KAREN SUE CONNER, .

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Grievant, .

.

.

v. . Docket No. 93-01-421

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BARBOUR COUNTY BOARD OF EDUCATION, .

.

Employer. .

D E C I S I O N

Grievant, Karen Conner, filed this complaint against the Barbour County Board of Education (hereinafter Board) on July 26, 1993, alleging as follows:

> On 7/22/93 I was informed that another class of drivers had been held. Mr. Larry told me that I would get to teach the next class of drivers at the conference on a previous similar grievance. I have more seniority, experience, and am better qualified to teach. I have been discriminated against because I am a woman and am being retaliated against as a reprisal by Mr. F. Edward Larry who was Director of Transportation during the 1992-93 school year.

With the grievance form, Grievant included a three page, typewritten summary of the facts alleged to exist and also the following request for relief:

A. Restore Mrs. Conner to rightful status.

B. Refrain from any more acts of harrassment [sic], reprisal and discrimination against Ms. Conner and her family by any and all members and employees of the Barbour County Board of Education.

C.
Payment for Ms. Conner for the class held in June that she was morally and illegally deprived of.

D.
Monetary damages for mental and physical pain being suffered as a result of the discrimination and violation of the Equal Protection Clause by the Barbour County Board of Education and employees acting on its behalf.

E.
Formal verbal and written apology by all parties involved.

F.

Appropriate disciplinary measures taken against parties involved in this deplorable matter.

Grievant's complaint was denied at levels one and two and the Board waived participation in the grievance at level three. A level four appeal was received on October 8, 1993, and a hearing was conducted on November 12, 1993. Briefs were received from both parties on or before November 23, 1993. (See footnote 1) Grievant has abandoned any claim based upon sex discrimination.

Findings of Fact

1. The Board uses School Bus Operator Instructors (hereinafter Instructors) to teach a forty-hour class in the summer to substitute Bus Operators on how to properly drive a school bus.

2. Grievant had taught the class for approximately ten years until the summer of 1992 when two other Bus Operators taught the class.

3. Instructors are required to be certified by the State Board of Education.

4. At all times pertinent hereto, Mr. F. Edward Larry was the Transportation Director for the Board.

5. It was Mr. Larry's practice to notify his Bus Operators who wished to act as Instructors about

continuing certification requirements and changes.

6. In November 1992, Mr. Larry sent two Bus Operators to a certifying class for Instructors but did not send Grievant.

7. Grievant was not awarded the position of Instructor for the 1992 summer term which is the subject of a separate grievance.

8. Regarding the summer 1993 Instructor position at question in this case, Mr. Larry posted the position as vacant on June 8, 1993.

9. It had not been Mr. Larry's past practice to post Instructor positions.

10. The posting for this position read as follows:

> Instructor needed to train substitute bus operators.
>
> This person must be certified by the State Board of Education as a school bus operator instructor.
>
> Deadline for application June 15, 1993.
>
> Apply: F. Edward Larry
>
> 105 South Railroad Street
>
> Philippi, WV 26414

11. Grievant did not see this posting, therefore, she did not apply for the position.

12. On June 8, 1993, Grievant also took part in a grievance conference with Mr. Larry as a representative of another Bus Operator. This conference was somewhat hostile.

13. On or around October 8, 1992, Grievant was involved in a grievance conference with Mr. Larry involving her own claim. At times, this meeting became argumentative and Grievant made a sarcastic statement about her ability to train Bus Operators.

14. Grievant was not chosen to be the Instructor for the summer of 1993 and, as a result, the instant claim was filed.

Parties' Contentions

Grievant contends that the position of Instructor is a combination service/professional position which must be filled with the most senior/qualified applicant. She avers that she was not chosen for this position as a result of Mr. Larry's wish to retaliate against her because she took part in the grievance conference on June 8, 1993. She also argued that the posting was improper. The Board argues that the position was not required to be posted but, after it was posted, Grievant did not apply; therefore, she had no right to hold the position. The Board disavows that Grievant was denied an opportunity for consideration for the position as a result of retaliation.

Discussion

"Reprisal" is defined in W.Va. Code §18-29-3(p) as "the retaliation of an employer or agent toward a grievant or otherparticipant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to establish that an action which has been taken can be declared a prohibited personnel practice of reprisal, a grievant must show the following:

1) He/She engaged in a protected activity.

2) He/She was subsequently treated in an adverse fashion by the employer or agent.

3) The employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity.

4) There was a causal connection (consisting of an inference of retaliatory motive) between the protected activity and the adverse treatment.

5) The protected activity was a significant factor in the employer's decision.

If the grievant meets the above burden, the employer may still prevail if it can demonstrate that it would have taken the same action had the protected conduct not occurred. See, Gerlach v. Federal Trade Commission, 8 MSPB 599 (1981), citing, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 247 (1977). Further, the grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. In most cases, reprisal must be proven by circumstantial evidence and inferences drawn therefrom.

In the case at hand, Grievant has established that she was not considered for the Instructor's position based, at the least, upon her participation in the June 1993 grievance conference. All proper inferences drawn from the evidence lead to a conclusion that Mr. Larry posted as vacant the position in question in order to cover for the fact that he had not selected Grievant for the 1993 summer position. It was the Board's position and past practicethat the Instructor's position was not one which required posting. However, almost immediately after Grievant participated in a hostile grievance conference with Mr. Larry, the decision was made to post the position.

Once Mr. Larry decided to invoke the posting provisions of Code §18A-4-8b, he was obligated to comply with those provisions regardless of whether he was legally obligated to post the position in the first place. This statutory provision, states in pertinent part,

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job.

Mr. Larry testified that he posted the job properly and in compliance with the laws of the State. It is presumed that he is familiar with the above provision, if not by formal citation then by substance. However, the posting was lacking in that it could not have been posted for five working days because it was posted sometime within the last two days of school. Further, the posting did not set forth the terms of employment or a description of the position. Apparently, the Board has employed Bus Operators as Instructors for numerous years. It could not have been a surprise to Mr. Larry that he

needed to appoint someone to this position. If he had wanted to post the position, the question exists as to why he did not post it much earlier before the end of school. Theonly logical answer to this question is that he wished to cover-up his desire that Grievant not receive the job.

Grievant questioned Mr. Larry as to why she was not sent to the training seminar held in November 1992. Mr. Larry stated that he did not send her because she had commented in an earlier grievance conference that she did not wish to train bus drivers anymore. When asked by the Board's counsel to recall the exact statement made by Grievant at this conference, Mr. Larry attributed the following statement to Grievant: "If you can't trust me to have discipline on my own school bus then you can't trust me to effect to train any of your substitute bus operators." Mr. Larry's interpretation of this statement, made in the context of an argumentative exchange during a grievance conference, was unreasonable in light of the facts of the case. Therefore, it was also unreasonable for him to assume that Grievant did not want to attend whatever training was necessary to retain her certification to instruct Bus Operators. It is determined that Mr. Larry provided this argument as a pretext for the fact that the position was improperly posted in order to provide an excuse why Grievant did not apply for the position.

Mr. Larry testified that he wanted to establish a new practice within the County that all Bus Operators be given a chance to perform as instructors so that they could receive the certification training. This theory, on its face, makes logical sense. However, there was never any corroboration that this was the reason why the practice regarding the filling of the position was changed. Further, the 1992-1993 school year was the last year that Mr. Larry was the Transportation Director. Therefore, he had no hands-on way to ensure that this would continue to be the philosophy of the Department. It is determined that this testimony was self-serving and also pretext for the true reason why the position was posted.

In conclusion, Grievant has established by a preponderance of the evidence that she engaged in the protected activity of participating as a representative in the grievance procedure and, as a result, she was not given the ability to be considered for the position of Instructor. This adverse action was taken as a result of reprisal for Grievant's exercise of her rights and was not the result of the exercise of a valid and legitimate business practice. Therefore, Grievant's claim must be sustained.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusion of law.

Conclusion of Law

1. Grievant has established by a preponderance of the evidence that she was denied the opportunity to be considered to teach a training session for substitute school bus operators based upon a retaliatory motive. Further, this retaliatory motive was a substantial or motivating factor in guiding the actions of the agents of the Board at issue in this case. See Conner v. Barbour Co. Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994).

Therefore, this grievance is hereby **GRANTED** and the Board of Education of Barbour County is **ORDERED** to reimburse Grievant for the salary she would have earned had she been hired as a School Bus Operator Trainer for the 1993 summer term plus interest. The other remedies Grievant seeks are not available in this forum.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 20, 1994

Footnote: 1Grievant submitted a letter to the undersigned in lieu of a formal brief. This letter further attempted to establish facts pertinent to Grievant's claim. Attached to this letter was an audio tape of a conversation she had had with a person not called as a witness at the hearing, letters she had received, and other documents relating to the School Bus Operator Training Manual discussed at the hearing in this matter. The audio tape was entirely inaudible. Further, it has been determined that the other documents described have little or no relevance to the issue in the case.