

	)	
<b>DONNA G. LEWIS, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 04-2051</b>
	)	<b>Issued: April 25, 2005</b>
<b>DEPARTMENT OF THE INTERIOR, BUREAU</b>	)	
<b>OF INDIAN AFFAIRS, Tuba City, AZ,</b>	)	
<b>Employer</b>	)	
	)	

### Case Submitted on the Record

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

On August 16, 2004 appellant filed a timely appeal of merit decisions of the Office of Workers' Compensation Programs' decisions dated January 30 and July 2, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for a subpoena.

On May 13, 2002 appellant, then a 55-year-old teacher, filed an occupational disease claim alleging that she developed stress in the performance of duty. Appellant indicated that she

first became aware of the injury and its relation to her work on April 17, 2002. Appellant did not stop work.<sup>1</sup>

Appellant submitted a 12-page statement. She alleged that she was continually harassed by Louise Thompson the second-grade teacher regarding her teaching capabilities. Appellant alleged that Ms. Thompson and her husband and a neighbor, Verna Talsalt, harassed her on several occasions regarding her dogs and her family. Regarding the harassment towards her family, appellant explained that this included receiving a letter of reprimand for taking a government vehicle in December 2001 with a friend. She also alleged that rumors were made regarding with her personal life. Appellant indicated that she was a union steward and was harassed with regard to filing grievances, including one regarding 15-minute breaks that led to a “staff meeting” on May 6, 2002. Appellant alleged that her leave requests on March 8, 15 and 22, 2000 were denied. She indicated that on March 22, 2002 she received a nonrenewal letter from Ester Frejo, the principal. Further, appellant alleged that, on April 11, 2002, she was monitoring the school halls when she approached three male students in the gymnasium. Appellant advised that later that day, she found out that one of the students had a loaded gun and that, upon hearing this, she became sick to her stomach. A few days later a second gun was found on campus in a truck. She experienced headaches and sought medical attention.

In letters dated June 25, 2002, the Office requested additional supportive factual and medical evidence.

The Office received a February 11, 2002 letter to Ms. Frejo, the principal, regarding a student Lamour Tracy; an April 22, 2002 note to the principal from appellant, advising that she would not be in due to a family emergency; a July 14, 2002 narrative from appellant; a July 14, 2002 witness statement from Irene Benally, a coworker; a May 13, 2002 Form CA-7 claim for compensation for the period April 22 to 26, 2002; and medical documentation consisting of progress notes and reports dated May 9 through July 16, 2002 from Dr. Chelsea Chesen, a Board-certified psychiatrist. In a July 16, 2002 report, Dr. Chesen opined that appellant had chronic post-traumatic stress disorder and an exacerbation of the illness due to an incident that occurred while appellant was working as a teacher on a reservation.

In a July 14, 2002 statement, Ms. Benally, a teacher, discussed the treatment that appellant received from Ms. Thompson and her sister, Verna Talsalt. She alleged that, during meetings discussing school curriculum, Ms. Thompson would take up most of the time by claiming that she was not teaching the students to read. Ms. Benally explained that, when Ms. Thompson was asked to identify those students who were not reading, they were identified as special education students. Ms. Benally also indicated that she was surprised that appellant would take these attacks in stride at both the primary meetings and staff meetings. Another teacher advised Ms. Thompson that she should stop complaining and get on with her job. Ms. Benally also alleged that both sisters ganged up on appellant by claiming she took a week off after confronting the boys in the gym, by claiming a new union steward was needed and by picking on her family.

---

<sup>1</sup> Appellant requested sick leave from April 22 to 26, 2002.

In a July 14, 2002 narrative, appellant repeated her allegations and claimed that her illness resulted from the confrontation in the gymnasium with the three students, including one who was holding a loaded gun. She alleged experiencing harassment in filling out forms. Appellant provided a copy of her May 6, 2002 letter to Ms. Frejo, concerning grievances being filed for a 15-minute break and the letter dated March 22, 2002 advising her that her contract was not being renewed.

In a letter dated July 21, 2002, Ms. Frejo responded to the allegations, included a position description and alleged that there was no record of any stressful environment, harassment or prejudicial practice. She noted that no reports were filed by appellant or any other employee and that there were no duties that could be perceived as stressful due to overtime, deadlines, quotas, travel or intense assignments. Regarding conflicts with coworkers, Ms. Frejo advised that appellant had created conflicts by placing herself in awkward situations using her union status to write memoranda and grievances without the consent of staff members. She indicated that appellant was unfriendly to coworkers. Regarding accommodations, Ms. Frejo alleged that no doctor's reports were on file with respect to stress caused by her employment and that no special accommodations were made and that there were no staffing shortages.

The Office also received a report dated May 6, 2002 from Ms. Frejo, concerning the dates of April 6, 21 through 24 and 29 and May 6, 2002 in which she alleged instances involving appellant; a May 9, 2002 statement from Desi Yazzie, a sponsor of the eighth grade class, who alleged that he heard gunshots east of the school building on May 2, 2002 around 9:15 p.m.; a May 9, 2002 statement from Ms. Talsalt regarding appellant and her family; reports dated May 6, 2002 from Ms. Frejo, for surveillance regarding gunshots; a May 6, 2002 report from Rena Begay, appellant's neighbor, concerning an incident on May 4, 2002; a May 4, 2002 statement from Ms. Thompson concerning gunshots heard on May 3, 2002; a February 20, 2002 incident report concerning appellant giving money to students, except for the child of Ms. Thompson; a February 15, 2002 statement from Jerri Klassen, appellant's neighbor, concerning an incident on February 8, 2002. Additional statements included a February 11, 2001 letter from Ms. Begay, regarding Mr. Tracey, a student and an undated statement from Mr. Tracey regarding gunshots on May 5, 2002.

In a November 21, 2002 decision, the Office denied appellant's emotional condition claim. The Office accepted two incidents as factual, appellant's receipt of a letter of reprimand for taking a government vehicle in December 2001 with her boyfriend and a nonrenewal letter. These were both determined to be disciplinary and administrative actions, which were not in the performance of duty. The claim was denied as appellant failed to establish that her claim arose in the performance of duty.

By letter dated December 3, 2002, appellant requested a hearing. On January 24, 2003 she requested that the Office subpoena several witnesses.

By decision dated September 23, 2003, the Office hearing representative denied appellant's request for a subpoena on the grounds that she had not provided any compelling reasons as to why the persons identified in her request should be subpoenaed to testify. Appellant was advised that the denial of her request for a subpoena was not a basis for delaying a

hearing, nor was the denial appealable prior to issuance of an adverse decision of the Office hearing representative. Appellant was advised that she could bring anyone she would like to testify voluntarily. A hearing was held on October 22, 2003.

By decision dated January 30, 2004, the Office hearing representative affirmed the November 21, 2002 decision.

By letter dated May 13, 2004, appellant requested reconsideration. She alleged that she was harassed and treated unfairly by her coworkers, which was stressful, but emphasized that her claim was directly related to the April 11, 2002 incident in which she confronted three students in the gymnasium, one of which had a loaded gun. She included a separate 12-page statement repeating her allegations.

By decision dated July 2, 2004, the Office denied modification of the January 30, 2004 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>2</sup> On the other hand the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>3</sup>

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which she claims compensation was caused or adversely affected by employment factors.<sup>4</sup> This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.<sup>5</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office as part of its adjudicatory function, must make findings of fact regarding, which working conditions are deemed compensable factors of employment and are to be considered by the physician when

---

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

<sup>4</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>5</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>6</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated November 21, 2002, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must thus initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant claims that she confronted three boys in the gymnasium while on a duty as a hall monitor. She later learned that one of them had a loaded gun. She also alleged that a few days later a second gun was found in a truck. The Board finds that appellant's emotional condition is not compensable as it resulted from her reaction to the subsequent revelation that guns were found rather than from her day-to-day duties, specially assigned duties, or any other requirement imposed by her federal employment. She has not establish that the boys in the gymnasium were armed as alleged. The Board finds that appellant's reaction to hearing that a weapon was found on a student and later in a truck was self-generated and did not arise out of or in the course of employment and thus is not a compensable employment factor.<sup>8</sup> The fact that an employee learns of a situation after the fact and sustains an emotional condition, does not, in and of itself, provide the necessary nexus to establish that the emotional condition occurred while in the performance of duty, as required by the Act.<sup>9</sup>

Appellant attributed stress to receiving a letter of reprimand for taking a government vehicle in December 2001 with her friend, Tommy Shorty. She also alleged that on March 22, 2002 she received a nonrenewal letter from Ms. Frejo, the principal and that her leave requests were denied. Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>10</sup> The Board finds that these allegations relate to administrative or personnel matters, unrelated to

---

<sup>6</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>7</sup> *Id.*

<sup>8</sup> See *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998). In that case, the Board found that appellant's condition arose from the knowledge that her grandson, coworkers and acquaintances had died, rather than from the performance of her day to day duties, specially assigned duties or any other requirement imposed by her employment.

<sup>9</sup> See *id.*

<sup>10</sup> *Lori A. Facey*, 55 ECAB \_\_\_\_ (Docket No. 03-2015, issued January 6, 2004); *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004).

the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>11</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>12</sup> In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>13</sup> In the case at hand, the employing establishment denied any error or abuse. The employing establishment denied harassment, discriminating or being disrespectful towards appellant. Although appellant alleged that the employing establishment engaged in the above activities, she did not provide sufficient evidence to support her allegations or that any actions taken were unreasonable under the circumstances in this case. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also alleged harassment and discrimination on the part of her coworkers contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.<sup>14</sup> However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>15</sup> The employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors. Appellant alleged that her coworker, Ms. Thompson harassed her by alleging that she was inadequate as a teacher and that she had failed to teach the first graders to read. However, she provided insufficient evidence, such as specific witnesses' statements, to establish that the statements were actually made or that the actions actually occurred in the manner alleged. Although appellant provided a statement from Ms. Benally, a kindergarten teacher, who agreed that Mrs. Thomson berated appellant and verbally told appellant that she had not taught the children to read, she did not refer to any specific dates or instances of these statements. The employing agency responded with a statement from Ms. Frejo, who indicated that there was no record of complaints nor any related reports on file that were submitted by appellant or any other employee. As such, it appears that appellant's allegation of harassment is based on her perception. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

---

<sup>11</sup> See *Penelope C. Owens*, 54 ECAB \_\_\_\_ (Docket No. 03-1078, issued July 7, 2003). Assignment of work is an administrative or personnel matter of the employing establishment and coverage can only be afforded where there is a showing of error or abuse. *Robert W. Johns*, 51 ECAB 137 (1999); *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>12</sup> *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004).

<sup>13</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>14</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>15</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

Regarding appellant's allegations that the Office harassed her in the development of her claim, the Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.<sup>16</sup>

Appellant also alleged that she was harassed with regard to her filing of grievances as part of her union duties as a steward. However, she did not provide any additional information regarding her filing of grievances or the context, other than she filed a grievance regarding 15-minute breaks, which led to a staff meeting on May 6, 2002. The Board has generally held that matters pertaining to union activities are not deemed employment factors.<sup>17</sup> The record is devoid of any evidence specific evidence regarding the claimed union activities to warrant any inference that such activities would come within the exception to the general rule.<sup>18</sup> For instance, other than indicating that a staff meeting resulted as a result of her filing a grievance, no other evidence was received as to when this happened, the people involved, why it was felt to be harassment or any witness statements supporting any specific allegations. Thus, appellant has not established a compensable factor of employment.

Appellant referred to several instances of being harassed with regard to her dogs and to her personal life and of rumors regarding her fiancé, Mr. Shorty. She specifically referred to the actions of the second grade teacher, Ms. Thompson and her husband, as well as several neighbors, including Ms. Talsalt, Ms. Begay and Mr. Klassen. However, the Board has held that an employee's reaction to gossip or rumors is a personal frustration that is unrelated to an employee's job duties or requirements and is not compensable.<sup>19</sup> Coverage is not afforded with regard to matters or interactions not related to the claimant's job duties. Thus, appellant had not established a compensable employment factor in this regard.

To the extent that appellant is alleging a verbal altercation with Ms. Thompson, it is well established that verbal altercations or abuse in the workplace may constitute a compensable factor of employment. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.<sup>20</sup> Although she submitted a statement from a coworker, Ms. Benally, who agreed that Ms. Thompson generally made attacks against appellant regarding teaching the children to read, Ms. Benally did not provide any specific details of these incidents such as to the and time place or the nature of the words uttered. Because these allegations are vague they are insufficient to established that a compensable verbal altercation.

---

<sup>16</sup> See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

<sup>17</sup> See *Dinna M. Ramirez*, 48 ECAB 308 (1997). The involvement of union activities does not categorically preclude the possibility that compensable factors of employment have been alleged. The Board has recognized an exception to the general rule in that employees performing representational functions, which entitle them to official time are in the performance of duty and entitled to all benefits of the Act if injured in the performance of those functions. See *Marie Boylan*, 45 ECAB 338 (1994).

<sup>18</sup> See *Boylan*, *id.*

<sup>19</sup> See *Gracie A. Richardson*, 42 ECAB 850 (1991).

<sup>20</sup> *Frank B. Gwozdz*, 50 ECAB 434 (1999).

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and; therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.<sup>21</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.<sup>22</sup> The implementing regulation provides:

“A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.”<sup>23</sup>

### **ANALYSIS -- ISSUE 2**

As noted above, the Office has the discretion to grant or reject requests for subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.<sup>24</sup>

On January 24, 2003 appellant requested that the Office issue subpoenas to several witnesses. Appellant, however, did not provide a reason for the request. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena “is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.”<sup>25</sup> The hearing representative denied appellant’s request for a subpoena on the grounds that no evidence was submitted to establish that the testimony of the identified persons was essential to the adjudication of her claim. The Board finds that the Office hearing representative properly exercised his discretion in denying appellant’s request for a subpoena.

---

<sup>21</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

<sup>22</sup> 5 U.S.C. § 8126(1).

<sup>23</sup> 20 C.F.R. § 10.619.

<sup>24</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>25</sup> *Id.*



### **CONCLUSION**

For the foregoing reasons, as appellant has not established any compensable employment factors under the Act, she, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.<sup>26</sup> The Board further finds that the Office properly denied appellant's request for a subpoena.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 2, January 30, 2004 and September 23, 2003 are affirmed.

Issued: April 25, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

---

<sup>26</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki, supra* note 21.