DAVID GILBERT,

Grievant,

v. DOCKET NO. 02-ADMN-363

DEPARTMENT OF ADMINISTRATION/

DIVISION OF SURPLUS PROPERTY,

Respondent .

D E C I S I O N

Grievant, David Gilbert, filed two grievances against his employer, Respondent, Department of Administration ("DOA"), on September 23, 2002, which were heard together at Level II, and advanced together to Level IV. One of the grievances complained of discrimination in the assignment of parking spaces. As relief in that grievance, Grievant sought:

> written acknowledgement [sic] from the Agency Manager that he has engaged in the creation and enforcement of policy that is in contravention of West Virginia State Code §29, Article 6A, Chapter 2, Paragraphs (d) and (l). Furthermore, this written acknowledgement [sic] sought as relief should include a sincere written statement of apology for carrying out unwarranted disciplinary action intended to enforce an inherently invalid policy. In addition, a written “cease and desist” order should be issued from the Agency Manager's immediate supervisor to the Agency Manager, in the interest of preventing further such incidents of improper discipline from arising in the future. I specifically request that the current status quo with regard to parking at the Agency is not altered. The important issue is that no employee (current or future) is ever “disciplined” for parking in any certain parking place. I make this statement in the interest of maintaining harmony among employees at the Agency.

The other grievance statement is as follows:

> I have been subjected to discrimination in violation of the Americans with Disabilities Act; the most recent event occurring on September 10, 2002, in connection with my use of sick leave and the practice of eating small meals and snacks several times during the day to control my hypoglycemia. The events in question also constitute harassment as defined by WV State Code §29-6A-2(l), and a detriment to my health, in contravention of WV State Code §29-6A-2(i).

As relief Grievant sought:

> written acknowledgment from the Agency Manager that the disciplinary action of September 10[,] 2002[,] was improper in that it was in violation of West Virginia State Code §29, Article 6A, Chapter 2, Paragraph (i), and this written statement must also include a sincere written apology for engaging in improper disciplinary action. I also seek a written "cease and desist" order from the Agency Manager's immediate supervisor to the Agency Manager to prevent this matter from continuing, and to prevent further incidents like this from occurring.
>
> In addition to the above written statement, I also seek a written acknowledgement [sic] from the Agency Manager that the disciplinary action of September 10[,] 2002[,] was improper in that it was in violation of West Virginia State Code §29, Article 6A, Chapter 2, Paragraph (l), and this written statement must also include a sincere written apology for engaging in improper disciplinary action. I also seek a written "cease and desist" order from the Agency Manager's immediate supervisor to the Agency Manager to prevent this matter from continuing, and to prevent further incidents like this from occurring.
>
> Included in the Agency Manager's written statements as relief sought, the matter of compliance with the Americans with Disabilities Act should be addressed. Matters such as flexibility with regard to permitting the use of sick leave, and providing reasonable accommodations, as well as compliance with all other relevant stipulations as specified by the Act with regard to State Government Agencies should be addressed. Written apologies should be forthcoming with regard to the improper disciplinary action taken with regard to my use of leave time and eating as necessary to control my hypoglycemia.
>
> Finally, the September 10[,] 2002 memorandum from the Agency Manager should be eradicated from any personnel or correspondence files relating to any West Virginia State Government employee.

Grievant's counsel stated in his written argument submitted at Level IV that "[t]he sole relief that Mr. Gilbert seeks in the present appeal is a judgment directing his employer to allow him to continue to eat small meals at his desk to maintain his blood sugar level." (See footnote 1) The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant has been employed by DOA in the Surplus Property section as an Information Systems Coordinator since December 1, 1998.

2. When Grievant first started working for DOA he parked his vehicle in an open parking space in the front row, close to the door of the building where he would be working. He was told by Ken Frye, the Manager, not to park in that space because it was reserved for him, and to move his vehicle. The wall in front of the space bears a sign which reads, “Manager.” Grievant then parked in the space next to Mr. Frye's when it was available, until a new employee was hired to serve as secretary to the manager, and Mr. Frye told Grievant to move his vehicle and not park in that space, because it was reserved for the new employee.

3. In August of 2002, DOA hired a new employee, who began parking in the same spot in the front row everyday. Grievant asked his supervisor, Dave White, if Mr. Frye had reserved that space for the new employee, and was told the space had not been so assigned, and there was no policy on assignment of parking spaces.

4. Surplus Property does not have a written policy on parking in the parking lot. All the parking spaces are close to the building, and there is sufficient parking in the lot for all the employees. Traditionally, the male employees have left the spaces closest to the building for the female employees. Grievant may park in any of the spaces except the one labeled “Manager.” 5. Two and a half years ago, Grievant was diagnosed with reactive hypoglycemia. In order to properly maintain his blood sugar level, Grievant eats six to nine small meals a day. Grievant eats breakfast at home around 6:00 or 7:00 a.m., and then he eats a second breakfast shortly after he arrives at work, at 9:00 a.m. He eats lunch at 11:30 a.m. or 12:00 p.m., and then he has a second lunch at 3:00 or 4:00 p.m. at work. He then eats two meals in the evening, and a snack.

6. The letter documenting Grievant's illness states that Grievant was treated and counseled for diabetes on July 21, 2000, and he was told “the best technique for managing good blood sugars is to NOT skip meals and to eat at regular times.” The letter is signed by Paul Armiger RD, LD.

7. Mr. White and Mr. Frye are aware of Grievant's medical condition and his need to have snacks during the day, and have no problem with Grievant having snack food during the day at his desk.

8. Grievant's work hours are 8:30 a.m. to 5:00 p.m. He has an hour for lunch.

9. On September 10, 2002, Grievant arrived at work late. He brought his second breakfast with him to work, McDonald's hot cakes, (See footnote 2) and after checking his messages, began to eat his breakfast at his desk, using a fork. Grievant did not submit an annual leave slip for the period

from 8:30 a.m. until he arrived at work, or for the time he spent eating his breakfast. Mr. Frye asked Grievant to come to his office, and told him he was setting a bad example, and he was not to eat breakfast at his desk. Mr. Frye did not consider this a reprimand, and did not document it as such in Grievant's personnel file. 10. This was not the first time Grievant had arrived at work late, and then sat at his desk eating his breakfast. Mr. Frye had asked Mr. White to speak to Grievant about this practice, as other employees had complained to Mr. Frye about Grievant coming to work late and then eating breakfast at his desk while they were working. Mr. White had not yet spoken to Grievant about this issue.

11. Mr. Frye wrote a memorandum to Mr. White documenting his discussion with Grievant. The memorandum, dated September 10, 2002, states as follows:

> I asked you to speak to Dave Gilbert about coming in late, bringing breakfast, and sitting at his desk eating breakfast long after his normal work starting time. According to Mr. Gilbert, you did not discuss this matter with him.
>
> This morning, at 9:05 a.m., David Gilbert was sitting at his desk eating breakfast. I felt it necessary to discuss this matter with him. I informed Mr. Gilbert that this was not acceptable behavior, and that it did not promote the proper image to our customers, other employees, and GSA [federal General Services Administration] representatives who are currently conducting a review of our agency. I informed Mr. Gilbert that this will no longer be tolerated; and, if he cannot get up early enough to eat his breakfast and he feels it medically necessary to do so, that he contact you, his supervisor, and inform you that he will be late. He will then have to take annual leave for these occurrences. If this becomes a problem, you as his supervisor will have to deal with it in accordance with established personnel policies.

12. In September 2002, Grievant's desk was in view of the public. Grievant's desk is no longer in public view.

13. Grievant's medical condition does not cause him to be late for work, nor does it prevent him from arriving at work early, and eating his breakfast in the kitchen before his starting time, so that he is ready to begin working at 8:30 a.m. His medical condition does not require that he eat breakfast at 9:00 a.m. as opposed to 8:15 a.m.

14. Grievant has often observed other employees in the office eating lunch during their lunch break and snacks at their desks, but other employees do not eat breakfast at their desks. Grievant has been eating at his desk on a daily basis for years.

15. The kitchen is about 20 feet from Grievant's desk. Grievant is physically able to walk to the

kitchen. 16. Mr. Frye does not have a problem with Grievant eating his lunch at his desk during his official lunch break, or eating snacks at his desk during the day, such as fruit, a power bar, or a soft drink, and he has told Grievant this. A hot cakes breakfast from McDonald's is not a snack.

17. During August 2002, Grievant was ill, and took off several Fridays and Mondays due to his illness, and to go to the doctor. Mr. White cautioned Grievant about taking sick leave every Friday and Monday, and asked him if he could schedule his doctor appointments on other days. Mr. White did not believe Grievant was abusing his sick leave, but was concerned that it would appear that way to others.

Discussion

In nondisciplinary matters, the grievant has the burden of proving his case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). Grievant argued he was discriminated against because of his handicap, citing § 102 of Public Law 101-336. He argued that a reasonable accommodation would be to allow him to eat at his desk.

Respondent argued at the Level III hearing that Grievant had not demonstrated he is a qualified person with a disability, and the Americans with Disabilities Act is not applicable to him. Respondent further argued even if that Act were applicable to Grievant, Respondent is not required to allow Grievant to do as he chooses; it is only required to offer a reasonable accommodation, which it believes it has done by offering to let Grievant change his work hours, use part of his lunch hour as a breakfast break, and let him eat in the kitchen as opposed to his desk. Respondent pointed out that the documentation provided by Grievant of his illness states that Grievant needs to eat several small meals a days. It does not say Grievant needs to come to work late and then take a break from working to eat breakfast at his desk. Respondent noted that it is not fair to the other employees in the office to allow Grievant to come to work late and then eat at his desk,without taking annual leave or making the time up in some way, when the other employees must begin working at the assigned starting time.

Grievant also persisted in his assertion that he had received a verbal reprimand for eating at his desk, and that the memorandum to Mr. White constituted a written reprimand, despite the testimony from Mr. Frye that he did not consider his discussion with Grievant to be a reprimand, and Grievant's personnel record would not reflect that he was reprimanded. Accordingly, there was no reprimand,

and this issue will not be addressed further.

This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act ("WVHRA", W. Va. Code §§ 5-11-1, et seq.), including a claim of handicap discrimination, or the federal Americans with Disabilities Act ("ADA", 42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educational Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997).

> Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination", "favoritism", and "harassment", as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap- based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra.

W. Va. Code § 29-6A-2(d) 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.

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". Id.

Grievant has not been discriminated against. Grievant has not demonstrated that any other employee was allowed to habitually come to work late, and then eat his breakfast at his desk when he was supposed to be working. Rather, the other employees in the office obviously felt it was Grievant who was receiving preferential treatment, because they were working, while he was sitting at his desk eating. While it was certainly nice for Grievant that he could come to work late and then eat his breakfast without being required to make up the time in some way, his medical condition did not require that this occur. The undersigned has been presented with absolutely no justification for this practice. Grievant has not demonstrated that he is not physically able to arrive at work at 8:15 a.m., or earlier if necessary, and eat his breakfast in the kitchen.

W. Va. 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). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

The undersigned does not find it contrary to the demeanor expected by law, policy, or profession for a supervisor to expect an employee of the State of West Virginia to come to work on time, to eat his breakfast in the kitchen provided for employees, and to do so on his own time. While Grievant may find it annoying to conform to this reasonable expectation, it is not harassment.

Likewise, Grievant did not demonstrate discrimination when Mr. White cautioned him about using sick leave on Mondays and Fridays. Grievant presented no evidence that any other employee had a pattern of using sick leave on Mondays and Fridays and was not cautioned about this. Mr. White further was not harassing Grievant. He was pointing out to him that when an employee develops a pattern of using sick leave only on days immediately before or immediately after scheduled days off, it may cause additional scrutiny for leave abuse.

Finally, the facts establish that Grievant's claims with regard to parking are without merit.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In nondisciplinary matters, the grievant has the burden of proving his grievance by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act ("WVHRA", W. Va. Code §§ 5-11-1, et seq.), including a claim of handicap discrimination, or the federal Americans with Disabilities Act ("ADA", 42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educational Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997).

> Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination", "favoritism", and "harassment", as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap- based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra.

3. 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). W. Va. Code § 29-6A-2(d).

4. W. Va. 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). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). 5. Grievant has not been discriminated against by his employer, nor has he been subjected to harassment.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 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

Date: December 31, 2002

Footnote: 1

The grievances were denied at Level I on September 30, 2002. Grievant appealed to Level II, where decisions denying the grievances were issued on October 8, 2002. Grievant appealed to Level III, where a hearing on both grievances was held on October 22, 2002. Grievant was represented by Curtis B. Cooper, Esquire, and DOA wasrepresented by Amy Haynie, Esquire. A Level III decision denying the consolidated grievance was issued on October 29, 2002, and Grievant appealed to Level IV on November 6, 2002. The parties agreed to submit this grievance for decision based upon the record developed at Level III. This grievance became mature for decision upon receipt of Grievant's written argument on December 10, 2002. Respondent did not submit written argument.

Footnote: 2

Grievant stated he needs to have a high protein intake, limit the intake of starches and simple carbohydrates, increase his intake of complex carbohydrates, make sure the fat he consumes is monosaturated as much as possible, and "avoid polyunsaturated [sic] and saturated fats whenever possible." When asked at the Level III hearing by Respondent' counsel whether hot cakes were on the list of foods he was allowed to eat or were within his diet constraints of what he should eat, Grievant responded that he was allowed to eat anything he wanted.