JOHN MILLER,

Grievant,

v. **Docket No. 01-CORR-514**

WEST VIRGINIA DIVISION OF

CORRECTIONS/HUTTONSVILLE

CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, John Miller, filed this grievance against his employer, the Division of Corrections ("CORR"), on August 27, 2001, alleging reprisal. Relief sought was "to be left on the day shift that I worked prior to going into the Army."

This grievance was denied at all prior levels. Grievant appealed to Level IV on September 7, 2001, and multiple continuances were granted for good cause and by agreement of the parties. A Level IV hearing was held on June 25, 2002. (See footnote 1) **This case became mature for decision on September 3, 2002, after receipt of Respondent's proposed findings of fact and conclusions of law.**

Issues and Arguments

Grievant asserts his shift was changed from the day shift to the evening shift because he asserted his military re-employment rights through the grievance procedure. Grievant notes he is more senior than other employees working more desirable shifts. Respondent maintains Grievant's shift was changed because he had completed his training, and there was a need for a Lieutenant on the evening shift. Respondent also notes shifts are not assigned based on seniority, but on need. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed at the Huttonsville Correctional Center ("HCC") for thirteen years as a Correctional Officer before he entered into military active duty on or about November 5, 1997.

2. Prior to entering active duty, Grievant was assigned as Lieutenant in the K-9 Unit, but on April 22, 1997, he was placed "on temporary duty as the Security Specialist for new construction." Resp. Ex. No. 1, at Level III.

3. Grievant was discharged from the military on June 2, 2001. Thereafter, Grievant notified CORR he wished to be reinstated and he was.

4. After Grievant indicated he wished to return to work, the administrators at HCC met and discussed where Grievant's talents and rank could best meet the needs of the institution. It was decided, at that time, that there was a need for a Lieutenant on the evening shift on the E-1 Unit, a Behavioral Segregation Unit for maximum security prisoners. Test. Associate Warden Murphy, Level III Hearing at 3.

5. During Grievant's military absence, all the policies governing the agency were rewritten, and many changes were made at the facility and in the staffing. Several new units were opened.

6. Upon his return, Grievant was assigned to the E-1 Unit, one of the units opened during Grievant's absence. Grievant was considered to be in training, and he worked with the Lieutenant who was in charge of the unit. 7. Grievant filed a grievance on July 30, 2001, and he had a Level III grievance hearing on August 23, 2001. This grievance dealt with Grievant's desire to be returned to the K-9 Unit. See Miller v. Div. of Corrections, Docket No. 01-CORR-497 (Sept. 26, 2002).

8. On August 24, 2001, Grievant was considered to have completed his retraining, and he was assigned, effective September 2, 2001, to the 2:00 p.m. - 10:00 p.m. evening shift on the E-1 Unit. Twenty-one other employees, who were also considered to have completed their training, were also listed on the same posting, and were also reassigned. Ten employees were like Grievant and reassigned from day shifts to evening or night shifts.

9. Grievant has more state years of service than most of the other Lieutenants stationed at HCC. Grievant does not have as much Corrections experience as some of these

Lieutenants, as Grievant's time in the military is counted in his state years of service. (See footnote 2) Additionally, these other Lieutenants' years of experience with the Division of Corrections are unbroken.

10. Assignments at HCC are not based on seniority.

11. No employee is entitled to maintain a specific assignment. Assignments are within the discretion of the Commissioner and are based on the security needs of the facility.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Grievant alleged his change in shift was in reprisal for filing a grievance asserting his military re-employment rights. 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." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**
>
> **2) that he/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;**

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

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant filed a prior grievance on July 30, 2001. The change in Grievant's shift, "the adverse action" followed "within such a period of time that retaliatory motivation can be inferred." Grievant has established a prima facie case of reprisal, and the burden thus, shifts to Respondent to rebut the presumption of retaliation.

Respondent has demonstrated a legitimate, non-retaliatory reason for the adverse action. Grievant's training was over, and it was time to place him in his permanent assignment. There was a need for a Lieutenant on the E-1 Unit on the evening shift, and this was his planned assignment from the time HCC learned of his wish to return.

Just because the change occurred during the grievance process, does not establish the stated reasons for the change are pretextual. See Parry v. Div. of Corrections, Docket No. 00-CORR-102 (June 11, 2001). Grievant's reassignment occurred at the same time new shift assignments were given to twenty-one other employees. Grievant has not been able to demonstrate the reasons offered for his reassignment are pretextual. "[M]ereallegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustee/W.Va. Univ. - Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998). Accordingly, Grievant has not met his burden of proof.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. 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."

3. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**
>
> **2) that he/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;**
>
> **4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**
>
> **5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.**

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v.

Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

4. Grievant established a prima facie case of reprisal, as he demonstrated the change in shift, "the adverse action," followed "within such a period of time that retaliatory motivation can be inferred."

5. Respondent demonstrated legitimate nondiscriminatory reasons for the timing of Grievant's shift change and provided reasons for the actual change in shift. Grievant was unable to demonstrate these reasons were pretextual.

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." Any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 26, 2002

Footnote: 1

At the Level III and Level IV hearings, Grievant was represented by Attorney Scott Curnutte. Respondent was represented by its Attorney Heather Connolly at Level IV.

Footnote: 2

During his recent stint with the military, Grievant's duties were not connected to prisons or security.