PAUL CROSTON,

Grievant,

v. Docket No. 05-30-061

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

TAYLOR HEINZE,

Intervenor.

D E C I S I O N

Paul Croston ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a Custodian, filed a level one grievance on September 29, 2004, in which he claimed he was denied an extracurricular position as a result of discrimination, reprisal, and harassment. For relief, Grievant requests instatement with back pay and interest. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following a level two hearing, and MCBE waived consideration at level three. Appeal was made to level four on February 23, 2005. An evidentiary hearing was conducted on April 21, 2005, to supplement the level three record. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Harry M. Rubenstein, Esq., of Kay Casto & Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on May 18, 2005.

The following facts have been derived from a preponderance of the evidence made part of the record at level two and level four.

Findings of Fact

1. Grievant has been employed by MCBE as a full-time Custodian for approximately twenty years, and has been assigned to Morgantown High School at all times pertinent to this grievance.

2. Grievant has been President of the Monongalia County School Service Personnel Association for seventeen years.

3. On August 10, 2004, MCBE posted a vacancy for a half-time custodian at the transportation facility. Upon consideration of need and finances, MCBE reposted the vacancy as a two-hour extracurricular assignment. This arrangement has been successfully used by MCBE in another situation.

4. Grievant was the most senior applicant for the extracurricular assignment.

5. Before the extracurricular assignment was filled, MCBE posted the position for a third time, again as a half-time position.

6. The position was awarded to Intervenor who also holds a second, half-time position. The entire three and one-half hours of the part-time position is necessary to complete the cleaning of the fifteen hundred square feet of the transportation offices assigned to this position.

7. Several years earlier, MCBE posted a position for a Custodial Supervisor. Grievant applied and was the third most senior applicant. After both higher ranked applicants declined the position, MCBE did not offer it to Grievant, but eliminated the assignment.

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 § 4.21 (2004); 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). See W. Va. Code § 18-29-6. "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that his failure to receive either the Custodial Supervisor position or the extracurricular position establishes a clear pattern of discrimination, reprisal and harassment, arising from his role in the county personnel association. MCBE denies that Grievant has been penalized for his participation in the employee organization, and asserts that the decision to return the transportation office position to a half-time rather than extracurricular

assignment was based on actual need.

Discrimination is defined by W. Va. Code §18-29-2(m) 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." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).**

Reprisal is defined by W. Va. Code §18-29-2(p) as "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 presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing 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; 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, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). If a grievant

establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627,309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997). Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). At the level four hearing, Grievant testified that because MCBE processes a significant number of grievances during the school year, and the majority of them are from employees in the transportation department, he believed there would be concern that he would spend his work time on those matters. Grievant advised Transportation Director Irv Schenetzer at his interview that he would be there to work, not to promote MCSSPA business. Mr. Schenetzer testified that he did not consider Grievant's association status to be a problem, but did not believe the work could be completed in two hours. This opinion was supported by the testimony of Intervenor, who stated that it takes the entire three and one-half hours to complete the cleaning.

Grievant did not file a grievance when he was not offered the supervisory position, and considering the length of time since that event, no clear pattern of discrimination has been established. Grievant has not shown that any other association officer, past or present, has been penalized in such a fashion. Because the incidents occurred three years apart there was no repeated or continual disturbance, irritation or annoyance to constitute harassment. Although Grievant has been President of the county association for seventeen years, and was not selected for this assignment, the evidence does not support a finding of reprisal. While Grievant's frustration at the course of events isunderstandable, there is insufficient evidence that MCBE's actions were motivated by a desire to keep him out of the assignment.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusion 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 § 4.21 (2004); 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). See W. Va. Code § 18-29-6. "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 Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Discrimination is defined by W. Va. Code §18-29-2(m) 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. An employee attempting to prove discrimination under the education statute need only establish that he/she was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant. Bd. of Educ. v. White, 605 S.E.2d 814 (W. Va. 2004).

4. Reprisal is defined by W. Va. Code §18-29-2(p) as "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." 5. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing 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; 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).

6. "Discrimination" is defined by W. Va. Code § 18-29-2(m) 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." 7. W. Va. Code § 18-29-2(n)

defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

8. Grievant has failed to prove by a preponderance of the evidence that MCBE has violated W. Va. Code §§ 18-29-2 (m), (n), or (p). Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia County. Any 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. 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: JUNE 7, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE