

JAY HARRIS,

Grievant,

v.

Docket No. 99-BEP-472

**WEST VIRGINIA BUREAU OF EMPLOYMENT
PROGRAMS, OFFICE OF JUDGES,**

Respondent.

DECISION

On June 25, 1999, Jay Harris (Grievant) initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Bureau of Employment Programs, Office of Judges (BEP), had engaged in retaliation, and improperly required him to take annual leave to appear as a subpoenaed party for a deposition relating to a lawsuit he had filed against BEP. After the grievance was denied at Levels I and II, Grievant appealed to Level III, where an evidentiary hearing was conducted on September 13, 1999. On October 22, 1999, BEP Commissioner William F. Viewig adopted the recommended decision of the grievance evaluator, Jack W. DeBolt, denying the grievance at that level. Grievant appealed to Level IV on November 2, 1999. During a pre-hearing telephone conference on December 20, 1999, the parties agreed to submit the grievance for decision on the basis of the record developed at Level III. The parties further agreed on a briefing schedule, which was subsequently extended for good cause shown, at Grievant's request. This matter became mature for decision on February 29, 2000, upon receipt of the parties' written arguments.

[\(See footnote 1\)](#)

Based upon a preponderance of the credible evidence contained in the record established at Level III, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Bureau of Employment Programs (BEP) as a Paralegal in the Office of Judges. Grievant's paralegal duties for BEP involve Workers' Compensation matters.
2. On March 24, 1999, Grievant filed a civil action in the Circuit Court of Kanawha County, West Virginia, alleging racial discrimination. This lawsuit was styled as Jay Harris v. Robert Smith and the West Virginia Bureau of Employment Programs/Office of Judges, Civil Action No. 99-C-675.
3. Grievant was subpoenaed by the Defendants to be deposed as a party at a deposition in the above-styled matter on June 23 and 24, 1999.
4. BEP required Grievant to take annual leave for the two days he was absent from work to attend the deposition. To the extent Grievant had insufficient annual leave to cover his absence, he was required to take leave without pay for 3.5 hours.
5. Robert Smith is employed by BEP as Chief Administrative Law Judge of the Office of Judges. He was named as a defendant party in the lawsuit filed by Grievant. Tammy Hypes is employed by BEP in an unspecified capacity.
6. Ms. Hypes attended the deposition on June 23 and 24, 1999, as BEP's designated representative. Judge Smith attended the deposition in his official capacity as the supervisor of the Office of Judges, and as a party. Neither Judge Smith nor Ms. Hypes were required to take annual leave in order to attend the deposition.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Grievant's entitlement to court leave to attend the deposition in question is primarily controlled by Section 15.11 of the Administrative Rule of the West Virginia Division of Personnel (DOP), 143 C.S.R. 1 § 15.11 (1998), which is entitled "Court, Jury, and Hearing Leave," and states the following:

(a) Upon application in writing, an employee hired for permanent employment shall be granted leave with pay when, in obedience to a subpoena or direction by proper authority, he or she serves upon a jury or appears as a witness before any court or judge, any legislative committee, or any officer, board, or body authorized by law to conduct any hearing or inquiry. This subdivision shall not apply in cases where the employee is a litigant, defendant or other principal party or has a personal or familial interest in the case or proceeding. This subdivision shall not be construed:

(1) to deprive, prohibit, or infringe upon the rights of any employee who is a party to, or

a witness in, a grievance proceeding or a court of law proceeding resulting from the course of employment; or,

(2) to deprive, prohibit, or infringe upon the rights of any employee in their pursuit of personal or civic responsibilities while on annual leave or a personal leave of absence.

(b) The employee shall furnish such written confirmation of the absence as is required by the Director.

In addition to DOP's rule, BEP has adopted a leave and attendance policy, Administrative Directive 6700.80, which includes a provision concerning "other paid leave." This policy states:

It shall be the policy of this Bureau to allow all provisional, probationary, permanent and temporary employees paid time away from their official duties to pursue various civic, legal, and other Bureau related business for which the use of annual, sick or compensatory time is not applicable. Necessary time off will be shown on official leave records as Other Paid Leave (OPL) and service with the Bureau will be considered as uninterrupted. Requests for Other Paid Leave may be authorized by the appropriate Division Director and shall be submitted in writing at least 48 hours in advance of the time it is required.

Other Paid Leave will be authorized for:

B) Court, Jury and Hearing Purposes - When an employee is directed by proper authority to appear as a witness for the Federal or State Government, a political subdivision thereof, or to attend court in any capacity in connection with an official state duty, he/she shall be entitled to Other Paid Leave. Expenses (mileage, lodging, etc.) in connection with this duty will be reimbursed in accordance with State travel regulations

When an employee is summoned by proper judicial authority to serve on a jury or to appear as a witness in proceedings not connected with a State duty, Other Paid Leave will be granted. Employee will not, however, be paid for any expenses incurred but shall be entitled to keep any fees paid by the court in addition to regular salary. Litigants in a civil suit and those under indictment must use annual leave for the Court appearances.

Employees absent from work in order to participate in legally constituted hearings concerned with the Education and State Employees Grievance Procedure, (OPL, limited to four hours each, may be charged by the grievant and his/her representative in preparation of the grievance.)[,] Human Rights Act, or other quasijudicial body shall

be entitled to (OPL) for time necessary for attendance, including travel time. Any expenses incurred by the employee will be reimbursed in accordance with the State travel regulations.

Requests for other paid leave to pursue legal problems must be accompanied by a copy of the summons or other directive.

R Ex 1.

Grievant contends BEP's refusal to grant him court leave in accordance with DOP's Administrative Rule, and its own written policy, was an act of reprisal for filing a civil action against his employer and supervisor. Grievant contends this lawsuit resulted from the course of employment, making him entitled to the benefits of the Rule.

This Grievance Board has not previously addressed an employee's entitlement to court leave under DOP's Rule. However, it is well recognized that an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See, e.g., Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Bailey v. W. Va. Dep't. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Likewise, the language employed in DOP's directives must be given its ordinary meaning in the context it is used. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 887 (1995).

Although Grievant may have appeared in court proceedings as defined by DOP's rule, it is equally clear Grievant was subpoenaed to testify in a matter in which he is a litigant. As a result, he has an interest in the outcome of that litigation. The Rule contains an explicit exclusion "where the employee is a litigant, defendant or other principal party or has a personal or familial interest in the proceeding." 143 C.S.R. 1 § 15.11(a) (1998). Therefore, in the absence of a clear exception in the provisos which follow, Grievant is barred from receiving court leave by the terms of DOP's Administrative Rule.

Contrary to Grievant's argument, requiring an employee to pursue litigation against his employer on his own time, by taking annual leave or leave without pay, does not deprive, prohibit or infringe upon the right of an employee to pursue his employment dispute through the courts. Moreover, Grievant did not file this lawsuit in the course of his employment. He filed this lawsuit of his own

volition regarding an issue that arose out of his employment. This represents a significant distinction between the circumstances of Grievant's participation in this matter, and the involvement of other BEP employees. Judge Smith and Ms. Hypes did not elect to participate in this lawsuit. Although Judge Smith was named as a defendant by Grievant in his civil complaint, his duties as Chief Judge over the Office of Judges could warrant his appearance at the deposition as part of his duties. Ms. Hypes was properly present on official business as the designated representative of the defendant employer.

DOP's Administrative Rule allows for supplemental attendance and leave regulations as follows:

Each agency shall prepare supplemental rules as may be required. The rules shall not enhance nor diminish the benefits afforded by this subsection. Copies of all rules shall be filed with the Director who may approve, amend or disapprove the supplemental rules.

143 C.S.R. 1 § 15.13 (1998). Thus, BEP's policy on court leave can neither enhance nor diminish Grievant's entitlement to court leave under DOP's Rule. Further, these directives regarding leave to attend court proceedings must be read in para materia. See Canfield v. W. Va. Dep't of Educ., Docket No. 97-DOE-508 (Mar. 31, 1998); Peters v. Raleigh County Bd. of Educ., Docket No. 94-DOE-043 (Sept. 27, 1994).

Like the DOP Rule, BEP's policy provides that litigants in a civil suit must use annual leave to appear in court. Although the policy provides that employees who attend court in connection with an "official state duty" may receive Other Paid Leave, suing your employer out of a matter which arises from your employment situation is a privilege, not an official duty. The Legislature has elected to extend greater privileges to employees participating in grievances before this Grievance Board as a matter of public policy, [\(See footnote 2\)](#) allowing them to attend hearings on state time, as well as giving them four hours of work time to prepare their grievance. W. Va. Code § 29-6A-3(p). However, this Grievance Board has no authority to make public policy by extending this same benefit to state employees who are engaged in civil litigation against their employer over a grievance-like matter. See Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997). Grievant also asserts that BEP's action in requiring him to take leave was an act of retaliation for filing his lawsuit. W. Va. Code § 29-6A-2(p) [\(See footnote 3\)](#) defines "reprisal" as "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 redress it." In general, a grievant alleging unlawful

retaliation, in order to establish a prima facie case, [\(See footnote 4\)](#) must prove:

- (1) that the employee engaged in 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 motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir.1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991). If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Charleston Area Medical Ctr. Found., Inc., 188 W. Va. 57, 422 S.E.2d 624 (1992); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). 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. See Conner, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

The undersigned is not convinced that requiring an employee to take leave when away from his regular duties constitutes an "adverse employment action." Normally, such matters as reprimands, suspensions and terminations are considered adverse actions. See Hochstadt, supra. Further, filing a lawsuit against your employer is not conduct specifically protected from reprisal under the grievance procedure statute, even though it may be "protected conduct" as a matter of public policy. See Page v. Columbia Natural Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996). Grievant was not previously a "participant in the grievance procedure" as contemplated in W. Va. Code § 29-6A-2(p). See Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-

546 (June 24, 1998). See also Hoffer, supra.

However, assuming Grievant did establish a prima facie case of reprisal, BEP's reliance upon the language in DOP's Administrative Rule precluding litigants from receiving court leave provides a legitimate, nonretaliatory reason for its action. Moreover, because the rules governing court leave were already in existence when Grievant requested other personal leave, or "court leave," and the absence of any credible evidence that any other state employee has been given court leave to participate in a deposition in a lawsuit filed against his or her employer, BEP was not motivated by animosity toward Grievant's action in initiating a lawsuit when it made the decision to require him to take annual leave. See Skaggs v. Elk River Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996).

Because Judge Smith is the overall supervisor of Grievant, his presence at the deposition may properly be considered to have arisen in the course of his employment, because his duties necessarily include making decisions on personnel matters that may lead to litigation. BEP is likewise entitled to designate an official representative to appear at a deposition. Thus, Ms. Hype's presence is readily distinguishable from Grievant's. The fact that neither of these employees was required to take annual leave to attend Grievant's deposition does not render BEP's reasons for denying Grievant court leave pretextual. Indeed, the court leave provisions do not apply to them because they were attending the deposition as part of their official duties.

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

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See, e.g., Parsons v. W. Va. Dep't of Transp., Docket No. 97- DOH-289 (oct. 30, 1997); Bailey v. W. Va. Dep't. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

3. DOP's Administrative Rule relating to court leave, 143 C.S.R. 1 § 15.11 (1998), and BEP's

Administrative Directive 6700.80 relating to other paid leave, when read in pari materia, do not entitle Grievant to court leave or other paid leave to attend a deposition in a civil lawsuit he filed against his employer and supervisor alleging racial discrimination.

4. A grievant alleging unlawful retaliation in violation of W. Va. Code § 29-6A- 2(p), in order to establish a prima facie case, must prove:

- (1) that the employee engaged in 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 motive can be inferred.

Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996).

5. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997). 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. See Conner, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

6. To the extent Grievant established an arguable case of reprisal, BEP established a legitimate, nonpretextual reason for its actions, based upon DOP's Administrative Rule, and BEP Administrative Directive 6700.80.

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. 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 22, 2000

[Footnote: 1](#)

Grievant was represented by counsel, John G. Hackney, Jr., and Joseph C. Cometti. BEP was represented by Staff Attorney Patricia J. Shipman.

[Footnote: 2](#)

The West Virginia Supreme Court of Appeals has observed that this procedure was established by the Legislature "to invest scarce government resources in solving problems rather than investing those resources in an army of lawyers to go to court to defend against every employee complaint." Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992).

[Footnote: 3](#)

Grievant's brief cites W. Va. Code § 18-29-2(p) for the definition of "reprisal." This Code section is included in the grievance procedure for school employees, W. Va. Code §§ 18-29-1, et seq., which is not applicable to state employees. (The Level III Grievance Evaluator similarly referred Grievant to Code §§18-29-1, et seq., for his appeal rights.) In any event, the language in the two statutes is virtually identical, and this Grievance Board interprets these parallel reprisal provisions without distinction.

[Footnote: 4](#)

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).