**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**THOMAS G. LACY,**
**Grievant,**

**v.** **DOCKET NO. 2009-1606-KanED**

**KANAWHA COUNTY BOARD**
**OF EDUCATION,**
**Respondent.**

## DECISION

Grievant Thomas Lacy filed this grievance on June 1, 2009, claiming harassment, discrimination, and emotional distress by his supervisor. His stated relief sought is "Management behavioral classes or dismissal."

A level three hearing was held in the Grievance Board's Charleston office on December 14, 2009. Grievant appeared *pro se* and Respondent was represented by its general counsel, James Withrow, Esq. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

## Synopsis

Grievant made many claims in his statement of grievance of perceived wrongs dating back to the date he was hired. Most of these claims were untimely, but he alleged ongoing harassment, which is a continuing practice. However, he nevertheless failed to make a claim for any event that occurred within the time for filing of a grievance, and his allegations of harassment did not rise to the level of misconduct that could be construed as harassment. Therefore, the grievance is denied.

## Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed by Respondent as a Substitute in its Maintenance Department.

2. Grievant's supervisor is William Hughart, Maintenance Supervisor.

3. Grievant has been an employee of Respondent for six years.

4. On February 20, 2009, Grievant was called out to substitute for a job that was to run from 6:00 a.m. to 2:00 p.m. He arrived at 11:00 a.m. and worked until 2:00 p.m., and was paid for the hours he worked rather than for a full day. Respondent's policy is to only pay for a full day if the employee works at least 3.5 hours.

5. Respondent has a summer maintenance program that requires them to hire around 40 extra summer positions. Substitute employees are only hired if no regular employee applies and receives the position; except for one slot that requires an electrician's license. No regular employee has an electrician's license, but a substitute employee does, so he may be hired for that job. Grievant does not have an electrician's license.

6. If a regular 261-day employee is absent during the summer, a substitute is used through the normal substitute call-out system. Grievant is called out in the summer, but does not always answer the call.

7. Grievant does not have a commercial driver's license (CDL), so he is ineligible to fill any jobs that require a CDL. Contrary to Grievant's belief that he was made

ineligible for truck driving jobs because he made a complaint, in reality he stopped getting those jobs because he was not qualified due to his lack of a proper license.

8. Mr. Hughart, in the past has informally reprimanded Grievant in front of other employees rather than privately, but Grievant could not recall the last time this happened.

9. Respondent asserted the issue of timeliness at the lower level hearing.

**Discussion**

Since this claim is not challenging a disciplinary action, Grievant bears the burden of proving his claims by a preponderance of the evidence.[1] However, Respondent contends the claims raised in the statement of grievance are untimely.

Grievant's Statement of Grievance in full is set out in nine parts:

1) Extreme conduct by William "Bill" Hughart by insulting and harassing me in view of six other Employees at Crede School. This has caused severe emotional distress. He has belittled me and harassed me over a period of 5 years.
2) He has denied me of differential pay and overtime pay.
3) He has blacklisted me for many call-outs especially 2/10 through 12 of 2009.
4) Blacklisted me for the summer call-outs while I have seniority over other employees.
5) He has not paid me for February 20, 2009 call-out.
6) Denied any clothes allowance and other benefits calling me just a "sub".
7) His general management style is reckless and unfair and he has created an environment that is hostile to work in.
8) I seek an administrative remedy and a recovery of lost wages along with a return of my dignity.
9) General comment is that management need training on EEOC policies and training in management skills or terminated.

---

[1]Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

Of these discrete complaints, he could not describe any incident that occurred after February 2009. Respondent correctly argues, as it did at the lower levels of this proceeding, that Grievant's claims are untimely, as he filed this claim more than fifteen days after the last occurrence of any event he complains of. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997).

To be considered timely, and therefore within the jurisdiction of the Grievance Procedure, a Grievance must be filed "Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." W. VA. CODE § 6C-2-4(a)(1).

Grievant did argue, however, that Mr. Hughart's behavior was consistent and that he always acted in an insulting and harassing manner. In that respect, the working condition Grievant complains of is ongoing, and is the only aspect of this grievance that could be considered timely.

WEST VIRGINIA CODE § 6C-2-2(l) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.” What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "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 his or 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. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998); *Tibbs v. Hancock County Bd. of Educ.*, Docket No. 2009-0375-HanED (Aug. 4, 2009).

Grievant’s claims that his Management “chews you out in front of the whole group, not one-on-one,” which is embarrassing. He stated at the lower level hearing that this happened the first year he worked for Respondent, but also stated this happened several other times. Grievant further claimed as “harassment” the fact that when he comes into work, Mr. Hughart does not greet him or return a greeting.

Although Grievant requested several subpoenas for witnesses he said could corroborate his claims, he elected not to serve those subpoenas on his co-workers. There was no evidence that Respondent interfered with Grievant’s ability to subpoena and

present witnesses. With no clear description of what he claims is harassment or when it occurred, Grievant failed to meet his burden of proving that he was harassed.

The following conclusions of law support this discussion:

**Conclusions of Law**

1. Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. To be considered timely, and therefore within the jurisdiction of the Grievance Procedure, a Grievance must be filed "Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." W. VA. CODE § 6C-2-4(a)(1).

3. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

4. If the respondent meets its burden of proving a grievance is untimely, the grievant may then attempt to demonstrate that he should be excused from filing within the

statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). Grievant did not present evidence of any fact that would excuse him from timely filing.

5. With the exception of Grievant's claim of ongoing harassment, Respondent met its burden of proving this grievance is untimely.

6. "Harassment" is "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997); *Tibbs v. Hancock County Bd. of Educ.*, Docket No. 2009-0375-HanED (Aug. 4, 2009).

7. Grievant did not meet his burden of proving that he has been subjected to harassment.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty days of receipt of this Decision. See W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

**January 26, 2010**

**M. Paul Marteney**
**Administrative Law Judge**