THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DALLAS PLUMLEY and CRAIG ADKINS,

Grievants,

v. **DOCKET NO. 2013-0324-CONS**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On September 7, 2012, Dallas Plumley and Craig Adkins ("Grievants") filed a Level One grievance with their employer, the Lincoln County Board of Education ("Respondent" or "LCBE") alleging the following:

> The county board of education has asked Grievants to sign a contract (attached) that commences July 1 for 220 days and in violation of recent board of education action indicating that the contractual period of employment is August 8 to June 4. Thus, the contracts presented by the school system violate the board of education's action with regard to the time frame for employment. Moreover, Grievants contend that this action is in retaliation for their currently pending grievance regarding their claim of 11 months pay for the 2011-2012 school year.

Following a Level One conference on October 15, 2012, LCBE Superintendent Patricia Lucas issued a decision denying the grievance on October 24, 2012. On October 31, 2012, Grievants requested mediation at Level Two. Following a Level Two mediation session on January 22, 2013, Grievants appealed to Level Three on January 22, 2013.

A Level Three hearing was held before the undersigned Administrative Law Judge on March 29, 2013, at the Grievance Board's Charleston, West Virginia office.

Grievants were represented by Jeffrey G. Blaydes, Esquire, of Carbone and Blaydes, and Sidney Fragale, Staff Representative for AFT-West Virginia. Respondent was represented by Rebecca Tinder, Esquire, of Bowles Rice. This matter became mature for decision on July 22, 2013, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants allege that the contracts they were required to sign violated some official action by the Board of Education, and that the terms contained in those contracts were included as retaliation for their actions in filing separate grievances in August 2012 challenging their pay calculations. However, there was no evidence to indicate how the contracts necessarily violated any agreement approved by LCBE. Indeed, no provisions in these contracts were as restrictive in regard to scheduling JROTC Instructor duties as the agreement between LCBE and the Army, which required Grievants to satisfy various Army requirements. Further, Grievants failed to establish a *prima facie* case of retaliation because they did not establish by a preponderance of the evidence that the 220-day contracts they were required to sign in September 2012 contained terms that differed from their 220-day contracts for the previous school year so as to constitute a materially adverse personnel action. Therefore, this grievance must be denied.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Lieutenant Colonel Dallas Plumley and Sergeant Major Craig Adkins ("Grievants") are employed by LCBE as Junior Reserve Officer Training Corps ("JROTC") Instructors.

2. On August 6, 2012, Grievants filed grievances against LCBE alleging that they were not being properly compensated for their services under their existing 220-day teaching contracts, as required by the Board's written agreement with the United States Army to employ them in administering the local JROTC unit.

3. Subsequent to filing their grievances in August 2012, Grievants were asked to sign new teaching contracts for the 2012-13 school year. These contracts were continuing contracts with employment terms of 220 days commencing on July 1, 2012, and ending on June 30, 2014, which is the end of the school system's fiscal year.

4. Grievants signed each of these contracts "under protest," asserting that the contracts improperly perpetuated the compensation which they were challenging through their previous grievance, and that the period of employment should have been stated as running from August 8, 2012 to June 4, 2013.

5. Grievants further assert that these contracts were imposed upon them in retaliation for the grievances they filed in August 2012, and which they continued to pursue through the grievance procedure.

6. No LCBE official told Grievants when they were required to work the additional 20 days of employment they were authorized beyond the normal 200-day contract for teachers. *See* G Ex 3.

7. Grievant Plumley has worked a total of 227 days and Grievant Adkins has worked a total of 232 days during the 2012-2013 school year.

8. Included in the 232 days referenced in Finding of Fact Number 7, above, Grievant Adkins attended a 6-day continuing education program in July 2012 as required and conducted by the Army.

9. LCBE does not ordinarily compensate teachers who attend similar training that is not required by LCBE.

10. Grievants' decision to work extra days and when to schedule those days arises out of the nature of their duties as JROTC Instructors, as opposed to guidance from the county superintendent, school principal, or any other LCBE official.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

This grievance involves two essential allegations: (1) the contracts Grievants were required to sign for the 2012-13 school year violated some action of the Board of Education; and (2) the contract terms were intended to retaliate against them for filing a

pending grievance challenging their pay calculations. As to the first of these allegations, the evidence indicated that any restrictions on the dates when Grievants were permitted to perform their duties, outside the 200 days when other teachers are working, are dictated by the Army's requirements as reflected on DD Form 2767. *See* G Exs 5 & 6. To the extent that their contracts are inconsistent with the contract between LCBE and the Army, the provisions in their employment contracts are more beneficial, because the contracts which they are protesting, on their face, permit them to perform their duties on any dates between July 1, 2012 and the end of the school year (June 30, 2013). More importantly, it appears from the evidence that Grievants necessarily work on weekends and school breaks because that is when other entities schedule and conduct the beneficial activities in which JROTC students participate with the assistance of their Instructors. The evidence presented simply does not support the allegation Grievants submitted at Level One.

Grievants also claim that the contracts which they signed in protest were issued in retaliation for the grievances they filed challenging their pay in August 2012. W. Va. 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 for any lawful attempt to redress it." In general, grievants alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

(1) that they were engaged in activity protected by the statute (*e.g.*, filing a grievance);

(2) that their employer's official or agent had actual or constructive knowledge that the employees engaged in the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employees' protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievants have failed to establish a *prima facie* case of discrimination by a preponderance of the evidence. Although Grievants engaged in protected activity when they filed their initial grievances, and the Board was undoubtedly aware of these grievances, the credible evidence of record indicates that LCBE did nothing beyond maintaining the *status quo* in regard to Grievants' employment situation, and continued to treat them substantially the same in 2012-13 as they were treated in the prior school year before they filed their grievance. The statutory prohibition against retaliation is merely a shield to protect employees who file grievances from responsive adverse actions by their employers, it is not a sword to be used against the employer's established legal position defending against an ongoing grievance.

More particularly, the undersigned Administrative Law Judge finds that Grievants suffered no material adverse action as a result of LCBE's insistence on signing a standard teaching contract which, by its terms, essentially continued their employment under the same terms and conditions as in the previous school year, notwithstanding Grievants' position that at least some of those terms involved a misapplication of law and written agreement under which they worked. However, there was no loss of pay beyond that which they were challenging in their earlier grievance, nor was there any change in their titles or responsibilities, and their benefits were not diminished. *See Crady v. Liberty Nat'l Bank & Trust Co*., 993 F.2d 132, 136 (7th Cir. 1993). In short, Grievants were no worse off with these contracts in their personnel files than they were when they filed their initial grievance on August 6, 2012.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ*., Docket No. 93-29-481 (Apr. 4, 1993).

2. To establish a *prima facie* case of reprisal or retaliation, the Grievants must establish by a preponderance of the evidence the following evidence:

> (1) that they were engaged in activity protected by the statute (*e.g*., filing a grievance);

(2) that their employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

3. Grievants failed to establish a *prima facie* case of retaliation in that there was no persuasive evidence that the employment contracts they were required to sign in September 2012 represented an adverse employment action.

4. Grievants failed to establish by a preponderance of the evidence that the employment contracts they were required to sign in September 2012 involved a material violation of any applicable law, statute, rule, or regulation applicable to their employment status.

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).

Date: July 30, 2013

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LEWIS G. BREWER
Administrative Law Judge