LARRY K. DILLON,

Grievant,

v. DOCKET NO. 01-HHR-585

W. VA. DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU FOR

CHILD SUPPORT ENFORCEMENT,

Respondent.

DECISION

Grievant Larry K. Dillon filed this grievance at Level I on July 12, 2001,alleging that he was 1) improperly given a suspension; and 2) that he has been subjected to a hostile work environment in retaliation for filing a prior grievance, as evidenced by low performance evaluation ratings that are unwarranted based on his actual performance. He states:

> There has been a calculated series of retaliations against me to include accounting for my every minute of the day which other BCSE offices were not required to do, a quoto [sic] on legal referrals which other BCSE offices, especially in our own region, were not required to do, a disciplinary letter requiring me to do an enormous amount of work in a short period of time to “supposedly” catch me up on my case work when in fact we have been working shorthanded for some time. All of my performance ratings have been the lowest in any office or region in Child Support and criticism given that was not warranted again because of lack of help in our office, written slander [sic] and libel in the form of these performance reports, bad performance reports that covers [sic] periods that have not even got [sic] here yet. When I filed my grievance against the state for generating quotos [sic] to produce numbers last year I was told by my team leader that quote “Porter Stanley, Regional Manager sent me a message to tell you your grievance better not leave this office,” unquote. I then relayed this message to other co-workers and could not believe I would be threatened for this. Since then I have had to pay dearly in performance reports, extra work, and [a] series of retaliations for that grievance. This has caused a hostile work environment for me and has placed my career with the state in jeopardy.

The suspension issue was resolved in Grievant's favor at Level III, but that decision also found there was no hostile work environment. The “calculated series of retaliations” is therefore the only issue for consideration at Level IV (See footnote 1). As relief, Grievant seeks to have the Corrective Action Plan in his personnel filed removed or sealed, and to have his last two performance evaluations revised or sealed.

A Level IV hearing was held in the Grievance Board's Beckley Office on February 6, 2002.

Assistant Attorney General Jon Blevins represented Respondent, and Lisa Davis Clark, Esq. of Gibson, Lefler & Associates represented Grievant. The parties agreed to submit their proposed findings of fact and conclusions of law by March 15, 2002, and later agreed to extend that date to April 5, 2002, whereupon this matter became mature for a decision.

FINDINGS OF FACT

1. Grievant has been employed by Respondent since July or August, 1998, as a Legal Assistant. He at first worked two or three months in the Mercer County office for training, then was permanently assigned to the McDowell County office in Welch.

2. Grievant received an interim Employee Performance Appraisal on March 22, 2000. [Lvl. III Gr. Exh. 2] On this evaluation, completed by Ivan C. Newberry, Jr., TeamLeader at the McDowell County office and Grievant's supervisor, Grievant's overall rating was “Good; Meets Expectations.” On August 31, 1999, Grievant completed a self- evaluation on which he rated his own performance at 2.70, “Exceeds Expectations.” [Lvl. III Gr. Exh. 1] He had received an “initial” evaluation by Mr. Newberry in October, 1999 that detailed Grievant's performance expectations, but did not provide an actual rating. [Lvl. III Gr. Exh. 2]

3. Grievant and two other legal assistants in the McDowell County Office filed a prior grievance in June, 2000 claiming that performance quotas for legal referrals that had been imposed on the McDowell County office were improper. This grievance was denied at Levels I through IV, and has not been appealed. (See footnote 2)

4. Mr. Newberry completed Grievant's first annual Employee Performance Appraisal in September, 2000 for the October, 1999 through August, 2000 rating period. Grievant's overall rating was 1.69, “Meets Expectations.” (See footnote 3) Of 23 categories rated, Grievant scored “Meets Expectations” in 16 and “Needs Improvement” in 7, with no “Exceeds Expectations” rated. The rating category key for this appraisal describes “Meets Expectations” as, “This overall evaluation demonstrates success and competency in theperformance of the job. The employee has produced the desired or intended results and completely satisfies the established standards and expectations.” [Lvl. III Gr. Exh. 3]

5. The October, 1999 to August, 2000 reporting period was the first period during which Grievant had a full caseload.

6. Grievant received another interim performance appraisal on February 21, 2001. This form

placed Grievant in the “Fair, but needs improvement” category. [Lvl. III Gr. Exh. 4] Under “Performance Development Needs,” Mr. Newberry commented:

> Mr. Dillon has been placed on a corrective action plan to bring his case work in line with BCSE policy and procedures. He is behind in virtually all aspects of his case work, to include case reviews, Held $ [sic], entering court orders, and referring cases for audit. He is expected to improve his performance and to focus on meeting the federal standards and time frames in all aspects of his case work, while following all BCSE policy and procedures.

7. Grievant's next annual Employee Performance Appraisal was completed on August 29, 2001. His overall rating for the September 1, 2000, to August 31, 2001, period was 1.52, “Meets expectations.” Out of 23 categories rated, he was scored “Meets expectations” in 12 and “Needs Improvement” in 11, with no categories rated “Exceeds Expectations.”

8. A Corrective Action Plan (CAP) was instituted in an attempt to help Grievant improve his work performance. The plan, effective January 23, 2001, established case work productivity goals for the following six weeks. Grievant did not challenge the CAP through the grievance procedure, and admitted that he was at that time behind in all his casework. Grievant was not the only employee with a CAP.

9. Mr. Newberry provided a letter of recommendation for Grievant on June 9, 2000, addressed "To Whom It May Concern," in which he stated in part that Grievant "hasproven himself to be an able and competent employee. . . . He will be an asset in whatever endeavor he chooses to pursue." This letter was written by Mr. Newberry in hopes that it would help Grievant find employment elsewhere, and did not accurately reflect Mr. Newberry's opinion of Grievant's work performance.

DISCUSSION

The issues remaining in this grievance are not disciplinary, so Grievant bears the burden of proving his allegations by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges that his decreasing Employee Performance Appraisal scores and Corrective Action Plans are retaliation for his filing a grievance in June 2000. Respondent maintains that Grievant's evaluations are accurate and the corrective action plans were needed to increase Grievant's performance.

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." The West Virginia Supreme Court of Appeals established what was necessary to make a prima facie case for an action of unlawful reprisal. Although the court was considering a discharge case, the test it established applies equally well to other acts of reprisal:

> The burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged, and (absent other evidence tending to establish a retaliatory motivation) (4) that discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Syl. pt. 4 in part, Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W.Va. 53, 365 S.E.2d 251 (1986). “However, this test can be applied when an employer has taken some other type of other 'adverse' action against the employee such as . . . issuing the employee an unfavorable evaluation. [Glavasic v. Marshall Univ., Docket No. 91-BOT-391 (Feb. 28, 1992).]” Satterfield v. W. Va. Division of Energy, Docket No. 91- ENGY-178 (Aug. 31, 1992).

“An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' Mace v. Pizza Hut, Inc., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also* Shepherdstown Volunteer Fire Dep't v. State ex rel. W. Va. Human Rights Comm'n, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. [sic] Mace, 377 S.E.2d 461 at 464.” W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

Grievant engaged in the protected activity of filing a grievance in June, 2000 and since he filed it with his employer, we know his employer was aware of the activity. However, Grievant's proof falls well short of establishing that he was subjected to adverse, retaliatory actions. Instead, Respondent attempted to provide constructive direction to Grievant in the form of a non-disciplinary CAP and candid performance evaluations. Grievant admitted that when the CAP was initiated, he was behind in all his casework. Nevertheless, his evaluation generously put him in the “meets expectations” category, which is a favorable rating. Grievant's characterization of what he contends was adverse treatment amounts to an allegation of harassment. He essentially claims it was harassment for his supervisor to actually attempt to supervise him and for Respondent to expect timely, accurate work.

West Virginia Code § 29-6A-2(i) 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).

The Welch office undisputedly has the poorest performance in its region. Grievant apparently feels that, as long as other employees also perform inadequately, he should be free to maintain that level of performance without comment from his supervisor. I have been unable to find any prior cases that support this contention. As noted earlier, the quota issue that Grievant contends is evidence of harassment has been determined to have been a reasonable and valid response to the poor performance of the office as a whole. Grievant may not now relitigate that issue, as it has already been decided.

The doctrine of *res judicata* prevents reconsideration when a party seeks to relitigate "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 (1988); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Four conditions must be met in order to apply the doctrine of res judicata: (1) identity in the thing sued for;

(2) identity of the cause of action;

(3) identity of persons, and of parties to the action; and

(4) identity of the quality in the persons for or against whom the claim is made.

Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994), citing Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). The quota issue was fully addressed in Grievant's prior grievance, where it was found that "Grievants have failed to establish DHHR violated any law, policy, regulation, or statute in setting a quota requirement in the McDowell County office." Dillon, *supra*. Having failed to prevail on the quota issue in his prior grievance, Grievant may not now attempt to have the same issue involving the same parties reopened. *See* Buckley v. W. Va. Schools for the Deaf and Blind, Docket No. 99- DOE-226 (Aug. 31, 1999).

Further, as other employees in the office have also been placed on Corrective Action Plans, it is

clear Grievant has not been singled out, and that other employees in the office are also expected to perform as expected.

Likewise, I am not persuaded by Grievant's argument that his supervisor's frequent insistence on correcting mistakes in case files was a form of harassment meant to interfere with his ability to timely complete his work. His supervisor's comments on his August, 2001 Performance Appraisal included, “Employee still has a problem with time management in regards to case work and overall productivity.” [Gr. Exh. 5] Grievant testified that his supervisor would repeatedly send him email messages with tasks to do, that interrupted him or prevented him from working on something else. Grievant would print out each email, then go to the remote printer to get it. Reviewing Grievant's Exhibit 10, a stack of such print-outs, it is apparent that much of the interference was caused by Grievant's owninefficiencies. Grievant failed to present a convincing argument that his supervisor should not insist on accurate, complete and timely work.

Grievant sought to impeach Mr. Newberry's official performance appraisals with the June 9, 2000, recommendation letter Mr. Newberry provided for him. Mr. Newberry credibly testified though that this letter was not an accurate appraisal of Grievant's work, and was a courtesy intended to help him find employment elsewhere. Although Grievant also introduced a similar letter from Richard Goldstein, a Bureau for Child Support Enforcement attorney, there was no evidence that Mr. Goldstein was in a position to accurately evaluate Grievant's overall work performance.

Grievant has failed to establish that his performance appraisal was inaccurate and failed to establish that it was a reprisal for filing a previous grievance. The following Conclusions of Law support this discussion.

CONCLUSIONS OF LAW

1. The issues in this grievance are not disciplinary, so Grievant bears the burden of proving his allegations by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Reprisal is "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." W. Va. Code § 29-6A-2(p).

3. In order to prove unlawful reprisal in a discharge case,

> The burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged, and (absent other evidence tending to establish a retaliatory motivation) (4) that discharge followed hisor her protected activities within such period of time that the court can infer retaliatory motivation.

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4. “An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' Mace v. Pizza Hut, Inc., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also* Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. [sic] Mace, 377 S.E.2d 461 at 464.” W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

5. Grievant failed to establish a *prima facie* reprisal claim by failing to show that he was subject to an adverse action. Grievant's performance appraisal of "Meets Expectations" was surprisingly generous, and his Corrective Action Plan was a constructive attempt by his supervisor to help Grievant improve his performance.

6. Respondent nevertheless established that there were legitimate reasons for it actions. 7. West Virginia Code § 29-6A-2(l) 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).

8. The doctrine of *res judicata* prevents reconsideration when a party seeks to relitigate "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 (1988); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Four conditions must be met in order to apply the doctrine of res judicata:

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Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994), citing Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975).

9. The quota issue was fully addressed in Grievant's prior grievance, where it was found that "Grievants have failed to establish DHHR violated any law, policy, regulation, or statute in setting a quota requirement in the McDowell County office." Dillon, *supra*. Having failed to prevail on the quota issue in his prior grievance, Grievant may notnow attempt to have the same issue involving the same parties reopened. *See* Buckley v. W. Va. Schools for the Deaf and Blind, Docket No. 99-DOE-226 (Aug. 31, 1999).

10. Grievant failed to meet his burden of proving Respondent's performance expectations were unreasonable, or that his supervisor's insistence on adequate work performance was harassment.

Accordingly, this grievance is hereby **DENIED.**

Further it is hereby **ORDERED** that the relief granted in the Level III decision in this matter be implemented forthwith.

Any party 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 §29-5A-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.

DATED: April 19, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant indicated at the hearing that he had been offered and had accepted a job outside the state, but at the time of the hearing, he was still employed by Respondent. Although it is highly likely that this grievance will be rendered moot by grievant's voluntary resignation by the time this decision is issued, there is no evidence as of the date it became mature for decision that Grievant is no longer employed by Respondent.

Footnote: 2

Dillon, et al., v W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-257 (Mar. 20, 2001). This decision found that the attorney referral quotas imposed on Grievant's office were proper.

Footnote: 3

The evaluation forms used for Grievant's interim appraisals were different from the forms used for annual appraisals. The interim forms use a scale of "Good; Meets Expectations," "Fair, But Needs Improvement," and "Does Not Meet Expectations." The annual forms use a numerical scale from 1.00 to 3.00, which is then related to an "alpha" score of "Exceeds Expectations," "Meets Expectations," or "Needs Improvement."