KAREN SUE CONNER

Grievant,

v. **Docket No. 93-01-154**

BARBOUR COUNTY BOARD OF EDUCATION

Respondent.

D E C I S I O N

The principal issue presented by this grievance is whether the Respondent committed an act of reprisal against the Grievant by replacing her as the instructor of substitute bus operators. In addition to the reprisal charge, the Grievant alleged that the Respondent violated or misinterpreted the seniority laws pertaining to school service personnel and engaged in harassment, favoritism, and waste. (See footnote 1) As the factual basis for these claims, the Grievant alleged: A bus operators' training class was held in November 1992. The job was not posted; instructors were hired at a board of education meeting on November 17, 1992. They had less senioriityand no previous experience and were therefore less qualified. (See footnote 2) At the level four hearing, the Grievant requested back pay for the teaching work she was not permitted to perform.

In denying the grievance, the grievance evaluator at level two relied upon an opinion letter by Henry Marockie, the State Superintendent of Schools, addressing the question whether a transportation director has the authority to hire trainers for bus operator certification on the basis of skill and ability to teach. In that October 21, 1992 letter, the State Superintendent answered in the affirmative, stating that such training positions are "not classified as service personnel jobs." (Level Two Exh. 2). The State Superintendent attached to this letter an earlier letter opinion issued by his office on February 14, 1990, in which he reached the same conclusion, i.e., teaching substitute bus operators is not the type of work included in the class title definition of "bus operator" in W. Va. Code, 18A-4-8 (BOE Exhs. A and B at level four). Consequently, such assignments need not be posted and filled in accordance with the requirements of W. Va. Code, 18A-4-8b.

Findings of Fact

Based upon all evidence of record, the undersigned makes the following Findings of Fact.

1. The Grievant has been employed as a bus operator by the Respondent since 1976. In addition to her regular bus operator duties, the Grievant has served during the last five school years as the trainer of substitute bus operators. During this time period, she trained approximately thirteen substitute bus operators and she was paid each year for the training she provided. She has been certified by the West Virginia Department of Education as a bus operator instructor since 1985.

2. At the time this grievance arose, Mr. R. Edward Larry was the Respondent's Director of Transportation.

3. On or about November 1992, Mr. Larry recommended to the county superintendent that two other employees serve as instructors for the 1992-1993 school year. The Respondent acted favorably on that recommendation. The Grievant had more experience and more seniority as a bus operator than either employee selected.

4. Near the beginning of the 1992-93 school year, Mr. Larry directed the Grievant to return a student to the student's original seating assignment in the back of the bus. The Grievant had changed the student's seating assignment because the student had been rude and disrespectful to the Grievant on two occasions. 5. The Grievant objected to Mr. Larry's seating directive and asserted that she had the exclusive right to determine student seating assignments. This became the subject of a grievance thatwas recently denied. Conner v. Barbour County Bd. of Educ., Docket No. 92-01-457 (Mar. 15, 1994).

6. In connection with that grievance, the Grievant and Mr. Larry had a level one conference at the bus garage on October 8, 1992. The evidence establishes that this was an emotionally-charged conference in which the Grievant stood up and declared that Mr. Larry had exceeded his legitimate authority.

7. There is a factual dispute concerning what the Grievant said during that conference. In denying the grievance at level one, Mr. Larry asserted the Grievant had stated at the conference that she "would not train any more substitutes for me."

8. The Grievant has denied making that statement throughout this grievance. At the level two

hearing, the Grievant introduced an affidavit of her husband, also a bus operator employed by the Respondent, who was present at the October 8 conference (Exh. 1). He avers in the affidavit that the Grievant never made the statement attributed to her by Mr. Larry nor any other statement that could be construed to mean such a thing. According to the affidavit, the Grievant stated that "if I don't know the law [governing the duties and responsibilities of bus operators] then perhaps I shouldn't be training your darn drivers."

Discussion

Mr. Larry testified at level four that he believed the Grievant no longer wanted the trainer position because of the statement she made at the October 8 conference. He said that he relied on opinion letters from the State Superintendent statingthat such assignments did not have to be posted and filled pursuant to the requirements of W. Va. Code, 18A-4-8b (See footnote 3), and further said he recommended two other employees for the assignment because he thought they were better qualified based upon their prior work experience, communication skills and mechanical ability.

Mr. Larry further testified that he had two reasons for not recommending the Grievant to be the instructor for the 1992-93 school year. Part of the reason was the Grievant's statement during the conference that she was not going to conduct the training in the future. The other reason for making the instructor change was that after he attended a transportation conference held in late July or early August 1992, he had decided that it would a good idea for all bus operators or bus mechanics to receive the instructor's training. This testimony is consistent with his statements at the level two hearing. Mr. Larry stated that his actions were not taken to harass, to show favoritism or as an act of reprisal or retaliation against the Grievant.

The Grievant's reprisal claim is dispositive of this case and, accordingly, the other claims asserted will not be addressed. Reprisal is defined in W. Va. Code, 18-29-2(p) to mean "the retaliation of an employer or agent toward a grievant or any otherparticipant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." (See footnote 4)

The purpose of statutes prohibiting acts of reprisal is to make it unlawful for an employer to take any action designed to punish an employee for engaging in protected activity, such as filing a grievance and pursuing it vigorously, and/or to deter an employee from exercising such rights. See Harvey v. Merit Systems Protection Bd., 802 F.2d 537, 547 (D.C. Cir. 1986). (See footnote 5) This

Board's administrative law judges have addressed the prohibition against reprisal in W. Va. Code, 18-29-2(p) in a number of cases. The best discussion of this provision is perhaps contained in Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989), in which the respondent county board of education was found to have retaliated against the grievant for filing grievances challenging his suspension and subsequent dismissal. The county board of education in that case billed the Grievant who resided in Ohio for over four thousand dollars in out-of-state tuition for his children.

In Webb it was noted that the definition of reprisal is poorly drafted and an attempt was made to set forth a clear statement of a grievant's burden of proof in such cases. Webb adopted amodified version of the analytical framework employed in retaliatory discharge cases under the West Virginia Human Rights Act. (See footnote 6) That standard can be fairly paraphased as follows: A grievant may make a prima facie showing of reprisal under W. Va. Code, 18-29-2(p) by establishing by a preponderance of the evidence: (1) he engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer subsequently took an adverse action against the employee; and (4) retaliatory motivation or that the adverse action followed the employee's protected activity within such period of time that retaliatory motivation can be inferred. The employer can rebut a prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for the adverse action. 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.

No matter what analytical approach is used to determine whether an employer has engaged in a prohibited personnel practice, such as reprisal, the 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. Warren v.Dept. of Army, 804 F.2d 654 (Fed. Cir. 1986); Harvey, supra; See P. Broida, A Guide to Merit Systems Protection Board Law & Practice, Chapter 13 (5th ed. 1988).

Seldom will there be direct evidence of reprisal and therefore in most cases employees must rely on circumstantial evidence. Consequently, the proximity in time between the protected activity and

the adverse personnel action is often a factor considered in determining whether an action was motivated or caused by a retaliatory motive.

Applying the Webb analysis to the instant case, the undersigned concludes the evidence is sufficient to establish a prima facie case of reprisal. The Grievant had filed previous grievances and, more importantly, at a grievance conference she had disputed the authority of her immediate supervisor, Mr. Larry, to rescind a seating assignment change she had made because of the improper behavior of a student who rode on her bus. This was protected activity. (See footnote 7) The employer, indeed the administrator who is accused of reprisal, was well aware that the Grievant had engaged in this protected activity. The employer subsequently took an adverse action against the Grievant, by selecting two other employers to be the trainers of substitute bus operators for the 1992-1993 school year, a role that the Grievant had performed for the past several years. Finally, it can be inferred from the factual circumstances that the change in instructors was due to aretaliatory motive on the part of Mr. Larry who recommended the change. Although the exact date of Mr. Larry's recommendation is not of record, it was made less than two months after the October 8 conference.

The Respondent offered two reasons for replacing the Grievant as the trainer. First, Mr. Larry believed the Grievant no longer wanted to be the trainer based upon her statement at the conference on October 8. Second, he testified that he had made a decision to send two different employees each year for the instructor training after attending a transportation seminar held in late July or early August 1992.

As to the first proffered reason, the undersigned finds Mr. Larry's assertion to be improbable at the very least and approaching incredible. It is accepted that the Grievant made a sarcastic statement to the effect that if Mr. Larry did not think she knew what a bus operator's duties and responsibilities were perhaps she should not be the instructor of substitute bus operators. The undersigned finds it highly unlikely that Mr. Larry could have construed or interpreted her statement as a declaration that she no longer wanted to perform the teaching role she had performed for the last several years. Accordingly, the undersigned finds this was not the real reason why he recommended the change.

The second allegedly non-retaliatory reason for the change is legitimate on its face. Certainly, a transportation director might reasonably determine that offering this training/teaching opportunity to as many bus operators or bus mechanics as possiblewould be in the best interest of the school system. And it is quite plausible for such a decision to be made in connection with attendance at a

transportation conference where such matters as recent changes in the law and procedure affecting a county board of education system of transporting students would be discussed. Hence, it is concluded that the Respondent offered sufficient, credible evidence to rebut the prima facie showing of reprisal.

The issue remaining is whether the evidence preponderates in favor of a finding that this reason was merely a pretext for an act of reprisal. In other words, was this the true reason for Mr. Larry's recommendation to replace her as the teacher. See Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496-97 (W.Va. 1989). On this factual question, the undersigned finds it highly significant that Mr. Larry did not maintain initially that he had replaced the Grievant for that reason. According to the grievance form, Mr. Larry and the Grievant had an informal conference concerning this grievance on December 2, and when no written response was made after the conference, the grievance was filed on December 14. In a written decision issued the following day, Mr. Larry made no mention of a decision to offer other employees this opportunity. Rather, he stated, in pertinent part, that "[i]f you recall, you also stated that you would not train any more substitutes for me in Transportation." There is no reference of record to any plan or intent on Mr. Larry's part to offer instructor training opportunities to other employees prior to the level two hearing in January 1993, when he stated his intentionto offer the training to every bus operator or bus mechanic during the next five or six year period (Level Two Tr. at 7-8). This circumstance severely weakens the credibility of Mr. Larry's testimony in regard to his motivation for replacing the Grievant as the trainer.

Upon consideration of the totality of the facts and circumstances, including the belated assertion by Mr. Larry of an earlier decision on his part to rotate instructors, the absence of any other evidence corroborating his testimony on that point, and the demeanor of the witnesses, the undersigned finds that this proffered reason is a pretext. Furthermore, the undersigned concludes the Grievant has established by a preponderance of the evidence that her grievance activity was a substantial or motivating factor in her being replaced as the instructor of substitute bus operators.

Conclusions of Law

Based upon all matters of record, the undersigned reaches the following Conclusions of Law.

1. The Grievant has proven by a preponderance of the evidence that her grievance activity was a substantial or motivating factor in her being replaced as the trainer of substitute bus operators for the 1992-93 school term.

2. The Grievant has therefore established that the Respondent engaged in an act of reprisal within the meaning of W. Va. Code, 18-29-2(p).

Accordingly, this grievance is **GRANTED** and the Respondent is hereby **ORDERED** to award Grievant back pay equal to what she would have received had she continued to serve as the sole instructor of substitute bus operators for the 1992-1993 school year.

Either party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Barbour County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code, 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

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RONALD WRIGHT

Administrative Law Judge

Date: April 8, 1994

Footnote: 1 After denials at the three lower levels of the grievance procedure, the Grievant appealed to level four and a hearing was held in Elkins on September 27, 1993, at which time the parties supplemented the record with testimony and documentary evidence. The case became mature for decision on or about October 20, 1993, with the receipt of post-hearing proposed findings and conclusions.

Footnote: 2 During the level four hearing, the Grievant testified and introduced one document to support a claim of sexual harassment. The undersigned permitted that evidence to be introduced but ruled that the sexual harassment claim would not be ruled upon because it was not part of the original grievance and because the Grievance Board does not have jurisdiction to adjudicate such complaints. In Norton v. W. Va. Northern Community College, Docket No. 89-BOR-503 (Apr. 28, 1993), the administrative law judge concluded that the Legislature did not intend to vest the Grievance Board with the authority to adjudicate violations of the West Virginia Human Rights Act, W. Va. Code, 5-11-1 et seq. That ruling is hereby confirmed.

Footnote: 3 It is noted that the Legislature recently amended W. Va. Code, 18A-4-16, effective ninety days from its passage on March 10, 1994, by adding a new subsection five which states, in part, that "[t]he board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b,

article four of this chapter... ." This footnote should not be interpreted as an expression of opinion on the applicability of this amendment to the type of assignment at issue in this case.

Footnote: 4 W. Va. Code, 18-29-3(h) also provides that "[n]o reprisals of any kind shall be taken by any employer or agent of the employer against any interested party ... . A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination."

Footnote: 5

Footnote: 6 See Frank's Shoe Store v. W.Va. Human Rights Commission, 179 W.Va. 53, 365 S.E.2d 251 (1986).

Footnote: 7 In the words of the provision prohibiting acts of reprisal, the Grievant's conduct at the grievance conference was either "the alleged injury itself" or a "lawful attempt to address it."