ALLEN J. CODY,

Grievant,

v. **Docket No. 05-DJS-415**

DIVISION OF JUVENILE SERVICES and

DIVISION OF PERSONNEL,

Respondents.

DISMISSAL ORDER

Allen J. Cody, ("Grievant"), employed by the Division of Juvenile Services ("DJS") at the Industrial Home for Youth ("IHY"), filed a level one grievance on September 16, 2005, in which he alleged that his position had been reclassified as a result of retaliation. The grievance was denied at levels two and three. Appeal to level four was made on November 28, 2005. Grievant is represented by counsel, Michael J. Romano, DJS is represented by Steven R. Compton, Assistant Attorney General, and the Division of Personnel ("DOP") is represented by Karen O'Sullivan Thornton, Assistant Attorney General. Respondents have filed a "Motion to Hold the Grievance in Abeyance," citing civil litigation filed by Grievant now pending in the Kanawha County Circuit Court in which he requests the same relief as that he seeks in the present grievance. A hearing on the Motion was held on August 30, 2006. After due consideration of the evidence presented by the parties, the undersigned finds that it is appropriate to dismiss the grievance from further consideration at level four.

Findings of Fact

1. Grievant has been employed by DJS at the IHY at all times pertinent to this grievance.

2. Grievant was first employed by DJS as a Recreation Assistant, but he was promoted to the classification of Recreation Specialist in 1988. 3. In 2000, Grievant was promoted to the position of Deputy Superintendent at IHY, over the objection of then-DJS Director Manfred Holland. Eventually a compromise was attained whereby Mr. Holland acquiesced to the political pressure surrounding Grievant's promotion. However, because he did not believe Grievant was qualified for the position, Director Holland decided to place Grievant in an "in-training" status with no supervisory authority over other employees. Grievant was advised that his progress would be monitored, which could eventually result in him being given supervisory authority over other employees at IHY.

Grievant did not file a grievance challenging the decision to withhold supervisory authority.

4. In 2002, an Equal Employment Opportunity Commission investigation substantiated the claims of another employee that Grievant had acted in retaliation and created a hostile work environment. As a result, DJS demoted Grievant to Corrections Program Supervisor, with an attendant five percent salary reduction.

5. A grievance following the demotion was granted in December 2004, and Grievant was reinstated to his position as Deputy Superintendent effective February 2005. The issue of whether Grievant was entitled to hold supervisory authority was not determined by the level four decision. (See footnote 1)

6. The level four decision was upheld by the Circuit Court of Kanawha County by Order dated July 5, 2005. 7. On or about July 6, 2005, Cynthia Largent-Hill, then-Director of DJS, requested the DOP review the Deputy Superintendent positions at IHY and at the Davis Correctional Center.

8. Pursuant to an audit finding that the two positions were not assigned supervisory duties, DOP determined they were misclassified. The positions were subsequently reallocated by DOP to Corrections Program Supervisor, paygrade 13, effective September 7, 2005.

9. Grievant initiated this grievance at level one on September 16, 2005, seeking reinstatement of the Deputy Superintendent position at IHY, and his assignment to that position, or a comparable supervisory position.

10. On January 11, 2006, Grievant filed a complaint in the Circuit Court of Harrison County, naming the Department of Military Affairs and Public Safety, DJS, Manfred G. Holland, and Cindy Largent Hill as defendants. In this complaint, Grievant alleges, in part, that the Deputy Superintendent position was reallocated by DJS in retaliation for his having prevailed in the prior grievance regarding his demotion. For relief, Grievant seeks: reinstatement of the Deputy Superintendent position at IHY, and his assignment to that position, with the duties and supervisory authority held by such a position, or in the alternative, his assignment to a supervisory position comparable in pay grade, salary, duties and authority; compensatory, general and exemplary damages; attorney fees; costs; and interest. This case has been transferred to the Circuit Court of Kanawha County, by agreement of the parties.

Discussion

The statement of the grievance filed by Grievant on September 16, 2005, is as follows:

Grievant's position as Deputy Superintendent of the [IHY] was eliminated based on the pretext that economic efficiencies required its elimination, because the position of Deputy Superintendent at IHY had no supervisory authority, duties or responsibilities. The position of Deputy Superintendent was stripped of all supervisory authority, duties, and responsibilities by the Division shortly after Grievant was assigned to that position in or around 2000, at least in part, as retaliation for political patronage. The Division assigned the supervisory authority, duties and responsibilities of the Deputy Superintendent's position to positions titled Assistant Superintendents created after Grievant's assignment as Deputy Superintendent. The positions of Assistant Superintendent were eventually given higher salary grade classifications then [sic] the Deputy Superintendent's position, even though the Deputy's position was higher in the chain of command.

The Division previously attempted to wrongfully demote Grievant from his position as Deputy Superintendent, but that demotion was overturned by this Grievance Board. After the Grievant was returned to his position in February 2005, the Division eliminated the position of Deputy Superintendent on September 7, 2005, without ever returning any supervisory authority, duties, and responsibilities provided for in the posted job description for the Deputy Superintendent and for which Grievant was hired. The elimination of the position of Deputy Superintendent was a pretext to demote Grievant in retaliation for his successful challenge to his wrongful demotion and was based upon the false grounds that the Deputy Superintendent's position at IHY had no supervisory authority, duties, and responsibilities when it was the Division that had stripped the same from the position at the time Grievant was first hired for the same. The Division's decision to eliminate the position of Deputy Superintendent was, therefore, retaliatory and discriminatory in violation of the laws of this State.

Additionally, and in the alternative, Grievant was, in the least, entitled to the supervisory position immediately below that of the eliminated position of Deputy Superintendent.

Relief sought: Grievant seeks reinstatement of the position of Deputy Superintendent at IHY, or, in the alternative, assignment of Grievant to an equal supervisory position at IHY or that immediately below the position of Deputy Superintendent.

Retaliation *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." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that they engaged in protected activity, e.g. filing or participating in a grievance;

2) that they were 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 employees 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 employees' protected activity within such a period of time that retaliatory motivation can be inferred. (See footnote 2)

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. (See footnote 3)

Grievant's claim of retaliation is specious. Although the request that DOP review the Deputy Superintendent positions was submitted one day following the Circuit Courtorder in Grievant's previous grievance, both DJS and DOP are obligated to ensure that personnel are correctly classified. (See footnote 4) After an audit was completed, DOP, not DJS, determined that Grievant's position was misclassified. DOP was not a party in the prior grievance, and would have no reason to engage in retaliation. Grievant does not dispute DOP's finding that he did not perform any supervisory duties; therefore, the decision to reallocate the position based upon the duties actually performed cannot be construed as retaliation. It is also important to note that Grievant is not challenging DOP's determination that his duties are those of a Program Supervisor.

Timeliness

Grievant is now seeking not only reinstatement to a supervisory position, but to an assignment of supervisory authority which he, in fact, never held. Grievant did not file a grievance when supervisory authority was removed from the Deputy Superintendent's position at the time of his appointment in 2000. Neither did Grievant file a grievance when he was reinstated with no supervisory authority in

February 2005.

W. Va. Code § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievancewithin three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Grievant has been aware that he would have no supervisory authority since 2000, and is barred by the foregoing statutory time lines from pursuing that claim some five years later.

Pending civil action

The pending civil action includes a claim of retaliation relating to the reallocation of the Deputy Superintendent position, and the requested relief includes that being sought at level four. Because the civil claim is broader in nature than the pending grievance, and because a level four decision would likely result in a subsequent appeal to circuit court, it would be economically prudent for the matter to be resolved by a single review.

In addition to the foregoing, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. *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."

2. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that they engaged in protected activity, e.g. filing or participating in a grievance;

2) that they were 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 employees 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 employees' protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). *See 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).

3. A determination by DOP that Grievant's position was misclassified based upon the duties he performed, does not constitute retaliation by DJS for his previous grievance.

4. *W. Va. Code* § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

5. Grievant knew in 2000 that he would be assigned no supervisory duties, and is now barred by statutory time lines from pursuing that issue. Accordingly, the grievance is **DISMISSED**, and ORDERED stricken from the docket of the Education and State Employees Grievance Board.

Any party may appeal this Dismissal Order 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 Order. *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.

DATE: September 8, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Cody v. Div. of Juvenile Serv./Ind. Home for Youth, Docket No. 02-DJS-174 (Dec. 2004).

Footnote: 2

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See 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).

Footnote: 3

Webb, supra.

Footnote: 4

W. Va. Code § 29-6-10(1) mandates that DOP prepare, maintain and revise a position classification plan for all positions in the classified service and a position classification plan for all positions in the classified-exempt service, based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.