

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HOWARD MEDDINGS,

Grievant,

v.

Docket No. 2020-1523-WayED

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Howard Meddings, filed this grievance against his employer, Wayne County Board of Education, dated June 22, 2020, stating as follows:

Grievant is regularly employed by Respondent and has been for many years. Grievant has been involved [in] multiple grievances within the last 2-3 years. The first involving Respondent causing the exposure of several employees to asbestos. (Docket No. 2019-0152-CONS), this grievance is still pending. The second involving an unsatisfactory Personnel Evaluation which was settled when the county agreed to remove the evaluation from Grievant's personnel file in return for the grievance being withdrawn. (Docket No. 2018-1302-WayED). The third in which several employees including Grievant, reported a hostile work environment caused by Respondent's employee (then the Chief Mechanic). (Docket No. 2019-0710-CONS), this grievance was withdrawn due to the departure of the Chief Mechanic from that position. The fourth involving the selection of another less senior employee for the position of Mechanic/Director of Services/Inspector/School Bus Supervisor over the Grievant. (Docket No. 2020-0006-WayED), this grievance is still pending. Due to the legal issues of the other employee, Grievant was put into the position of Mechanic/Director of Services/Inspector/School Bus Supervisor "until the return of the regular employee." It has now become clear that the regular employee will not be returning, and that Grievant is the most senior service employee who is qualified for the position. Instead of posting the position as a service position, as it has been for 30+ years, Respondent has decided to change the job title and post it as a professional position, solely so that Grievant will not be

qualified for the position. Grievant has also reported illegal activity which resulted in the Wayne County Board of Education President (Joann Hurley's) brother being arrested. Respondent's actions constitute reprisal, retaliation, and harassment. Respondent's actions are in violation of W. Va. Code § 6C-2-2, § 6C2-3 (sic), and are arbitrary and capricious.

As relief sought, Grievant seeks "[f]or the position of Mechanic/Director of Services/Inspector/School Bus Supervisor to be posted as a service position, as it has been for the last 30+ years, and for Grievant to be given fair consideration when he applies for the position. Also, for Grievant to be treated fairly and for, going forward, the Respondent Board of Education's President, Joann Hurley, recuse herself from any Board decisions involving Grievant or Grievant's position because of her clear conflict of interest."

A level one conference was held on July 2, 2020, and the grievance was denied by decision dated July 31, 2020. Grievant appealed to level two on August 17, 2020. A level two mediation was conducted on December 3, 2020. Grievant perfected his level three appeal on December 21, 2020. A level three hearing was conducted on April 14, 2021, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by representative Gordon Simmons, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Richard S. Boothby, Esquire, Bowles Rice LLP. This matter became mature for decision on June 7, 2021, upon receipt of the last of the parties' post-hearing proposals.

Synopsis

Before his position was abolished through a reduction in force (RIF), Grievant was

regularly employed by Respondent as an Inventory Supervisor/Groundsman/Handyman. Grievant made suggestions about how his department should be reorganized to be more efficient, which included RIF'ing his position and creating three new positions. Grievant worked on this reorganization plan with the Superintendent. Grievant's position was RIF'd as he had proposed to the Superintendent and he did not contest the same. However, the Board refused to approve the creation of the three new positions as proposed. The Board changed one of the three to a professional position, for which Grievant was not qualified, and rewrote the job qualifications and responsibilities. The Board did not approve the creation of the other two positions. As a result, Grievant had no employment for the upcoming school year. Grievant argues that the Board engaged in acts of reprisal, retaliation, and harassment. Respondent denies Grievant's claims and asserts that the Board acted properly, violating no rule, policy, or law. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, the grievance is **DENIED**.

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

Findings of Fact

1. Grievant first began working for Respondent as a custodian in January 1988. Later, he worked as a bus operator, and finally, as an Inventory Supervisor/Groundsman/Handyman. One of Grievant's responsibilities was to maintain the parts room. All of Grievant's positions with Respondent were service personnel positions.
2. Todd Alexander is the Superintendent of Wayne County Schools. Superintendent Alexander began in this position effective July 1, 2017.

3. Immediately preceding Mr. Alexander in the position of Superintendent of Wayne County Schools, was David Roach, who was appointed as interim Superintendent on or about March 24, 2017. He served as interim Superintendent until June 30, 2017. Prior to Mr. Roach, Dr. Steven Paine served as Superintendent of Wayne County Schools. He left his position on or about March 23, 2017, when he was appointed State Superintendent of Schools. Accordingly, Wayne County Schools had three different superintendents between the middle of school year 2016-2017 and the beginning of school year 2017-2018.

4. Sometime during the 2016-2017 school year, then-Superintendent Paine requested the West Virginia Department of Education ("WVDE") Office of School Transportation conduct an audit on the Respondent's transportation department. The record is unclear as to then-Superintendent Paine's reasons for requesting the audit. Neither party called Dr. Paine to testify at the level three hearing.

5. There was testimony that the theft of tools, parts, and/or equipment was a problem in the Transportation Department at the time Dr. Paine requested the audit. However, the report presented as evidence at the level three hearing makes no mention of theft. At the beginning of the report, OST writes that it analyzed the operations of the Transportation Office and determined that there were several areas "that should be considered for improvement to increase the over-all efficiency of the transportation office." Thereafter in the report, OST details its findings and recommendations.

6. At all times relevant herein, Joann Hurley was a member of the Wayne County Board of Education. Ms. Hurley served as Board President in 2019 and 2020 pursuant to the Meeting Minutes presented as evidence at level three. It is unknown

what, if any, office she holds with the Board of Education.

7. Ms. Hurley's brother, Eugene Sammons, served as Transportation Director from, at least, sometime in 2017 until sometime during the 2018-2019 school year, at which time he retired. During his time as Transportation Director, Mr. Sammons was Grievant's supervisor. Following Mr. Sammons' departure, Bill Priest was hired as the Transportation Director.

8. Mark Queen was employed by Respondent in the Transportation Department as a Mechanic/Director of Services/Inspector/School Bus Supervisor at least some of the time Grievant was employed as the Inventory Supervisor/Groundsman/Handyman.

9. In a report dated March 3, 2017, the WVDE Office of School Transportation ("OST") announced the findings of the "Wayne County Office Audit" Superintendent Paine asked it to perform. The audit report noted a number of deficiencies and inefficiencies in the Transportation Department. However, theft is not mentioned in the report that was presented as evidence at level three. Most of the report addresses school buses, bus operators, the lack of leadership over the Transportation Office and supervision of employees, lack of compliance with safety requirements, insufficient record keeping, insufficient employee evaluation process, inefficiency because the department was housed in three separate buildings, and the lack of cost effectiveness. Grievant's name is not mentioned in the report, nor is there any specific reference to the Inventory Supervisor/Groundsman/Handyman. "Supervisors" are mentioned. The parts department is only mentioned once, and such was in OST's "Recommendation #1", which states as follows:

1. Evaluate and reorganize the duties of the supervisors and provide training for supervision and effective leadership;
2. Supervisors should receive training on Safety requirements;
3. Reorganize the Office by relocating the secretary to the same office with the supervisors. This will assist in the reorganization of the parts department. It will also allow for better communication among the office staff.¹

10. On April 25, 2017, the Respondent Board voted to terminate Grievant's employment as Inventory Supervisor/Groundsman/Handyman for the 2017-2018 school year due to a reduction-in-force (RIF). Pursuant to the Meeting Minutes, this vote was unanimous.²

11. Sometime after he became Superintendent in July 2017, Superintendent Alexander recommended to the Board that they rescind its decision to terminate Grievant's employment contract as Inventory Supervisor/Groundsman/Handyman. This decision was, at least, in part because the position was important, carried significant responsibility, and because Grievant was near retirement and would not be able to transfer into another position. The parties did not introduce the Minutes from any Board meeting during which the rescission occurred. Instead, Grievant, Lois Little, former Wayne County Board of Education member, Tom Jarrell, former Wayne County Board of Education member, and Superintendent Alexander testified about the decision to rescind the termination of Grievant's employment contract.³

¹ See, Respondent's Exhibit No. 10, pg. 1, "WV Department of Education School Bus Facilities Audit, Administrative Review."

² See, Respondent's Exhibit No. 11, pg. 2, pg. 8, "Minutes, Wayne County Board of Education Special Meeting #2, April 25, 2017."

³ See, testimony of Tom Jarrell, former member, Wayne County Board of Education; testimony of Grievant; testimony of Lois Little.

12. As the decision to terminate his employment contract was rescinded in July 2017, Grievant's employment for the 2017-2018 school started on time, and he missed no work. Grievant continued to work in the Inventory Supervisor/ Groundsman/Handyman position for the 2018-2019 school year.

13. In the spring of 2019, Mr. Queen took a leave of absence as a result of a health condition. Mr. Queen's first leave of absence went from May 6, 2019, until July 29, 2019. He continued on a leave of absence for the entire 2019-2020 school year.⁴

14. From May 1, 2019, to May 7, 2019, Respondent posted a long-term leave of absence position to temporarily fill Mr. Queen's Mechanic/Director of Services/Inspector/School Bus Supervisor position.⁵ Grievant and Lee Reeves applied for the position.

15. Respondent approved the transfer of Lee Reeves from Chief Mechanic in the Transportation Department to temporarily fill the "Mechanic/Director of Services/Inspector/School Bus Supervisor" effective June 13, 2019, until the return of Mr. Queen.⁶

16. Grievant filed a grievance over his non-selection for the position of Mechanic/Director of Services/Inspector/School Bus Supervisor. That separate grievance is Docket No. 2020-0006-WayED. Grievant had previously filed several grievances from 2018-2019 regarding various issues.

⁴ See, Respondent's Exhibit 1, "Minutes of the Wayne County Board of Education Special Meeting #43, June 3, 2019."

⁵ See, Respondent's Exhibit 8, "Service Personnel Job Posting, Wayne County Public Schools."

⁶ See, Respondent's Exhibit 2, "Minutes of the Wayne County Board of Education Special Meeting #45, June 11, 2019."

17. Sometime after he was transferred into the position of Mechanic/Director of Services/Inspector/School Bus Supervisor, Lee Reeves was arrested in connection with Wayne County bus garage thefts.⁷

18. Based upon the record of this matter, it appears that Eugene Sammons was arrested sometime after his retirement. Grievant has suggested that this arrest was in connection with the bus garage thefts, but there was no documentary evidence presented to confirm this or, what, if any, charges were brought, or any resolution of the same.

19. Grievant asserts that he cooperated with law enforcement regarding an investigation into the bus garage thefts, but he did not provide any specific information about the same. It is unknown which law enforcement entities were involved or when such occurred. Grievant did not call any law enforcement officers to testify at level three and did not provide any documentary evidence regarding any such involvement or investigation.

20. Upon his arrest, Mr. Reeves became unavailable to perform the duties of his temporary position as Mechanic/Director of Services/Inspector/School Bus Supervisor. Soon thereafter, Grievant "stepped-up" into the position and began doing both the duties for the Mechanic/Director of Services/Inspector/School Bus Supervisor and the Inventory Supervisor/Groundsman/Handyman. It is unclear from the record as to whether Grievant was paid more for doing these additional duties.

21. While performing the work of both Mechanic/Director of Services/Inspector/School Bus Supervisor and the Inventory

⁷ No documentary evidence was presented regarding Mr. Reeves' arrest, any charges that may have been brought against him, or any resolution to the matter.

Supervisor/Groundsman/Handyman, Grievant made suggestions to Superintendent Alexander, and possibly Mr. Preece, about how to restructure the Transportation Department and some of its positions, including his, to be more efficient and to address some of the concerns and problems discussed in the 2017 Audit.

22. Grievant and Superintendent Alexander had conversations about what changes should be made in the Transportation Department positions and they reviewed the 2017 Audit together. Grievant recommended to Superintendent Alexander that his position of Inventory Supervisor/Groundsman/Handyman be RIF'd, the position descriptions be rewritten entirely, and the new positions posted.

23. Superintendent Alexander did not promise Grievant one of the new positions, or otherwise guarantee him employment after his RIF.

24. Given his qualifications and seniority, Grievant believed that he would have a good chance of getting one of the new positions.

25. As a result of their discussions, Grievant and Superintendent Alexander designed three new positions: Inventory Supervisor; Chief Mechanic; and, Mechanic.⁶ However, it is noted that those specific job titles do not appear in the subsequent board meeting minutes when the creation of the new service personnel positions was addressed.

26. In accordance with their discussions, Superintendent Alexander began the process of eliminating Grievant's position of Inventory Supervisor/ Groundsman/Handyman.

27. At the meeting of the Respondent Board on April 21, 2020, Grievant's

⁶See, Grievant's Exhibit 2, "Ordering Parts Protocol" document.

position, Inventory Supervisor/Groundsman/Handyman, was abolished and Grievant's employment contract was terminated due to reduction in force for the 2020-2021 school year.⁹

28. Grievant did not request a hearing before the Board regarding its decision to terminate his employment contract through RIF, or otherwise challenge the decision. Given his participation in designing the new positions with Superintendent Alexander, Grievant planned to bid on them.

29. At the Board of Education Meeting on June 4, 2020, Superintendent Alexander recommended the creation of the new service personnel positions. The Board went into executive session to discuss the same. After returning to the open session, "the Create Positions (Service) was pulled for separate consideration." Thereafter, Superintendent Alexander recommended the creation of a Mechanic/Inventory Clerk position, but this item "died for lack of motion."¹⁰

30. At the Board Meeting on June 11, 2020, Superintendent Alexander recommended the creation of a service position, Manager of Transportation. The Board went into executive session to discuss the recommended personnel actions. During the executive session, the board members decided to change the Manger of Transportation position from a service personnel position to a professional position asserting that a professional position was needed to get the Transportation in compliance with the 2017 Audit recommendations. While Superintendent Alexander could not remember the

⁹ See, Respondent's Exhibit 3, "Minutes, Wayne County Board of Education, Special Meeting #42, April 21, 2020."

¹⁰ See, Respondent's Exhibit 4, "Minutes, Wayne County Board of Education, Special Meeting #48, June 4, 2021."

specific members who wanted to change the position from service personnel to professional, David Thompson, a bus operator who testified at level three, recalled Joann Hurley discussing the change during the open session before the Board went into executive session.¹¹

31. The Respondent Board approved the creation of a Coordinator of Transportation position that would be a professional position. The job description was thereafter amended to make it a professional position.¹²

32. As the Manager of Transportation position was changed to Coordinator of Transportation, a professional position, Grievant was not qualified to hold the same. Therefore, he could not bid on the job.

33. At the Board Meeting held on June 23, 2020, Superintendent Alexander recommended the Board create a Shop Foreman position, which would have been a service personnel position. However, "[f]ollowing discussion, motion failed by a Vote (sic) of 2-3. (Joann Hurley, Johnita Jackson, and Dennis Ashworth held the nay votes)."¹³

34. The Coordinator of Transportation professional administrative position was posted for bid from June 15, 2020, to June 22, 2020. The Job description listed the following as qualifications required to hold this position as follows:

1. Administrative Certificate;
2. Administrative experience recommended/preferred including supervisory and leadership experience;
3. Demonstrate strong knowledge of computer programs and applications;

¹¹ See, Respondent's Exhibit 5, "Minutes, Wayne County Board of Education, Special Meeting #49, June 11, 2020; testimony of Todd Alexander; testimony of David Thompson.

¹² See, Respondent's Exhibit 5, "Minutes, Wayne County Board of Education, Special Meeting #49, June 11, 2020.

¹³ Respondent's Exhibit 6, "Minutes, Wayne County Board of Education, Special Meeting #51, June 23, 2020.

4. Must be willing to obtain CDL with passenger/student endorsement within the first year of hiring date;
5. Must be willing to obtain school bus operator certification within the first year of hiring date;
6. Ability to direct and operate multiple operations in a highly organized, accurate, systematic, productive and professional manner;
7. Must possess effective communication skill to maintain good relationships with schools, students, parents and community;
8. Ability to cooperate with others during high pressure and conflict situations;
9. Ability to carry out a system of staff trainings and development;
10. Must be able to comprehend state statutes, state and county policies and regulations to ensure compliance;
11. Ability to handle confidential information with extreme care;
12. Good record keeping skills with ability to organize materials so that sound managerial decisions can be made.
13. Prior experience that indicates the ability to work cooperatively and effectively with others.
14. Must be able to work flexible hours and attend meetings after hours;
15. Must demonstrate dependability, tact, courtesy, enthusiasm, self-control and honesty.

The job descriptions listed the following responsibilities:

1. Assist the director in all aspects of operating a safe and efficient transportation system;
2. Call to schedule substitute bus operators or designate responsibility as needed;
3. Operate the radio duty or designate responsibility as needed;
4. Oversee the parts inventory and garage supplies;
5. Assist in conducting ongoing evaluation of road conditions for the safe travel of school buses during and outside of normal work hours;
6. Assist all transportation employees in solving problems which may affect his or her performance.
7. Assist in evaluation of transportation employees for the purpose of improving the system;

8. Record absences of transportation employees and assign substitutes to cover vacancies;
9. Receive calls/inquiries from parents and school personnel;
10. Disseminate transportation information to parents and school employees/schools;
11. Work with schools and bus operators with all concerns on discipline issues to ensure safety on buses;
12. Work with computer programs to manage parts inventory, routing, surveillance systems, fleet management, fuel usage, etc.;
13. Act as a resource for parents, schools and bus operators to plan and initiate the most efficient, economical and safest transportation of students;
14. Work closely with the special education department to ensure compliance with laws and regulations regarding students with special needs;
15. Assist with coordinating proper drug and alcohol testing;
16. Attend meetings or respond to emergency situations after hours;
17. Conduct accident investigation;
18. Work closely with chief mechanic/staff to ensure the buses are in safe working order and purchase necessary equipment, parts and supplies;
19. Assist in oversight [of] daily operations of bus garage;
20. Qualified to assist in selecting school bus operators, routing and scheduling buses;
21. Operate a bus when needed;
22. Relay instructions to bus operators;
23. Plan emergency routing;
24. Assist daily lube schedules and preventative maintenance scheduled for buses and county owned vehicles;
25. Perform related tasks as may be assigned by the Director of Transportation.¹⁴

35. Larissa Thompson, former Principal at Wayne Elementary School, bid on and received the Coordinator of Transportation position, effective July 1, 2020. As of the

¹⁴ See, Respondent's Exhibit 9, "Professional Job Posting."

time of the level three hearing, she remained in that position.¹⁵

36. Grievant could have bid on the Shop Foreman and Inventory Clerk positions as they would have been service personnel positions for which he held the qualifications.

37. As a result of the Respondent Board's actions with respect to the reorganized positions in the Transportation Department in June 2020, Grievant did not secure employment with Wayne County Schools for the 2020-2021 school year.

38. Neither party called Joann Hurley, Eugene Sammons, Lee Reeves, Bill Preece, or any current members of the Wayne County Board of Education, or those who were on the Board in 2019 or 2020, as witnesses to testify at the level three hearing, nor were subpoenas for the same requested. Further, neither party called or subpoenaed Dr. Paine or Mr. Roach.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.*

In April 2020, during the reduction-in-force (RIF)¹⁶ and transfer season, Grievant's

¹⁵ Respondent's Exhibit 6, "Minutes, Wayne County Board of Education, Special Meeting #51, June 23, 2020.

¹⁶ Reduction in force, also known as "RIF," is the term used to describe the statutory process followed when a board of education is required to reduce the number of employees in its employment.

position of Inventory Supervisor/Groundsman/Handyman was abolished and his employment contract, terminated. Grievant was not eligible for transfer. Despite having the right to request a hearing on his RIF, Grievant did not request one and one was not held. Grievant did not grieve the elimination of his position or the termination of his employment contract. Therefore, this decision will not address the Board's decision to take these actions in the spring of 2020.

The only matter at issue in this grievance is Grievant's claim that Respondent engaged in acts of reprisal and harassment by posting the new position of Coordinator of Transportation, which was assigned all his job duties as Inventory Supervisor/Groundsman/Handyman, plus the ones he had been performing in the absence of Mr. Queen, as a professional position instead of as a service position, thereby foreclosing Grievant's ability bid on or hold the position. Grievant contends that the Board, led by President Joann Hurley, changed the position in order to leave him without employment in retaliation, and as harassment, for his reporting of Mr. Sammons' alleged illegal activity, which resulted in Mr. Sammons' arrest, and as reprisal for Grievant's participation in several grievances in the past. Grievant also asserts that Respondent's decision to post the position as professional instead of as service personnel was arbitrary and capricious.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207

W. Va. 513, 534 S.E.2d 378 (2000). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"[T]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd*

Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W. Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

“‘Harassment’ means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.” W. VA. CODE § 6C-2-2(l). “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). Reprisal is defined 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.” W. VA. CODE § 6C-2-2(o). 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;
- (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.

See *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). “The filing of grievances and EEO complaints is a protected activity.” *Poore v. W. Va. Dep’t of Health & Human Res./Bureau for Children & Families*, Docket No. 2010-0448-DHHR (Feb. 11, 2011). “[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 inference can 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 protected activity. See *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Wamer v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013).

Grievant has participated in the grievance process several times since 2018 and Respondent knew of his participation when he was RIF'd in 2020. However, Grievant was being RIF'd voluntarily as part of the plan to reorganize and restructure the Transportation Department to be more efficient. So, while technically, Grievant was subject to adverse personnel action in April 2020 when he was RIF'd, the adverse personnel action he complains of in this grievance is the Board changing the proposed new Transportation Manager position to Coordinator of Transportation, a professional position, for which he could not apply, and lessening the service personnel-type certifications formerly required of the person performing the duties assigned so that a professional candidate could qualify to hold the position. Grievant also appears to assert that the Board's rejection of the other two service personnel positions Superintendent Alexander recommended in June 2020 was also adverse personnel action against him because the Board's actions foreclosed his opportunity for reemployment.

Grievant did not hold any of the three new proposed positions. It is undisputed that he had been performing the duties of all three positions for the 2019-2020 school

year, and he had performed the Inventory Supervisor/Groundsman/Handyman duties for many years before that. However, his position was abolished as he had recommended to Superintendent Alexander, and Grievant was not guaranteed any of the new positions. The positions first had to be approved by the Board, then, if approved, they would have been posted for bid. Grievant was aware of the risk of losing employment when he asked to be RIF'd.

Grievant further argues that the Board's actions with respect to the proposed new positions were taken to retaliate against him for cooperating with law enforcement and for the alleged arrest of Mr. Sammons. This has nothing to do with the grievance process. The testimony and the Board Meeting Minutes presented at the level three hearing establish that Ms. Hurley, Mr. Sammons' sister, was president when the Board changed the proposed Manager of Transportation position to the professional position of Coordinator of Transportation which prevented Grievant from being able to bid on it. She was also the president when the board rejected Superintendent Alexander's recommendation to create the two service personnel positions for which Grievant could have applied. Pursuant to the meeting minutes, the Board was aware that Grievant was RIF'd in April 2020, and that he had no employment secured for the 2020-2021 school year when those actions were taken.

Grievant presented very little evidence aside from his own testimony to support his claims that Ms. Hurley and the other Board members acted solely to retaliate against him for his involvement with the police investigation, past grievances, or the result of any grudge against him. Grievant did not call Ms. Hurley, Mr. Sammons, Mr. Reeves, Mr. Preece, or any of the members of the Board who were serving in 2020 who made the

decisions about which he complains. Further, he called no law enforcement officers and presented no documentary evidence to support his claims regarding the arrests, the investigation, or his participation in any such investigation. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). For these reasons, this ALJ cannot conclude that Grievant met his burden of proving the elements of his claims of reprisal and harassment. However, even if he had proved reprisal, Grievant would still not prevail.

"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 presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

It is undisputed that the 2017 Audit detailed significant problems with leadership and management of the Transportation Department that needed rectified in order to improve efficiency and to save money. It is noted that Eugene Sammons was the Director of Transportation when that audit was done. The bulk of OST's recommendations

focused on improving the management, leadership, and supervisory work to bring about the needed changes in the department. OST identified that, within the Transportation Department, there was poor record keeping, evaluations were done improperly, confidential documents were not kept secure, there was noncompliance with safety requirements and reporting, among many other things. For these reasons, while it may have been somewhat unusual, this ALJ cannot conclude that it was unreasonable, or otherwise arbitrary and capricious, for the Board to decide to reorganize the department to correct these deficiencies by creating a new management position for a professional employee who would be responsible for evaluations, proper record keeping, compliance with safety standards and requirements, supervision of employees, etc. Grievant presented no evidence to prove that the Board's decision violated law, rule, or policy, or that it was otherwise improper. Therefore, this grievance is DENIED.

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 his 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. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this

discretion must be exercised reasonably, in the best of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. "[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322

(June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W. Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "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).

6. Reprisal is defined 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." W. VA. CODE § 6C-2-2(o). "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).

7. 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;
- (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.

See *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). “The filing of grievances and EEO complaints is a protected activity.” *Poore v. W. Va. Dep’t of Health & Human Res./Bureau for Children & Families*, Docket No. 2010-0448-DHHR (Feb. 11, 2011).

8. “[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 inference can 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 protected activity. See *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep’t of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013).

9. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

10. Grievant failed to prove his claims by a preponderance of the evidence.

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 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 (eff. July 7, 2018).

DATE: June 23, 2021.



Carrie H. LeFevre
Administrative Law Judge