THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD D. MANGUS,

Grievant,

v. **Docket No. 2013-1009-HRC**

HUMAN RIGHTS COMMISSION,

Respondent.

DECISION

Grievant, Richard D. Mangus, filed a level one grievance against his employer, Respondent, Human Rights Commission ("HRC"), on January 4, 2013, stating as follows: "[s]upervisors hold files of cases assigned to me and make me get one at a time; and have me repeat work such as making frivolous and unnecessary changes to documents I have written and requiring me to make repeat phone calls to ask questions I already asked, wasting time." As relief sought, Grievant seeks the following: "[a]ll files in my work cubicle, locks put on file drawers, cessation of unnecessary document revisions and repeat phone calls."

The level one hearing was conducted on January 23, 2013. The grievance was denied by decision dated February 4, 2013. Grievant appealed to level two on February 6, 2013. A level two mediation was conducted on March 18, 2013. On April 8, 2013, Grievant perfected his appeal to level three. A level three hearing was held on August 6, 2013, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*.[1] Respondent

[1] Grievant's sister, Beverly Morris, was present during the level three hearing. She did not act as Grievant's representative. She was present only for moral support. Respondent had no objection to Ms. Morris being present during the hearing.

appeared by counsel, J. Robert Leslie, Deputy Attorney General. This matter became mature for decision on September 10, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, an investigator, asserts that management treated him differently than other similarly situated employees, when it stopped allowing him to keep his case files at his desk. Grievant further asserts that he was directed to rewrite reports and complaints more often than his co-workers. Grievant also asserts that the centralized filing system his employer implemented is inefficient and causes him to waste time. Respondent denies Grievant's claims, and asserts that the decision to implement the centralized filing system was the prerogative of management and violates no rules, policy, or law. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Richard D. Mangus, is employed by Respondent as an Investigator II.

2. Grievant's direct supervisor is James L. Johnson, Investigator III/Supervisor. Yodora Booth is the Director of Operations at HRC. Phyllis H. Carter, Chief Administrative Law Judge, is the Acting Executive Director of HRC.

3. As an Investigator II, Grievant is required to conduct interviews, draft reports, and draft legal documents, such as complaints, to be filed with various

government agencies. Further, Grievant is required to maintain, update, and organize investigative files.

4. Investigators are required to complete five case reports and three complaints each month. Investigators are also required to participate in case review meetings with Mr. Johnson, Ms. Booth, and/or agency attorneys.

5. Many investigators at HRC, including Grievant, do not complete five case reports and three complaints each month.

6. Investigators are commonly required to revise or rewrite the complaints they have drafted after such are reviewed by Mr. Johnson, Ms. Booth, and the agency's attorneys.

7. After reviewing his work product, Grievant's supervisors and agency attorneys have required him to make revisions and corrections to his reports and complaints. They have also required Grievant to re-interview complainants by telephone.

8. In 2012, Grievant's supervisors observed his case files appearing disorganized and incomplete. Grievant's cubicle also appeared messy and disorganized.

9. In or about August 2012, Mr. Johnson moved Grievant's case files from Grievant's cubicle to his office. Mr. Johnson required Grievant to retrieve his case files one at a time from his office, and Grievant was not allowed to store the files in his cubicle. Until this time, Grievant's case files were housed in his cubicle.

10. Mr. Johnson removed Grievant's files from his cubicle in an effort to help Grievant improve his work product, the theory being if Grievant worked on one case file

at a time, he would complete his reports and better organize his files. Grievant was not the only investigator whose files were taken from him in this fashion. Mr. Johnson held the files of Investigator James Slack for a time period in 2012, as well.

11. In January 2013, Director Carter made the decision to institute a centralized filing system for the case files at HRC to correct a deficiency that had been noted in a report of the 1995 Performance Audit under the sunset provisions of the West Virginia Human Rights Act and in response to an inquiry made by the Executive Director of the Herbert Henderson Office of Minority Affairs on behalf of the Legislative Oversight Committee. The deficiency noted concerned confidentiality of records and safety.

12. The centralized filing system and procedure requires that all case files be housed in a secure, locked room. To complete their work on case files, employees check-out files one at a time, and return them to the file room. Investigators are no longer allowed to house case files at their desks.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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 Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant argues that the centralized filing system and procedure causes him to waste time. Further, although Grievant does not use the term "discrimination," he asserts that he has been singled-out and treated differently than other employees. Specifically, Grievant claims that he was required to re-write reports and complaints more often than other employees, as well as re-interview people, and that his files were taken away from him months before the centralized filing system was instituted. Respondent denies Grievant's claims, and asserts that it treated Grievant no differently than any other employee. Respondent further asserts that the decision to place the case files in a centralized location is within management's discretion and violates no policy or rule.

In the grievance process, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The evidence presented establishes that management and the agency attorneys commonly directed the investigators to re-write or revise complaints they have drafted. Also, the evidence establishes that investigators were commonly directed to re-interview individuals over the phone. The evidence presented does not establish that Grievant was treated differently than the other investigators. While it appears that some investigators had to do fewer re-writes than others, such was a factor of the quality of their work. Simply put, the writing of reports and complaints just comes easier to some. Respondent demonstrated that drafting complete, accurate complaints and reports is crucial to HRC fulfilling its duties and responsibilities.

Grievant also asserts that he was singled out when Mr. Johnson removed his case files from his cubicle in or about August 2013, before the centralized filing system was implemented. From the evidence presented, it appears that Mr. Johnson removed Grievant's files from his cubicle in an effort to help Grievant improve his work product and organization. Also, the evidence establishes that Mr. Johnson took Investigator James Slack's files from him in a similar fashion.[2] Even though Grievant's files were taken from his cubicle months before the office-wide ban on housing files at employees' desks was implemented, such was done in an effort to improve Grievant's work product. The evidence presented does not suggest that Mr. Johnson took the files from Grievant's cubicle for any improper, or arbitrary, reason. Therefore, Grievant has failed to prove by a preponderance of the evidence that he was the victim of discrimination.

[2] It is unclear from the record why Mr. Johnson took Investigator Slack's files.

Grievant complains that the centralized filing system is inefficient and causes him to waste time. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ*., Docket No. 99-39-271 (Nov. 30, 1999). The Grievance Board may not substitute its management philosophy for that of an employer. *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997). While the undersigned can understand Grievant's frustration with not having his files readily accessible at his desk, Grievant has presented no evidence to suggest that the centralized filing system and procedure violates any rule, policy, or law. The evidence presented establishes that Director Carter implemented the centralized filing system to correct a deficiency regarding the confidentiality of records and safety that had been noted in a legislative audit. While the centralized filing system has changed how Grievant performs his work, it has caused no detriment to Grievant's performance, health, or safety.

For the reasons set forth herein, the undersigned finds that Grievant has not met his burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. *See,* Procedural Rules of the W.

Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990).

2. In the grievance process, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, an employee must prove:

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Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ*., Docket No. 99-39-271 (Nov. 30, 1999). The Grievance Board may not substitute its management philosophy for that of an employer. *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997).

4. Grievant has failed to meet his burden of proving his claims by a preponderance of the evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) 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).

DATE: December 31, 2013.

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Carrie H. LeFevre
Administrative Law Judge