

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANNY LUCAS,
Grievant,

v.

Docket No. 2019-0563-DOT

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Danny Lucas, is employed by Respondent, Division of Highways ("DOH"), as a Transportation Worker 3, Equipment Operator ("TW3EQOP"). He was assigned to District 2. Mr. Lucas filed a level one grievance form dated November 2, 2018 alleging:

Grievant was subjected to hostile work environment: When Grievant refused to act as a crew leader, agency falsified paperwork, including Grievant's signature, in such a way as to create the appearance that he had been crew leader.¹

As relief, Grievant seeks, . . . "cessation of unlawful coercion and hostile work environment." At the level three hearing Grievant said he wanted the DOH to be ordered not to assign him as a crew leader under any circumstances.

A level one conference was held on December 4, 2018, and a decision denying the grievance was issued on December 21, 2018. Grievant appealed to level two on December 26, 2018, and a mediation was conducted on March 7, 2019, after which this matter was placed in abeyance until no later than May 8, 2019, to give the parties additional time to negotiate. Grievant appealed to level three on May 1, 2019. A level

¹ The grievance statement is set out as it was written on the grievance form.

three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on October 29, 2020. Grievant personally appeared and was represented by Gary DeLuke, UE Local 170. Respondent was represented by Jesseca R. Church, Esquire, DOH Legal Division.

At the close of the hearing, the parties were given the opportunity to present Proposed Findings of Facts and Conclusions of Law. Respondent's representative requested one extension for filing these proposals and Grievant's representative requested two extensions. Neither party objected to the extensions. The final date for submission of the post-hearing proposals was January 19, 2021. This matter became mature for decision on that date.

Synopsis

Grievant alleges that he was subjected to a hostile workplace when Respondent required him to take a temporary upgrade to a Crew Chief and completed paperwork related to the assignment in Grievant's name. Respondent may occasionally and intermittently assign employees work outside their normal classification to help in areas of need. Grievant did not prove that Respondent was treating him improperly when he was assigned to a temporary upgrade, nor that Respondent was subjecting him to a hostile workplace.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Danny Lucas, is employed by Respondent, Division of Highways (“DOH”), as a Transportation Worker 3, Equipment Operator (“TW3EQOP”). He was assigned to District 2.

2. Grievant was first employed by DOT as a Transportation Worker 2 Equipment Operator (TW2EQOP”) in 2008. He was assigned to the DOH Cabell County facility in District 2. He applied for a promotion to TW3EQOP in 2012. He was selected for the position and transferred to Lincoln County.

3. The duties for the TW3EQOP position were set out in the job posting as follows:

TW3EQOP – Under limited supervision, performs skilled work in the construction and maintenance of highways. Operates a variety of heavy motorized maintenance equipment such as a motor grader, backhoe, tandem and single axle trucks, wheeled tractor, skid-steer loader and wheeled loader. May be required to operate other related highway maintenance equipment as employee training permits. Performs preoperation and postoperation check of equipment. Makes major repairs to roads. May be exposed to inclement weather and hazardous working conditions. **Performs related work as required.** (Emphasis Added)

(Grievant Exhibit 1)

4. In 2018, two Transportation Worker 3 positions were posted for the District 2 Bridge Department. These positions were not for Equipment Operators. The “duties” section in these postings contained the sentence “May serve as an occasional lead worker.” Those postings did not contain the sentence “Performs related duties as required.” (Grievant Exhibits 5 & 6)

5. In 2018, a TW3EQOP vacancy was posted that year in District 10. In addition to the duties included in the posting Grievant applied for, this posting included the sentence “Related work as required such as Flagging, Shovel Material, Cleaning Culverts, Mowing, Brush Cutting, Litter Pickup and Cleaning Equipment. The “duties” section also included the catch-all sentence, “Performs related duties as required.” (Grievant’s Exhibit 9).

6. In 2019, two vacancies were posted for TW2EQOP positions; one in District 1 and another in District 10. The “duties” section in the District 1 posting contained the phrase, “This position will . . . fill in as a crew leader as needed,” as well as the sentence “Performs related duties as required.” (Grievant Exhibit 7). The District 10 posting contained the phrase “May lead or train a lower level equipment operator” as well as the sentence, “Performs related duties as required.” (Grievant Exhibit 8)

7. The “duties” listed in DOH job postings are a representative sample of the predominate duties for the position but are not intended to be an exclusive list of all the duties that an employee in the position may be assigned.²

8. Grievant has received Employee Performance Appraisals (“EPA”) from his supervisors on forms provided by the Division of Personnel. The EPA 1 form contains a section titled “Responsibilities” in which the employee’s essential duties and responsibilities are listed. This is not intended to be an exhaustive list of all duties performed by the employee but rather a representative sample.³ Grievant’s EPA 1s for 2015 and 2019 did not contain a specific reference to serving as a lead worker or crew

² Level three testimony of Kathleen Dempsey, DOH District 2 Human Resources Manager.

³ *Id.*

chief. They did contain the sentence “Performs related duties as required.”⁴ (Grievance Exhibit 11)

9. The classification specifications which were in effect when Grievant was promoted to the TW3EQOP position in the “Minimum Qualifications” section states:

Crew Chief Only: Three years of full-time or equivalent part-time paid experience in highway construction and maintenance, or in bridge or structural steel construction.

The titles included in the section “Areas of Assignment” include: Automotive Body Repair; Bridge Maintenance; Building Trades; Core Drilling; Equipment Operation; Equipment Repair; Highway Maintenance; Metal Work; and Crew Chief. (Grievant Exhibit 4)

10. “In the area of “Examples of Work,” the classification specifications include the sentence “May lead and train lower level workers in performing skilled and semi-skilled work.”

11. Like the duties in a job posting, the “Examples of Work” section of the classification specifications is intended to give a representative sample of the work performed by a worker in that classification, not an exhaustive list of all duties.⁵

12. Policy number DOH 3.12 *Temporary Upgrades for Hourly Employees*, regulates assignments and pay in situations where a DOH employee is upgraded to a higher-level classification to meet a temporary need of the agency. (Respondent Exhibit 5). This routinely occurs when the Crew Chiefs⁶ for a particular unit are off work due to

⁴ This sentence in Grievant’s 2015 EPA 1 states “Performs related *work* as required.” (emphasis added). The use of the word “work” instead of “duties” does not materially alter the meaning.

⁵ Level three testimony of Kathleen Dempsey, DOH District 2 Human Resources Manager.

⁶ Also referred to as crew leaders. These titles are interchangeable.

injury, illness, annual leave, or training etc. In those instances, TW3's in the appropriate area are upgraded to serve as the leader of the crew in the Crew Chief's absence.⁷

13. Policy number DOH 3.12 *Temporary Upgrades for Hourly Employees* provides in part:

1.0 PURPOSE:

The purpose of this policy is to provide for the payment of increased wages to employees in the transportation worker series who are temporarily assigned to perform the job duties of a higher-level classification than they currently hold.

3.0 POLICY:

3.1 Conditions of temporary assignment

Employees may be assigned by the District Engineer/Manager or Division Director to perform duties normally contained in certain classifications when it is not feasible or practical to make a permanent assignment to the position. Such occurrences may be the result of vacation schedules, the absence of employees due to illness, the temporary need for additional work crews or other unforeseen circumstances. Changes in assignments may be made only according to those classifications listed in Appendix A. Employees temporarily upgraded must meet the minimum requirements for the higher classification.

3.2 Assignment to Higher Classification

An employee who is temporarily required to perform, and in fact does fully perform the essential job functions of a higher-level classification, as provided in Appendix A, will be paid the Tier 1 rate for the higher classification. The higher rate will not apply to assignments of less than one hour. Assignments to a higher classification may not exceed 1,000 hours in a calendar year. The Commissioner of Highways or his designee may grant extensions to the 1,000 hours where legitimate justification is presented.

Id. (Respondent Exhibit 5)

⁷ Level three testimony of Kathleen Dempsey, DOH District 2 Human Resources Manager.

14. Grievant has made it clear to his supervisors since he was promoted to the TW3EQOP position that he did not want to be temporarily upgraded to Crew Chief ("TW3CRCH"). He is happy operating equipment and does not want the additional responsibility of supervising a project even for short periods. This is generally not a problem because other TW3s want the upgrades for the additional pay and the upgrade counts as supervisory experience when the employees apply for a promotion.

15. Grievant's supervisors have tried to accommodate Grievant's wish to avoid upgrades. At the time of the hearing, Grievant had only been upgraded to a TW3CRCH one time in his entire tenure as a TW3.

16. Grievant was working at Cabell County on or about October 31, 2018 and was informed by his supervisor, Larry Thacker, that he was needed as a TW3CRCH. Respondent DOH needed Grievant to act as a Crew Chief due to several employees who were classified as TW3CRCH's being absent from work. Grievant was one of the few TW3EQOPs available for an upgrade that day.

17. Grievant expressed that he did not want to be upgraded and would not take the assignment. Mr. Thacker told Grievant that if DOH needed him to act as a TW3CRCH, he was required to do so. Mr. Thacker then ordered Grievant to serve as the Crew Chief or be written up for insubordination. Grievant had previously been asked to take an upgrade to Crew Chief on other occasions but always declined. He had never been ordered to take the Crew Chief assignment before this date.

18. Instead of refusing a direct order and potentially being subject to disciplinary action for insubordination, Grievant agreed to act as Crew Chief for the day and thereafter filed a grievance.

19. Grievant performed the supervisory duties of the Crew Chief but was not required to do the paperwork regarding time and materials. Grievant's supervisor Larry Thacker filled out the "Daily Work Report" that is routinely completed by the Crew Chief. He signed it as prepared by: "Larry Thacker for Daniel Lucas". A note was written on the back of the form that said, "D. Lucas upgrade for crew leading." (Respondent Exhibit 3)

20. Grievant refused to accept the additional pay for being upgraded to a TW3CRCH even though he was listed as the crew lead on the work report and entitled to the pay upgrade.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that he was subjected to a hostile work environment when his supervisor required him to serve in a temporary upgrade to Crew Chief for one day, and filled out a form showing that Grievant had worked the upgrade without his consent.

Grievant specifically alleges that Larry Thacker falsified his signature. In reality, Mr. Thacker signed the "Daily Work Report" as "Larry Thacker for Daniel Lucas." The only signature he placed on the document was his own. He added the phrase "for Daniel Lucas" to make it clear that Grievant was temporarily upgraded to Crew Chief that day.

The “Daily Work Report” is typically completed by the Crew Chief. Mr. Thacker’s action accurately reflected the situation and may have been necessary for Grievant’s upgrade in pay to be authorized. There was nothing nefarious or improper by Mr. Thacker’s action in this instance.⁸

Grievant points to a variety of job postings which have different entries in the “duties” sections regarding TW3EQOP employees serving as lead workers and temporarily acting as Crew Chief.⁹ Specifically, District One posted TW2EQOP positions with the sentence “This position will . . . fill in as a crew leader as needed,” in the “duties” section of posting. These postings were all dated after Grievant’s present position was posted in 2012. Grievant’s posting did not contain a duty entry related to lead work, but like all the postings, it did contain the phrase “Performs related duties as required.”¹⁰ What these examples demonstrate is that the various DOH districts do not have uniform postings they are required to use for each classification vacancy. There is nothing that requires job postings for specific positions in different districts to be identical. The “duties” listed in DOH job postings are a representative sample of the predominate duties for the position, but are not intended to be an exclusive list of all the duties an employee in the position may be assigned.¹¹

The Grievance Board has long recognized that Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas

⁸ The fact that Grievant intended to refuse the pay does not affect Mr. Thacker’s action or motivation.

⁹ See FOFs 4-6, *supra*.

¹⁰ See FOF 3, *supra*.

¹¹ Level three testimony of Kathleen Dempsey, DOH District 2 Human Resources Manager.

of need. See *Broadbudd et al. v. Dep't of Health & Human Ser.*, Docket No. 89-DHS-606/607/608/609 (Aug. 31, 1990); *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009); *Baker v. Dep't of Health & Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016). The Classification Specifications for a TW3 provide that employees in that classification, "May lead and train lower level workers in performing skilled and semi-skilled work."¹² The DOP defines "lead work/lead worker as follows:

This is a level of work at which an incumbent is assigned the ongoing responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds of work.¹³

This is exactly what Crew Chiefs do. They assign duties to the members of the crew and oversee their performance on the daily project, while performing TW3 work of their own. Grievant is a TW3EQOP with more than three years of full-time experience in highway construction and maintenance.¹⁴ Consequently, Respondent has the authority to assign Grievant to Crew Chief duties occasionally and intermittently when such assignments are necessary to meet the organization's need.

The Division of Personnel *Prohibited Workplace Harassment Policy*, defines "Hostile Workplace Harassment" as:

H. Nondiscriminatory Hostile Workplace Harassment: A form of harassment commonly referred to as "bullying " that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses,

¹² Grievant Exhibit 4.

¹³ DOP *Pay Plan Policy* Appendix A.

¹⁴ Grievant Exhibit 4.

ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.¹⁵

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.

¹⁵ The definition of sexual harassment is not included herein since it is not applicable to this 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 did not show any conduct by Respondent which comes close to meeting the definition of a hostile workplace. Respondent periodically asked Grievant if he wanted a temporary upgrade to Crew Chief. On a single occasion required Grievant to perform the duties of a Crew Chief when no other reasonable option was available. These are legitimate actions.

It is understandable that Grievant does not want temporary upgrades. He is happy and competent in his duties as a TW3EQOP. He does not want the added responsibility of assigning specific tasks to his co-workers, completing paperwork or oversight of a project. Generally, there is no reason to require Grievant to take these upgrades. Many of his co-workers are happy to take these upgrades because they result in higher pay and supervisory experience. In fact, it has only happened once in eight years. Respondent should only require Grievant to upgrade if no options are available such as giving the upgrades to other workers who covet them. Grievant did not prove by a preponderance of the evidence that he has been subjected to a hostile workplace. Accordingly, the grievance is **DENIED**.

Conclusion of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep’t of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

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. Agencies may occasionally and intermittently assign employees work outside their normal classification to help in areas of need. See *Broadbudd et al. v. Dep't of Health & Human Ser.*, Docket No. 89-DHS-606/607/608/609 (Aug. 31, 1990); *Adkins v. Workforce W. Va. and Div. of Personnel*, Docket No. 2009-1457-DOC (Oct. 13, 2009); *Baker v. Dep't of Health & Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016).

3. The DOP defines “lead work/lead worker as follows:

This is a level of work at which an incumbent is assigned the ongoing responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds of work.

DOP Pay Plan Policy Appendix A.

4. The Division of Personnel *Prohibited Workplace Harassment Policy*, defines “Hostile Workplace Harassment” as:

H. Nondiscriminatory Hostile Workplace Harassment: A form of harassment commonly referred to as “bullying ” that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.¹⁶

¹⁶ The definition of sexual harassment is not included herein since it is not applicable to this case.

5. 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).

6. "'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).

7. "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).

8. Grievant did not prove by a preponderance of the evidence that he has been subjected to a hostile workplace.

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* 156 C.S.R. 1 § 6.20 (2018).

Date: February 26, 2021

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE