JESSE MULLINS,

Grievant,

v. DOCKET NO. 94-20-598

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jesse Mullins, filed this grievance on August 15, 1994, as follows:

> **Reprisal being taken against me for filing a grievance in the form of reducing the number of classes I will be teaching for the 1994-1995 orientation program for South Charleston Stamping and Manufacturing.**
>
> **REMEDY: Reinstatement of full class loads originally promised to me with all appropriate back pay and anything to make me whole and no further reprisal taken against me in the future.**

Following adverse decisions at the lower levels, Grievant filed a Level IV appeal on October 3, 1994. Hearing was held on April 18 and June 22, 1995, and post-hearing submissions were filed on or about July 10, 1995, at which time this case became mature for decision.

The material facts are not in dispute and are summarized in the following findings of fact.

<u>Findings of Fact</u>

1. Grievant is employed by Respondent Kanawha County Board of Education as a vocational teacher at the Ben Franklin Career Center.

2. Grievant has been an instructor for a manufacturer's orientation training program ("MOT") for the South Charleston Stamping and Manufacturing Company ("SCSM") since

1987. Safety and other topics relevant to working in a plant environment are taught to prospective adult employees.

3. In May 1994, Respondent posted a vacancy for an "administrator position" of Project Manager: Regulatory Compliance Training Center. Grievant applied for the position, submitting an application package, including the MOT program and classes taught at SCSM, to Dr. Diana Long, Coordinator of Services to Business and Industry. Among Dr. Long's duties are responsibility for assisting local industry in establishing training courses. Grievant was not selected for the position.

4. Grievant filed a grievance over his non-selection on June 17, 1994. Dr. Long was present as a witness at Grievant's Level II hearing on July 12, 1994.

5. Dr. Long originally set up the MOT program at SCSM and then turned the operation of the program over to Hugh Wilder, Vice Principal at Ben Franklin. Norm Brown was Dr. Long's staff person at SCSM, and was responsible for scheduling and doing the general leg work for the training classes.

6. Funding ran out for Norm Brown's position in 1993, and he no longer was responsible for setting up the training at SCSM. However, he still worked at SCSM and kept in contact with the people at Ben Franklin. LIV, Long. (See footnote 1)

7. In July 1994, Norm Brown informed Mr. Wilder that SCSM was going to be hiring again, and they needed to schedule an MOT program as quickly as possible. Mr. Wilder informed the MOT instructors, including Grievant, and requested they supply Mr. Brown with a complete copy of the course outline for the MOT program. LII, G. Ex. 4.

8. Grievant was to teach 8 classes, or approximately 36-40 hours, for the MOT program which was scheduled to begin in August 1994. LIV, Wilder, Mullins.

9. In July 1994, Dr. Long learned that the new NGK plant wished to be involved in the MOT training course. Because NGK was a new "client", Dr. Long wanted the curriculum to be more "generic" than it had been in the past. Dr. Long "pulled" the curriculum at SCSM in order to review it and update it. She then realized that Norm Brown had allowed Grievant to teach several classes which he was not qualified to teach. LIV, Long.

10. During Grievant's Level II hearing in his non-selection grievance, Dr. Long learned that Grievant had been teaching an OSHA "lock-out, tag-out" program that should not have

been part of the MOT curriculum. The "lock-out, tag-out" program was only forcurrent employees of the SCSM plant, not prospective employees. Thus, as part of Dr. Long's review of the MOT curriculum, she deleted that portion of the program. LIV, Long.

11. The West Virginia Department of Education requires, for a part-time vocational teaching permit, that individuals have either 6 years of working experience in the field to be taught, or a college degree in the field to be taught, plus 3 years working experience. Grievant had been teaching courses for which he was not qualified, including Troubleshooting, Inspection Methods, Statistical Process Control, First-Aid, and Fork Truck. Therefore, Dr. Long pulled Grievant from those classes as well. LIV, Long.

12. Dr. Long did not ask Grievant about his qualifications, but assumed, based on what he had taught before, that he was not qualified to teach those courses. Dr. Long did not specifically tell Grievant she was pulling him from teaching those classes. She merely presented him with a calendar for the MOT class and asked him if he could teach certain classes on certain days. LIV, Long.

13. Grievant testified that he has a B.A., a Master's Degree in Vocational Administration, and three years' work experience at the Detroit Diesel Engine Factory. Although Grievant maintains he is qualified to teach the courses, he has never presented Dr. Long with any documentation of his credentials. LIV, Grievant; Long.

14. Grievant executed a supplemental contract of employment to teach classes in the MOT program, which began in August 1994, and ran through December 1994. G. Ex. 4.

Discussion

Grievant alleges that Dr. Long pulled his courses and reduced his hours in retaliation for filing a grievance over his non-selection as Project Manager. Respondent contends that Dr. Long pulled his classes because he was not qualified to teach them.

W. Va. Code § 18-29-2(p) defines reprisal as:

> **. . . the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.**

W. Va. Code § 18-29-3(h) states:

> **No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.**

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 that: (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 relatiatory motivation can be inferred. 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.

The employer can rebut a prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for theadverse 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. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Applying the foregoing analysis to the instant case, the undersigned concludes the evidence is sufficient to establish a prima facie case of reprisal. Grievant had filed a previous grievance over his non-selection as Project Manager, and attempted to establish that his teaching experience in the MOT program in part qualified him for the position. This was protected activity. His employer was well-aware that Grievant had engaged in this protected activity. His employer subsequently took an adverse action against Grievant by reducing the number of classes he was to teach. Finally, Dr. Long's decision to reduce Grievant's classes occurred almost immediately after Grievant's hearing on the non-selection grievance.

Respondent offered two reasons for pulling Grievant's classes. First, Dr. Long testified that the OSHA lock-out, tag-out class was never intended to be part of the MOT program and

should not have been included in the curriculum. Second, Dr. Long testified that, on review of the MOT curriculum, she became aware that Grievant was teaching classes for which she assumed he was not qualified. Both of these reasons for pulling Grievant's classes are legitimate on their face. Dr. Long's actions were reasonable in light of theschool system's obligation to provide appropriate instruction by qualified teachers.

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 the true reason for Dr. Long pulling Grievant's classes to retaliate against him for filing a grievance over his non-selection as Program Manager. Dr. Long testified that it was merely a coincidence that Grievant's hearing took place at precisely the same time she was reviewing the curriculum to update it for the new NGK sparkplug manufacturer. It was also coincidence, and unfortunate for Grievant, that she learned for the first time during his non-selection hearing that he was teaching the OSHA class, which was totally inappropriate for the MOT program.

Dr. Long testified that Grievant is one of her top instructors and she wants to continue to work with him. Her only concern was that Grievant had been allowed, presumably by Norm Brown, to teach classes for which he was not qualified. LIV, Long.

Based on the above analysis and the evidence presented, the undersigned finds that Dr. Long's reasons for pulling Grievant's classes were not pretextual, but were the result of a legitimate review of the program to ensure she could meet her customers' needs.

Conclusions of Law

1. Grievant bears the burden of proving the allegations of his grievance by a preponderance of the evidence.

2. Grievant made a prima facie showing of reprisal under W. Va. Code § 18-29-21(p).

3. Respondent has proven by a preponderance of the evidence that its reasons for reducing Grievant's hours were legitimate and non-retaliatory in nature.

4. Grievant has not proven by a preponderance of the evidence that the reasons offered by his employer for the reduction of his hours as a teacher of the MOT program were merely a pretext for a retaliatory motive.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha 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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MARY JO SWARTZ

Administrative Law Judge

Dated: July 31, 1995

Footnote: 1 ***References to testimony at the Level IV hearing in this matter will be "LIV, (Witness' name)."***