**JOHN COLLINS,**

**Grievant,**

**v.**

**DOCKET NO. 02-DOH-230**

**WEST VIRGINIA DEPARTMENT OF**

**TRANSPORTATION/DIVISION OF HIGHWAYS,**

**Respondent.**

**D E C I S I O N**

Grievant, John Collins, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways"), on April 10, 2002, alleging:

> Harassment. On two occasions I was told by Mark Terry, that I should not file grievances against Larry [Pauley] and that by doing so I was trying to cause trouble. Each time I felt as though my job was being threatened. The latest incident I was told that I tried that I tried to run over Mark Terry's toes, and that it was written on my timesheet. . . I feel that because I did file a grievance against Larry Pauley, he is now encouraging harassment toward me from other employees and rewarding co-workers with better working conditions and overtime.
>
> Relief sought: For Larry [Pauley] and Mark Terry to be reprimanded for their acts of harassment toward me. And I seek full compensation for any attorney fees or other expenses that may occur. I also seek full compensation for any other losses because of the harassment. I would also like to have the false accusations removed from my time sheet.

The level one and two grievance evaluators denied the grievance, and Grievant appealed to level three on June 14, 2002. The level three hearing was held on July 1,2002, and Grievance Evaluator Brenda Craig Ellis recommended denial of the grievance on July 22, 2002, and Jerry Bird, Assistant Commissioner, accepted that recommendation. Grievant appealed to level four on July 29, 2002, and

a hearing was scheduled for September 5, 2002, where the parties agreed the matter could be submitted on the record developed at the lower levels. The parties declined to file post-hearing submissions, and this matter became mature for decision on September 5, 2002. Grievant was represented at level three by Roger Sowards, and Highways was represented by Carrie Dysart, Esq.

## SUMMARY OF EVIDENCE

### Grievant's Exhibits

Ex. 1 -

> Fifteen pages of transcript testimony from the level three hearing in Collins v. W. Va. Div. of Highways, Case Nos. 2002-0222-E-055, DFH-056, DFH- 057, and DFH-058 (June 17, 2002).

### Highways' Exhibits

None.

### Testimony

Grievant testified in his own behalf, and presented the testimony of Mark Terry, Dennis Collins, and Warren Miller. Highways presented the testimony of Larry Pauley.

Based upon a review of the entire record in this proceeding, I find the following facts have been proven by a preponderance of the evidence.

## FINDINGS OF FACT

1. Grievant is employed by Highways in District Two, Lincoln County, as a Transportation Worker II Craftsworker.

2. Larry Pauley is employed by Highways in District Two, Lincoln County, as the County Administrator. 3. Mark Terry is employed by Highways in District Two, Lincoln County, as a Transportation Worker II Equipment Operator.

4. In January or February 2002, Grievant asked for a grievance form in the presence of Mr. Terry and Warren Miller, Assistant to the Supervisor.

5. Of his own volition, and not in any supervisory capacity, Mr. Terry suggested to Grievant that perhaps the matter could be resolved if he would talk to Mr. Pauley, and then he would not have to file the grievance.

6.

Mr. Terry does not supervise Grievant.

7.

Mr. Pauley had no knowledge of these comments from Mr. Terry to Grievant.

8. From time to time, Highways employees pick up deer killed on the road and move them off the road. Normally they are called out in response to a call from Charleston Control, but sometimes an employee will do this on his own. When this happens, the employee will report it to Mr. Pauley, and a crew will go out to the location and remove the deer. In these instances, the employee can get paid for the time spent moving the deer.

9. Grievant reported to Mr. Pauley that he had moved a deer, but when Mr. Pauley asked where the deer was located so it could be moved from the side of the road, Grievant would not or could not tell him. Mr. Pauley did not approve compensation for Grievant because he did not believe he had moved a deer.

## DISCUSSION

In a non-disciplinary matter Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges that Larry Pauley, the Lincoln County Administrator, has harassed him, and has encouraged other employees to harass him. Although not included in the grievance statement, the Level Three Grievance Evaluator allowed testimony regarding alleged discrimination against Grievant as well. Highways denies the allegations of harassment or discrimination.

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.” Grievant claims the comments made by Mark Terry that he should talk to Mr. Pauley instead of filing a grievance constitute harassment. The evidence shows that Mr. Terry was not acting in any supervisory capacity when he said this, was not attempting to discourage Grievant from filing

grievances, and was merely voicing his personal opinion.

Additionally, there was testimony about an incident where Grievant was operating a crew cab, and had pulled out without warning while Mr. Terry was leaning on the truck. Grievant believes Mr. Terry has made up or has embellished the incident in an attempt to get Grievant written up. That incident is the subject of another grievance, and little testimony was provided in the instant grievance about it.

Grievant also believes he is being harassed and discriminated against by Mr. Pauley. He believes Mr. Pauley is behind Mr. Terry's “harassment,” but there was no evidence presented that Mr. Pauley was even aware of Mr. Terry's statement to Grievantabout speaking to Mr. Pauley first before filing a grievance. With regard to the discrimination claim, Grievant claims Mr. Pauley has treated him differently than other employees by refusing to pay him for picking up a deer.

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). 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).

Grievant has established that he picked up a deer on his off hours, and that Mr. Pauley did not compensate him for it, while other employees have received compensation. Therefore, Grievant has established a prima facie case of discrimination, and the burdenshifts to the employer to demonstrate a legitimate, non-discriminatory reason for its actions. Mr. Pauley testified that when other employees have asked for compensation for picking up deer in their off hours, they have been able to tell Mr. Pauley the location of the deer, so that a crew can go out and remove it. When Mr. Pauley asked Grievant where the deer was located, he would not or could not tell him. Thus, Mr. Pauley concluded that there was no deer, and denied Grievant the compensation. Clearly, had Grievant been able to tell Mr. Pauley the location of the deer, allowing a crew to remove it, he would have been entitled to compensation. But Grievant's refusal to communicate the location of the deer to Mr. Pauley left him no choice but to refuse Grievant compensation. Frankly, the undersigned is mystified why Grievant would not tell Mr. Pauley the location of the deer if indeed he had moved one out of the highway. Therefore, I find that Highways has articulated a legitimate, non-discriminatory reason for refusing to compensate Grievant for deer removal in this instance.

Finally, other than Grievant's belief that Mr. Terry and Mr. Pauley are harassing him, there was no evidence to support this belief. Mr. Terry was only expressing his own personal opinion that Grievant should communicate with his supervisor before filing a grievance. While Grievant obviously did not appreciate Mr. Terry's advice, that does not constitute harassment within the definition of W. Va. Code 29-6A-2(l). Hamilton v. W. Va. Bureau of Empl. Programs, Docket No. 01-BEP-374 (Aug. 24, 2001). The evidence set forth by Grievant with respect to Mr. Pauley also falls short of proving harassment.

## CONCLUSIONS OF LAW

1. In a non-disciplinary matter the Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. 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.”

3. 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:

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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

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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.

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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.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: September 19, 2002**