OLLIE HUNTING,

Grievant,

v. **Docket No. 01-22-629**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ollie Hunting, filed three grievances against his employer, the Lincoln County Board of Education ("LBOE"), in September and October 2001. All the grievances alleged harassment and reprisal, two also alleged discrimination, and one also alleged that a hostile work environment had been created. One of the grievances stated “Respondent has posted duties taken away from Grievant for lack of need.” Attached to the first grievance was the following list of allegations which Grievant described as discriminatory treatment:

1 1. The superintendent testified in a grievance hearing as to Grievant's duties for this school year and what duties would be taken away as a result of his contract being cut 40 days. Now superintendent is returning several of those duties to Grievant.

2 2. Grievant was told to change his sign-in location because “people couldn't” find him. Grievant always signs out appropriately near his office and has voice mail.

3 3. At the beginning of school when Grievant was attending Staff Development as required by statute, the Superintendent was questioning others about Grievant's whereabouts.

4 4. The Superintendent left a voice mail for Grievant that was intimidating and threatening and indicated that Grievant was not doing his job.

5 5. Grievant's payroll sheet location has been changed to the superintendent's office.

6 6. Grievant met with the Superintendent and tried to work out #5, but the

next day received a letter reneging on that agreement.

7 7. The Lincoln County Board has created a work environment that is threatening and hostile. The Superintendent has told Grievant that “one of them has to go”.

8 8. Grievant has a grievance on his cut of 40 days of employment and feels that this reprisal is because of that grievance and past grievances.

After an extensive discussion off the record before the Level IV hearing, in an effort to resolve the grievances, Grievant's counsel stated that the only issues remaining werea claim of discrimination based upon Grievant being required to sign the payroll report in the Superintendent's office, and discrimination and harassment in the assignment of duties which had previously been part of Grievant's job to other employees after Grievant's contract was reduced. Grievant's counsel stated that all other issues raised by Grievant had been resolved. Accordingly, the issue of where Grievant signs out when he leaves the Central Office, although raised in Grievant's post-hearing written argument, will not be addressed.

The relief sought in the grievance which alleged Grievant's former duties had been posted was “[h]arassment to stop and to be made whole including salary and benefits plus 10% interest.” In the other grievances, Grievant also sought as relief “reprisal, discrimination to stop.”

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. Grievant has been employed by LBOE as an Attendance Director for five years. His office is located at the Central Office for LBOE, at the Yeager Career Center, at the rear of the building. Prior to taking this position, he was employed by LBOE as a teacher, assistant principal, and principal.

2. In the Spring of 2001, Grievant was properly notified that his contract would be reduced from 240 to 200 days. In connection with the reduction of Grievant's contract term, some duties were removed from Grievant. He grieved this action, and his grievance was denied in a Level IV decision dated July 13, 2001, styled Hunting v. Lincoln County Board of Education, Docket No. 01-22-241 (“Hunting I”). That decision is on appeal to the Lincoln County Circuit Court.

3. At the beginning of the 2001-2002 school year, Superintendent William Grizzell, Grievant's

supervisor, told Grievant he was to come to his office to sign the payroll report every two weeks. The Superintendent's office is in the same building as Grievant's office. No other Director signs the payroll report in the Superintendent's office. Grievant had previously signed the payroll report in the Food Services section of the building.

4. The Superintendent's secretary, another Central Office secretary, the Assistant Superintendent, and the Coordinator of Technology sign the payroll report in the Superintendent's office. Each administrative unit receives its own payroll report, which lists the payroll record of each employee in the unit. Grievant is not responsible for an administrative unit, and does not supervise any employees. Grievant is part of the Superintendent's administrative unit. The Superintendent determined that Grievant should be signing the payroll report with his administrative unit, as he was not associated with the Food Services unit.

DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

Grievant argued in his post-hearing written argument that he had demonstrated harassment, discrimination, reprisal, and favoritism with respect to the reduction of his contract from 240 to 200 days, and that Respondent's justification for this action was pretext as Grievant's duties have been assigned to other employees whose contracts were lengthened, and Grievant has been offered employment on a per diem basis for some work. This is the first time Grievant had mentioned favoritism in this grievance, and this attempt to amend the grievance at this late date to include a claim of favoritism must be rejected.

Respondent argued that, with regard to Grievant's complaints about his previous duties being posted, Grievant is attempting to relitigate Hunting I. The undersigned agrees. The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the “relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.” Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Hunting I determined that Grievant's contract could be reduced, and certain duties could be removed from him. Grievant cannot again in

this proceeding challenge the propriety of the decision to remove certain duties from him and reduce his contract, particularly since this issue is now before the Circuit Court and is out of this Grievance Board's hands.

The only remaining issue relates to the Superintendent's directive that Grievant sign the payroll report in his office. Grievant has alleged discrimination, retaliation, andharassment. (See footnote 2) Again, in his post-hearing written argument he belatedly alleged favoritism as well.

W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (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.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a “legitimate, nondiscriminatory reason” for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra. In Hunting I, this Grievance Board discussed claims of discrimination by Grievant, where he asserted he was being treated in a different fashion from other Directors, and specifically found that Grievant was not similarly situated to other Directors.

> As indicated in the discussion regarding W. Va. Code § 18A-4-5b, Grievant's job duties and level of responsibility are readily distinguishable from the duties and

> responsibilities assigned to the Board's other Directors. Thus, Grievant has not established a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) or (o).

Hunting I. Grievant did not present any evidence to demonstrate that he was similarly situated to any other employee whom he alleges was treated in a different fashion, or which would otherwise cause the undersigned to revisit this ruling.

Further, as Respondent pointed out, Grievant could not point to any detriment he had suffered by being required to sign the payroll report in the Superintendent's office, which is an element which must be established in order to demonstrate a prima facie case of discrimination. His argument was that this requirement was detrimental because he was being treated differently. He did not indicate that there was any hardship, shame, or injury of any kind associated with going to the Superintendent's office. Under Grievant's theory, different treatment would be synonymous with detrimental treatment. Detriment is defined in Webster's New World Dictionary as, “damage, injury.” The undersigned cannot conclude that the Superintendent's directive that Grievant walk down the hall to his office to sign the payroll report every two weeks is a detriment to Grievant. Further, the Superintendent had a valid reason for his decision. Grievant is not responsible for an administrative unit, and does not supervise any employees. He is part of the Superintendent's administrative unit, and the Superintendent determined that Grievant should be signing the payroll report with his administrative unit, as he was not associated with the Food Services unit.

Reprisal is defined in W. Va. Code § 18-29-2(p) as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for analleged 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). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra.

Again, a key element to reprisal is that the treatment received by the grievant be adverse. Adverse is defined as “1. hostile; opposed. 2. unfavorable; harmful.” The undersigned cannot find anything adverse in the Superintendent's decision that Grievant would sign the payroll report in the Superintendent's office.

W. Va. Code § 18-29-2(n) defines harassment as “repeated or continual 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).

The Superintendent has the right to decide where, and in what manner, his subordinates will sign the payroll report. His action in determining that Grievant should sign the payroll report in his office because he was part of his unit, and did not supervise a unit, while apparently annoying to Grievant, is not contrary to the demeanor expected by law, policy, or profession, and does not constitute harassment.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Hunting I determined that Grievant's contract could be reduced, and certain duties could be removed from him. Grievant cannot again in this proceeding challenge the propriety of the decision to remove certain duties from him and reduce his contract, particularly since this issue is now before the Circuit Court and is out of this Grievance Board's hands.

3. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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.

4. A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (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.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant is not similarly situated to other Directors. Hunting v. Lincoln County Bd. of Educ., Docket No. 01-22-241(July 13, 2001). Further, Grievant did not demonstrate that the requirement

that he go to the Superintendent's office to sign the payroll report was detrimental to him. The fact that a grievant is required to perform his work in a different fashion than others does not in and of itself constitute detrimental treatment.

6. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant 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). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra.

7. Grievant did not demonstrate that the Superintendent's decision that he would sign the payroll report in the Superintendent's office was an adverse action.

8. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual 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).

9. The Superintendent has the right to decide where, and in what manner, his subordinates will sign the payroll report. His action in determining that Grievant should sign the payroll report in his office because he was part of his unit, and did not supervise a unit, does not constitute harassment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 16, 2002

Footnote: 1

These grievances were filed on September 18, October 10, and October 31, 2001. The grievances were denied at Level I, and Grievant appealed to Level II, where a hearing on all the grievances was held on November 27, 2001. A Level II decision denying the grievance was issued on December 13, 2001. Grievant bypassed Level III, appealing to Level IV on December 21, 2001. A Level IV hearing was held on February 19, 2002. Grievant was represented by Jason A. Poling, Esquire, and Respondent was represented by James W. Gabehart, Esquire. This grievance became mature for decision on March 29, 2002, the deadline for submission of reply briefs. Neither party filed a reply brief.

Footnote: 2

Although Grievant's counsel did not mention a claim of reprisal when summarizing the remaining issues, this claim was included in Grievant's post-hearing written argument, and counsel's failure to mention this argument will be considered an oversight, as it will not prejudice Respondent to address the claim of reprisal in this decision.