STEVEN PASTERNAK,

Grievant,

v. **Docket No. 00-HE-357**

HIGHER EDUCATION INTERIM GOVERNING

BOARD/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Steven Pasternak, is employed by Marshall University ("MU" or "University") in the Buck Harless Student Athlete Program ("BHSAP") as an Academic Counselor. (See footnote 1) His Statement of Grievance reads:

> 1. Violation of the past practices and policies of the Buck Harless Student Athlete Program of allowing academic counselors the use of comp-time in order to adjust their schedules to meet the needs of their students. This action is also in reprisal for filing a grievance and an ADA Complaint.
>
> 2. Violation of W.Va. (sic) Code §18-29-3. Grievance procedures generally. The removal of two Annual Leave days for attending my own grievance hearing against my supervisor and Marshall University. This action is also in reprisal for filing the grievance and an ADA Complaint.

The relief sought was the reinstatement of comp-time and the two days of annual leave. Additionally, Grievant requested his supervisor, Michelle Duncan, be "appropriately disciplined" for insubordination as he believed she had, through the above identified actions engaged in "the third and forth (sic) acts of reprisal and retaliation."

This grievance was denied at Levels I and II. At Level II, Grievant alleged a default had occurred. The grievance and the issue of default were appealed to Level IV on September 25, 2000. A Level IV default hearing was held on December 20, 2000, and theundersigned Administrative Law Judge found no default had occurred. Pasternak v. Higher Education Interim Governing Bd./Marshall Univ.,

Docket No. 00-HE-357D (Feb. 6, 2000).

A Level IV hearing on the merits of the case was held on March 21, 2001. This case became mature for decision on May 7, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as an Academic Counselor/Learning Specialist at BHSAP since November 1998. This position is classified as exempt, and it is not subject to the Fair Labor Standards Act ("FLSA"). Accordingly, neither overtime nor comp time is required if Grievant works longer hours than his stated work week. The position was designated as exempt in the job posting.

2. During Ms. Duncan's tenure, she had allowed Grievant and the other counselor to collect and receive comp time, because the BHSAP staff is required to work more than the expected 37.5 hours in some weeks to meet the needs of the students they serve. Grievant kept track of this comp time and used it with the permission of Ms. Duncan when the duties at BHSAP were light. 3. Grievant filed a grievance in early 2000, dealing with his evaluations and the extension of his probationary period. He requested accommodation for his learning disability. This grievance was granted, in part, at Level II, and MU was directed to change some portions of his evaluations. The Hearing Examiner also found MU failed to develop an Improvement Plan with clear goals and objectives for the extended probationary period, and some of the evaluation ratings indicated a degree of retaliation. This Decision did not find the overall "needs improvement" rating was inaccurate or was the result of retaliation. The Director of Equity Programs was directed to respond Grievant in writing by April 14, 2000, and Grievant's Supervisor was to work closely with the Director of the Office of Human Resources, Jim Stevens; the Director of Equity Programs, David Harris; and Grievant to develop an Improvement Plan. This Decision was not appealed.

4. Sometime in late April or early May 2000, Ms. Duncan was in a meeting with Mr. Stevens and Mr. Harris concerning the development of an Improvement Plan, when she was informed that exempt employees, such as Grievant, were not allowed to receive comp time, and for her to grant her employees this privilege was a violation of University policy.

5. On May 2, 2000, Grievant filed a second grievance alleging MU had violated the Level II Decision of the first grievance.

6. The staff was informed on May 11, 2000, that comp time would no longer be allowed as it violated University policy. Ms. Duncan also reiterated this information at a subsequent meeting.

7. Ms. Duncan did not ask any of her employees how much comp time they had, nor did she make any arrangements to allow any employee to take any time they currently had "in the bank." This change in policy was applied across the board, and none of the affected employees, including Grievant, asked questions at the time of this announcement.

8. Grievant had 35 hours of "banked" time at the time of the announcement.

9. University policy does allow for time-shifting or flex-time within the same pay period, with the permission of the supervisor. For example, an employee might need to work ten hours the first three days of a pay period, and, if it did not conflict with the needs of the employer, the employee could work fewer hours some of the following days in the pay period.

10. MU's Classified Staff Handbook states, "[e]xempt employees are excluded from the provisions of the Fair Labor Standards Act. Employees in this status typically work a 7.5 hour day[,] but may be required to work additional and/or varied hours." This Handbook also discusses comp time and overtime only in relation to non-exempt employees.

11. The Procedural Rules of the University System of West Virginia at 128 C.S.R. 31 at Section 2.6 explain exempt employees are not covered by the Fair Labor Standards Act.

12. The Legislative Rules of the University System of West Virginia at 128 C.S.R. 62 at Section 2.25 clarify exempt employees are not covered by the Fair Labor Standards Act. These rules, at Section 5.1, state "[c]ompensatory time off shall only be allowed to the extent authorized by federal and state law." 13. MU does not grant comp time to exempt employees.

14. The Level IV hearing in the second grievance was scheduled on September 18 and 19, 2000.

15. On Sunday, September 17, 2000, Ms. Duncan sent Grievant an e-mail asking him if he had submitted an annual leave form for the hearing dates. She informed Grievant he would need to do so, if he not yet completed the form.

16. Ms. Duncan only attended the first day of hearing, September 18, 2000. At the close of the second day of hearing, Grievant asked Administrative Law Judge Brenda Gould if he needed to take

annual leave for the work days he missed while attending his grievance hearing. Judge Gould informed Grievant he was not required to use annual leave. Respondent's attorney and Mr. Stevens were in the room at the time of this discussion. Judge Gould requested Mr. Stevens resolve the situation.

17. On Wednesday, September 20, 2000, Ms. Duncan asked Grievant for his annual leave slip. Grievant informed Ms. Duncan he did not need to fill one out, and she should talk to Human Resources to confirm this information. Ms. Duncan continued to request that Grievant fill out the annual leave form, and Grievant did so.

18. Two work days later, on Monday, September 25, 2000, Grievant filed this grievance.

19. On September 28, 2000, after discussion with Mr. Harris, Grievant received an informal response to his grievance from Mr. Harris. Grievant was told exempt employees were not allowed to receive comp time pursuant to the West Virginia Code and University policies. On the issue of annual leave, Mr. Harris reported, "[Y]ou will not becharged any leave time for the two days which you attended the Level IV grievance hearing, held September 18 and 19, 2000. University policy provides that the time should be counted as time worked. I am sorry for any inconvenience as a result of this mis- communication."

20. Grievant filed the grievance to Level II. In addressing the annual leave issue, Ms. Duncan noted Grievant's two days of annual leave would not be submitted to Human Resources, and stated she was "misadvised on the requirement of utilizing annual leave for grievance hearings. . . ."

21. Ms. Duncan returned Grievant's annual leave form to him with the word VOID written across it. At no time have the two days at issue ever been submitted to Human Resources, nor have they ever been removed from Grievant's annual leave tally.

Issues and Arguments

Grievant asserts he was told by Ms. Duncan when he started work at BHSAP that he was entitled to comp time if he worked over, and he had worked under this assurance since he began his employment. He argues University policy does not prevent his receiving comp time, and he should be allowed to continue under this promise. Alternatively, he maintains he should at least be allowed to received comp time for the hours he had already "banked" at the time of Ms. Duncan's announcement on May 11, 2000. Grievant also maintains Ms. Duncan's demanding he fill out the

annual leave form,instead of checking with Human Resources first, is an act of retaliation, and he wants this Grievance Board to issue a ruling stating his supervisor engaged in retaliation. (See footnote 3)

Respondent argues Ms. Duncan should have never allowed her exempt employees at BHSAP to have comp time, and her statement that these employees could bank this time to use much later was an ultra vires act. It is and has been against University policy to grant exempt employees comp time. Respondent notes Grievant was not the only employee effected by this change, and this fact demonstrates this announcement was not an act of retaliation. As for the issue of Grievant's annual leave, Respondent asserts this issue is moot, as the time was never removed, and Grievant has suffered no harm. Respondent maintains Ms. Duncan did not know annual leave was not used for the days Grievant attended his grievance hearing; thus, her request for Grievant to fill out the annual leave form was based in ignorance.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would acceptas sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant alleges he was retaliated against for filing a grievance. This retaliation took two forms. One was the removal of the opportunity to accumulate comp time, and the other was the "demand" he fill out an annual leave slip after his request that his supervisor check with Human Resources first. Grievant did file prior grievances. (See footnote 4)

W. Va. Code § 29-6A-2(p) 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." To demonstrate prima facie case of reprisal, a

grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

On the issue of the annual leave form, the undersigned Administrative Law Judge finds no reprisal in Ms. Duncan's request or requirement to fill out the form. Grievant has not met his burden of proof and demonstrated a prima facie case of retaliation. There is no indication she had prior knowledge that the time spent at a Level IV grievance hearing was to be counted as work time and not annual leave. (See footnote 5) Certainly, Ms. Duncan could have acceded to Grievant's request that she check first, but she was not required to do so. She thought she was correct in requesting the form. It is clear Grievant and Ms. Duncan have "trust issues" and do not have a healthy working relationship. This fact alone does notmake Ms. Duncan's request for the form over Grievant's protests an act of retaliation or of insubordination.

Grievant established a prima facie case of reprisal on the second issue. It is clear Grievant's comp time was removed shortly after he had received a favorable decision in his first grievance.

Even though Grievant has established a prima facie case on the comp time issue, Respondent has demonstrated legitimate, non-retaliatory reasons for its decisions. Ms. Duncan's prior statement that counselors could receive this type of benefit was an ultra vires act.

This Grievance Board has discussed the issue of ultra vires acts at some length. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95- HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Resources, Docket No. 99- HHR-228 (Nov. 30, 1998).

This rule is clear. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers[,] and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangementsincumbent administrators may agree to or prescribe." Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415, 421 (1985)(citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)). See also, Parker, supra. It is well settled that a supervisor's oral representations or prior acts are not binding on an agency, where the supervisor does not possess authority to make that determination. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998). See Chapman v. Dep't of Transp., Docket No. 97-DOH-261 (Nov. 24, 1997); Fraley v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993); Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993). Although this is a harsh rule, it is one espoused by the West Virginia Supreme Court of Appeals and, of course, by this Grievance Board in earlier decisions.

Accordingly, Ms. Duncan's promise of comp time without authority, constituted an ultra vires act, and as such cannot be utilized to grant Grievant his requested relief. She did not have the authority to make such a decision or promise. To continue to allow Grievant comp time would have been against University policy. It is noted in the Classified Staff Handbook that exempt employees typically

work a 7.5 hour day, but they "may be required to work additional and/or varied hours." Therefore, it is an expectation of the University that Grievant might occasionally have to work past 37.5 hours to meet the requirements of his position, and no further compensation or benefit should be anticipated if this additional time is required.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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 §4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W. Va. Code § 29-6A-2(p) 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." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). Seealso Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

3. Grievant did not establish a prima facie case of retaliation on the issue of requiring a leave slip.

4. Grievant established a prima facie case of reprisal on the issue of comp time, as he demonstrated the removal of his ability to bank comp time, "the adverse action", followed "within such a period of time that retaliatory motivation can be inferred."

5. Respondent demonstrated a legitimate nondiscriminatory reason for ceasing to allow Grievant to accumulate and use comp time. To continue this practice would constitute an ultra vires act as Grievant is an exempt employee, and it is against University policies and past practice to allow exempt employees to acquire comp time.

6. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95-HHR-297 (Jan. 31, 1996). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998).

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Cabell County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 6, 2001

Footnote: 1

Some of the data cited in this Decision came from Pasternak v. Board of Trustees/Marshall University, Docket No. 00-BOT-174 (November 30, 2000). The parties directed the undersigned Administrative Law Judge to this Decision.

Footnote: 2

Grievant was represented by Steve Angel from the West Virginia Federation of Teachers, and Respondent was represented Assistant Attorney General Beth Ann Rauer.

Footnote: 3

Grievant was informed at the start of the Level IV hearing that it was not within the authority of this Grievance Board do mete out discipline to employees.

Footnote: 4

It is unclear from the time frames and testimony whether Ms. Duncan was aware of the second grievance at the time she informed her employees that comp time was not allowed. It is more likely than not that she was.

Footnote: 5

Grievant initially testified Ms. Duncan had been a party to the conversation with Administrative Law Judge Gould, and she had been present on the second day of the Level IV hearing. Grievant later changed his testimony and stated at Level IV that she was not in the room during the conversation with the administrative law judge.