THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

VALERIE J. TIBBS,
Grievant,

v. **DOCKET NO. 2009-0375-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent, and

BETTY COLVIN,
Intervenor.

DECISION

This grievance was filed by Grievant, Valerie J. Tibbs, on September 17, 2008, against her employer, the Hancock County Board of Education. The statement of grievance reads:

> Mr. Reinard took my assigned job the preschool run and divided it between two drivers and as[s]igned me their special ed students. I was already taken off transfer at which [sic] at the time. I was told the transfer was to add new students in and around my bus route. As they do ever[y] year. Their bus[es] are better equipped for special ed students as mine is for preschool. I feel this action was unfair and done for spite as related to other like actions taken toward me at the end of last year.[1] I went up and reported these to the vice superin[ten]dents office and the superin[ten]dents office.

As relief Grievant seeks,"[m]y route back, my supervisor to treat me fair."

A hearing was held at level one on September 29, 2008, and the grievance was denied at that level on October 10, 2008. Grievant appealed to level two on November 3, 2008, and a mediation session was held at the Grievance Board's Westover office by

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[1] Grievant's representative clarified at the hearing that Grievant was claiming harassment.

Administrative Law Judge Wendelyn A. Campbell on January 13, 2009. An Order of Unsuccessful Mediation was entered on January 14, 2009, and Grievant appealed to level three on January 30, 2009. By Order entered April 28, 2009, Betty Colvin was granted Intervenor status. A level three hearing was held before the undersigned Administrative Law Judge on June 17, 2009, at the Grievance Board's Westover office. Grievant was represented by Owens Brown, West Virginia Education Association, and Respondent was represented by William T. Fahey, Esquire. This matter became mature for decision on July 20, 2009, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant challenged changes made to her route after she received a letter stating she had been taken off the transfer list, and requested that her old bus route be reinstated. Grievant was again placed on transfer for the 2009-2010 school year, rendering this part of the grievance moot, as Respondent may make any necessary changes to Grievant's route. Grievant also claimed harassment by the Transportation Coordinator. While the Transportation Coordinator's actions did irritate and annoy Grievant, his behavior was not contrary to that expected by law, policy, or profession. In particular, it is the job of the Transportation Coordinator to make necessary adjustments to bus schedules in order to best serve the needs of the students and the Board of Education.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education ("HBOE") as a Bus Operator for 31 years. Grievant transports special education students.

2. Grievant was placed on transfer in the Spring of 2008, due to anticipated changes in the special education student population, and changes to the pre-school program.

3. By letter dated July 21, 2008, Assistant Superintendent Wayne E. Neely advised Grievant that "your name has been removed from the transfer list for the 2008-2009 school year and you have been reassigned to your present position according to the adjusted bus schedule."

4. Grievant's bus route was changed just before the beginning of the 2008-2009 school year. These changes significantly altered her schedule from the prior year.

5. Grievant was again placed on transfer in the Spring of 2009.

6. During the 2007-2008 school year, Grievant finished her run before Intervenor Betty Colvin on Fridays because there was no pre-school on Fridays. Grievant transported special needs pre-schoolers Monday through Thursday. Intervenor Colvin complained about this, and would from time to time announce on the radio in the bus garage that Grievant had already parked her bus and was leaving in her car. Transportation Coordinator Tim Reinard spoke to Ms. Colvin and other bus operators on more than one occasion, and told them to stop this type of behavior. He also issued a policy letter regarding professionalism on the radio, but the behavior continued through the end of the school year. This type of behavior ceased after the 2007-2008 school year.

7. In the Spring of 2008, Mr. Reinard prepared an agenda for a meeting of the bus driver committee, and placed Grievant's name beside an agenda topic which was controversial. Grievant's name was also placed beside other agenda topics, but only one other bus operator's name was on the agenda beside a topic. Other agenda items had "northern drivers" beside the topics. Grievant was a member of the bus driver committee, and had been outspoken on the controversial topic.

8. While Mr. Reinard was preparing Grievant's evaluation, he was talking to another bus operator in his office. The record does not reflect whether the other bus operator knew whose evaluation Mr. Reinard was preparing, or whether the other bus operator could even see the evaluation. Mr. Reinard did not discuss Grievant's evaluation with the other bus operator.

9. Mr. Reinard commented on Grievant's evaluation that Grievant's participation in the union was affecting her work relationships, and he would "work on that." Mr. Reinard wanted to make sure Grievant was aware of this problem. Grievant did not think this was an appropriate comment for an evaluation; however, she did not advise Mr. Reinard of this, and she wrote on her evaluation, "comments are ok with me."

10. During the 2007-2008 school year Grievant transported pre-school special education students, who began their school day later than the other elementary students. For the 2008-2009 school year, pre-school began at the same time as the rest of the elementary school, and pre-school special education students could be transported on the same bus, at the same time as the special education elementary students. Bus schedules had to be changed because of this time change. Mr. Reinard rearranged the routes of the three special education buses which transported special education students in the

Broadview Elementary, Liberty Elementary and Weirton Heights Elementary area. He made the changes to the schedules which he believed best served the needs of the students and HBOE, and he also tried to make the schedules of the three bus operators more equal.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent first argued that this grievance was moot, as the 2008-2009 school year has ended, and Grievant was placed on transfer for the next school year. Respondent may change Grievant's schedule as needed for the coming school year. W. VA. CODE § 18A-2-7. Grievant believed the grievance was not moot because Respondent has always looked to the prior year's schedule when developing the new schedule. While this may well be true, it does not mean that Respondent cannot change Grievant's schedule for the 2009-2010 school year in any manner that it chooses to best serve the needs of the students and HBOE. This part of the grievance is moot.

> When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008). "Because it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Grievant also asserted a claim of harassment, which is not moot. Grievant claimed Mr. Reinard harassed her by not putting a stop to Ms. Colvin's complaints about Grievant's schedule, including Ms. Colvin's announcements over the radio; by completing her evaluation in the presence of another employee; by noting her union affiliation on her evaluation; by putting her name by a controversial issue on an agenda; and by changing her bus route.

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior

expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *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). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

While Mr. Reinard's actions certainly irritated and annoyed Grievant, his behavior was not contrary to the behavior expected by law, policy and profession. First, Mr. Reinard spoke to Ms. Colvin and other bus operators about their unprofessional behavior, and told them to stop. If they did not follow his directive, that does not constitute harassment by Mr. Reinard. The behavior has now stopped.

As to the complaint that Mr. Reinard put Grievant's name beside a controversial topic on an agenda, Mr. Reinard testified that everyone knew Grievant was outspoken on this issue, so placement of her name by this topic was not new information, and he did not intend to create a problem for Grievant. The record does not reflect whether the placement of a name beside an agenda item indicated that person or group had raised the issue, or whether that person or group would be speaking to the issue, nor was there any evidence that the placement of Grievant's name on the agenda did, in fact, cause any problems for

Grievant. When preparing an agenda, it is not uncommon to identify the person who raised the issue, or will lead the discussion.

With regard to Grievant's evaluation, while it may have been inappropriate for Mr. Reinard to continue to work on evaluations in the presence of other employees, there was no evidence that the other employee in this case saw Grievant's evaluation, and this behavior does not constitute harassment. Further, Mr. Reinard's comments about Grievant's union affiliation merely represent a statement of a problem he perceived, and one which he felt he needed to work on. Grievant was not concerned with the comments at the time, as she wrote on the evaluation, "comments are ok with me."

Finally, Grievant does not agree that the changes Mr. Reinard made to her bus route were in the best interests of the students and HBOE, and she preferred her old schedule. However, it is Mr. Reinard's job to determine what changes need to be made to the schedules of the bus operators. There is no doubt that changes were necessary for the 2008-2009 school year because the start time for pre-school had changed. Mr. Reinard reevaluated HBOE's transportation needs, and developed a new schedule for all three of the special education bus operators in the southern part of the county, which he believed was efficient. There is no evidence which would support a finding by the undersigned that Mr. Reinard changed Grievant's schedule simply out of spite. Mr. Reinard was doing his job.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules

of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

> 2. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008).

3. As Grievant has been placed on transfer for the 2009-2010 school year, and the 2008-2009 school year has ended, the claim regarding the change in Grievant's route is moot.

4. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession."

5. Mr. Reinard has not harassed Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 4, 2009