

MARVIN E. ELSWICK,

Grievant,

v.

DOCKET NO. 97-PSC-520

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

D E C I S I O N

Grievant Marvin E. ("Ed") Elswick, was employed by the Public Service Commission of West Virginia ("PSC") from 1984 until his dismissal effective January 16, 1998. On August 14, 1997, Grievant filed a grievance against his supervisor, Wayne Crowder, alleging generally that he had been subjected to discrimination because of preferential treatment of other staff, hostile work environment, functional downgrade of position, suspected advancement of other staff based on his job duties, reprisal, and harassment. That grievance proceeded through the lower levels of the grievance process, culminating in a level three decision denying the grievance as untimely by PSC Commissioner Charlotte R. Lane, dated November 26, 1997. Grievant appealed that decision to level four on December 1, 1997. Shortly thereafter, on December 6, 1997, Commissioner Lane informed Grievant by letter that he was being reduced in force, effective January 16, 1998, due to a lack of work at the PSC. Grievant filed a grievance challenging his layoff directly to level four on February 2, 1998. These two grievances were consolidated by Order of Administrative Law Judge Lewis G. Brewer dated August 27, 1998.

On October 24, 1999, PSC filed a Motion for Summary Judgment, alleging the two grievances were untimely filed. The Motion came on for hearing before ALJ Brewer on October 25, 1999, and an Order denying, among other things, the Motion for Summary Judgment was issued by ALJ Brewer on December 10, 1999.

After many continuances for good cause, this matter came on for hearing before the undersigned Administrative Law Judge on October 12 and 13, 2000. [\(See footnote 1\)](#) This matter became mature for decision on November 21, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by James B. Lees, Jr., Esq., Hunt & Lees, and the PSC was represented by Sean Harter, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Answer to Respondent's Interrogatories and Requests for Production to Documents to Grievant, dated June 13, 2000.

Ex. 2 -

July 28, 1997 memorandum from Wayne Crowder to Ed Elswick.

Ex. 3 -

August 1, 1997 memorandum from Lowell D. Basford to Marvin E. Elswick.

Ex. 4 -

West Virginia Civil Service System Position Description of Marvin E. Elswick, dated June 3, 1997.

Ex. 5 -

August 6, 1997 memorandum from Ed Elswick to Lowell D. Basford.

Ex. 6 -

1999 U.S. Individual Income Tax Return for Marvin E. and Barbara D. Elswick.

Ex. 7 -

Personnel Action Forms for Cynthia L. Randolph; Position Description Forms for Cynthia L. Randolph.

PSC Exhibits

Ex. 1 -

Application for Leave with Pay for Ed Elswick, dated November 25, 1997.

Ex. 2 -

May 27, 1997 memorandum from Charlotte R. Lane to All Employees re Position Description Form.

Ex. 3 -

Position Description Form for Ed Elswick, dated June 3, 1997.

Ex. 4 -

November 7, 1997 letter from Charlotte R. Lane to Edison L. Casto, Director, Division of Personnel re: proposed reduction in force.

Ex. 5 -

September 1997 Division of Personnel Report on review of PSC job classifications and pay grades.

Ex. 6 -

LIII Decision of Charlotte Lane denying August 14, 1997 grievance of Ed Elswick.

Ex. 7 -

December 1, 1997 letter from Edison L. Casto to Charlotte R. Lane.

Ex. 8 -

December 5, 1997 letter from Charlotte R. Lane to Ed Elswick.

Ex. 9 -

September 2, 1997 letter from Edison L. Casto to Charlotte R. Lane, enclosing the Position Classification and Salary Equity Study Report (same as Ex. 5).

Testimony

Grievant testified in his own behalf, and presented the testimony of Spiro T. Mitias, Jeffrey Wilson, Victoria Hensley, Elizabeth Sharp, and Charlotte R. Lane. PSC presented the testimony of

Charlotte R. Lane and Lowell D. Basford.

FINDINGS OF FACT

1. Grievant was hired by the PSC in 1984. In 1989, Grievant was employed as the Building and Grounds Manager of the Administrative Division of the PSC.

2. During that year, 1989, Grievant asked Wayne Crowder, then a Utility Analyst, to apply for the position of Grievant's assistant. Mr. Crowder applied, and was transferred from his Utility Analyst job to the position of Grievant's assistant.

3. While Mr. Crowder was employed as Grievant's assistant, a dispute between them arose. Grievant discovered that Mr. Crowder was "coding" invoices, a task Grievant customarily performed. Upon that discovery, Grievant told Mr. Crowder that invoice "coding" was not Mr. Crowder's job, and that Mr. Crowder did not know what he was doing. Mr. Crowder replied that he was "going to get" Grievant.

4. In 1993, Mr. Crowder was appointed Manager of Administration, a position for which Grievant applied, and became Grievant's direct supervisor.

5. Between 1993 and 1996, Mr. Crowder, in a manner which would have made Uriah Heep proud, undertook to fulfill his threat to "get Grievant". He assigned tasks previously assigned to Grievant to others. Grievant documented some of those job reassignments, but did not document any such reassignments after 1996, presumably because by that time, he did not have any "meaningful" work left to do. Between 1993 and 1996, when Grievant would confront Mr. Crowder with these actions, Mr. Crowder informed Grievant of his right to file a grievance, and Grievant expressed his awareness of the grievance process at that time.

6. Charlotte Lane assumed the duties and responsibilities of Chairman of the PSC in early May 1997. One of Chairman Lane's first actions in office was to request, on May 13, 1997, the Division of Personnel to conduct a review of the job classifications and salaries of PSC employees, including those employees in the Administrative Division.

7. Lowell D. Basford, Assistant Director of Classification and Compensation, Division of Personnel, conducted the job audit, which included, among other things, completion of Position Description forms and interviews of PSC employees.

8. Grievant completed his section of a Position Description form on June 3, 1997. Line No. 17

of the Position Description form instructs the employee to describe the tasks he or she performs. In response to that instruction, Grievant described seven areas of work he allegedly was performing.

9. On June 20, 1997, Chairman Lane noted on Grievant's Position Description form that the functions described by Grievant therein had been "out-sourced," and that the position of Building and Grounds Manager appeared to be unneeded.

10. Mr. Basford interviewed Grievant on August 1, 1997. During that interview, Grievant told Mr. Basford that he sat in his office all day and did nothing, and that such situation had existed since 1992. In addition, Grievant informed Mr. Basford that he did not perform any of the work in six of the seven areas described on the Position Description form, and only some of the work described in the seventh area.

11. On or about August 14, 1997, Grievant filed a grievance, in which he alleged discrimination, hostile work environment, harassment, reprisal, and a functional downgrade of his position. In "Addendum No. 2" to that grievance, Grievant conceded that the PSC did not harm him, but that the harm underlying the grievance was the result of Mr. Crowder's actions towards him.

12. On August 19, 1997, a level I informal conference was held. By letter dated August 26, 1997, Mr. Crowder notified Grievant that his grievance was denied. Grievant appealed to level three on September 3, 1997.

13. In its "Position Classification and Salary Equity Report," dated September 2, 1997, the Division of Personnel recommended that the position of Building and Grounds Manager of the PSC's Administrative Division be abolished because it was obviously not needed.

14. A Level III hearing was scheduled for September 10, 1997. During that hearing, Grievant stated on the record that he had been subjected to harassment at work during the last four or five years. The merits of the grievance were not heard on September 10, 1997, however, as Grievant requested a continuance of more than 90 days. The Level III hearing was scheduled for December 15, 1997.

15. Based upon the Division of Personnel's recommendation, her personal observation that Grievant did little, if any, work, and her understanding that the functions of the Building and Grounds Manager had been "outsourced," Chairman Lane decided to eliminate the position of Building and Grounds Manager. By letter dated November 6, 1997, Chairman Lane requested the Division of Personnel to approve a reduction-in-force.

16. On November 17, 1997, Franklin Crabtree, Director of the Transportation Division of the

PSC, filed a motion to dismiss Grievant's grievance on the grounds that it was filed untimely pursuant to W. Va. Code § 29-6A-4(a).

17. At its meeting on November 20, 1997, the Division of Personnel approved the proposal to eliminate the position of Building and Grounds Manager held by the Grievant, effective January 16, 1998.

18. On November 25, 1997, Grievant submitted to the PSC an "Application for Leave With Pay," with a physician's excuse, which indicated that Grievant was unable to work until March 1, 1998, due to an illness. At no time, however, did Grievant provide a physician's release to return to work to the PSC, or contact the PSC about other employment. 19. On November 26, 1997, Chairman Lane rendered a Level III decision, which denied and dismissed Grievant's grievance on the grounds that it was filed untimely pursuant to W. Va. Code § 29-6A-4(a), and rendered moot by elimination of Grievant's position. Grievant appealed that decision.

20. By letter dated December 5, 1997, Chairman Lane informed Grievant of the elimination of his position, and his grievance rights.

21. On February 22, 1998, Grievant filed a second grievance, with respect to the decision to eliminate his position, and requested that his two grievances be consolidated and a Level IV hearing be scheduled.

22. The PSC terminated Mr. Crowder's employment.

AFFIRMATIVE DEFENSE TO AUGUST 14, 1997 GRIEVANCE

PSC argues that the August 14, 1997 grievance was untimely filed, in that many of the instances of harassment, reprisal, and discrimination occurred long before Grievant filed the grievance. ([See footnote 2](#)) In the alternative, PSC argues that the August 14, 1997 grievance is moot. As the issue of timeliness could be dispositive of a portion of this grievance, it will be addressed first.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence

which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket NO. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93- BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

It is undisputed that Grievant documented many of Mr. Crowder's actions against him, specifically with regard to taking his job duties away from him, but did not document anything of this nature past 1996. Presumably this is because there was nothing left of Grievant's job to take away in 1996. It is also undisputed that the harm Grievant suffered which caused him to file the August 14, 1997 grievance was suffered at the hands of Mr. Crowder. Mr. Crowder is no longer employed by the PSC. To the extent that much of the relief sought in that first grievance involves actions to be taken against Mr. Crowder, that relief, of course, is moot, and cannot be granted. The rest of the relief sought in that grievance involves reinstatement of Grievant's job duties and responsibilities, additional training, and a salary increase.

PSC points to Grievant's testimony at the Level III hearing on September 10, 1997, that he told Mr. Basford that he had been subjected to harassment at work for the last four to five years. Mr. Basford reported to Chairman Lane that Grievant told him he had not had any work to do since 1992, although Grievant asserts he told Mr. Basford that that was when Mr. Crowder started taking his work away from him. In either event, Grievant did not point to any one specific incident of harassment or discrimination which occurred within ten days prior to the filing of his grievance. While discrimination or harassment can be continuing violations, a grievant is charged with filing a grievance over this

treatment within ten days of the most recent occurrence of a continuing practice giving rise to these charges. See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Grievant asserts that every day he was without work constituted another occurrence of discrimination and harassment at the hands of Mr. Crowder. Grievant testified he sought the advice of an attorney, who told him he needed to have a document specifically stating his job duties had been removed if he hoped to prove his allegations against Mr. Crowder. Grievant had even asked Mr. Crowder on several occasions if his job duties were officially being taken away, and Mr. Crowder said "no." It was not until August 6, 1997, as a result of Personnel's desk audit, that written documentation confirmed that Grievant's job duties had been taken away. Grievant filed his grievance on August 14, 1997.

Despite Grievant's reliance on an attorney, Grievant was familiar with the grievance process, and there is no indication that anyone at PSC discouraged him from filing a grievance between 1992 and 1997. Grievant's testimony and handwritten notes establish that his former job duties were reassigned to others years before he filed his first grievance. Grievant's proffered justification for not filing the grievance earlier, that PSC did not specifically notify him that his former job duties were assigned to others, is without merit. In Greathouse v. W. Va. Dept. of Transp., Docket No. 99-DOH-413 (1999), a similar argument was put forth by the grievants, who contended their untimely filing was excusable because they did not become aware of the identity of the individual who performed overtime work until fewer than 10 days prior to the dates the grievances were filed. This Grievance Board rejected that contention because the grievants in Greathouse were aware long before 10 days prior to the dates on which their grievances were filed that somebody was performing that overtime work. Similarly, Grievant was aware that Cynthia Randolph and others performed his former duties years before he filed his grievance, whether he was formally notified of the job reassignments or not. Therefore, Grievant, like the grievants in Greathouse, did not have a valid excuse for the delay in filing of his grievance, and the August 14, 1997 grievance is denied as untimely filed. ([See footnote 3](#))

DISCUSSION OF FEBRUARY 2, 1998 GRIEVANCE

In a non-disciplinary grievance, the grievant bears the burden of proving the charges in his 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); Crouser v. W. Va. Dept. of Tax & Revenue,

Docket No. 00-T&R-239 (2000); W. Va. Code § 29-6A-6. Grievant's position was eliminated pursuant to a reduction in force, a non-disciplinary action; therefore, Grievant bears the burden of proof.

A preponderance of the evidence is 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). It may not be determined by the number of witnesses, but by the greater weight of all evidence, the witnesses' opportunity for knowledge, information the witnesses possess, and the witnesses' manner of testifying; these factors determine the weight of the testimony. Black's Law Dictionary, 5th Ed., p. 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957).

Grievant alleges his discharge was the result of harassment, discrimination, hostile work environment, and retaliation; the actions of Wayne Crowder toward him constituted a substantial detriment to or interference with his effective job performance; and the reduction in force was merely a pretext for his dismissal from the PSC. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz. v Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). In order to establish harassment in violation of W. Va. Code § 29-6A-2(l), the grievant must show a pattern of conduct, rather than a single improper act. See Hall v. W. Va. Dept. of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dept. of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also Thompson v. Bd. of Trustees, Docket No. 96-BOT- 097 (Dec. 31, 1996).

W. Va. Code § 29-6A-2(d) defines "discrimination" as "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." In order to establish a claim of discrimination, an employee

must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Parsons v. W. Va. Dept. of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. See Spencer v. Bureau of Employment Programs, Docket No. 98-HHR-130 (Jan. 29, 1999). Certainly any act might be construed by someone as harassing, hostile, disruptive, or offensive. The question is what standard is to be applied. See Hattman v. Bd. of Directors/West Liberty State College, Docket No. 95- BOD-265R (July 13, 1998). In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. Graley v. W. Va. Parkways and Economic Development Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000). Accord Lanehart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997).

Certainly, an employer is entitled to expect its employees to conform to certain standards of civil

behavior. Graley, supra; Redfearn v. Dep't of Labor, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." See Fonville v. DHHS, 30 MSPR 351 (1986)(citing v. Glover v. DHEW, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. Graley, supra; Hubble v. Dep't of Justice, 6 MSPR 553 (1981).

From 1984 through 1992, Grievant continually acquired additional duties in his position as Buildings and Grounds Supervisor up to and including all of the purchasing functions at the PSC, working with contractors and vendors for services such as maintenance, heating and air conditioning, and landscaping, and other functions normally associated with the management of the building and grounds, such as moving furniture, painting, minor electrical repairs, and the like. Grievant performed some of these functions himself with the help of staff, and contracted out the larger projects. One of Grievant's responsibilities was the preparation and processing of inter-governmental transfers (IGTs), or the transferring of funds from one agency to another.

Grievant hired Wayne Crowder as his assistant in 1989. Shortly thereafter, Grievant noticed that IGTs were not passing across his desk as frequently as before. Grievant discovered that Mr. Crowder was preparing and processing the IGTs without his knowledge, and he instructed him to stop working on them. Crowder told Grievant that he would "get him".

Grievant had been hired by Robert Stine, and in 1993 Mr. Stine retired. At that time, Grievant and Mr. Crowder applied for his job, Manager of Administration. Mr. Crowder was selected by then-Chairman Boyce Griffith, and from that point on, Grievant never saw any IGTs again. It was also at this time that Mr. Crowder began the process of "getting" Grievant by gradually stripping away all of Grievant's duties and responsibilities. Many of Grievant's prior responsibilities were assigned to Mr. Crowder's assistant, Cynthia Randolph. See G. Ex. 3.

Prior to 1993, as part of his responsibility to the building and grounds, Grievant worked closely with Terra Care, the landscaping contractor. Around 1995, Mr. Crowder had a run-in with Kevin Arnold at Terra Care over a Christmas tree Crowder wanted to buy for Chairman Griffith. After that, Mr. Crowder took every opportunity to criticize and complain about Terra Care's services, and instructed Grievant not to work with them anymore. When representatives from Terra Care were in the building, Mr. Crowder told Grievant to stay in his office.

During this time Grievant would also get conflicting instructions. Chairman Griffith would tell

Grievant to do something, and while performing the task, Mr. Crowder would tell him to stop and get back in his office. If Grievant would stop work, he would "catch hell" from Mr. Griffith. If he did not stop work, he would catch hell from Mr. Crowder.

Grievant had also been responsible for assigning parking spaces to employees in the PSC parking lot. Mr. Crowder took that job away from him, but told him he was to "monitor" the parking lot, meaning stand in the parking lot and make sure no one parked where they were not supposed to.

Grievant was routinely excluded by Mr. Crowder from meetings and discussions with contractors and other management about projects involving the buildings and grounds, some of which he had initiated.

Grievant's relationships with co-workers and staff at PSC became strained after 1993, as his work assignments were given to other employees. Mr. Crowder told one of Grievant's co-workers that he (Grievant) was working himself out of a job. Grievant would periodically ask Mr. Crowder if his job had officially been changed, and Mr. Crowder would respond in the negative. Any task Grievant undertook would be criticized by Mr. Crowder and Griffith. Grievant asked them for something in writing describing what his job duties were, but he received no response from either of them.

Spiro Mitias, a Utility Financial Analyst at PSC, testified that Grievant had always been responsible for helping employees get furniture and equipment, but that after Mr. Crowder became Manager of Administration, whenever they needed assistance, Mr. Crowder would send someone other than Grievant. [\(See footnote 4\)](#)

Jeffrey Wilson, a former employee of the PSC, testified that he would always ask Grievant when he needed any type of assistance with vendors, or anything related to the building and grounds. After Mr. Crowder became Manager, Cynthia Randolph was doing all of that work. Mr. Wilson testified he never knew why Grievant was not doing those tasks any longer.

Victoria Hensley, Payroll Coordinator at the PSC, testified that Grievant was responsible for anything to do with the building prior to 1993, and was always busy. When Mr. Crowder became Manager, Grievant's duties were taken away from him.

Elizabeth Sharp, Personnel Coordinator, was there when Grievant was hired in 1984. She testified Grievant did everything relating to the building and grounds before 1993. After 1993, Grievant's activities diminished progressively until he had nothing to do. Grievant told her he was having difficulties with Mr. Crowder and Mr. Griffith.

Grievant admittedly did not file grievances during this time period, believing that, without some official documentary evidence from PSC, he would not be able to prove what Mr. Crowder was doing. Given the evidence regarding Mr. Crowder and then-Chairman Griffith, it is readily apparent that Grievant would not have gotten far had he filed grievances during the time period Mr. Crowder was his immediate supervisor. The Catch- 22 is that his inaction resulted in giving the incoming administration, i.e., Chairman Lane, the impression that Grievant did no work and was satisfied with that situation.

When Chairman Lane came into office in 1998, she had already heard of trouble at PSC. She knew the FBI was investigating irregular purchasing activities; she knew that “tons” of people had nothing to do; and she felt she was sitting on a “time bomb.” During her first few weeks at the PSC, Lane observed that Grievant sat in his office all day and did not appear to have any work to do. She learned that everything to do with the building and grounds was contracted out or “out-sourced”, and wondered whether there was a need for a Buildings and Grounds Supervisor.

Because of her observations of Grievant, as well as other employees who did not appear to have much work, Lane ordered a job audit of PSC from the Division of Personnel. It was during this job audit that Grievant told Mr. Lowell Basford of the Division of Personnel that he sat in his office all day and did nothing, and that that situation had existed since 1992. Grievant also told Mr. Basford about Mr. Crowder's actions in stripping away all of his duties from the time he became Manager of Administration, and Mr. Basford relayed this information to Chairman Lane.

Chairman Lane prepared a list of menial tasks for Grievant to do, and testified she became very frustrated with him when he asked her questions about the list. She admitted that Grievant came to talk to her about Mr. Crowder at one point, but that she was put out with him, and did not want to hear his complaints. Chairman Lane testified she had no confidence in Mr. Crowder from the moment she met him, and immediately curtailed his spending authority at PSC. It is apparent Chairman Lane associated Grievant with the Crowder problem, and was content to let him go through a reduction in force.

Grievant does not contend the reduction-in-force provisions were applied incorrectly, but it is of interest to the undersigned that no attempts were made by Chairman Lane to find another position at the PSC for Grievant. Despite her testimony that there were “tons” of people at the PSC who had nothing to do when she took office, she managed to find other jobs for them through reorganization

and transfer. Only Grievant was reduced in force. Her rationale was that there was no other position available for him at the salary he was making at the time. At the time of his reduction-in-force, Grievant's salary was \$33,780 a year. R. Ex. 3.

In conclusion, I find that Mr. Crowder's treatment of Grievant over the years amounted to harassment and reprisal, whether it be for political activity, for also applying for the Manager of Administration job, for criticizing his work when he was Grievant's assistant, or for any other myriad of reasons. Crowder acted with deliberate and malicious intent to strip away Grievant's job, leaving with him nothing to do, and thus making Grievant look bad to his co-workers and other management personnel.

With regard to Grievant's claim of discrimination, he was similarly-situated to other employees at the PSC who allegedly had nothing to do when Chairman Lane came into office, yet he was the only one who was reduced in force. Clearly, at that particular point in time, Grievant had no work to do, and so his reduction in force was related to his actual job responsibilities, or lack thereof. However, there was never any attempt by Chairman Lane or Mr. Basford to investigate the reasons why this situation existed, despite Grievant's complaints to them. Therefore, I find that Grievant's reduction in force was merely pretext for Chairman Lane's desire to rid herself of perceived problem employees, and since Grievant's complaints were intricately interwoven with Mr. Crowder, and Mr. Crowder was promising to become a huge black mark on PSC, she found it expeditious to take the opportunity presented to her to dismiss Grievant from employment.

Finally, with regard to Grievant's contention he was reduced in force due to his political activities during the 1996 Governor's race, there is some evidence that Mr. Crowder was not happy with Grievant's political affiliation, and that he repeatedly told Grievant he was backing the wrong party. Grievant openly and actively supported Charlotte Pritt for Governor, and claims at least part of the reason Mr. Crowder was out to get him was due to his allegiance with Pritt. Spiro Mitias, a Utility Financial Analyst at the PSC, testified he heard Mr. Crowder say he was going to "fuck" Grievant, Mitias, and anyone else who supported Charlotte Pritt for Governor. However, while political affiliation may have contributed to Mr. Crowder's treatment of Grievant, there is no evidence to demonstrate it had anything to do with Chairman Lane's decision to dismiss him through a reduction in force. It is just one more example of Mr. Crowder's aberrant, irrational behavior towards Grievant, which ultimately led to Grievant having no work to do. And that is the reason Chairman Lane took the action

she did.

CONCLUSIONS OF LAW

1. W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

2. “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty.” See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997).” Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999).

3. Grievant has proven by a preponderance of the evidence that Mr. Wayne Crowder's treatment of him in progressively stripping away all of Grievant's duties and responsibilities from 1993 through at least 1996 constituted harassment as defined by W. Va. Code § 29-6A-2(l).

4. W. Va. Code § 29-6A-2(d) defines “discrimination” as “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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996);

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

5. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. Grievant has proven by a preponderance of the evidence that he was subject to discrimination by the PSC as defined by W. Va. Code § 29-6A-2(d), as the only employee at PSC who was reduced in force, when testimony of Chairman Charlotte Lane was that there were “tons” of people at the PSC with no work to do when she entered into office.

7. PSC demonstrated it had a legitimate, non-discriminatory business reason for Grievant's reduction in force, due to lack of work, but Grievant has successfully shown that reason was mere pretext for PSC, and Chairman Lane in particular, wanting to be rid of him, as he was perceived as a problem employee whose affairs were closely intertwined with those of Mr. Crowder.

8. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. Graley v. W. Va. Parkways and Economic Development Auth., Docket No. 99-PEDTA-406 (Oct. 31, 2000).

9. Grievant has proven by a preponderance of the evidence that he was subjected to a hostile work environment at the hands of Mr. Crowder which continued to exist up until the time of his reduction in force.

10. Grievant has failed to prove by a preponderance of the evidence that his dismissal was related to his political affiliation or activities.

Accordingly, this grievance is **GRANTED**, and the PSC is hereby **ORDERED** to reinstate Grievant to a comparable position at the same salary he had at the time of his reduction in force. The PSC is also **ORDERED** to compensate Grievant back pay, with interest from the date of his reduction in force to the present, and any and all benefits to which he is entitled.

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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ
Administrative Law Judge

Dated: December 29, 2000

[Footnote: 1](#)

This matter was reassigned to the undersigned on May 31, 2000, due to the resignation of ALJ Brewer.

[Footnote: 2](#)

The parties stipulated that timeliness was no longer an issue with regard to the December 5, 1997 dismissal letter.

[Footnote: 3](#)

This holding does not mean that the instances of harassment, discrimination, hostile work environment, and reprisal cannot be set forth as evidence in Grievant's dismissal grievance.

[Footnote: 4](#)

Many of the incidents described in this grievance regarding Mr. Crowder were also presented in a grievance filed by Mr. Mitias, which was decided by this Grievance Board in Mitias v. W. Va. Public Serv. Comm'n, Docket No. 95-PSC-029 (Dec. 14, 1995).