HUBERT ANDERSON,

Grievant,

v. **Docket No. 95-DOH-549**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION

Hubert Anderson, Grievant, filed this grievance against Respondent, West Virginia Division of Highways alleging:

> I applied for a lateral transfer from Mechanic II to Operator II in Webster Springs. Two positions were posted in Webster County in January, 1994[,] and reposted in October, 1994. When the position[s] w[ere] filled I was transferred to Hacker Valley while a new person was hired to fill the Webster Springs position. I am being discriminated against[,] and being retaliated against[,] due to calling Commissioner VanKirk about the situation. The relief sought is to be transferred to Webster Springs.

Grievant was denied relief at the lower levels of the grievance procedure. Grievant appealed to Level IV on December 6, 1995. A Level IV hearing was held on March 13, 1996, but by letter dated March 6, 1996, from Grievant's representative, the undersigned Administrative Law Judge was informed that the parties had “agreed to a continuance ... pending settlement.”

On September 16, 1996, Grievant's representative notified the Grievance Board that the grievance could not be settled. By order dated November 20, 1996, this matter was scheduled for a Level IV evidentiary hearing on December 3, 1996. This case matured for decision on January 17, 1997, with receipt of the parties post- hearing submissions. The following findings of fact were derivedfrom the record.

FINDINGS OF FACT

1. Grievant was hired by Respondent on August 9, 1987, as a Mechanic on the night shift at the Webster Springs station. Grievant is currently employed by Respondent as an Equipment Operator II, assigned to the Hacker Valley substation. Grievant's shift at the Hacker Valley substation rotates every two weeks.

2. Respondent has three work stations located within Webster County. The main station is located at Webster Springs, and substations are located at Cowen and Hacker Valley.

3. At the relevant time of this grievance, there was a total of eight Operator IIs and IIIs, stationed at Webster Springs, seven at Cowen, and six or seven at the Hacker Valley substation.

4. The number of operators at each location is based on equipment available at each location; therefore, the numbers of Equipment Operators at each location remains fairly constant.

5. Equipment Operators are often called out in emergency situations, e.g., trees in the road, snowstorms, flooding situations, etc. These types of emergency situations may occur frequently.

6. In January 1994, Respondent posted two Equipment Operator II positions for Webster County. Grievant, who at the time was a Mechanic, applied for both positions.

7. Respondent chose not to fill the positions at that time because both its night shift mechanics (Grievant and Mr. Phares) applied for the positions, and there were not any qualified peopleon the register. January is also a “critical time” for Respondent, and repairs need to be made as soon as possible in the winter months.

8. When Grievant learned that these positions were not going to be filled, he telephoned Fred VanKirk, Commissioner of the Division of Highways.

9. Mr. Collins, Grievant's immediate supervisor, informed Grievant of the grievance procedure and the chain of command within the agency, and directed him not to telephone Mr. VanKirk again. Mr. Collins told Grievant that disciplinary action would occur if he called Commissioner VanKirk's office again.

10. In October 1994, two Equipment Operator II positions were again posted in Webster County. As with the first set of postings, the stations where the vacancies occurred were not specified.

11. After the second time these positions were posted, Grievant was interviewed. Grievant was told during his interview that if he was selected for the second position he would have to go to the Hacker Valley substation, because Mr. Smith, an applicant for the position, had already been chosen for the Equipment Operator II position at the Webster Springs station. (See footnote 1)

12. Mr. Collins selected Grievant for the Equipment Operator II position at the Hacker Valley Substation, a lateral classification change. 13. Grievant did not tell Mr. Collins that he did not want the Equipment Operator III position if it was at the Hacker Valley substation.

14. Mr. Smith lives just outside the city limits of Cowen. Mr. Smith was assigned to the Webster

Springs substation, which is approximately 13 miles from his residence. He lives approximately 31 miles from the Hacker Valley substation.

15. Grievant lives approximately 6-7 miles from the Webster Springs substation, and 12-14 miles from the Hacker Valley substation.

DISCUSSION

Grievant claims Respondent retaliated against him because he called Commissioner VanKirk's office. "Reprisal" is defined in W.Va. Code §18-29-2(p) as "the retaliation of an employer or agent toward a grievant or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to establish that an action constitutes reprisal, the burden is upon the Grievant to show:

1. He engaged in a protected activity;

2. The employer had actual or constructive knowledge that grievant engaged in the protected activity;

3. He was subsequently treated in an adverse fashion by his employer; and

4. The adverse action followed the employee's protected activities within such period of time that one can infer retaliatory motivation.

If Grievant meets the above burden, Respondent may rebut the presumption of retaliatory action by demonstrating that it hadlegitimate nondiscriminatory reasons for its action. Should Respondent succeed in rebutting the presumption, Grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. W.Va. Dept. of Natural Resources v. Myers, 191 W.Va. 72, 443 S.E.2d 229 (1994); Fasce v. Bd. of Directors/W.Va. Institute of Technology, Docket No. 94-BOD-1072 (Sept. 13, 1995).

“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.” Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-598 (July 31, 1995). Grievant asked Commissioner VanKirk about the posted positions, and was informed that he qualified for the

positions, and had preference because he and Mr. Phares were already employed by Respondent. However, Respondent could not afford to lose both of it Webster County mechanics at the same time during the winter without good replacements. Mr. Collins
testified that there were not any qualified mechanics on the roster at that time. Eventually, qualified mechanics were placed on the roster, and Grievant and Mr. Phares were both placed in Equipment Operator II positions. Grievant was placed at Hacker's Valley, and Mr. Phares was placed in a similar position in another county.

Respondent's rationale was that it is better for it to have Mr. Smith drive approximately 13 miles to the Webster Spring station, than to have him drive approximately 31 miles from the Hacker Valley substation, and for Grievant drive an extra 7 milesto the Hacker Valley substation, for a total of approximately 14 miles. Respondent tries not to create a hardship on its employees by asking them to drive more than 20 miles in one direction to work. Level III, Agency Ex. 6. Although Grievant's mileage may exceed 20 miles round-trip, it does not exceed 20 miles in one direction. Level III Tr. 9 and 18. If Mr. Smith was assigned to the Hacker Valley substation, he would endure a hardship as defined by Respondent. Level III Tr. 25.

Moreover, the position Grievant received was the shift he desired (day shift), enabling him to cease working nights. However, he did not get the location he desired. This does not mean Respondent retaliated against him. In this case, Grievant failed to prove that his calling Commissioner VanKirk's office was a “significant,” “substantial” or “motivating” factor in his being assigned to the Equipment Operator II position at the Hacker Valley substation, or his claim of reprisal. See, 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).

Grievant also claims Respondent discriminated against him. W.Va. Code §29-6A-2(d) defines discrimination as:

> "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A prima facie showing of discrimination, under W.Va. Code §29- 6A-2(d), consists of a grievant establishing:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the

other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W.Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W.Va. Bureau of Employment Programs, Docket No. 94- BEP-099 (Dec. 18, 1996); Hendricks v. W.Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then a respondent may rebut it by articulating a legitimate reason for its action. (See footnote 2) However, a grievant may still prevail if he can demonstrate the reason proffered by a respondent was pretextual. Ritchie v. W.Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); Singleton v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1996).

Grievant did not seriously pursue his claim of discrimination. Nowhere in the record does Grievant assert that he is similarly situated to anyone. Grievant also failed to identify how he met the other two prongs of a prima facie case of discrimination. Grievant's representative, in her post-hearing submission, merely cited the steps of a prima facie case of discrimination, and then alleged that Respondent failed in making a rebuttal case. However, it is Grievant's duty to first prove a prima facie case of discrimination, and in this case Grievant failed to do so.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters, a grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Owens v. W.Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. "Reprisal" is defined in W.Va. Code §18-29-2(p) as "the retaliation of an employer or agent toward a grievant or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3. To establish that an action constitutes reprisal, the burden is upon the Grievant to show:

a. He engaged in a protected activity;

b. The employer had actual or constructive knowledge that Grievant engaged in the protected activity;

c. He was subsequently treated in an adverse fashion by his employer; and

d. The adverse action followed the employee's protected activities within such period of time that one can infer retaliatory motivation.

4. If Grievant meets the above burden, Respondent may rebutthe presumption of retaliatory action by demonstrating that it had legitimate nondiscriminatory reasons for its action. Should Respondent succeed in rebutting the presumption, Grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. W.Va. Dept. of Natural Resources v. Myers, 191 W.Va. 72, 443 S.E.2d 229 (1994); Fasce v. Bd. of Directors\W.Va. Institute of Technology, Docket No. 94-BOD-1072 (Sept. 13, 1995).

5. W.Va. Code §18-29-2(m) defines discrimination as:

"Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

6. A prima facie showing of discrimination, under W.Va. Code §29-6A-2(d), consists of a grievant establishing:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

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7. If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then respondent may rebut it by articulating a legitimate reason for its action. However, agrievant may still prevail if he can demonstrate the reason proffered by a respondent was pretextual. Ritchie v. W.Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); Singleton v. W.Va. Dept. of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1996).

8. Grievant failed to prove, by a preponderance of the evidence, his claim of reprisal or discrimination, or that he was not selected for the position he wanted at the Hacker Valley substation because he called Commissioner VanKirk.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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.

Dated:7/14/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

When Grievant applied for the position he believed it was for a position at the Webster Springs substation, and not the Hacker Valley substation. Grievant was unable to articulate any reason for his belief during the Level IV hearing.

Footnote: 2

While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).