OLLIE HUNTING,

Grievant,

v v.

Docket No. 02-22-288

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ollie Hunting, is employed by the Lincoln County Board of Education ("LCBOE" or "Board"). He filed the following grievance on June 29, 2002:

> STATEMENT OF GRIEVANCE: In March, the Superintendent of Lincoln County Schools, William Grizzell, recommended that I be placed on the transfer list for the 2002-03 school year for the purpose on changing my duties. After meeting and conferring with Mr. Grizzell, it was clear that he was essentially reinstating duties and responsibilities that he had taken away the previous year. When these duties were taken away, my employment term reduced, and my salary cut, the Superintendent used "lack of need" as a justification for his actions. Obviously, a "need" exists for the Superintendent to reinstate the duties and responsibilities. However, his failure to reinstate my extended employment days was an arbitrary and capricious and consistent with the on-going practice of harassment and reprisal. It is my contention that the Superintendent has violated *West Virginia Code* § 18-29-(N)(P) [sic] and *West Virginia Code* § 18-2-7.
>
> RELIEF SOUGHT: Additional employment days to perform duties reassigned to me and that the Superintendent cease and desist from acts of reprisal and harassment.

A Level II hearing was held on July 22, 2002, and a Level II decision denying the grievance was issued on August 27, 2002. Level III was bypassed, and Grievant appealed to Level IV on September 12, 2002. A Level IV hearing was held on October 31, 2002. (See footnote 1) The deadline for the parties' proposed findings of fact and conclusions of law was November 27, 2002, at which time this grievance became mature for decision. (See footnote 2)

History, Issues, and Arguments

This grievance is fifth in a series of grievances relating to the reduction of Grievant's contract for the 2001 - 2002 school year, and Grievant's accompanying allegations of harassment and reprisal. (See footnote 3) These prior grievances have been denied by this Grievance Board, Grievant's contract remains at 200 days, and no evidence of harassment or reprisal has been found. (See footnote 4)

In this grievance, Grievant asserts all the duties that were removed from him at the time his contract was reduced have now been reassigned to him, and his contract should be increased. Grievant did not ask for removal of these duties.

Respondent maintains all the duties currently assigned to Grievant are ones that belong to his position, Director of Attendance. (See footnote 5) Additionally, Respondent notes not all the duties Grievant had before are currently reassigned, and the expectation is for Grievant to perform these duties during his 200-day contract. The other limited duties that need to be accomplished during the summer months would be picked up by Central Office staff. Accordingly, there is not a lack of need during the summer months, but a limited need thatcan be fulfilled by others. See Hunting v. Lincoln County Bd. of Educ., Docket No. 01-22- 241(July 13, 2001)(Hunting I).

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

Findings of Fact

1. Grievant has been the Attendance Director with LCBOE for six years.

2. When he was first hired, Grievant also served as the Textbook Custodian and received an additional ten days for this duty, for a contract of 210 days.

3. Pursuant to a group grievance, Grievant received a 240-day contract. Because the majority of an Attendance Director's duties are during the school year, Grievant was assigned additional duties to perform to fill up the additional thirty days.

4. While Grievant had the 240-day contract, he continued to be the Textbook Custodian. Other duties included supervising Saturday School, the Truancy Diversion Program, and the Alternative Learning Center. Grievant also coordinated home schooling applications, verified Drivers' License applications, (See footnote 6) worked in the Transition Program, and worked on in-lieu student transportation. (See footnote 7) As with all Central Office positions, Grievant is expected to perform

other duties as assigned by the Superintendent. 5. Enrollment in the Lincoln County school system has decreased each year, and cuts have been made to keep the system solvent. (See footnote 8)

6. Prior to the 2001 - 2002 school year, Grievant's position was cut to 200 days. He was expected to perform only one essential duty of his position during the summer, and this only on a per diem basis. This essential duty would be to attend court proceedings for truancy petitions so they would not be dismissed.

7. Grievant was still expected to perform the duties associated with his position during the 200 days of his school year contract.

8. It appears Grievant incorrectly believed that when his contract was reduced, he no longer had to perform any additional duties during the school year even if these tasks were identified in his Job Description. During the 2001 - 2002 school year, Grievant and Superintendent Grizzell had several discussions as to his duties and the expectations Superintendent Grizzell had for Grievant. These discussions, as well as the reduction in contract, resulted in multiple grievances.

9. This year when transfer time came around, Superintendent Grizzell placed Grievant's name on the transfer list to make it clear what additional duties Grievant was to perform.

10. By letter dated March 13, 2002, these additional duties were specifically listed as the reasons for Grievant's transfer. These duties were consistent with the expected duties of an Attendance Director, and were included in Grievant's Job Description. Grievant is still expected to perform only one essential duty of his position, court appearances, during the summer, and he will be paid for the days he is required to work. The expectation is that Grievant will seldom be required to work during the summer.

11. Grievant is not expected to perform all the prior duties he had when he possessed a 240-day contract. Grievant is no longer expected to be the Textbook Custodian, and he no longer supervises Saturday School, the Transition Program, the Truancy Diversion Program, and the Alternative Learning Center. Grievant is still expected to coordinate home schooling applications, verify Drivers' License applications, and work on in-lieu student transportation, as well as other duties as assigned by the Superintendent. The duties he is currently assigned are in keeping with his Job Description.

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 accept as 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 asserts he has demonstrated a continuing pattern of harassment and reprisal with respect to the statement of duties he received from Superintendent Grizzell. Respondent maintains, with regard to Grievant's complaints about his reduction of days and requested relief of additional days, that Grievant is attempting to relitigate his prior grievances on this subject. 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, 180 W. Va. 433, 440, 376 S.E.2d 639, 646 (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). The prior grievance decisions determined Grievant's contract could be reduced and his duties changed, and these actions were not harassment, discrimination, or reprisal. Grievant cannot in this proceeding relitigate the propriety of those decisions. Further, at no time was it stated that Grievant was not expected to fulfill the duties of his position during his contract term, just because his days were decreased. It is noted Grievant's duties were increased to give him enough to do when the thirty days were added.

The remaining issue is whether the transfer to identify and clarify Grievant's duties was harassment or reprisal.

Grievant has alleged the transfer was in retaliation for filing prior grievances. Grievant has the burden of proof on this allegation. Reprisal is defined in W. Va. Code §18-29-2(o) 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

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. Grievant has filed multiple grievances recently. However, he has not demonstrated he has been subsequently treated adversely. 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." See Hunting I. The undersigned cannot find anything adverse in Superintendent Grizzell's decision to clarify Grievant's duties, or to identify additional duties he is to perform that are included in his Job Description.

Even if Grievant had established a prima facie case, Respondent has rebutted the presumption of retaliation by offering legitimate, non-retaliatory reasons for the alleged adverse action. The transfer

was to identify duties Grievant is expected to perform and these duties are within his Job Description. No basis exists for finding Respondent's actions were motivated by any retaliatory rationale.

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). Grievant has not demonstrated "repeated or continual disturbance, irritation or annoyance . . . contrary to the demeanor expected by law, policy and profession." First it should be noted that harassment requires repeated or continual actions, and none of Grievant's other allegations of harassment have been established, as these grievances have been denied by this Grievance Board. Second, Superintendent Grizzell's decision to clarify Grievant's duties through the transfer process, was an attempt, albeit unsuccessful, to ward off future discussions and grievances about Grievant's duties and responsibilities. There are no unreasonable performance expectations here, and Grievant has not been criticized for his work, accordingly this clarification of duties does not constitute harassment.

The above-discussion will be supplemented by the following Conclusions of Law.

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, 18- W. Va. 433,440, 376 S.E.2d 639, 646 (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. 3. Reprisal is defined in W. Va. Code § 18-29-2(o) 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."

4. 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and 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 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

5. 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 thenestablish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

6. Grievant has not established a prima facie case of retaliation or reprisal as he has not been treated adversely.

7. 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).

8. Grievant has not demonstrated a continuing pattern of harassment. No unreasonable performance expectations were demonstrated, and Grievant has not been criticized for his work. Clarification and identification of duties do 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 23, 2002

Footnote: 1

Grievant indicated the main reason he requested a Level IV hearing was to complain about statements in the Level II Decision, which indicated Grievant had abused the grievance process, and had made defamatory statements about Superintendent Grizzell.

Footnote: 2

Grievant was represented by Gary Archer from the West Virginia Education Association, and the Board was represented by Attorney James Gabehart.

Footnote: 3

The parties requested the undersigned Administrative Law Judge to review the records in these prior grievances, and she has done so.

Footnote: 4

These grievances have been appealed to the circuit court.

Footnote: 5

The parties attempted to formulate a settlement agreement without success.

Footnote: 6

Grievant checks to see if a student meets the attendance requirements to apply for a drivers license.

Footnote: 7

It appears this task deals with reimbursing students and/or parents who provide their own transportation from places difficult for the buses to reach.

Footnote: 8

Grievant has asserted his Attendance Director's position was decreased to half- time at some point, but there is no evidence to support his belief.