HUSSEIN SHARIFPOUR,

Grievant,

v v.

Docket No. 99-DOH-089

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION

Hussein Sharifpour (Grievant) challenges his transfer to the District Six office of the West Virginia Division of Highways (DOH), alleging discrimination, retaliation, and favoritism. He requests as relief to "be assigned to work at the nearest location to my present office in any state facility." The grievance was initiated at level one on May 28, 1998, where Grievant's immediate supervisor was without authority to grant relief. The grievance was denied at level two on July 9, 1998. Upon appeal to level three, a hearing was scheduled and held on July 21, 1998. After evidence was taken at that hearing, the record was left open, pending potential further evidence from DOH. Prior to the scheduling of the conclusion of that hearing, Grievant filed a default claim at level four, which was subsequently dismissed, and the grievance was remanded to level three for further proceedings. (See footnote 1) The conclusion of the level three hearing was held on February 9, 1999, and the grievance was denied in a written decision dated February 11, 1999. Grievant appealed to level four on February 25, 1999. After a continuance granted for good causeshown, a hearing was conducted in this Grievance Board's office in Morgantown, West Virginia, on June 7, 1999. Grievant represented himself, and DOH was represented by counsel, Timbera Wilcox. This matter became mature for consideration at the conclusion of the level four hearing, the parties having declined to submit written fact/law proposals.

The following findings of fact are made from a preponderance of the credible documentary and testimonial evidence submitted at all levels of the grievance procedure.

Findings of Fact

1. Since 1986, Grievant has been employed by DOH as an Engineer in Training II (EIT II).

2. Prior to May of 1998, Grievant was assigned to Region II of the Traffic Engineering Division, consisting of Districts Four, Five, Six, Seven and half of District Three. His home office was in Clarksburg, West Virginia.

3. Grievant resides in Morgantown, West Virginia.

4. By administrative order dated May 1, 1998, DOH Commissioner Samuel H. Beverage implemented a reorganization of DOH.

5. As part of the reorganization, the ten employees of the Traffic Engineering Division who performed "engineering technician" functions (See footnote 2) were assigned to specific districts, rather than regions. The functions formerly performed by the Traffic EngineeringDivision were transferred to the individual district offices, to be handled by a "District Traffic Engineer" in each district, formerly the "engineering technician" employees, including Grievant.

6. Within the Clarksburg regional office, Grievant and four other employees were to be transferred to individual districts and become District Traffic Engineers (See footnote 3) .

7. Grievant and the four other employees of the Clarksburg office hold different titles, but perform similar work for DOH.

8. Management of DOH and the Traffic Engineering Division decided to allow the employees of the Clarksburg regional office to choose where they wanted to be assigned, based upon seniority, because all wanted to be assigned to District Four in Clarksburg.

9. Grievant had the least seniority of the Clarksburg employees.

10. Because he was the least senior, Grievant chose his assignment last, and the only district office left to be assigned was District Six in Moundsville.

11. Grievant is allowed to complete travel to and from the District Six office within his normal working hours, and he has been provided a state car for this travel.

12. Grievant has filed several prior grievances and a federal lawsuit against DOH, in which he alleged discrimination based upon his national origin (Iranian).

Discussion

Grievant's allegations are numerous and somewhat difficult to understand, but it appears that he believes he was given the worst assignment of the Clarksburg employees as the result of discrimination, favoritism, and retaliation. He contends that none of the other employees in his position are required to drive such a long distance, and that this decision was motivated solely by the prejudices against him on the part of his superiors. DOH contends that it attempted to accomplish these transfers as fairly as possible and operated within its broad discretion in such matters.

A state agency is permitted to transfer an employee from one geographic location to another, within the same agency, at any time. The West Virginia Division of Personnel (DOP) Administrative Rule, Section 11.06(a) states:

> Appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational sub-division of the same or another agency at any time. In the case of inter-agency transfers, annual and sick leave and all seniority rights shall be transferred with the employee.

The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Resources, Docket No. 96-HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Serv., Docket No. 91-DHS-111 (May 31, 1991). No particular justification for such a transfer is required under DOP's rule. Therefore, pursuant to the provisions of this rule,DOH had no obligation to transfer these employees based upon seniority, nor was it required to allow the employees to have any voice in the decisions as to where they would be transferred. Not only has DOH not violated this provision, but it went beyond what was required in order to attempt to fairly accommodate its employees. Nevertheless, Grievant contends that his transfer was motivated by the improper factors of discrimination, favoritism, and retaliation.

"Discrimination" is defined by W. Va. Code § 29-6A-2(d) as “

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the

> employees." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." A prima facie case of discrimination or favoritism requires the grievant to prove the following:
>
> (a) that he is similarly situated, in a pertinent way, to one or more other employees;
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Lunau v. Div. of Corrections, Docket No. 95-CORR-002 (May 31, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate,non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

While Grievant is similarly situated to the other Traffic Engineering Division employees who were subject to transfer, he has not been treated differently. DOH attempted to fairly assign transfers, based upon seniority. Unfortunately for Grievant, he happened to have the least seniority within his regional office, giving him the last, and possibly least favorable, choice. However, this does not constitute "different" or "unfair" treatment by his employer.

Grievant also offered some evidence regarding the assignments of the ten "engineering technicians" statewide to the ten district offices, in order to support his claims of discrimination and favoritism. He contends that there are other employees among the ten who have less experience and/or seniority than he, but they were given more favorable assignments. The decisions regarding the transfers were made on a regional basis, and Grievant's direct superiors decided upon the method for making the assignments within the Clarksburg regional office. It appears that management from each district was allowed input regarding the transfer of their employees, and there is no evidence that the transfers within the other regions or districts were made on a seniority basis. Therefore, Grievant was not similarly situated to all of those employees. Grievant has failed to

establish a prima facie case of discrimination or favoritism.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general,a grievant alleging unlawful retaliation, in order to establish a prima facie case, must prove:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va.53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Charleston Area Medical Center Found., Inc., 188 W. Va. 57, 422 S.E.2d 624 (1992); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawfulretaliation. See Conner, supra; W. Va. Dep't of

Natural Resources v. Myers, 191 W.
Va. 72, 443 S.E.2d 229 (1994).

There is no question that Grievant has engaged in a significant amount of grievance activity. He filed grievances in 1994, 1995, and 1996, along with two grievances filed in 1998. In addition, Grievant's immediate supervisor, Barry Warhoftig; William Wilshire, Director of Traffic Engineering; and Jeff Black, Human Resources Director, have all been involved in these grievances and were also involved in the decision-making process regarding Grievant's transfer. Grievant also filed a federal lawsuit in 1996 against DOH and Mr. Warhoftig, which was settled, and which Grievant unsuccessfully attempted to reopen in 1998. Therefore, due to the proximity of these activities to the decision which has adversely affected Grievant, a retaliatory motive may be inferred.

However, as discussed above, DOH has provided more than sufficient legitimate justifications for Grievant's transfer. All employees of the Traffic Engineering Division were transferred and assigned to individual districts as part of a statewide reorganization. Accordingly, in spite of Grievant's litigation and grievance activity, retaliation has not been proven by a preponderance of the evidence to be the motivation for the transfer decision.

Grievant also mentioned several times at the hearings in this grievance that he was the only engineering employee who had been “demoted.” It appears that Grievant believes that his new assignment and the requirement that he travel farther constitute a demotion. West Virginia DOP Administrative Rule Section 3.27 defines demotion as "a change in the status from a position in one class to a position in another class of lower rank as measured by salary range, minimal qualifications, or duties, or a reduction in an employee's pay toa lower rate in the pay range assigned to the classification." There is no evidence that Grievant's pay or classification has changed, so he has not been demoted. Having to travel a longer distance is not a factor to be considered when assessing whether an employee has been demoted.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dep't of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015

(Nov. 2, 1988).

2. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) as "

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

3. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. A prima facie case of discrimination or favoritism requires the grievant to prove the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Lunau v. Div. of Corrections, Docket No. 95-CORR-002 (May 31, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant failed to establish a prima facie case of discrimination or favoritism with regard to his transfer to District Six.

6. A grievant alleging unlawful retaliation, in order to establish a prima facie case, must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action

followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va.53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No.91-PEDTA-225 (Dec. 23, 1991). If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Charleston Area Medical Center Found., Inc., 188 W. Va. 57, 422 S.E.2d 624 (1992); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983).

7. Grievant established a prima facie case of retaliation or reprisal.

8. DOH has proven legitimate, nonretaliatory reasons for Grievant's transfer.

9. West Virginia DOP Administrative Rule Section 3.27 defines demotion as "a change in the status from a position in one class to a position in another class of lower rank as measured by salary range, minimal qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification."

10. Grievant has not been demoted.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 28, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

See Sharifpour v. West Virginia Dep't of Transp., Docket No. 98-DOH-265 (Sept. 9, 1998), where it was concluded that the newly enacted default provision of W. Va. Code § 29-6A-3(a)(2), effective July 1, 1998, did not apply to this grievance, which had been filed prior to the new statute's effective date.

Footnote: 2

The record is somewhat confusing on this issue. Grievant, an EIT II, supervises employees who have other engineering classifications, such as Senior Engineering Technicians. It appears that they all have similar job duties and have been grouped together by DOH as employees who perform "engineering technician" functions, but it is unclear exactly what these functions are. However, clarification of this issue is not necessary to the outcome of this grievance.

Footnote: 3

Although it does not appear that Grievant's classification title under the rules of the Division of Personnel has changed, he has received the "title" of "District Traffic Representative" with his transfer, because he is not a licensed engineer. However, it does not appear that Grievant's title or classification is at issue in this grievance.