THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LINDA ANN HYPES,

Grievant,

v. **Docket No. 2010-0389-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Linda Hypes, Grievant, is a Transportation Worker 2 Craft Worker ("TW2CW") employed by West Virginia Division of Highways ("DOH"). Grievant Hypes is assigned to the Look Out Substation in Fayette County, West Virginia. Ms. Hypes filed a level one grievance form dated September 21, 2009, which contained the following grievance statement:

> On or about 09/04/09 my job duties were drastically changed, after 14+ years of the same duties, being a craft worker II. Now these duties are being performed by supervisors and various other employees as they are assigned. SEC. 3, SEC.4, SEC.6, and all others that pertain.[1]

As relief, Grievant seeks to be "Returned to former duties immediately and all discriminatory practices stopped now."[2] Grievant Hypes requested a level one conference.

A level one conference was held on October 19, 2009, and a level one decision denying the grievance was rendered on November 18, 2009. Grievant appealed to level two and a mediation was held on March 23, 2010. An Order related to the mediation was entered on March 26, 2010, and Grievant Hypes filed a timely appeal to level three.

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[1] The Section references were never addressed in the level three hearing.

[2] Level one grievance form.

A level three hearing was held in Beckley, West Virginia on February 16, 2011. Grievant appeared at the hearing *pro se.* Respondent DOH was represented by Jason C. Workman, Esquire, with the DOH Legal Division. At the close of the testimony the parties agreed that any proposed findings of fact and conclusions of law that either party wished to submit would be mailed no later than March 28, 2011. Grievant did not submit any fact/law proposals. The proposals from Respondent DOH were received at the West Virginia Public Employees Grievance Board on March 28, 2011. This matter became mature for decision on that date.

Synopsis

Grievant Hypes had been a TW2CW at the Look Out Substation for many years. She mostly worked in the office of the substation doing clerical and janitorial work, as well as answering the phone and operating the radio. She spent very little time on the road crews helping with the maintenance of the highways. Grievant asserts that she was assigned to perform duties on the road maintenance crews instead of office duties in retaliation for her questioning the DOH policy related to workers wearing uniforms.[3]

Respondent counters that they do not typically have office workers in substations now because it is not an efficient use of resources. When DOH officials realized that Grievant was still assigned primarily to office duties, even though her classification was a TW2CW, they took action to assign her duties more consistent with her job classification.

[3] Grievant also asserts that the action was taken for political reasons related to her party affiliation and in reprisal for her filing a prior grievance. While these issues will be addressed herein, the majority of Grievant's evidence related to the DOH uniform policy.

Grievant failed to prove that her reassignment to duties within her classification was arbitrary and capricious, or the result of retaliation or reprisal. The grievance is DENIED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Hypes has been employed as a TW2CW at the DOH Look Out Substation for more than twenty-three years.

2. There are three DOH facilities in Fayette County. The main DOH Office is located in Oak Hill. There are two substations; one at Look Out and one at Falls View.

3. For some time Grievant worked on the road maintenance crews out of the Look Out Substation. However, for approximately the last fourteen years Grievant has been performing mostly clerical and janitorial duties at the substation and she engaged in road repair only on rare occasions. Grievant's typical duties included the following:

- Answering the telephone and operating the two-way radio;
- Routine record keeping including milage and time sheets ;
- Cleaning the bathrooms, sweeping and mopping the floors, dusting and taking out the trash; and
- Running the buffer and ordering supplies.[4]

` 4. The West Virginia Division of Personnel classification specifications for the Transportation Worker 2 describes the position, in part, as follows:

TRANSPORTATION WORKER 2

Nature of Work

Under general supervision, at the full performance level, performs skilled work in the construction and maintenance of highways and related buildings and structures. Operates motorized highway maintenance equipment such as

[4] Grievant's Exhibit 3, a daily schedule prepared by Grievant for the hearing.

> boom mower, mudjack, front-end loader, tandem-axle truck and snow plow. Makes major repairs to highways, culverts, bridge structures; welds, and erects steel girders and supports; builds forms and finishes concrete; performs overhaul of gasoline powered engines and/or diesel powered equipment; performs major body repairs for automotive and maintenance equipment. Performs a variety of skilled and semiskilled work at the full-performance level in the mechanical or building trades in connection with the maintenance and repair of state facilities, institutions, and buildings. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.[5]

5. A Job Posting for a DOH TW2CW position in Wood County described the duties for the position as follows:

> TW2CW - Under general supervision at the full performance level, performs skilled work in the construction and maintenance of highways. Will use a variety of manual and power hand tools. Will assist Highway Equipment Operators and Craft Workers in work such as flagging, shoveling materials, cleaning culverts, mowing, brush cutting, litter pickup, and janitorial work. Performs related work as required. May be exposed to inclement weather and hazardous work conditions.[6]

6. In early September 2009, Grievant's duties were changed from working almost exclusively in the substation office to working with the road maintenance crews, doing typical TW2CW work on the public highways of Fayette County.

7. Previous to the reassignment of Grievant's duties, the DOH had adopted a policy related to employees wearing uniforms. Employees who spent most of their time

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[5] Grievant's Exhibit 1.

[6] Grievant's Exhibit 2. This posting is not for Grievant's position nor for a position in Fayette County. While the job postings my vary from county to county, this posting is a fairly representative sample of what a posting for a TW2CW position would contain.

doing road maintenance on the public highways were required to wear uniforms made from brightly colored and reflective material.[7]

8. The District 9 Administrators stated that Grievant was required to wear a uniform because she was in the TW2CW classification. Employees in that classification were required, by policy, to wear uniforms since most of their work was performed on the public highways. Grievant objected to being required to wear a uniform since she worked almost exclusively in the substation office.

9. Donald Beals is the DOH County Administrator for Fayette County. Grievant's supervisor told Administrator Beals that Grievant did not need to wear a uniform since nearly all of her work took place in the office.

10. When Donald Beals reported this to his supervisor, that manager was surprised that Grievant was working in the office since it is the standard for DOH, state-wide, that substations do not have office workers. Administrator Beals' supervisor instructed him to assign Grievant duties on the maintenance crews and to have her wear a uniform.

11. Mathew Rowan, is the District Engineer for District 9 of the DOH. Fayette County is in District 9. One of Engineer Rowan's duties is to review all overtime reported by employees in that District. Mr. Rowan had been to the Look Out Substation previously and noticed that Grievant did mostly office work there. He noticed that Grievant had been

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[7] *See, Canaday et al v. Div. of Highways,* Docket No. 2009-1715-CONS (Dec. 23, 2010) and *Williams v. Div. of Highways*, Docket No. 2010-0545-DOT (June 25, 2010), for a complete discussion of the DOH Uniform Policy and a description of the uniforms required to be worn by certain DOH employees.

reporting overtime and that concerned him because he thought she was a clerk and clerks are not supposed to work overtime. When Engineer Rowan discovered that Grievant was classified as a TW2CW, he brought it to DOH management's attention that she should not be exclusively assigned office work. This discussion was also part of the reason for the reassignment of duties for Grievant.

12. The DOH had previously been sued by female employees in the Transportation Worker 2 classification because they had been routinely given the office work in county offices and substations. It was alleged that this practice improperly kept female employees from advancing in the Transportation Worker classification because it denied them the opportunity to gain experience with road repair equipment and procedures, as well as training opportunities.

13. Following this lawsuit, it became the practice of DOH to make no distinction between the assignments given to Transportation Workers based upon the gender of the employee. Additionally, there were no office workers for substations because this was viewed as an inefficient use of employees. Clerical and janitorial duties were to be divided among the transportation workers regardless of gender or performed by the supervisors.[8]

14. As with many rural areas in West Virginia, there are locations in the Look Out service area where two-way radio reception is problematic. There are also areas that do not have good cell phone coverage. To address the communication issues that might arise if there was no person working in the Look Out Substation office, DOH put an answering machine in the substation and provided that all calls would be automatically routed to the

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[8] Level three testimony of Jeff Black, DOH Director of Human Resources.

office in Oak Hill where they would be answered. Additionally, all supervisors were given cell phones so that they could be contacted by either radio or phone.

15. Grievant Hypes had filed a previous grievance against the DOH in 2008. That grievance was decided at level three in 2009. *See, Hypes v. Div. of Highways,* Docket Number 2008-1648-DOT (March 5, 2009).

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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 alleges that her duties were drastically changed from office and janitorial work to road maintenance as reprisal for her questioning of the DOH policy requiring uniforms and because she previously filed a grievance. There is no dispute that her reassignment occurred shortly after Grievant objected to being required to wear a uniform. Respondent argues that the uniform issue brought it to the attention of DOH management that Grievant was working almost exclusively in the substation office which is a practice they had been trying to eliminate. Respondent alleges that the reasons for Grievant's reassignment were to further legitimate work related goals.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer 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, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
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> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown*

Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004). As discussed in the case of *Franks Shoe Store, supra,* this process has also been used to determine if an employer is guilty of improper retaliation against an employee for engaging in protected activity other than the Public Employee Grievance Procedure.

Grievant alleges that she had been working almost exclusively in the substation office for nearly fourteen years while classified as a Craft Worker. She points to a recent job posting for a Craft Worker position which contains the duties of janitorial work and "related work as required" as proof that she was performing work within her classification. She alleges that the only reason she was reassigned was because she had previously filed a grievance and had recently complained about the new policy that required her to wear a uniform.

There is no doubt that the filing of a grievance by Ms. Hypes in 2008 was a protected activity under the statutory definition of reprisal. Grievant had not actually filed a grievance related to the DOH uniform policy. Consequently, there is some question if her questioning of the policy constitutes a protected activity under the definition of reprisal in WEST VIRGINIA CODE § 6C-2-2(o). Additionally, no argument was made regarding whether her complaints about the uniform policy met the standards for protected speech by a public employee

under *Connick v. Myers,* 461 U.S. 138 (1983) and its progeny. However, for purposes of this discussion, it will be assumed that it is. Therefore, Grievant has met the first prong of the test.

After complaining about being required to wear a uniform, Grievant was reassigned to duties with the road maintenance crews instead of the clerical and janitorial duties she had been performing. While these duties are within the Craft Worker classification, Grievant believed the reassignment to be adverse treatment.

The DOH managers knew that Grievant had complainted about the implementation of the uniform policy. They also had, at least, constructive notice that she had previously filed a grievance since it resulted in a level three decision that is filed with the Office of the Secretary of State and published on the West Virginia Public Employees Grievance Board website database. *See, Hypes v. Div. of Highways,* Docket Number 2008-1648-DOT (March 5, 2009).

The remaining question is whether there is a causal connection between the adverse action and the adverse treatment. An inference can be drawn that a retaliatory motive existed based upon the proximity in time between the protected activity and the adverse treatment. Grievant was reassigned soon after she complained about having to comply with the uniform policy. Additionally, the level three decision in her prior grievance was issued approximately six months before the reassignment. Assuming the complaint and the grievance were protected activities, she has made a *prima facie* case of reprisal. However, Respondent was able to rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action.

Respondent noted that the reason given for Grievant not needing to wear a uniform was that she spends virtually all of her work time in the substation office. The DOH demonstrated that it is the state-wide standard that substation offices not have full-time office workers. DOH noted that it is not an effective use of the workforce to have a TW2CW in substation offices all the time. Rather, calls to the substations are generally routed to the county offices.

Additionally, DOH points out that there has been prior litigation regarding the routine assignment of clerical and janitorial work to female employees in the Transportation Worker classifications. Jeff Black has been the DOH Director of Human Resources for 24 years. He testified that the lawsuit alleged that this practice improperly kept female employees from advancing in the Transportation Worker classification because it denied them the opportunity to gain experience with road repair equipment and procedures, as well as training opportunities. Following this lawsuit, it became the practice of DOH to make no distinction between the assignments given to Transportation Workers based upon the gender of the employee. Clerical and janitorial duties were to be divided among the transportation workers regardless of gender or performed by the supervisors. Consequently, when the DOH management became aware that Grievant was assigned almost exclusively to clerical and janitorial duties in the substation office, Administrator Beals was directed to adjust Grievant's duties to conform with the typical duties of TW2CW employees and to divide the janitorial duties at the Look Out substation among all the Transportation Workers.

Finally, there was no evidence that the prior grievance had any influence upon Grievant's reassignment. When Administrator Beals was questioned about the grievance at level three he could not remember that Grievant Hypes had filed it.

West Virginia DOH Administrative Operating Procedures, Section II, Chapter 8 allows the DOH to reassign an employee to different duties within the same organizational unit as long as those duties remain within the employee's job classification. *Keaton et al. v. Div. of Highways*, Docket Number, 2010-1523-CONS (June 30, 2010). Grievant's reassigned duties are within her classification and the reasons for her reassignment are legitimate and non-retaliatory. Grievant introduced no evidence to prove that the non-retaliatory reasons for the reassignment were a pretext for retaliatory motives. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

(1) That he engaged in protected activity (i.e., filing a grievance);

> (2) That he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *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).

3. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989).

4. "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

5. Grievant established a *prima facie* case of reprisal, but Respondent was able to prove, by a preponderance of the evidence, that it had legitimate, non-retaliatory reasons for reassigning Grievant to perform duties related to road maintenance. Grievant did not

prove that Respondent's reasons for the reassignment were merely a pretext for retaliatory motives.

Accordingly, the 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: August 1, 2011

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

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