DAVID GILBERT,

Grievant,

v. **DOCKET NO. 03-ADMN-016**

DEPARTMENT OF ADMINISTRATION/

DIVISION OF SURPLUS PROPERTY and

DIVISION OF PERSONNEL,

Respondent.

D E C I S I O N

Grievant, David Gilbert, filed this grievance against his employer, Respondent, Department of Administration ("DOA"), on November 8, 2002. Because his Statement of Grievance was very lengthy, he was asked at the Level IV hearing to clarify his grievance. Grievant asserted he had been retaliated against for filing prior grievances, and had been functionally demoted. As relief, Grievant sought seeks to have the duties assigned to him in November 2002 removed.

This grievance was denied at all lower levels. Grievant appealed to Level IV on January 10, 2003. A Level IV hearing was held on March 7, 2003. This case became mature for decision on April 2, 2003, the deadline for the parties' proposed Findings of Fact and Conclusions of Law. (See footnote 1)

Issues and Arguments

Grievant asserts DOA retaliated against him when the agency required him to attend a one hour safety class on lifting, and when he was assigned additional duties in the warehouse. Grievant maintains these new duties are outside his classification, and he has been functionally demoted. (See footnote 2)

Respondent avers Grievant was directed to attend the lifting class because he lifts computers and their associated hardware with some regularity, and all employees who lift were required to attend the class. Respondent maintains since it reassigned Grievant's Office Assistant duties and replaced them with computer tasks which are at a higher level, no functional demotion occurred. Additionally, Respondent assigned Grievant the new duties because it wanted to use Grievant's skills in the area

of computer technology, to increase its revenue and Grievant's productivity.

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 employed by DOA in the Surplus Property Section ("SPS") since December 1, 1998. 2. Initially Grievant was hired as an Office Assistant I, Pay Grade 3, but later he was reallocated to a mixed position and classified as an Information Systems Coordinator I ("ISC I"), Pay Grade 12, at the request of his supervisor, David White, and with the approval of the Director of Surplus Property, Ken Frye.

3. Contrary to Grievant's assertions, he retained the Office Assistant duties when he was reallocated to an ISC I.

4. Although Grievant did not spend a predominant amount of his time performing his ISC I duties, he was still classified by the Division of Personnel as an ISC I pursuant to the Exemption of the Predominant Duty Rule. SPS does not need an employee to work full-time as an ISC I because the system consists of only 12 computers.

5. The Exemption of the Predominant Duty Rule applies if the employee: 1) spends 25% of his time performing the duties of the higher classification; 2) the difference in the two classifications is significant in both pay grade and complexity; and 3) the classification in which the employee spends 25% of his time is the driving factor when considering the qualifications for the position.

6. In his ISC I position, Grievant's first priority is to maintain the computer network at SPS.

7. Since he was first employed, Grievant has assessed surplus computers for their contents, and occasionally repaired computers to sell to nonprofit agencies. Usually, these computers were moved back and forth from the warehouse to Grievant's office, and this process could result in damage to the computers. 8. Grievant filed two grievances on September 23, 2002. (See footnote 3)

9. Last year, Workers' Compensation Division recommended Surplus Properties institute a safety training program. In October 2002, a federal General Services Administration audit advised Surplus Properties it should have a safety program.

10. After this second recommendation, Surplus Properties instituted a safety training program, and the first program was on lifting.

11. Mr. Frye told the safety trainer to obtain a list of names of those who should attend the safety programs from the supervisors. The trainer did this, and Mr. White recommended Grievant to attend the safety training on lifting, as he occasionally lifted computers and their parts during the course of his work.

12. Grievant received notice of this training on October 2, 2002.

13. Grievant attended the training in early November 2002, but believed it did not apply to him, as much of the program was about lifting heavier items, and the safe use of the forklift.

14. In May or June 2002, the EPA changed the regulations for disposal of computers. These items were now considered hazardous waste, and the cost associated with their elimination increased dramatically.

15. Prior to this change, SPS had sold computers on pallets in lots. SPS did not receive much money from these types of sales, and frequently the buyer would take onlya few items from the computers and leave the rest, resulting in SPS being responsible for their disposal.

16. Mr. Frye had noted revenue was down, and he was also expecting cuts in his budget, as were most state agencies. He began to assess the agency and each person's position to see what could be done to increase productivity and revenues. Mr. Frye directed each of his administrators to review the duties of their employees and to give suggestions for ways to increase productivity and revenues.

17. Mr. White suggested Grievant's Office Assistant duties be reassigned and then Grievant would have time to assess many more surplus computers. This change would result in selling more computers individually and asking more for the ones sold in lots because they would then know the worth of these computers.

18. In November 2002, Grievant was directed to go to the warehouse and assess the surplus computers. He was to check each one, and if a small or easy repair could be made to ones that did not work, he was to correct the problem.

19. Grievant was told to check in his office each morning before he went to the warehouse to make sure the SPS computer network was functioning correctly.

20. The first two weeks after the new assignment, Grievant spent his entire day at the

warehouse.

21. Mr. White then directed Grievant to spend at least an hour a day in the office on the network. Additionally, Mr. Frye calls Grievant over to the office as needed to work on SPS's computer system.

22. The amount of time Grievant spends in his office can vary widely. At times, he spends only five hours of his 37½ hour work week in the office, and other times hespends full days and weeks in the office. While the duties of an ISC I are focused on the agency's computer network, some of the duties Grievant performs in the warehouse are covered in the ISC I classification specification. For example, this classification specification states the employee is to receive equipment, log inventory, and maintain inventory records. The computers he assesses are the inventory of SPS.

23. Many of the duties Grievant performs at the warehouse are those of an Information Systems Assistant ("ISA"), Pay Grade 9. (See footnote 4) Test. Lowell Basford, Level IV hearing.

24. Contrary to Grievant's assertions, he spends at least 25% of his time performing the duties of an ISC I.

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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 grievant has not met his or her burden. Id.

Grievant asserts he has been retaliated against for filing prior grievances. Grievant has the burden of proof on this allegation. Reprisal is defined in W. Va. Code § 29-6A-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.

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 demonstrated a change in his duties and the requirement to attend the lifting class followed the filing of two grievances. What Grievant did not establish was that he had been "treated in an adverse manner." Regarding the lifting class, Grievant was required to attend this one hour presentation because he occasionally lifted computers and their hardware. The purpose of this training was to keep Grievant safe. SPS had been told to provide this training to prevent on-the-job injuries, and many other employees were required to attend, including a supervisor and an Office Assistant. No untoward motive can be gleaned from this data.

As for the change in duties, again Grievant has not shown he has been "treated in an adverse

manner." Grievant is now doing ISA work instead of his Office Assistant duties. These duties are of a more complex nature, more closely dovetail with his ISC I duties, and represent an increase in responsibility and complexity. While it is obvious Grievant does not like being at the warehouse and does not want to be there, the basic reason he gave for this reluctance was because he did not feel he was not adequately performing his ISC I duties. The testimony of Mr. Frye and Mr. White was clear and in agreement; Grievant is performing his ISC I duties satisfactorily, and they see no problem with Grievant's performance. In fact, both supervisors are pleased with the increase in Grievant's productivity. The next issue to address is Grievant's assertion that he has been functionally demoted. "It has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement." Dudley v. Bureau of Senior Serv., Docket No. 01-BSS- 092, (July 16, 2001)(citing Gillespie v. W. Va. Dep't of Corrections, 89-CORR-105 (Aug. 29, 1989)).

Grievant asserted he had been functionally demoted because the amount of time he spends performing his ISC I duties has fallen below 25%. Pursuant to the testimony of Mr. Basford, if the time Grievant spends performing these types of duties falls below 25%, Grievant may need to be reallocated to a lower pay grade. Mr. Basford also indicated the amount of time was not calculated on a daily or weekly basis, and the amount of time is not assessed in detail.

The testimony differed between the parties as to how much time Grievant spent in the office. Taking the Grievant's testimony, one hour in the office and 6½ in the warehouse, he usually spends approximately 14% of his time in the office on ISC I duties. His supervisor testified Grievant spends approximately 30% to 40% of his time in the office on ISC I duties. Examining all this evidence, the undersigned Administrative Law Judge finds when the typical time Grievant spends in the office is averaged in with the full days and occasional week Grievant occasionally spends in the office, the total would be at least 25%. This is especially true since some of the duties Grievant performs at the warehouse are within the ISC I classification. Accordingly, Grievant has not demonstrated the time hespends working as an ISC I has fallen below the 25% mark and would require a reallocation of his classification by the Division of Personnel.

Since the duties Grievant is now performing are more complex and carry more responsibility than the Office Assistant duties, Grievant has not been functionally demoted. Further, since Mr. Frye is

now more pleased with Grievant's performance and productivity, the additional duties would not impact Grievant's ability "to obtain future job advancement." Dudley, supra.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 grievant has not met his or her burden. Id.

2. Reprisal is defined in W. Va. Code § 29-6A-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." 3. 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).

4. 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.

5. While Grievant has established a change in duties occurred close in time to the filing of his grievances, he has not established a prima facie case of retaliation, as he did not prove he was treated in an adverse manner. 6. "[A] 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement." Dudley v. Bureau of Senior Serv., Docket No. 01-BSS-092, (July 16, 2001)(citing Gillespie v. W. Va. Dep't of Corrections, 89-CORR-105 (Aug. 29, 1989)).

7. Grievant did not establish he has been functionally demoted.

Accordingly, this grievance is **DENIED**.

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 § 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 10, 2003

Footnote: 1

Grievant was represented by Attorney Clinton Smith, and Respondents were represented by Attorney Amy Haynie.

Footnote: 2

In his original Statement of Grievance, Grievant asserted the phone in the warehouse was broken and implied Mr. Frye would not fix it because Grievant was now working in the warehouse. Testimony revealed the phone was broken accidently, and the supervisor of the warehouse did not think it needed to be fixed as there were other phones available to the employees in that area.

Footnote: 3

These grievances were appealed to the Grievance Board and were consolidated for hearing and decision with Docket No. 02-ADMN-363. They were denied on December 31, 2002.

Footnote: 4

Grievant maintained the new duties he performed were those of a Storekeeper. Grievant has no expertise in classification, and his opinion was not accepted by Lowell Basford, Division of Personnel's Assistant Director of Classification and Compensation. Additionally, the parties agreed Mr. Basford was an expert in the area of classification and compensation. Accordingly, this assertion will not be discussed further.