

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TANE L. TOOTHMAN AND KATHLEEN REED,

Grievants,

v.

Docket No. 2019-1747-CONS

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Tane Toothman and Kathleen Reed, are employed by Respondent, Marion County Board of Education. On June 5, 2019, Grievant Toothman filed a level one grievance, alleging:

On June 3, 2019 I was presented with a finalized bus schedule which reflected a change to my existing run that included 35 extra miles. No transfer letter or procedure was forthcoming. This violates WV Code 18A-2-7, 6-C-2-3c, 6C-2-2 definitions (d) (h) (IV). This change also removes me completely from my attendance area and is the result of favoritism [sic]/retaliation.

For relief, the grievant sought the following:

To be returned to my previous bus run and to have disciplinary measures take for the favoritism [sic] and retaliatory nature of the reasons why there was an attempt to change my run to this degree. ...

To summarize, Tane Toothmans bus run #71, has been moved from it's attendance area and had 35 additional miles added to it to make a new run for another driver and with no legal transfer including Transfer letter and/or hearing before the board. All efforts have been made to communicate these issues to the Transportation Director and the Superintendent. It is also believed that the P.M. portion of the ALC run should be bid out as a midday just as the morning portion and should not be added to a bus run and that by trying to do so moves

Bus #71 far out of legal boundaries. The agreement made by the previous driver of Bus #96 to do this does not carry over...¹

Grievant Kathleen Reed filed a level one grievance form dated June 11, 2019, alleging:

On June 3, 2019, I received a copy of a finalized bus schedule for the 2019-2020 school year. This schedule adds stops and time to my run that were previously on another driver and then removed giving preferential treatment to that driver and discriminating [sic] against me. Violating WV Code 6-C-2-2 and WV Code 18A-2-7.

For relief, Ms. Reed sought the following:

That my bus run remain as configured during the 2018-2019 school year and that any action "favoring" a similarly situated driver be rescinded and that any action which "discriminates" [sic] against me be rescinded. ...

It is our position that there has been violation of the following: Attached documentation is evidence of such. Kathy Reed drives bus #92 which was never part of the proposed transfer/realignment of Bus #96 and is now being put upon her route without transfer. ...

These grievances were consolidated at level one. On June 9, 2020, Grievants amended their grievance, without objection, as follows:

The bus run in question in the aforementioned grievance was affected again by a transfer this year although the current grievance is still pending and therefore, the status of the bus run is unknown.

In addition, during the transfer hearing process at the local BOE level on May 21, 2020, missteps occurred as to the confidentiality and the "closed" nature of the hearing thereby affecting the due process rights of the grievant. Subsequent efforts to resolve the issue have failed. Therefore, given that current events are directly relative to the ongoing Level 3, I am requesting to add these events to the current Level 3 Grievance, thereby amending it.

¹Each grievance has been edited for length.

A level one conference was held on June 26, 2019. A level one decision denying the grievances was issued around July 15, 2019. Grievants appealed to level two on July 22, 2019. A mediation session was held on October 21, 2019. Grievants appealed to level three of the grievance process on October 29, 2019. A level three hearing was held via an online platform on July 17, 2020. Grievants appeared along with their representative, Gordon Simmons, West Virginia School Service Personnel Association (WVSSPA). Respondent appeared through Rockie DeLorenzo and by counsel Richard S. Boothby, Esq. This matter became mature for decision on August 21, 2020. Each party submitted Proposed Findings of Fact and Conclusions of Law.²

Synopsis

Grievant Toothman and Grievant Reed are employed by Respondent as bus drivers. Respondent notified Grievants of changes to their bus schedules for the 2019-2020 school year. Grievants contend these changes were in retaliation for their union and grievance activity. They also allege lack of due process because Respondent did not provide them transfer letters and timely notice of rights or obtain their written consent to changes. After Grievants initiated this action, Respondent properly transferred their routes for 2020-2021. Grievants amended their grievance to include breach of confidentiality after Respondent let Grievant Toothman's supervisors listen in on her transfer hearing against her wishes. As Grievants were properly transferred in 2020-2021, their due process claims requesting reinstatement to their 2018-2019 routes are moot. Their claims of retaliation and breach of confidentiality do not entail a request for return to their 2018-2019 routes. Nevertheless, Grievants did not prove a right to

²Grievants do not address their discrimination/favoritism claim in their PFFCL. This claim is deemed abandoned and will not be addressed further.

confidentiality in transfer hearings or that changes to their 2019-2020 routes were retaliatory. Accordingly, this grievance is DENIED.

The following Findings of Fact are based on a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are employed as full-time bus drivers by Respondent, Marion County Board of Education.

2. Grievants are members of the Marion County chapter of the West Virginia School Service Personnel Association (WVSSPA). Grievant Toothman is its vice president and transportation representative and her husband, Joe Toothman, is its president.

3. In January of 2019, due to the planned retirement of nine bus drivers, Respondent began holding meetings with bus drivers to discuss potential changes to their bus routes for the 2019-2020 school year. Respondent sent certified letters to some drivers. (See testimony of Transportation Director Chad Norman, Transportation Supervisor Ron Schmuck, and Grievant Toothman)

4. On January 25, 2019, Union President Joe Toothman and Grievant Toothman met with Transportation Supervisor Schmuck to discuss recommendations, responses, and suggestions for routes in the 2019-2020 school year. (Grievant Toothman's testimony)

5. In a memorandum to the Marion County Board of Education dated March 20, 2019, Supervisor Schmuck made four proposals of bus routes for 2019-2020, each of which described a "consideration of drivers to be placed on the transfer list." Grievants were listed as affected drivers. (Grievants' Exhibit 1)

6. On April 15, 2019, Grievants sent then Superintendent Price a petition with drivers' signatures detailing concerns in changing their bus schedules. The letter states that on March 23, 2019, Respondent sent some of the drivers certified letters informing them that their runs were being affected by upcoming vacancies. The letter cites West Virginia Code 18A-2-7, which requires employees to be notified of transfers by April 1, 2019. The letter states, "it became clear that routes were being changed in areas that were not directly affected by retirements or resignations and were also not in any way involved. Also, there were some areas where there were legitimate vacancies, and yet, routes in those areas were NOT changed." (Grievants Exhibit 5)

7. Supervisor Schmuck told school Board Member Donna Costello that Grievants had bullied bus drivers into signing the petition challenging changes to their bus routes. When Ms. Costello ran into one of the named drivers, she asked him if he was bullied and was told no. (Ms. Costello's testimony)

8. On April 16, 2019, the Marion County Board of Education met to address a levy. After adjournment, Superintendent Price told the Board members that "Ron [Schmuck] brought in these schedules." Price responded affirmatively when asked if these drivers were on the transfer list, adding, "the ones that got letters." Price went on to tell the Board members "the proper form for each of those, if they get a transfer is RIF, and if they want a hearing, they can demand a hearing. If they get some other adjustment to their schedule and they don't agree with it, they file a grievance." (Grievants' Exhibit 8)

9. On April 21, 2019, Transportation Director Chad Norman sent Grievants and other affected drivers a letter informing them of "realignment/adjustments in bus routes" for the 2019-2020 school year. (Grievants' Exhibit 7)

10. Grievants and other affected drivers believed that these were transfer letters since they had been received via certified mail. However, the letters made no reference to “transfer” and contained no notification of “transfer hearing” rights. (See Grievants’ Exhibit 7)

11. These changes were not what had been discussed with Joe Toothman and Grievant Toothman during their meeting with Supervisor Schmuck on January 25, 2019. (Grievant Toothman’s testimony)

12. Due to the resulting confusion, WVSSPA, via Grievant Toothman and her husband, contacted the superintendent for clarification. (Grievant Toothman’s testimony)

13. On April 29, 2019, Director Norman sent a reply letter reiterating the points in the April 21st letter and adding, “This is not to be confused with a transfer and you are not considered on the transfer list.” (Grievants’ Exhibit 2)

14. By May 21, 2019, Director Norman had spoken with the affected bus drivers about voluntarily agreeing to the proposed bus route changes for the 2019-2020 school year. Most of these bus drivers voluntarily agreed to the recommended changes. (Testimony of Director Norman & Supervisor Schmuck)

15. Grievant Toothman’s 2019-2020 bus schedule increased from 2018-2019, by about 35 miles a day (from 49 miles to 84 miles) and traversed multiple areas into the North Marion attendance area. This resulted in her bus transporting fewer students than before. (Grievant Toothman’s testimony)

16. Grievant Toothman’s downtime was comparable to that of other bus drivers. (Grievants’ Exhibit 6)

17. Respondent told Grievant Toothman she had excessive downtime. (Grievant Toothman’s testimony)

18. Supervisor Schmuck prepared a comparative summary of Grievant Toothman's 2018-2019 and 2019-2020 assigned bus routes showing that her miles increased by 29.2 miles and that her time on the clock decreased by 5 minutes to 5 hours & 30 minutes. Supervisor Schmuck concluded, "YOU ASK, HOW CAN THE DRIVER, DRIVE 29.1 MORE MILES AND BE ON THE CLOCK LESS TIME? NO 35 MINUTE SMOKE BREAK." (Respondent's Exhibit 13)

19. Grievant Toothman's time on the clock technically remained unchanged because a portion of her downtime (i.e. "smoke break") had been removed. (Respondent's Exhibit 13)

20. Respondent contracts with its bus operators to be on the clock for up to seven hours a day. (Grievant Toothman's testimony)

21. Grievants were not scheduled to work seven hours in any school year relevant to these grievances. (Respondent's Exhibits 15, 16, 20, & 21)

22. WVSSPA has had an ongoing battle with the transportation department. The union has challenged changes affecting its members and has been involved in filing a number of grievances³ against Respondent. (Grievants' testimony)

³See *Tennant v. Marion County Board of Education*, Docket No. 06-24-135 (December 8, 2006); *Romano v. Marion County Board of Education*, Docket No. 2008-1504-MrnEd (December 16, 2008); *Boore v. Marion County Board of Education*, Docket No. 2011-1306-MrnEd (November 4, 2011); *Santy v. Marion County Board of Education*, Docket No. 2012-1010-MrnEd (September 12, 2012); *Thomas v. Marion County Board of Education*, Docket No. 2014-0499-MrnEd (July 9, 2014); *Thomas v. Marion County Board of Education*, Docket No. 2014-0499-MrnEd (January 20, 2015); *Cyphers v. Marion County Board of Education*, Docket No. 2011-1306-MrnEd (November 4, 2019). The most recent representation was a decision involving Grievant Reed's husband, *Reed v. Marion County Board of Education*, Docket No. 2019-0844-MrnEd (December 27, 2019).

23. At the time of the changes to their bus routes, Grievant Reed's husband, Robert Reed, was represented by the union in an ongoing grievance action against Respondent. (Grievant Reed & Mr. Reed's testimony)

24. When the school attended by Grievant Reed's grandchild closed early one day due to an emergency, Supervisor Schmuck called the school to check on whether Grievant Reed's grandchild had been picked up. (Grievant Reed's testimony)

25. The change to Grievant Reed's bus route has her traversing and crossing the dangerous Manley Chapel Road. Respondent had previously avoided routing buses across traffic on this road, instead having buses simply traverse it and turn around at either end. (Grievant Reed's testimony)

26. Supervisor Schmuck does not normally monitor drivers during their breaks. However, for a period of time prior to changing Grievants' 2019-2020 schedule, Supervisor Schmuck monitored Grievant Toothman during her smoke breaks. Respondent never accused Grievant Toothman or voiced any suspicion that she violated any rule or policy when smoking during her downtime. (Supervisor Schmuck's testimony)

27. Grievants did not agree to the proposed changes to their bus routes. (Grievants' testimony)

28. On October 29, 2019, Grievants appealed to level three of the grievance process.

29. On March 24, 2020, prior to their level three hearing, Respondent sent each Grievant a letter notifying them they were being considered for "transfer" in the 2020-2021 school year due to bus route realignment. It informed them of their right to a hearing before the school board. (Respondent's Exhibit 27 & 28)

30. Grievant Reed did not request a transfer hearing for her 2020-2021 bus route. (DeLorenzo's testimony)

31. Grievant Toothman requested a transfer hearing for her 2020-2021 bus route. She requested that the hearing be closed. (Grievant Toothman's testimony)

32. On April 21, 2020, Grievant Toothman had a transfer hearing before the school board regarding her 2020-2021 bus route. (Respondent's Exhibit 29)

33. Grievant Toothman's 2020-2021 transfer hearing was held using an online platform. Multiple invitation links were sent to Board members, the Superintendent, and various central office administrators, including Director Norman and Supervisor Schmuck. (DeLorenzo's testimony)

34. Director Norman and Supervisor Schmuck listened in on Grievant Toothman's transfer hearing but did not testify. (DeLorenzo's testimony)

35. Grievant Toothman was not aware that Director Norman and Supervisor Schmuck were present until after the transfer hearing. (Grievant Toothman's testimony)

36. The transfer hearing is a matter of record. (DeLorenzo's testimony)

37. On April 22, 2020, Respondent sent a letter to each Grievant notifying them of their placement on the "transfer list" for the 2020-2021 school year. (Respondent's Exhibits 27 & 29)

38. On June 9, 2020, Grievants emailed the Grievance Board a request to amend the original grievance to include a claim that Respondent had breached confidentiality during the transfer hearing process for the 2020-2021 school year. On June 11, 2020, Respondent replied by email that it did not object.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievants assert that Respondent denied them due process in not providing transfer letters for changes in their 2019-2020 school year bus routes and depriving them of their right to a hearing before the school board. They contend that these changes violate the prohibition in West Virginia Code § 18A-4-8a(j) against changing a service employee’s work schedule during the school year without their written consent. They claim this deprived them of due process and request that they be returned to their 2018-2019 bus routes. Further, Grievants contend that Respondent implemented these changes in retaliation for their union activity and assistance with grievances. Grievants assert that Respondent breached confidentiality when it allowed Director Norman and Supervisor Schmuck to listen in on the transfer hearing for Grievant Toothman’s 2020-2021 route changes.

Respondent counters that claims calling for reversal of the 2019-2020 route changes are moot because that school year has ended and Grievants were properly transferred to new routes in 2020-2021. Respondent concedes that claims of retaliation based on the 2019-2020 route changes are not moot but argues they are unsupported by the evidence. Respondent contends that while the breach of confidentiality claim

emanating from the 2020-2021 transfer hearing is not moot, it was not grieved. Grievants counter that their claims relating to the 2019-2020 schedule changes are not moot because they amended their grievance to include claims for the 2020-2021 schedule which is based on the 2019-2020 schedule. They further argue that they properly grieved their breach of confidentiality claim when they amended their grievance and Respondent stated it did not object.

In support of mootness, Respondent contends that the relevant facts are identical to those in *Tibbs v. Hancock County Bd. of Educ.*, Docket No. 2009-0375-HanED (Aug. 4, 2009). In *Tibbs*, the Grievance Board determined that a grievance based on route changes in a prior year became moot once the grievant was transferred the following year.

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. *Id.*

"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]." *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v.*

Lewis County Bd. of Educ., Docket No. 02-21-028 (June 21, 2002), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

Just as in the current action, the grievant in *Tibbs* argued that her grievance was not moot because the route to which she was transferred was based on the contested route from the prior school year. Furthermore, *Tibbs* held that even if the 2009-2010 bus route to which the grievant was transferred was based on the grieved bus route from the prior school year, the school board was not prohibited from changing the grievant's bus route for the 2009-2010 school year "in any manner that it chooses to best serve the needs of the students and [the school board]." The same is true for the current action. Here, Grievants argue that the 2020-2021 bus routes are based on their 2019-2020 routes. Grievants grieve their 2019-2020 bus routes and simply want their old runs from 2018-2019. There is no backpay component to this claim.

Further, Grievants do not grieve their transfer for the 2020-2021 school year. Grievants' amendment of their grievance simply raises a breach of confidentiality claim and does not challenge their new 2020-2021 bus routes. While the undersigned has due process concerns regarding the way changes were implemented for 2019-2020, there is no dispute that Grievants were properly transferred for the 2020-2021 school year. As

such, the undersigned cannot return Grievants to their 2018-2019 routes. The portion of the grievance that attempts to reverse the changes in 2019-2020 is now moot. As such, the undersigned will not entertain the merits of Grievants' claim challenging these changes.

The remaining claims for retaliation and breach of confidentiality are not moot because they entail relief that does not necessitate awarding Grievants their old routes. Grievants did not request that these claims be remedied by returning them to their 2018-2019 routes. Regarding breach of confidentiality, Grievant Toothman alleges that Respondent violated her due process by allowing Transportation Director Norman and Transportation Supervisor Schmuck access to her transfer hearing in spite of her request and Respondent's acknowledgement that it would be a closed hearing. However, Grievants do not cite any rule or law that was violated by allowing Transportation Director Norman or Transportation Supervisor Schmuck to listen in on the proceeding.

The 2020-2021 transfer hearings were held using an online platform. Multiple invitation links were sent to Board members, the Superintendent, and various central office administrators, including Director Norman and Supervisor Schmuck. Neither Director Norman nor Supervisor Schmuck testified at this transfer hearing. Grievant Toothman was not aware that they had listened in until after the transfer hearing. Everything stated during the transfer hearing is a matter of record. Thus, Director Norman and Supervisor Schmuck would have had access to the record. Grievants did not prove that Respondent violated Grievant Toothman's due process rights.

As for retaliation, "[n]o reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person

held responsible is subject to disciplinary action for insubordination.” W. VA. CODE § 6C-2-3(h). 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, a grievant 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 the following elements:

- (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that his 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.

Matney v. Dep’t of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013). 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). “[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).

“An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). “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).

Grievants contend they were retaliated against for their ongoing union activity and assisting in grievances against Respondent. Grievants are members of the Marion County chapter of the WVSSPA. Grievant Toothman is the Marion County chapter vice president and her husband is its president. Grievants assert that “[s]chool personnel are entitled to meet together, form associations and work in concert to improve their circumstances and the circumstances of the schools.” W. VA. CODE § 18A-2-12A(b)(3). Generally, a protected activity at the very least entails participating in or assisting someone in remedying an alleged injury through the grievance process. In the context of retaliation, this Board has interpreted “grievance proceeding” to mean a range of “protected activities” beyond a “grievance proceeding.” See *Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (September 22, 2016). WVSSPA has an ongoing battle with Respondent’s transportation department. The union has challenged bus route changes and has assisted in a number of grievances against Respondent over the years. In January of 2019, they assisted Grievant Reed’s husband in filing a grievance and Grievant Toothman met with Respondent about proposed changes to routes. The

union represented Mr. Reed in the grievance which was ongoing at the time Respondent decided to change their routes for 2019-2020. Grievants engaged in union advocacy in April of 2019, when they circulated a petition challenging Respondent's changes for 2019-2020 bus routes which they sent to the superintendent on April 15, 2019. Grievants proved they engaged in a protected activity.

Grievants also showed that Respondent knew they engaged in a protected activity. Transportation Supervisor Schmuck and Transportation Director Norman were aware of Grievants' history of assisting union members in grievance actions and acknowledged that they communicated with the union about the bus route changes starting in January of 2019. Supervisor Schmuck also acknowledged, with some frustration, that Grievants had, in April of 2019, circulated among WVSSPA drivers a petition objecting to the new bus schedules, even accusing Grievants of bullying drivers into signing it.

Grievants contend that Respondent engaged in adverse employment actions in changing their bus routes for 2019-2020. Respondent counters that Grievant Reed agreed to her 2019-2020 bus route changes. However, Grievant Reed provided unrefuted testimony that she did not agree. Further, had Respondent obtained Grievant Reed's consent, it should have done so in writing. On April 21, 2019, Respondent sent Grievant Reed a letter informing her of changes to her bus route for 2019-2020. West Virginia Code mandates that consent for schedule changes be in writing if during the school year. "A service person may not have his or her daily work schedule changed during the school year without the employee's written consent ..." W. VA. CODE § 18A-4-8a(j). It is further implied that notice for the school year ends on or before April 1st of the prior year. "The superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel and recommend their dismissal

pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before April 1st if he or she is being considered for transfer or to be transferred. ..." W. VA. CODE § 18A-2-7(a). Respondent acknowledges that Grievant Toothman did not consent to the changes to her bus routes. Thus, Grievants proved that Respondent took adverse employment action against them in changing their 2019-2020 routes.

The first three elements for reprisal have been met leaving only the issue of a causal connection between the protected activity and the adverse action. An inference may be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. Grievants and the union assisted Grievant Reed's husband with his grievance. That grievance was filed in January of 2019 and was ongoing until a decision was issued in December of 2019. On January 25, 2019, Union President Joe Toothman and Grievant Toothman meet with Supervisor Schmuck to discuss recommendations, responses, and suggestions for routes in the 2019-2020 school year. On April 15, 2019, Grievants sent their petition challenging the proposed bus route changes to the Superintendent. Respondent notified Grievants of their 2019-2020 bus route changes on April 21, 2019. However, in a memorandum to the Marion County Board of Education dated March 20, 2019, Supervisor Schmuck had made four proposals of bus routes for 2019-2020. Grievants were listed as affected drivers. Nevertheless, Grievants' activity in January occurred prior to the March 20th memorandum. Two months prior is a short enough time period to infer that the adverse actions resulted from retaliatory motives. Grievant has made a *prima facie* case of retaliation.

As Grievants have established a *prima facie* case of reprisal, Respondent may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. See *Mace, supra*. As justification for the changes to Grievants' 2019-2020 routes, Respondent points to the retirement of nine bus drivers and the greater efficiency sought from remaining drivers. Respondent justified its greater efficiency in order to avoid replacing the vacant positions, which resulted in only slightly more work from its remaining drivers. Grievants allege that routes were changed in areas not directly affected by retirements and that routes covering some areas where there were vacancies were not changed. Respondent contends that all bus route changes were made to achieve greater efficiency. There are many moving parts when reformulating bus routes with nine fewer drivers. The reduction of nine routes has ripple effects on routes that may not seem to be directly affected by the retirements. Respondent provided a legitimate non-retaliatory reason for these changes.

Grievants now have the opportunity to prove that the reason offered by Respondent for changes to their 2019-2020 routes were merely pretext for unlawful discrimination. See *Conner, supra*. Grievants put forth a number of incidents to establish pretext, including Supervisor Schmuck and Respondent monitoring Grievant Toothman's smoking habits, calling the school attended by Grievant Reed's grandchild to see if she had been picked up, forcing Grievant Reed to cross Manley Chapel Road against protocol, sending Grievant Toothman across multiple attendance areas, eliminating Grievant Toothman's smoke break, and justifying its elimination of some of Grievant Toothman's downtime by calling it a "smoke break." Grievants highlight Supervisor Schmuck's regular monitoring of Grievant Toothman and point to his testimony that he did not monitor any other driver during their downtime or "smoke break." Grievants point

out that Supervisor Schmuck's underlying hostility towards Grievant and lack of valid justification for monitoring her smoking habits was on full display during the following cross-examination:

How do you know it was a smoke break?

"Because I've seen her standing out there smoking."

For 35 minutes?

"Correct."

Every day?

"Every day."

Are you certain about that?

"Absolutely. If we would need to go to another level, I have pictures also."

Every day?

"Every day."

You stood there every day making film of Ms. Toothman?

"I did not say that I filmed her. I know that drivers have. She was out there every day. I have drivers that had taken pictures of her out there on a smoke break. She parked right in front of my office window."

Do you normally monitor the smoking of all of your drivers on break?

"No. I just monitor her. She just happened to be the first one on the lot. She is the first one in ... and about the last one back out."

(Supervisor Schmuck's testimony is highlighted.)

While Supervisor Schmuck may have treated Grievants inappropriately at times, none of these incidents demonstrate that the reason given by Respondent for the changes was pretext for retaliation. In order to accept Grievants' theory, the undersigned would have to find that Respondent refused to replace any of the nine retiring bus drivers and spread their duties among numerous bus drivers in an effort to get back at and

inconvenience Grievants as a result of their union and grievance activity. Grievants did not prove these changes to their 2019-2020 bus routes were retaliatory.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “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].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

3. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-

PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

4. As Grievants were properly transferred for the 2020-2021 school year, and as the 2019-2020 school year has ended, their due process claims correlating to a request for reinstatement to their 2018-2019 routes are moot.

5. “No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination. W. VA. CODE § 6C-2-3(h). 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.”

6. In general, a grievant 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 he was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that his 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.

Matney v. Dep’t of Health & Human Res., Docket No. 2012-1099-DHHR (Nov. 12, 2013).

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).

7. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). "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).

8. Grievants did not prove that the changes in their 2019-2020 bus routes were in retaliation for their union and grievance activity.

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 W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 29, 2020

Joshua S. Fraenkel
Administrative Law Judge