and move the lockers. Grievant continued to refuse, stating that it was not safe. At the end, Grievant said, "Whatever" and went to the break room and shut the door.

4. During this incident, both Grievant and Director Moffett raised their voices quite loudly, such that they could be heard in other areas of the building.

5. In the break room, Grievant began to talk to two of his coworkers, George Keefer Jr. and Kenneth Lee Rhodes, stating that the lead removal company had not cleaned the lead dust because of a loophole, and the company was reporting it was safe when Grievant's testing showed it was not.

6. Director Moffett went back to his office near the break room, and he could hear Grievant talking loudly about the lead situation in the break room.

7. Director Moffett forcefully opened the door to the break room and loudly told Grievant to sit down and be quiet or he would be written up. Director Moffett's demeanor was angry and agitated. Director Moffett opened the door quickly and with force, but he did not let go of the door as he entered.

8. In 2012, Grievant and Director Moffett had another confrontation in which Director Moffett jumped up from his desk chair, "shaking his fist and hand," and with a raised voice said, "Do you want me to take you to the office?"

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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).

In his grievance statement, Grievant asserted Director Moffett had acted with "intimidation and bullying" and alleged violation of "State and County code of conduct policies", however Grievant did not name said policies or enter any policies into evidence. During the level three hearing, Grievant's counsel asserted Director Moffett had subjected Grievant to a hostile work environment. There was no requested relief about the lead paint situation itself and no testimony was offered to explain how that situation was resolved. Respondent asserts Grievant has failed to meet his burden of proof and that the conduct does not rise to the level of harassment.

There is no significant dispute of the facts. Grievant, Director Moffett, Mr. Rhodes, Mr. Keefer, and Foreman Howard Myers testified. Both Grievant and Director Moffett admitted that they were both loud in their confrontation in the main room. There is no dispute that Director Moffett opened the break room door quickly and forcefully, but did not let go of the door. Director Moffett, Grievant, and the three witnesses agreed that Director Moffett was loud when he told Grievant to sit down and be quiet, but described

different levels of volume. Director Moffett admits he is naturally loud and was louder than normal. Mr. Rhodes stated Director Moffett was yelling. Mr. Keefer stated Director Moffett's voice was raised. Howard Myers stated that Director Moffett was loud but not yelling. Grievant did not describe Director Moffett's volume on his own. When his counsel asked if Director Moffett's voice was raised, he replied, "Yes." When asked if Director Moffett was screaming, he replied, "Yes."

In asserting Director Moffett had acted with "intimidation and bullying," it appears Grievant is alleging harassment. "'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). 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).

Grievant's counsel also specifically alleged hostile work environment during the level three hearing. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

"'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

Grievant only grieved the lead paint incident in his grievance statement. In testimony, Grievant also testified about the incident that occurred in 2012 and an alleged incident that occurred at an unspecified time after the lead paint incident. The alleged incident that occurred after the lead paint incident cannot be considered as it occurred after the grievance and was not a part of this grievance. Also, the other witnesses briefly testified about a few other incidents, but those were not incidents that involved Grievant, so, therefore, cannot be considered.

Grievant has proven that during two incidents Director Moffett inappropriately raised his voice and made forceful gestures. However, these two incidents occurred approximately three years apart. Further, while Grievant's testimony about the 2012 incident was unrebutted, he testified so briefly about that incident that it is not clear to the

undersigned exactly what happened. It is inappropriate for a supervisor to raise his voice at an employee, however, the lead paint incident started with a heated discussion in which Grievant also raised his voice. Although Grievant testified that he was intimidated by Director Moffett, this does not appear likely as Grievant would not have responded by raising his own voice at Director Moffett if he had been intimidated. There was no testimony offered to show that these two instances unreasonably interfered with Grievant's work performance.

While it is clear Director Moffett's behavior in these two instances was inappropriate, the two instances occurred years apart, which does not rise to the level of repeated or continual behavior necessary to prove harassment or severe or pervasive conduct necessary to create a hostile work environment.

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. W. VA. CODE ST. R. § 156-1-3 (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).

2. "'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). 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).

3. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

4. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006).

5. “As a general rule ‘more than a few isolated incidents are required’ to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm’n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997).” *Marty v. Dep’t of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

6. Grievant proved two incidents of inappropriate conduct that occurred over the span of three years, which does not rise to the level of repeated or continual behavior necessary to prove harassment or severe or pervasive conduct necessary to create a hostile work environment.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: April 21, 2017

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Billie Thacker Catlett
Chief Administrative Law Judge