HOWARD CONNER

Grievant,

v. **Docket No. 93-01-246**

BARBOUR COUNTY BOARD OF EDUCATION

Respondent.

D E C I S I O N

Grievant, a bus operator employed by the Barbour County Board of Education (hereinafter BOE), contends that he was entitled to a reinstituted "extra run" (See footnote 1) based upon the BOE's prior practice of awarding such runs to the bus operator who had previously performed the run. (See footnote 2)

The statement of grievance reads as follows: The BOE violated, misapplied or misinterpreted "seniority laws and county policy. This is yet another instance of the harassment and favoritism and bending of rules to suit various instances when the Board chooses to retaliate against an employee because of priorgrievances and discrimination claims." As to the facts, Grievant alleged that on April 20, 1993, the BOE approved the county superintendent's recommendation and selected Ken Curtis for an extra run from the Vocational Center to Broaddus Hospital. Grievant asserted that he had performed this run for at least two years and, in accordance with policy and prior practice, he earned seniority on this run and should have been given it. He also asserted that if he had been awarded the extra run, it would have saved the Vocational Center money.

There is little, if any, dispute concerning the material facts. On March 29, 1993, the BOE posted and Grievant bid on an "extra run" that lasted only three or four weeks. The BOE selected the applicant with the most seniority as a bus operator to perform the extra run. At the level two hearing,

Grievant relied on the BOE's alleged prior practice of awarding extra bus runs that occur every school year to the same bus operator who performed the run the previous year.

Grievant testified that for three or four weeks during the spring of 1987 and 1988 he performed the identical bus run that the BOE reestablished in 1993. The BOE does not dispute this testimony. Grievant further stated that the run was posted and he bid on the run both prior years. It is also undisputed that the extra run at issue in this proceeding was discontinued after the spring of 1988 for lack of adequate funding and that bus operators were not employed again for this run until 1993. During theintervening years, the students were transported between the vocational center and the hospital in vans and automobiles.

At the level two hearing, some nine "extra run" job postings were entered in evidence covering the years 1988, 1991, 1992, and 1993. Mr. R. Edward Larry, the Director of Transportation, testified that when the 1993 run was posted he believed it was different than the run performed in 1987 and 1988, i.e., the former bus run included trips to the hospital and to other locations as well. Mr. Larry stated at the level four hearing that he considered the reinstituted run a new run because it had been discontinued for several years. He acknowledged that if the extra run in question had been made every year, Grievant would have been awarded the run in 1993 based upon the BOE's prior practice of awarding these types of bus runs to the same bus operator each year. He further stated that he thought the law was unclear on how reinstituted extra runs should be awarded, and thus he decided to post and fill the position in accordance with the requirements of W. Va. Code, 18A-4-8b. (See footnote 3) Mr. Larry stated that his actions were not taken to harass, to show favoritism or as an act of reprisal or retaliation against the Grievant.

The level two evaluator concluded that the BOE had properly posted and filled the position. In his level three appeal,Grievant argued that the postings introduced at level two were irrelevant since they were not for reinstituted extra runs. The appeal was denied at level three on the grounds that there was no evidence of any misapplication or violation of service personnel seniority laws or county policy, or of harassment, favoritism or retaliation against any employee. This appeal followed.

Discussion

Grievant cannot prevail on the prior practice claim for at least two reasons. (See footnote 4) First, the Grievance Board has ruled in several cases that absent a legal requirement to do so, a board of

education is not required to continue to follow the same informal personnel practices year after year. See e.g., Taylor v. Monongalia County Bd. of Educ., Docket No. 92-30-314 (Nov. 30, 1992); Biller v. Upshur County Bd. of Educ., Docket No. 90-49-533 (Sept. 27, 1991); Napier v. Logan County Bd. of Educ., Docket No. 89-23-635 (May 25, 1990); Issacs v. Lincoln County Bd. of Educ., Docket No. 89-22-555 (Jan. 12, 1990); Wass v. Ritchie County Bd. of Educ., Docket No. 43-87-206-3 (Oct. 31, 1988); Terek v. Ohio County Bd. of Educ., Docket No. 35-87-294-3 (July 20, 1988). Since county board's of education and county superintendents have been vested with broad discretion in personnel matters, no other conclusion can be reached. (See footnote 5)

Second, although the BOE did have a prior practice of assigning extra bus runs to the same bus driver year after year if the employee bid on it, there is no evidence that it followed such practice with respect to reestablished bus runs that had been discontinued for several years. The failure to prove the BOE had such an established past practice is also fatal to the prior practice claim. Furthermore, if Grievant's argument were accepted, more senior bus operators would be permanently deprived of any opportunity to perform the run simply because Grievant had performed this run several years earlier. This would be contrary to the general rule that school service personnel assignments must be made primarily on the basis of job classification seniority. See W. Va. Code, 18A-4-8b & 18A-4-8g; Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331 (1993). (See footnote 6)

There is scant evidence bearing on the harassment and reprisal claims. Certainly, there was not sufficient evidence to establishGrievant had been the victim of harassment as defined in W. Va. Code, 18-29-2(n), which requires a showing of a series of actions or inactions on the part of management contrary to the demeanor expected by law, policy and profession. Reprisal is defined in W. Va. Code, 18-29-2(p) to mean "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." (See footnote 7)

As was discussed recently in Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994), the purpose of statutes prohibiting acts of reprisal is to make it unlawful for an employer to take any action designed to punish an employee for engaging in protected activity, such as filing a grievance and pursuing it vigorously, and/or to deter an employee from exercising such rights. See Harvey v. Merit Systems Protection Bd., 802 F.2d 537, 547 (D.C. Cir. 1986). The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a

"significant," "substantial" or "motivating" factor in the adverse personnel action. Warren v. Dept. of Army, 804 F.2d 654 (Fed. Cir. 1986); Harvey, supra; See P. Broida, A Guide to Merit Systems Protection Board Law & Practice, Chapter 13 (5th ed. 1988).

No extended analysis of the limited evidence introduced on the reprisal issue is required here. The undersigned concludes the Grievant has not established by a preponderance of the evidence that his grievance activity was a substantial or motivating factor in his nonselection for the bus run in question. Although the undersigned is aware of other cases in which the BOE has been found to have retaliated against Grievant's spouse, who is also a bus operator employed by the BOE, and although Grievant may have established a prima facie case (See footnote 8) of reprisal, he has failed to prove by a preponderance of the evidence that the BOE's reasons for the selection of another bus operator were a pretext for an act of reprisal or that the BOE changed its prior practice in retaliation for his protected activity.

Conclusions of Law

Based upon all matters of record, the undersigned reaches the following Conclusions of Law.

1. An employee in a nondisciplinary matter must prove the allegations of a grievance by a preponderance of the evidence.

2. Absent a legal requirement to do so, a board of education is not required to adhere to the same informal personnel practices year after year.

3. Grievant has not proven that he was entitled to the extra bus run at issue in this case based upon a prior practice of the BOE.

3. Grievant has failed to prove that he was the victim of harassment or reprisal as those terms are defined in W. Va. Code, 18-29-2.

Accordingly, this grievance is **DENIED.**

Either party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Barbour County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code, 18-29-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

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RONALD WRIGHT

Administrative Law Judge

Date: April 28, 1994

Footnote: 1 This type of short-term bus run was also referred to as an activity run or vocational run.

Footnote: 2 After denials at the three lower levels of the grievance procedure, Grievant appealed to level four and a hearing was held in Elkins on September 27, 1993, at which time the parties supplemented the record with testimony and documentary evidence. The case became mature for decision on or about October 20, 1993, with the receipt of proposed findings and conclusions.

Footnote: 3 It is noted that the Legislature recently amended W. Va. Code, 18A-4-16, effective ninety days from its passage on March 10, 1994, by adding a new subsection five which states, in part, that "[t]he board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b, article four of this chapter... ."

Footnote: 4 Although Grievant alleged a violation of county policy, no written policy was ever introduced in evidence by either party.

Footnote: 5 It must be noted, however, that Subsection 2.8 of West Virginia Board of Education Policy No. 5300 provides that "[a]ll official and enforceable personnel policies must be written and made available to every employee of each county board ofeducation."

Footnote: 6 Grievant's representative at the level two hearing also argued that the BOE violated paragraph three of W. Va. Code, 18A-4-8b, which states that "[t]he county may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter." This argument is without merit. This sentence, added to the statute in 1983, was discussed in Lucas v. Lincoln County Bd. of Educ., Docket No. 90-22-419 (May 20, 1991). The administrative law judge concluded that this provision has no application to jobs filled after the effective date of the amendment in 1983. Its purpose was to ensure that no wholesale reshuffling of existing jobs would result from the major changes made in the school service personnel laws that year. Furthermore, the BOE in this case did not "prohibit" Grievant from holding the extra run, rather it simply awarded the bus run to the applicant with greatest seniority.

Footnote: 7 W. Va. Code, 18-29-3(h) also provides that "[n]o reprisals of any kind shall be taken by any employer or agent of the employer against any interested party ... . A reprisal constitutes a grievance, and any person held to be

responsible for reprisal action shall be subject to disciplinary action for insubordination."

Footnote: 8 A prima facie case is extremely easy to establish where the alleged act of reprisal occurs within a short period of time after the protected activity.