ELIZABETH WILSON,

Grievant,

v.

DOCKET NO. 97-27-278

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Elizabeth Wilson, filed the following grievance on March 6, 1997, protesting a letter of reprimand issued by her employer, the Mercer County Board of Education ("Board"):

> Grievant, a regularly employed school bus operator, has received a written reprimand for allowing another bus operator to smoke on her bus and for taking a nonapproved route to her designated parking spot. Grievant contends that the reprimand was unfair and inaccurrate (sic). Further, she contends that the reprimand was in retaliation for her filing of a previous grievance. Grievant alleges a violation of West Virginia Code §18-29-2 and requests removal of the letter of reprimand and any reference to it from Grievant's personnel records.

The grievance was denied at level one on April 28, 1997, and at level two on May 28, 1997. At level three, the Board waived consideration of the grievance. A level four evidentiary hearing was conducted in Charleston, West Virginia, on August 7, 1997, and this case became mature for decision on September 10, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

Level Two Board Exhibits

Ex. 1 -

State of West Virginia School Transportation Regulations

Ex. 2 -

Map of Elizabeth Wilson's bus route

Level Two Grievant Exhibits

Ex. 1 -

February 14, 1997 letter from William E. Hopkins, Coordinator of Transportation, to Elizabeth Wilson.

Level Four Grievant Exhibits

Exs. 1-5 -

Pictures of various school buses in various locations taken by Grievant

Testimony

Respondent offered the testimony of William H. Hopkins. Grievant testified in her own behalf, and offered the testimony of Carolyn Weiss.

ISSUE

The issue presented is whether the Board has proven by a preponderance of the evidence that Grievant deviated from her regular bus route on the morning of February 12, 1997, and whether a passenger on Grievant's bus that morning was smoking a cigarette, in contravention of established rules and regulations.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1.

Grievant is employed by the Board as a regular bus operator.

2.

On February 12, 1997, Grievant gave a fellow bus operator, Carolyn Weiss, a ride home after their regular morning run. Ms. Weiss had permitted another bus operator to use her bus for an extra duty assignment that day. 3.

Grievant deviated from her regular route to her home on that day in order to permit Ms. Weiss to conduct some personal business.

4.

Ms. Weiss smoked a cigarette while riding on Grievant's bus.

5.

William Hopkins, Coordinator of Transportation, saw Grievant driving off her regular route on February 12, 1997, and saw Ms. Weiss smoking a cigarette on the bus.

6.

By letter dated February 14, 1997, Mr. Hopkins reprimanded Grievant for deviating from her regular route to conduct personal business, and for allowing another employee to smoke a cigarette on her bus. LII G. Ex. 1.

DISCUSSION

In a disciplinary grievance, the employer has the burden of showing that the action taken against the employee was warranted. Grievant does not deny she deviated from her regular route home in order to allow Ms. Weiss to conduct personal business. Grievant also does not deny that Ms. Weiss was smoking on her bus.

The State of West Virginia School Transportation Regulations provide, in pertinent part:

VI. AUTHORITY AND RESPONSIBILITY OF COUNTY SCHOOL PERSONNEL IN PROVIDING SCHOOL TRANSPORTATION SERVICES

Pursuant to Chapter 18, Article 5, Section 13, Subsection 6, and Chapter 18A, Article 5, Section 1, West Virginia School Law, the following regulations are established:

A.

Passengers

1. The school bus operator shall be in charge of the bus, pupils and other passengers. School administrative and instructional personnel will cooperate with the bus operator to maintain proper discipline on the bus. (Emphasis added).

. . .

C.

Other operating procedures

. . .

9. The bus operator shall observe the limits of all segments of assigned routes, as established by school transportation administrators. No extension, cutback or change shall be made, except in an emergency, without authorization by the transportation director. If any emergency necessitates a detour or temporary change of route, it shall be reported to the transportation director immediately.

It is undisputed that smoking is not permitted on a school bus by anyone.

Mr. Hopkins testified there are two major reasons a bus operator is not to deviate from her regularly scheduled route. First, if no bus service is offered in a particular area, the mere presence of a school bus in that area can serve to establish a route, if someone sees the bus, and requests service in that area. LII Tr., p. 50. Second, there are issues of liability should the bus be involved in an accident while it is off the regularly scheduled route. LII Tr., p. 61.

Mr. Hopkins also testified that a new driver is given a written schedule, which includes the route to take from the last stop to the designated parking spot. If the driver continues to drive that same route year after year, he or she is not given a new written schedule each year. Grievant would have been

given such a schedule when she began driving her current route. However, Grievant has been driving that route for 7 or 8 years, and Mr. Hopkins did not have any written record to establish Grievant's route. LII Tr., pp. 48-49. Grievant contends that she is not aware that the Board designated a specific route to be used when proceeding from the last stop of the route to the designated parking spot, and that small deviations from the regular route are common and harmless. Grievant's "awareness" does not change the fact that the transportation regulations require bus operators to travel their designated routes, except in cases of emergency. Ignorance of the policy is no excuse, and Grievant's lack of knowledge about the transportation regulations does not excuse her offense.

Grievant also contends she did not know Ms. Weiss was smoking on her bus, as Ms. Weiss was seated opposite her, and in any event, she does not have the degree of control or responsibility over a fellow employee that she would have over students in her care. Ms. Weiss was seated in the front seat opposite Grievant. Grievant testified she and Ms. Weiss both had their windows open, so she could not smell the cigarette. Again, transportation regulations specifically put the driver in charge of her passengers, including other employees of the Board. Whether or not Grievant knew Ms. Weiss was smoking is irrelevant. She had the responsibility to know what her passengers were doing while they were riding on her bus. She readily admits smoking is not allowed on a school bus, and testified she would not have given Ms. Weiss permission to smoke if she had asked.

The Board has proven by a preponderance of the evidence that Grievant participated in the events giving rise to her letter of reprimand, and that those events were in contravention of State of West Virginia Transportation Regulations.

Grievant alleges, however, that the letter of reprimand was given in retaliation for her filing an earlier grievance against the Board. The Grievant bears the burden of proving any affirmative defense. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131(Nov. 7, 1995). W. Va. Code § 18-29-2(p) defines "reprisal" as "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." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that she engaged in protected activity, e.g., filing a grievance;

(2) that she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

Establishment of a prima facie case of retaliation shifts the burden to the employer to show that Grievant's dismissal was the result of legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra. In the instant case, Grievant filed an earlier grievance against the Board relating to sick leave. Subsequently, this disciplinary action was taken against Grievant. Thus, Grievant has established a prima facie case of reprisal pursuant to W. Va. Code § 18-29- 2(p). However, the Board has offered a legitimate, non-retaliatory reason for reprimanding Grievant: she deviated from her regularly scheduled bus route without permission, and permitted another employee to smoke on her school bus, both in contravention of established transportation regulations. Thus, Grievant's reprisal defense fails.

At level four, Grievant raised the affirmative defense of discrimination. She claimed other bus operators deviated from their routes, but were not disciplined. Grievant introduced into evidence for the first time at level four a series of pictures she had taken of other school buses presumably off of their regularly scheduled routes, in an attempt to show she had been treated differently than other bus operators. LIV G. Exs. 1-5. Grievant testified that after she received the reprimand, she called

Mr. Hopkins' office and spoke to his secretary, Sue, a few times to complain about other buses deviating from their routes. She concluded that nothing was done about these complaints, so she began to carry a camera with her, and would periodically take pictures when she saw a bus where she did not think it should be. Although Grievant admitted she actually began taking these pictures before the level two hearing in this matter, she never told Mr. Hopkins about them, or showed him the pictures prior to the level four hearing. Despite the fact that Mr. Hopkins cannot be expected to take action against offenses of which he has no knowledge, Mr. Hopkins testified that he gets complaints all the time about buses not being where they are supposed to be. He admitted that he does not follow up on these complaints simply because he does not have the time. The only reason Mr. Hopkinsdisciplined Grievant for this offense was because he actually saw her off of her bus route, and actually saw Ms. Weiss smoking the cigarette.

CONCLUSIONS OF LAW

1. Respondent has proven by a preponderance of the evidence that Grievant, a bus operator, engaged in conduct which violates the State of West Virginia Transportation Regulations, under which she works.

2. Grievant failed to prove by a preponderance of the evidence that her discipline was in retaliation for the filing of an earlier grievance.

3. Grievant failed to prove by a preponderance of the evidence that the Board discriminated against her in imposing the letter of reprimand.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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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MARY JO SWARTZ

Administrative Law Judge

Dated: December 2, 1997