ROBIN CONFERE-KNOWLES

Grievant,

v. Docket No. 98-HHR-166

WEST VIRGINIA DEPARTMENT

OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Robin Confere-Knowles (Grievant), is employed as an Office Assistant III by the West Virginia Department of Health and Human Resources/Bureau for Public Health, Office of Environmental Health Services (DHHR). Grievant filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that she was the subject of retaliation or reprisal due to a "gag order" intended to "limit my interactions with another employee simply because I have been subpoenaed" for the grievance of the other employee, Earlie Delaney (Delaney). (See footnote 1) **The grievance was denied at Level I by immediate supervisor Wendy M. Casto on December 29, 1997. The grievance was denied at Level II by Administrator C. Russell Rader (Rader) on January 7, 1998. A Level III hearing was held on April 6, 1998, before Grievance Evaluator Barbara J. Wheeler (Wheeler). Grievant was represented at this hearing by Jerry Lilly of the Independent Union of Public Employees, and DHHR was represented by Rader and Donald Kuntz. At Level III, Grievant limited the relief she sought to "compliance with Section 29-6A-3(h) of the State Code of West Virginia." On or about May 8, 1998, the grievance was denied at Level III by Dr. Henry G.Taylor, Commissioner of the Bureau for Public Health. The parties, agreeing that the facts had been fully developed at Level III, requested that the matter be submitted on the Level III record for decision at Level IV. This matter became mature for decision on June 17, 1998.** (See footnote 2)

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level III hearing, and documentary evidence admitted at Levels I through III.

FINDINGS OF FACT

1.

Grievant is an Office Assistant III employed by DHHR in the Bureau for Public Health, Office of Environmental Health Services.

2.

Another employee of DHHR, Delaney, filed a grievance. Grievant was to be a witness in Delaney's grievance.

3.

While preparing his grievance, Delaney made more than twenty telephone calls to Grievant's office.

4.

These telephone calls upset some of Grievant's co-workers, and they complained to their supervisor, Rader.

5.

On December 22, 1997, Grievant was called into Rader's office and told by him that Delaney was attempting to telephone her at the office, that Rader had issued a “gag order,” and that she was not to speak with Delaney about his grievance during office hours. This upset Grievant.

6.

Rader faxed a memorandum to Delaney, dated December 19, 1997, informing him that his calls were interfering with the work of the office. This memorandum directed him to cease his calls immediately.

7.

Grievance Evaluator Wheeler, by letter dated December 22, 1997, rescinded Rader's memorandum and instructed DHHR to allow Delaney to telephone potential witnesses during working hours, albeit with the prior approval of the witnesses' supervisor.

8.

Wheeler's letter provided Delaney with a means of contacting Grievant, and other witnesses, that did not affect the normal operation or productivity of the office.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A- 6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991).

Grievant's complaint arises from a grievance filed by Delaney. Grievant was to be a witness in Delaney's grievance. While preparing his grievance, Delaney called Grievant's co-workers more than twenty times during work hours to interview them as potential witnesses. These telephone calls upset some of Grievant's co-workers, and theycomplained to their supervisor, Rader.

Rader determined that the telephone calls were disrupting the work environment of his office. Rader faxed a memorandum to Delaney, instructing him not to have any form of contact with the office during working hours. Additionally, Rader informed his staff not to have any contact with Delaney concerning his grievance. This "gag order" memorandum caused Grievant to file her complaint. Grievant alleges that Rader's directive not to talk to Delaney about his grievance constitutes reprisal for her participation in the grievance process. As relief, grievant seeks "compliance with section 29-6A-3(h) of the State Code of West Virginia".

West Virginia Code § 29-6A-3(h) states:

> No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

"Reprisal" means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

To establish a prima facie case of reprisal, the burden is upon a grievant to prove by a preponderance of the evidence, 1) that grievant engaged in protected activity, 2) that

grievant's employer was aware of the protected activities, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his or her protected activities within such period of time that retaliatory motivationcan be inferred. Frank's Shoe Store v. Human Rights Comm'n., 179 W. Va. 53, 365 S.E.2d 251 (1986); Ruby v. Insurance Comm'n. of W. Va., Docket No. 90-INS-399 (Jul. 28, 1992).

Grievant has established a prima facie case of retaliation. Her activity as a witness in the grievance procedure is protected under W. Va. Code § 29-6A-2(p). As evidenced by its "gag order," DHHR was well aware that she was a witness. Grievant, upon being called into Rader's office and told not to speak to Delaney about his grievance, became upset. The undersigned finds it reasonable to conclude that being called into a supervisor's office and told that you were not to exercise rights granted to you by statute, resulting in a feeling of being upset, constitutes adverse treatment. Finally, DHHR's actions followed Delaney's attempt to contact Grievant so closely in time, and were so clearly related to Grievant's role as a witness, as to make an inference of retaliatory motivation obvious.

However, an employer may rebut a grievant's prima facie case of retaliation by establishing "credible evidence of legitimate nondiscriminatory reasons for its action. . ." Mace v. Pizza Hut, Inc., 180 W. Va. 469, 472, 377 S.E.2d 461, 464 (1988). "Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination." W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 76, 443 S.E.2d 229,233 (1994).

DHHR has rebutted Grievant's prima facie case. W. Va. Code § 29-6A-3(p) also states that "it shall be understood by all parties that the first responsibility of any state employee is the work assigned by the appointing authority to the employee. Grievancepreparation and representation activities by an employee shall not seriously affect the overall productivity of the employee." DHHR presented credible evidence that Delaney's numerous calls had disrupted the work of its office by diverting employees from their assigned work and upsetting them. DHHR is permitted to establish reasonable requirements to prevent its work from being disrupted. A requirement that employees provide at least seventy-two hours notice before

taking time off to prepare for a grievance has been found to comply with the requirements of W. Va. Code § 29-6A-3(p). Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992). Grievant failed to introduce any evidence that the reason offered by the DHHR for its adverse action was merely a pretext.

It should be noted that Rader's “gag order” was rescinded only three days later. Grievance evaluator Wheeler quickly told Rader that Delaney had a right to confer with potential witnesses, but that he was not allowed to upset the normal operations of the office. From that time on Delaney could freely contact Grievant.

Wheeler's letter effectively awarded the only relief sought by Grievant, compliance with W. Va. Code § 29-6A-3(h). A decision reiterating this relief would be a meaningless exercise. Harrison v. Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.E.2d 605 (1986); Miraglia v. Ohio County Bd. Of Educ., Docket No. 92-35-270 (Feb. 19, 1993). This Grievance Board has consistently denied grievances when the remedy sought brings only de minimus relief, Carney v. W. Va. Div. of Rehabilitation Services, Docket No. VR-88-055 (Mar. 28, 1989); when the grievant seeks an advisory opinion, Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988); when "relief, if provided, would have no practical effect," Parsons v. Hancock County Bd. of Educ., Docket No. 15-88-249 (July31, 1989); or when the grievance has become moot, Fratto v. Harrison County Bd. of
Educ., Docket No. 89-17-294 (Nov. 30, 1989).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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CONCLUSIONS OF LAW

1. In order for grievant to prevail she must prove her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of

such participation. W. Va. Code § 29-6A-3(h).

3. Reprisal is the retaliation by an employer or agent 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. West Virginia Code § 29-6A-2(p).

4. To establish a prima facie case of reprisal, a grievant must prove: 1) that an employee engaged in an activity protected by the statute; 2) that the employee's employer was aware of the protected activity; 3) that, thereafter, an adverse employment action was taken by the employer; and 4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred. Frank's Shoe Store v. Human Rights Comm'n., 179 W. Va. 53, 365 S.E.2d 251 (1986); Ruby v. Insurance Comm'n. of W. Va., Docket No. 90-INS-399 (Jul. 28, 1992). 5. If a grievant makes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Mace v. Pizza Hut, Inc., 180 W. Va. 469, 472, 377 S.E.2d 461, 464 (1988).

6. If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 76, 443 S.E.2d 229,233 (1994).

7. Grievant has established a prima facie case of retaliation.

8. Respondent has rebutted Grievant's prima facie case.

9. Grievant has failed to prove by a preponderance of the evidence that the reason offered by DHHR for its adverse action was merely a pretext.

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.

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ANDREW MAIER ADMINISTRATIVE LAW JUDGE

Dated July 16, 1998

Footnote: 1 ***Initially, Grievant also alleged discrimination. However, this claim was abandoned at Level III.***

Footnote: 2 ***For administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge on June 15, 1998.***