THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RON SHAFFER,
Grievant,

v. **Docket No. 2013-0161-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent,

JAMES PAULEY,
Intervenor.

DECISION

Grievant, Ron Shaffer, is employed by Respondent, Kanawha County Board of Education. On August 7, 2012, Grievant filed this grievance against Respondent stating, "Grievant asserts that a fellow employee, Jamie Pauley, has harassed, bullied and assaulted him, physically and verbally in violation of the employee code of conduct and W. Va. Code 6C-2-2." For relief, grievant seeks: "appropriate measures to protect him from future incidents of harassment, bullying and assault; documentation of the incidents; and appropriate measures against Intervenor."

Following a level one conference[1], a level one decision was rendered on September 12, 2012, denying the grievance. Grievant appealed to level two on September 14, 2012. Grievant perfected the appeal to level three of the grievance process on December 31, 2012. A level three hearing was held on February 11, 2013 and March 25, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared, *pro se*. Respondent was represented by counsel, James W. Withrow, General Counsel, Kanawha County Board of Education. Intervenor was represented by Ben Barkey, West Virginia Education Association. This matter

[1] The record does not reflect the date of the conference.

became mature for decision on April 22, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleges he was harassed by Intervenor. Grievant proved by a preponderance of the evidence that he was harassed by Intervenor. The Grievance Board has no authority to order Intervenor to undergo drug testing or mental evaluation, or to order Respondent to take disciplinary action against Intervenor. Grievant is not entitled to know the disciplinary action taken against Intervenor. However, Respondent has some responsibility to stop an employee from engaging in harassing conduct. Accordingly, the grievance is granted.

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 is employed by Respondent as a heavy equipment operator in the maintenance department's grounds crew. Grievant has been employed by Respondent for approximately four and one half years.

2. Intervenor is a roofer/sheet metal mechanic with the grounds crew.

3. Sometime in the summer of 2011, Intervenor made a comment to Grievant to the effect of, "You'd look better six feet under." Grievant did not report this comment to his supervisor at the time.

4. In the summer of 2012, Grievant and Intervenor were assigned to a special project converting the previously-closed Chandler school. This was a major and priority project that involved many employees.

5. Sometime after Grievant and Intervenor began work at Chandler, Intervenor made a comment to Grievant about being an excellent marksman from being in military service and that “if you hear the shot, it wasn’t me, because I don’t miss.”

6. Sometime between July 20 and July 23, Grievant and several other employees, including Intervenor, were assigned to break up a sidewalk. Grievant was operating a skid steer, which is a multi-purpose piece of equipment with a “scoop” attached to the front, which can be used to move debris. Brian Canterbury was operating a jackhammer to break up the sidewalk. Intervenor was using a shovel to shovel the resulting debris into the scoop of the skid steer, while Grievant sat in the cab of the skid steer. During that time, Intervenor was angry with Grievant because Grievant would not leave the skid steer between loads to help with the other tasks. Grievant did not want to help Intervenor because of Intervenor’s previous behavior towards Grievant, and because Grievant believed he should be responsible for only operating heavy equipment. Tension continued to escalate and Intervenor picked up Grievant’s coffee cup and mimed spitting in it. Sometime later, Intervenor purposefully shoveled debris onto Grievant as he sat in the skid steer. The seat is situated several feet above the top of the scoop, and the cab is open in the front.

7. The next day, Grievant called the Superintendent of Schools to report the incidents. The Superintendent referred the complaint to the Executive Director of Maintenance, Terry Hollandsworth.

8. Mr. Hollandsworth conducted an investigation and determined that Intervenor “did exhibit behavior unbecoming of a Kanawha County School employee.” Mr. Hollandsworth later instructed Intervenor to cease such behavior and took

disciplinary action against him. Mr. Hollandsworth was prohibited from disclosing to Grievant any disciplinary action taken due to confidentiality.

9. At some point after the previous incidents were reported, Intervenor, in front of multiple employees, sang and danced around mocking Grievant for reporting his behavior. Grievant overheard this outburst, but it is unclear if Intervenor was aware Grievant was there.

10. Respondent has not worked Grievant and Intervenor together since the investigation. There have been no further incidents between them.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's dispute with Respondent goes deeper than the instant grievance. At the time of the hearing, Grievant had multiple grievances proceeding against Respondent and there had been incidents that happened after the filing of this grievance. Some of the evidence presented by Grievant was not actually relevant to this particular grievance, as this grievance is confined to the statement of grievance and

request for relief, which referred only to the actions of Intervenor. Issues such as the dispute Grievant had with Mr. Adkins over service of a subpoena and the relationship between Grievant and the rest of the team cannot properly be addressed in this decision.

Grievant alleges five specific incidents regarding Intervenor: throwing debris, miming spitting in his coffee, mocking him with a song, and making two statements Grievant perceived as threats. Although Intervenor did not testify, in the investigation he denied all allegations except he admitted he mimed spitting in Grievant's coffee. Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Collectively, Grievant's coworkers behaved very inappropriately as a group on the day of the hearing. While in the waiting room they were loud and disruptive and had to be called down by Grievance Board staff. This behavior happened in the presence of and with the possible participation of Mr. Lanham, a supervisor, and Mr. Blankenship, a crew leader. In addition, even though the witnesses were all specifically instructed not

to talk about the case or their testimony, witnesses were overheard by staff discussing the case and testimony and one of the witnesses admitted in his testimony that there had been discussions about the hearing and testimony in the waiting room as witnesses finished testifying and did not leave. This ALJ recognizes, as one of the witnesses stated in his testimony, that this is “a bunch of construction workers” whose behavior might be rougher than that of professionals. Regardless of that understanding, their behavior was unacceptable. However, Grievant’s own behavior in the hearing was also problematic. He was argumentative, threw his glasses down on the table multiple times, and did not follow the directions of this ALJ.

Grievant called numerous witnesses to testify. As stated above, much of the testimony was simply not relative to this particular grievance concerning the behavior of Intervenor. Further, most witnesses testified that they just did not see any of the incidents, not that they testified that the incidents did not happen. While this ALJ is of the opinion that several of the witnesses were not credible, credibility determinations will only be made for those witnesses for whom credibility was an issue in determining the relevant facts of this particular grievance.

Lisa Hoover is a pre-kindergarten aide who worked with the grounds crew at Chandler during the summer of 2012. Ms. Hoover witnessed Intervenor perform the mocking song and dance about Grievant. Ms. Hoover’s testimony was credible. While she seemed reluctant to involve herself in a dispute, she was calm and direct in her responses to questioning. Her testimony did not waiver under cross examination, and was plausible and consistent. She appeared to have no personal interest in this controversy.

Brian Canterbury is a bus driver who worked with the grounds crew at Chandler during the summer of 2012. He was working directly with Grievant and Intervenor when the debris throwing occurred. Mr. Canterbury did not see the debris being thrown. However, he testified that Intervenor and Grievant were "picking at" each other, and that Intervenor was angry because Grievant was not doing his fair share of the work. Then Mr. Canterbury turned around and saw Grievant's lap full of debris, saw Grievant leave, and cleaned the debris from Grievant's seat after he left. Although Mr. Canterbury does not normally work with the grounds crew, he was familiar with both Intervenor and Grievant from their previous employment. Mr. Canterbury did not appear to have any bias for or against either Grievant or Intervenor. His demeanor and attitude towards the proceeding appeared to be appropriate. Mr. Canterbury was credible.

While Grievant's demeanor was somewhat problematic, it did not seem to indicate dishonesty, but rather, frustration. No witness specifically disputed Grievant's assertions, but rather most witnesses simply testified that they did not recall, did not believe they were present, or that they simply did not see or hear anything. In the investigation, Intervenor denied all incidents, other than admitting to miming spitting. However, Intervenor did not testify, so his credibility cannot be determined and his blanket denial cannot be given weight. Further, Grievant's testimony regarding the incidents was supported by the testimony of several witnesses. Mr. Canterbury's testimony surrounding the debris throwing corroborates Grievant's testimony. Given Intervenor's admitted action with the coffee and his anger at Grievant, it is no stretch to believe he purposefully threw the debris on Grievant. Grievant's testimony regarding the mocking song and dance is supported by the credible testimony of Ms. Hoover who

directly witnessed this incident. Mr. Lanham admitted that Grievant had told him about the "six feet under" comment in 2011, directly after it happened. Grievant's testimony regarding the incidents was credible.

Therefore, it appears more likely than not that Intervenor mimed spitting in Grievant's coffee, threw debris on Grievant, performed a song mocking Grievant in front of Grievant and other coworkers, and made two inappropriate comments to Grievant. Analysis then turns to whether these incidents constitute a grievable event.

Grievant alleges that Intervenor's behavior constitutes harassment. "'Harassment' means 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). Grievant does not appear to have alleged the Intervenor's conduct had a discriminatory motive, so this grievance is not in the nature of a hostile work environment discrimination claim.[2]

Grievant's crew leader, immediate supervisor, and many co-workers, to the extent they admitted anything had happened, justified such behavior as "horseplay." There is no question Intervenor's actions crossed the line and were not "horseplay." Intervenor's actions were clearly intended to annoy and humiliate Grievant. They were not at all good-natured. These attempts to dismiss Grievant's concerns by the witnesses were clearly due to bias against Grievant. Spitting in someone's coffee is

[2] Although Grievant did file a discrimination complaint with the Human Rights Commission, that complaint was filed in February 2013. In this grievance, Grievant made no allegation that Intervenor knew or perceived Grievant to have a disability, or that Intervenor's actions were because of any perceived disability.

not acceptable under any circumstance. Throwing dirt and rocks on someone, and then making up a mocking song when he complains, is juvenile to the extreme. Grievant was, and remains, distressed by Intervenor's actions, and it was reasonable for Grievant to be irritated and annoyed. Intervenor's actions against Grievant were not confined to a single incident, but continued over time. Although many of the witnesses tried to justify rough behavior because of the nature of their work, Intervenor's actions were not acceptable even considering the rough nature of the work. There is no question Intervenor engaged in harassment of Grievant.

For relief, Grievant seeks "appropriate measures to protect him from future incidents of harassment, bullying and assault; documentation of the incidents; and appropriate measures against Intervenor." In his Proposed Findings of Fact Conclusions of Law, Grievant specifically requested that Intervenor be ordered to undergo a mental evaluation and drug testing and that Grievant be transferred "out of the grounds crew to another work area away from these individuals who assault and harass me." While the undersigned is convinced that Grievant was harassed by Intervenor as he asserts, the Grievance Board is limited in the relief that may be granted.

It is understandable that Grievant wants Intervenor to be punished more severely and to be informed of that punishment; however that is not a remedy available. Respondent did discipline Intervenor, but disciplinary actions are confidential, so Respondent was not allowed to inform Grievant of the disciplinary action taken. Even if Intervenor had not been disciplined, "[t]he Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another

employee. *Goff v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-048 (Apr. 7, 2003); *Coster v. W. Va. Div. of Corrections,* Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors,* Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.,* Docket No. 91-54-497 (May 14, 1992)." *Emrick v. Wood County Bd. of Educ.,* Docket No. 03-54-300 (March 9, 2004). The Board also does not have the authority to order mental evaluations or drug testing. "[W]hile at times an employer may request an employee submit to psychological testing and assessment, this request must be related to the employee's duties and performance, and it is a request made by management. *See Adkins v. Div. of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005). Even if this assessment is requested and performed, there are no provisions for employees to have access to another employee's medical records and reports." *Robinson and Anderson v. West Virginia University*, Docket No. 06-HE-416 (March 31, 2008).

Grievant asserts that the only way to protect him from future incidents of harassment would be to move him. Again, while it is understandable for Grievant to desire this outcome, there is no evidence that it is necessary to protect Grievant from Intervenor, and any alleged harassment by others is not within the scope of this grievance[3]. Respondent has separated Grievant and Intervenor. The two have not worked together since the incident, and this, coupled with whatever disciplinary action

[3] In his Proposed Findings of Fact Conclusions of law, in requesting a move, Grievant named "individuals who assault and harass me." This grievance was filed specifically regarding the actions of Intervenor. While Grievant presented evidence that there may be conflict between he and other employees, those instances are not a part of this grievance. To the extent Grievant believes he is suffering harassment or other injury by other employees, or that he has been retaliated against, those claims would need to be addressed in a separate grievance.

was levied against Intervenor, appears to have been sufficient to stop the harassment by Intervenor. Grievant admits there have been no further incidents with Intervenor since last year, so moving Grievant is not necessary to remedy the harassment that has now ceased.

Although there has been no further incident of harassment of Grievant by Intervenor, this may be due to simple lack of opportunity. Therefore, an order is still warranted. It is not clear whether the Grievance Board would have the authority to order Respondent to maintain separation between Grievant and Intervenor. Such a remedy has neither been specifically ordered nor denied by this Board. Previously, this Board has ordered the removal of a subordinate from the supervision of a harassing supervisor. *Grant v. Cabell County Bd. of Educ.*, Docket No. 04-06-345 (February 28, 2006). Also, this Board has ordered a Respondent to "take whatever steps that are appropriate and necessary, utilizing the corrective and disciplinary measures available" to stop harassment when the Respondent was aware of a situation in which an employee was harassing co-workers and took "no meaningful action to correct the situation." *White v. Monongalia County Bd. of Educ*., Docket No. 93-30-371 (March 31, 1994). In this case, Grievant was subjected to harassment by a coworker, and his crew leader and immediate supervisor did not take appropriate action, but Mr. Hollandsworth did take appropriate action once notified of the situation. "A board of education bears some responsibility to intervene and stop an employee from engaging in conduct which by definition constitutes harassment." *Id.* To that end, Respondent should be ordered to continue its intervention to prevent further harassment of Grievant by Intervenor by whatever means Respondent deems appropriate.

The following Conclusions of Law support the decision reached.

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. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "'Harassment' means 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).

3. Intervenor's actions against Grievant constituted harassment.

4. "The Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Goff v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-048 (Apr. 7, 2003); *Coster v. W. Va. Div. of Corrections,* Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors,* Docket No. 93-BOD-295 (Apr. 27, 1994). *See Daggett v. Wood County Bd. of Educ.*,

Docket No. 91-54-497 (May 14, 1992)." *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (March 9, 2004).

5. "[W]hile at times an employer may request an employee submit to psychological testing and assessment, this request must be related to the employee's duties and performance, and it is a request made by management. *See Adkins v. Div. of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005). Even if this assessment is requested and performed, there are no provisions for employees to have access to another employee's medical records and reports." *Robinson and Anderson v. West Virginia University*, Docket No. 06-HE-416 (March 31, 2008).

6. "A board of education bears some responsibility to intervene and stop an employee from engaging in conduct which by definition constitutes harassment." *White v. Monongalia County Bd. of Educ*., Docket No. 93-30-371 (March 31, 1994).

Accordingly, the grievance is **GRANTED**. Intervenor shall not engage in harassing behavior towards Grievant. Respondent shall continue its intervention to prevent further harassment of Grievant by whatever means Respondent deems appropriate.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: September 19, 2013

_____
Billie Thacker Catlett
Administrative Law Judge