**DAVID SEALS,**

**Grievant,**

**v.** **Docket No. 06-25-094**

**MARSHALL COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

David Seals ("Grievant"), employed by the Marshall County Board of Education ("MCBE") as a Bus Operator, filed a level one grievance on or about September 15, 2005, in which he stated:
My Rt. was given away to bus #72 a.m. and #88 p.m. without my permission. This was done after my grievance was settled this past summer. I was told by Marshall Co. that this was not going to happen. End of Rt. was added onto. I was not put on transfer list.

For relief, Grievant requested "Money, legal expenses, interest, and loss of extra money."

The record does not include a level one decision. The grievance was denied following an evidentiary hearing at level two, and Grievant elected to bypass consideration at level three. A level four hearing was conducted in the Grievance Board's Wheeling office on July 11, 2006. Grievant was represented by Rodney T. Berry, Esq., of Berry, Kessler, Crutchfield, & Taylor, and MCBE was represented by Richard S. Boothby, Esq. of Bowles, Rice, McDavid, Graff & Love, PLLC. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 17, 2006.

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

### Finding of Fact

1. Grievant has been employed by MCBE as a Bus Operator for approximately five years, and has been assigned route 86 in the Sand Hill area at all times pertinent to this grievance. Grievant has also served as President of the United School Service Personnel Association during this time period.

2. In February 2005, Grievant filed a grievance alleging that his bus route had been altered after the beginning of the school year, in violation of *W. Va. Code* § 18A-4-8a. This grievance was

settled, and Grievant was compensated for overtime he claimed to have incurred as a result of the changes.

3. Prior to the 2005-2006 school year, Transportation Supervisor Beth Bertram reviewed the three bus routes in the Sand Hill area, including Grievant's route. To more efficiently distribute the work load, changes were made to all the routes.

4. As a result of the changes, Grievant's route was reduced from 98 to 86 miles, and his work day was reduced from 9.25 to 5.83 hours.

5. Grievant no longer receives the 1.25 hours of overtime he had been paid in the previous school year.

## Issues and Arguments

Grievant argues that his assignment was changed as a result of reprisal, and in violation of *W. Va. Code* §18A-4-8a(8) which states:

No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

MCBE asserts that the minimal changes made in Grievant's route occurred prior tothe beginning of school, and were made in an effort to transport students in a more efficient manner.

## 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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

This issue has been addressed by the Grievance Board a number of times; however, because there are differing facts and circumstances surrounding each change of this nature, these claims are decided on a case by case, fact-specific basis. *Stover v. Mason County Bd. of Educ.*, Docket No. 96-

26-048 (Nov. 27, 1996); *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-23-541 (Mar. 27, 1996); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

As noted in *Froats v. Hancock County Board of Education*, Docket No. 89-15-414 (Dec. 18, 1989), a strict, literal interpretation of *W. Va. Code* § 18A-4-8a would preclude a school board from ever changing a service employee's schedule, even slightly, as one school year technically ends on June 30 and a new school year begins each July 1. Such a literal interpretation would produce an absurd result, inconsistent with the apparentlegislative intent of protecting school service employees from involuntary changes in their shift assignments. *See State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 454 S.E.2d 65 (1994). Thus, this Grievance Board recognized in *Froats* and *Conner* that county boards of education must have freedom to make reasonable changes in a service employee's schedule, so long as the alterations do not extend the employee's workday beyond the parameters of his or her current contract. *Conner, supra* at 15.

In this instance, Grievant's route was reduced by twelve miles which allowed him to complete his run within the regular work day. Although Grievant testified that he understood the prior route was his in perpetuity, that was incorrect. The changes made to route 86 consisted of deleting some miles at the beginning of the run, and adding onto the end of the run, for a total reduction of twelve miles. (See footnote 1) Grievant continues to be assigned a run comparable to the other bus operators in the Sand Hill area. MCBE has not changed Grievant's work schedule in violation of *W. Va. Code* § 18A-4-8a. *See Stover, supra; Cook v. Mason County Bd. of Educ*., Docket No. 96-26-105 (Aug. 19, 1996); *Teller v. Hancock County Bd. of Educ.*, Docket No. 96-15-188 (June 28, 1996); *Sipple, supra; Conner v. Barbour County Bd. of Educ.*, *supra*.

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*., *supra*. *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).

Grievant established a *prima facie* case of reprisal by showing that his route was amended after he had filed a previous grievance. However, MCBE has clearly rebutted the presumption of reprisal by showing the changes in Grievant's 2005-2006 assignment were made to redistribute the work load, a legitimate, nonretaliatory reason for the action. It appears that Grievant misunderstood the nature of the settlement agreement from his prior grievance, and believed that he was entitled to retain the overtime earnings throughout his employment. That simply was not what MCBE intended. Grievant continues to be paid for an eight-hour day, while working less than six hours under the revised assignment. In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

## 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 § 4.21 (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. Grievances contending an employee's schedule has been changed in violation of *W. Va. Code* § 18A-4-8a, which limits changes in a school service employee's daily work schedule during

the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis. *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-23-421 (Mar. 27, 1996). *See Conner v. Barbour County Bd. of Educ.*, *supra*; *Roberts v. Lincoln County Bd. of Educ.*, Docket No. 92-22-131 (Aug. 31, 1992).

3. Courts may venture beyond the plain meaning of a statute in those instances where a literal application would produce an absurd result. *State ex rel. Frazier v. Meadows,* 193 W. Va. 20, 454 S.E.2d 65 (1994). 4. Notwithstanding the language in *W. Va. Code* § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of his contract, some of which cannot reasonably be effected until shortly after school starts. *See Conner, supra; Froats v. Hancock County Bd. of Educ.,* Docket No. 89-15-414 (Dec. 18, 1989).

5. Grievant failed to prove by a preponderance of the evidence that his schedule had been changed in violation of *W. Va. Code* § 18A-4-8a, or that he had been transferred. 6. 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."

7. 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.*, *supra*. *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,* DocketNo. 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).

8. 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).

9. MCBE established a legitimate, non-retaliatory reason for making minimal changes to Grievant's bus route.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Marshall 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 tosuch 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: SEPTEMBER 7, 2006**

_____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

---

Footnote: 1

*Transportation Supervisor Bertram had ridden Grievant's 2004-2005 route with him, and opined that he drove at a much slower speed than necessary to safely transport the students. Apparently, that accounts for the reduction of 3.42 hours Grievant claims was required to drive the additional twelve miles.*