

DAVID A. WILSON, SR.,

Grievant,

v.

DOCKET NO. 96-DOH-019

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, David A. Wilson, Sr., filed this grievance directly at level four protesting his demotion and transfer effective January 2, 1996, stating as follows:

Grievant has been demoted without due process. This 51 year old grievant has been subject to harassment, discrimination, including political discrimination and hereby seeks a level four hearing.

Grievant seeks reinstatement to his former classification and position. A level four hearing was held on March 25 and April 17, 1996, at which time this case became mature for decision.

Issues

Grievant was the Transportation Realty Manager for Respondent's District Seven office, located in Weston, West Virginia. Grievant was responsible for five employees in the Weston office: William Ramsey, Transportation Realty Agent III; Gary Henry, Transportation Realty Agent II; Agnes Kessler, Transportation Realty Agent I; and Judith Kennen, the office's Secretary. The Transportation Realty Agents are also known as "Right- of-Way" agents. They are responsible for negotiating and procuring real estate for the right- of-ways on Respondent's road construction projects.

On December 15, 1995, Grievant was demoted in title to a Transportation Realty Agent IV and transferred from District Seven to the Central Office in Charleston, West Virginia. Grievant's disciplinary letter from Jeff Black, Director of Human Resources, states:

. . . The reason for your demotion is you have allowed a personal relationship you enjoy with one of your subordinates to create an adverse work environment in the unit to the extent that you are unable to effectively manage. This adverse environment has caused all of your subordinates, with the exception of the one with whom you share the relationship, to file written complaints. The District Engineer had previously discussed with you the potential for problems resulting from the relationship. . . .

Jt. Ex. 4.

Background

Grievant began having a personal relationship with one of his subordinates, Agnes Kessler, in or about April 1994. Ms. Kessler began working in the District Seven office in April 1991 as a Secretary. She was promoted from Secretary II to Right-of-Way Trainee in June 1994, as the result of filing a grievance. She was again promoted to Right-of-Way Agent I in August 1995.

Shortly after Grievant and Ms. Kessler began dating, Marvin Murphy, District Engineer, and Grievant's supervisor, met with both of them. Although there is no policy prohibiting office relationships, Mr. Murphy discussed the potential problems that could arise when a supervisor dates a subordinate in the same office. Ms. Kessler assured Mr. Murphy the relationship was consensual, and Grievant assured Mr. Murphy the relationship would not interfere with or impact the effective management of the District Seven office.

The other two Right-of-Way agents in the District Seven office, William Ramsey and Gary Henry testified that they knew about the relationship, and that it did not impact the office in the beginning, and in fact, things were "harmonious." However, as time went on, the environment became uncomfortable and tense, and Ms. Kessler seemed to be taking over. Mr. Ramsey spoke to Grievant about the situation, and it became clear to him that nothing was going to be done by Grievant to alleviate the situation.

In March 1995, Judith Kennan started work as the District Seven Secretary, filling the vacancy left when Ms. Kessler was promoted to Right-of-Way Agent. Ms. Kessler was the logical person to assist in Ms. Kennan's training and undertook that task. It became very apparent early on that Ms. Kessler and Ms. Kennan did not get along and hostile feelings between the two of them began to escalate. Ms. Kennan testified that Ms. Kessler would tell her one way to do a particular project, and then Grievant would tell her something else. Ms. Kessler would then become angry with Ms. Kennan for

going to Grievant for help.

Ms. Kennan testified that she tried to talk to Grievant about the problems she was having with Ms. Kessler, but he refused to listen to her, stating that "Agnes was not the problem." Grievant met with Ms. Kennan about three months into her probationary period to discuss her performance, and to put her on an "improvement plan." Grievant recorded the meeting with Ms. Kennan, and Mr. Ramsey was present as a witness. A review of the transcript of the meeting between Grievant and Ms. Kennan serves to support Ms. Kennan's assertion that Grievant would not discuss Ms. Kessler. Ms. Kennan repeatedly attempted to bring up the problems she was having with Ms. Kessler and Grievant would quickly change the subject, and at one point stated, "Well, Agnes is not the issue - ok - and Agnes is not going to become the issue." G. Ex. 4, p. 22.

Grievant testified that Ms. Kennan was a terrible secretary and, in fact, he recommended to Mr. Murphy, in what can only be described as a scathing attack, that she not be hired after her probationary period had ended. G. Ex. 1. Ms. Kennan had spoken to Mr. Murphy before about the problems in the District Seven office, particularly with Ms. Kessler, and after receiving Grievant's letter recommending she be terminated, he made inquiries about her abilities. Neither Mr. Ramsey nor Mr. Henry had experienced any problems with Ms. Kennan's performance. Mr. Murphy decided not to accept Grievant's recommendation and retained Ms. Kennan after her probationary period ended.

The District Seven office had responsibility, along with District Nine, for the Rt. 19 ("Birch River") construction project which began in earnest in the summer of 1995. It was the policy of the department to offer any overtime to be worked on a project to the most senior person first, and then work down the seniority list. Grievant did not offer any overtime work to either Mr. Henry or Mr. Ramsey, the most senior agents, but instead gave the overtime work to Ms. Kessler, as well as himself. A field office was set up at the Birch River location, and Ms. Kessler and Grievant in essence moved to Birch River for a majority of the Summer and Fall of 1995.

Archie Brackens, Transportation Realty Manager of District Nine, told Grievant he did not want Mr. Ramsey working in his district on the project due to some problems he had experienced with him in the past. Grievant testified that is why he initially did not offer overtime to Mr. Ramsey. Grievant did not explain why he could not offer Mr. Ramsey overtime in the District Seven portion of the project, however. Grievant never told Mr. Ramsey why he did not offer him overtime, nor did he tell

Mr. Murphy of Mr. Brackens' concerns regarding Mr. Ramsey.

Grievant testified he did not offer the overtime work to Mr. Henry because it was cemetery work, and he knew Mr. Henry did not like to do cemetery work. Additionally, that work involved the use of computers, and Mr. Henry did not have computer experience. Thus, Ms. Kessler was the natural choice for the project. Again, Grievant did not tell Mr. Henry at the time the reason why he was not offering him overtime work.

Mr. Ramsey and Mr. Henry believed Grievant gave Ms. Kessler the overtime because of their personal relationship, and in clear violation of the overtime policy. By the Fall of 1995, the environment in the District Seven office was so bad that when Grievant finally asked Mr. Ramsey to go to work on the Birch River project, he declined, because he would be at Birch River in addition to Ms. Kessler, and he did not want to be in the presence of Ms. Kessler and Grievant together.

In the Fall of 1995, Mr. Ramsey, Mr. Henry, and Ms. Kennan made complaints regarding the District Seven office, and Ms. Kessler specifically, to Beverly Stalnaker, the employee assistance counselor. Ms. Stalnaker also was Mr. Murphy's Administrative Assistant, and she informed him of these complaints and the trouble in the District Seven office. All three complained that the situation continued to get worse, and that Grievant would not listen to their concerns, and was only listening to Ms. Kessler. Grievant repeatedly informed them that "Agnes was not the problem." In September 1995, the three offended employees put their concerns in writing to Mr. Murphy. The letters summarized the hostile working environment present in the District Seven office, the advantageous treatment the employees' perceived was being given to Ms. Kessler, both in terms of control of the office, and the overtime she received at Birch River, and Grievant's inability to discuss, let alone attempt to resolve, the situation. Jt. Ex. 2.

As a result of the complaints and the letters, Mr. Murphy recommended on November 3, 1995, that Grievant be transferred from the District Seven office and demoted in title to Transportation Realty Agent IV. Mr. Murphy informed Grievant:

In your position of District Seven Transportation Realty Manager, it is your responsibility to serve in that role and carry out your duties in a manner that reflects the best interests of your employees, District Seven, and the West Virginia Division of Highways. Any conduct that causes or appears to cause an employee's inability to comport oneself in a completely fair and impartial manner and that is or appears to be improper, places that individual, his or her employees and supervisor, and the West Virginia Division of Highways in a potentially compromising and untenable situation.

As previously discussed with you about your personal relationship with a female subordinate, the potential for charges of favoritism, discrimination, and/or personal

gain have placed you, your supervisor, and the West Virginia Division of Highways in a difficult position. Over the past several months, this potential has developed and resulted in written complaints from all of your subordinates except for the one with whom you continue to share a personal relationship. Furthermore, the personal nature of your relationship with your subordinate places you, your supervisor, and the West Virginia Division of Highways potentially at risk for legal actions.

Therefore, you are being given notice that recommendation is being made for your demotion in title to a Transportation Realty Agent IV and your transfer to the Right of Way Division in Central Office in Charleston.

Jt. Ex. 1.

This memorandum was accompanied by a Notice to Employee of Disciplinary Action form which informed Grievant that, prior to a final decision on the action, he would be given an opportunity to respond in writing or in person to the District Engineer/Division Director. Grievant did respond in writing to Mr. Murphy on November 14, 1995, defending himself against the allegations contained in the letters of his subordinates. Jt. Ex. 3.

Mr. Murphy's recommendation was accepted, and Grievant was demoted in title and transferred to the Charleston office, effective January 2, 1996. Grievant's salary was unchanged. Jt. Ex. 4.

Discussion

An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 29-6A-6. Thus, in this disciplinary demotion case, Respondent must prove that Grievant was unable to effectively manage the District Seven office as a result of his personal relationship with one of his subordinates. Based upon the evidence and testimony presented at the level four hearing, as summarized above, the undersigned finds that Respondent has met its burden in proving Grievant had lost his objectivity as a result of his personal relationship with Ms. Kessler, and had become unable to effectively manage the District Seven office. It should be noted that, just because the work continued to flow from that office, and the Birch River project was essentially completed under Grievant's watch, that does not mean that Grievant had not lost his ability to effectively manage the personnel in his office. Management entails more than just ensuring work production. Management also involves fostering harmonious relationships between employees, and addressing problems which affect employee morale. This Grievant did not do when he refused to discuss his employees' concerns regarding the effect his personal relationship with Ms. Kessler was

having on the rest of the office. Grievant insists that everything was fine in the District Seven office until Judith Kennan was hired. It is undisputed that Ms. Kennan and Ms. Kessler did not get along, and the tension between them escalated the longer Ms. Kennan was there. Grievant suggests that all of the problems in the District Seven office were attributable to Ms. Kennan. In fact, Grievant suggests a "conspiracy" developed between Mr. Ramsey, Mr. Henry, and Ms. Kennan to discredit him and Ms. Kessler while they were away on the Birch River project. The undersigned finds this issue with Ms. Kennan to be nothing but a red herring. While Ms. Kennan may not have been the ideal secretary, it is irresponsible of Grievant, as a manager, to lay all blame for the problems in his office on his secretary. What Ms. Kennan's presence did accomplish was to exacerbate the already growing tension in the office because of the hostility exhibited between her and Ms. Kessler.

Grievant raises several affirmative defenses in his grievance statement, including harassment and discrimination. An employee raising an affirmative defense must establish such defense by a preponderance of the evidence. McFadden v. W. Va. Dept. of Health and Human Resources/Colin Anderson Center, Docket No. 94-HHR-428 (Feb. 17, 1995).

It is unclear of what due process rights Grievant contends he was deprived with regard to his transfer and demotion. Grievant was given notice of the action and an opportunity to respond, which he did. Grievant also was afforded the right to appeal that action to this Grievance Board pursuant to W. Va. Code §§ 29-6A-1, et seq. Beyond that, Respondent owed Grievant no other "due process" rights.

"'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 29-6A-2(l). Grievant has shown absolutely no evidence of any repeated or continual actions which would constitute harassment on the part of his employer. Rather, Mr. Murphy made one distinct decision to transfer and demote Grievant. Other than the conversation with Grievant early in April 1994, regarding the potential problems which could evolve as a result of his relationship with Ms. Kessler, Mr. Murphy never discussed the issue again with Grievant until the decision was made to transfer him. This action of Mr. Murphy's does not fit within the definition of "harassment."

Similarly, Grievant has failed to present any evidence whatsoever of discrimination on the part of his employer. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by

the employees." W. Va. Code § 29-6A-2(d). Grievant cannot even make a prima facie case of discrimination as he has failed to present evidence of any other employee in a similar situation who has been treated differently than he. The only person who was treated differently than Grievant in this case was Ms. Kessler, who was permitted to remain in the District Seven office. However, Ms. Kessler cannot be considered "similarly situated" to Grievant. Grievant was the supervisor in this situation, was in charge of the District Seven office, and failed to maintain an orderly, efficient, and harmonious working atmosphere in his office.

Grievant also claims his transfer was made for "political" reasons, because he cannot fathom any other reason for his treatment. However, other than his own speculation, Grievant has presented no evidence to support this theory. Respondent presented ample evidence, and in fact Grievant's own evidence supports, that Grievant simply failed to maintain control of his office. Regardless of whether Grievant was showing favoritism towards Ms. Kessler or not, he was in a situation as a supervisor involved with a subordinate, where he should have scrutinized every decision he made and every action he took to ensure that he did not create an appearance of impropriety. He obviously did not do this. Mr. Ramsey, Mr. Henry, and Ms. Kennan all felt uncomfortable in the office environment, resented Ms. Kessler's apparent control over matters in the office which should have been the purview of Grievant, and could not talk to Grievant about the problem. Indeed, the undersigned agrees with Respondent's counsel who summed up the situation by stating that Grievant "just doesn't get it." Grievant did not, and does not, understand that Respondent did not object to his relationship with Ms. Kessler, but rather, was concerned that Grievant would lose his objectivity in dealing with others in his office. That is exactly what happened. Any attempts to discuss the problems with Ms. Kessler with Grievant were dismissed by Grievant's statement that "Agnes was not the problem." Grievant repeated that statement at the level four hearing. Grievant still "doesn't get it." It is unfortunate for Grievant, who appears to be a hard worker and undoubtedly was an effective manager until recent events.

The decision to transfer and demote Grievant was the only reasonable decision Mr. Murphy could make in this instance. Suggestions were made by Grievant's counsel that perhaps Ms. Kessler should have been transferred. However, Grievant was the manager of the office. It was Grievant's responsibility, not Ms. Kessler's, to remain objective and to bend over backward to ensure that his relationship with her did not affect the relationships within the office. Grievant failed in that endeavor.

Based upon the foregoing discussion and evidence, it is appropriate to make the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant was the Transportation Realty Manager for Respondent's District Seven office in Weston, West Virginia.
2. Grievant began having a personal relationship with one of his subordinates, Agnes Kessler, a Right-of-Way Agent I.
3. This relationship created an uncomfortable working environment within the District Seven office, resulting in the remaining employees submitting written complaints to Marvin Murphy, Grievant's supervisor, about the situation.
4. Mr. Murphy had previously cautioned Grievant about the potential problems associated with a supervisor and a subordinate having a personal relationship within the same office.
5. Based upon the complaints and his own investigation, Mr. Murphy recommended Grievant be transferred to the Central Office in Charleston, West Virginia, and demoted in title only.
6. Mr. Murphy's recommendation was accepted and Grievant was transferred and demoted effective January 2, 1996.

Conclusions of Law

1. Respondent has proven by a preponderance of the evidence that Grievant failed to maintain control and effectively manage the District Seven office.
2. Grievant has failed to demonstrate by a preponderance of the evidence that he was the subject of harassment, discrimination, or political discrimination by Respondent.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and

provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ
Administrative Law Judge

Dated: May 16, 1996