RANDAL BROWN,

Grievant,

v. **DOCKET NO. 97-49-399**

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Randal Brown, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1, et seq., alleging that his teaching position was improperly subject to a reduction in force, specifically as a result of "harassment and retaliation for initiating the grievance process." (See footnote 1) He seeks reinstatement to the position with back pay, interest, and all associated benefits. Relief could not be provided by Grievant's immediate supervisor, so he appealed to level two, where a hearing was conducted on June 24, 1997. The grievance was denied in a written level two decision dated August 28, 1997. Consideration was waived at level three, and the matter was appealed to level four on September 4, 1997. A level four hearing was held in this Grievance Board's office in Morgantown, West Virginia, on December 11, 1997. The parties declined to submit written post-hearing arguments, so the matter became mature for decision at the conclusion of the level four hearing. (See footnote 2)

The following findings of fact are appropriate, based upon a preponderance of the credibleevidence of record.

Findings of Fact

1. Grievant was employed by the Upshur County Board of Education ("Board") during the 1996-1997 school year as an assistant band director at Buckhannon-Upshur High School ("BUHS") and as a band teacher at Buckhannon-Upshur Middle School ("BUMS"). He had been employed as an assistant band director at BUHS since August of 1990.

2. Beginning in 1993, the Board began suffering from financial difficulties, due to rejection of an excess levy by the county's voters. The levy was also rejected in later elections, the last being in February of 1997.

3. Because of failure of the levies and attendant financial constraints, the Upshur County school system went from having a $600,000 surplus of funds in 1993 to a $385,000 deficit at the end of the 1996-1997 school year.

4. Pursuant to financial cuts, Grievant and another music teacher were subject to a reduction in force in 1995. However, Grievant was recalled to employment for the 1996-1997 school year, due to the retirement of a more senior music instructor.

5. Grievant filed a grievance in July of 1996 regarding issues related to his contract of employment for the 1996-1997 school year, when he was recalled to work. A decision was issued at level four by Administrative Law Judge Weatherholt, dated January 31, 1997, granting the grievance.

6. Dr. Richard Hoover, Superintendent, was the level two evaluator in the prior grievance, which he denied. He was also a witness in that grievance. Dr. Hoover received a copy of Judge Weatherholt's decision by certified mail on February 3, 1997. 7. On March 26, 1997, the Board voted to terminate the position of assistant band director at BUHS and band teacher at BUMS, pursuant to Dr. Hoover's recommendation.

8. In the spring of 1997, Grievant was the least senior music teacher employed in Upshur County.

9. Because Grievant had the least seniority and held no other certifications, he could not laterally transfer or “bump” into another position, so he was placed on the preferred recall list at the end of the 1996-1997 school year.

10. Grievant's position was the only one eliminated in the spring of 1997. However, substantial cuts were made in extracurricular and administrative salaries.

11. Grievant's position was selected for elimination, because he taught discretionary electives not required by the State Department of Education. Because of its financial deficit, the Board used the position eliminated through Grievant's reduction in force to comply with state educational mandates. (See footnote 3)

Discussion

Grievant contends that Dr. Hoover recommended the elimination of his position because of his success in the grievance decision of January 31, 1997. Reprisal is defined by W. Va. Code §18- 29-2(p) as “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 address it.” A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or 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.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543-544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra. If the employer rebuts the claim of reprisal, the grievant may then prove by a preponderance of the evidence that the offered reasons are merely pretextual. Id.

Grievant has established a prima facie case of retaliation. He was successful in his prior grievance, in which a decision was issued on January 31, 1997. Shortly after receiving that decision on February 3, 1997, Dr. Hoover, who had direct involvement in the prior grievance, made the recommendation to the Board that Grievant's position be reduced in force. These facts are sufficient to establish “an inference of a retaliatory motive” on Dr. Hoover's part.

Establishment of a prima facie case of reprisal shifts the burden of production to the Board to

show that Grievant's position was eliminated for legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace supra; Shepherdstown, supra. Respondent maintains that the reason for Grievant's reduction in force was nothing other thaneconomic. After an assessment of available funding for salaries and state educational requirements, cuts had to be made, because there was insufficient money to pay all existing salaries and also comply with state mandates. The Board's action is permitted by W. Va. Code §18A-4-7a, which provides that, with respect to the employment of professional personnel, "[n]othing provided herein shall prevent the county board of education from eliminating a position due to lack of need." The same statute also provides for placement of teachers with the lowest seniority on the preferred recall list, unless the employee holds other certifications and can laterally transfer to another position.

In response to the Board's contentions, Grievant alleges that Dr. Hoover made inconsistent statements regarding the need for any RIFs (reductions in force) for the 1997-1998 school year. He introduced evidence from Board meetings held on January 7 and February 4, 1997, during which Dr. Hoover stated that there should be no need for RIFs for the following year, because all-day kindergarten had been implemented, which would support the need for personnel. However, Dr. Hoover stated that there should be no need for RIFs as a result of student population. Grievant's RIF was not, in fact, related to student population, but was caused by the financial deficit and the need to staff positions to comply with state educational requirements. It should also be noted that, at the February 4, 1997, Board meeting, Dr. Hoover had already received the prior grievance decision, and still did not propose that any RIFs be made. Dr. Hoover explained that, when confronted in March with the need to meet requirements without sufficient funding of positions--and another failed excess levy--he decided that at least one nonessential position had to be eliminated. Dr. Hoover has justified his actions, and they do not appear to be related to a desire to retaliate against Grievant. Grievant's reduction in force was not motivated by his grievance activity.

Although Grievant was the only employee who was RIFed, the Board has also established that many cuts were made to save money for the 1997-1998 school year. All extracurricular contractsalaries were cut by 37 per cent, and administrators and central office employees took voluntary salary cuts. This further supports the Board's legitimate reasons for eliminating Grievant's position.

Grievant has argued that other measures could have been taken instead of elimination of his

position and that cutting his position did not save a sufficient amount of money to be justified. However, this argument ignores the fact that his position was used to staff a position mandated by state educational requirements, for which there would not have been funding otherwise. Moreover, decisions based upon financial and economic factors regarding how to best serve the needs of schools are determinations which should be left to the Board. Sammons v. Mingo County Bd. of Educ., Docket No. 96-29-336 (Jan. 17, 1997). Furthermore, although discussing service personnel rather than professional positions, this Grievance Board has previously noted that grievants have a difficult burden in challenging staffing decisions made by a board faced with funding cuts. In such situations, "[t]he employee must necessarily acknowledge the true underlying reason for the action, and show that the board erred or otherwise abused its discretion in deciding which terminations . . . were the most reasonable." Dial v. McDowell County Bd. of Educ., Docket No. 96-33-259 at 7 (April 30, 1997). Grievant has not shown an error or abuse of discretion in the instant case.

Although Grievant established a prima facie case of reprisal, the Board provided legitimate, nonretaliatory reasons for elimination of his position, which Grievant has failed to prove were pretextual.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

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

3. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or 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.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543-544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

4. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

5. Grievant established a prima facie case of reprisal with regard to the elimination of his position in March of 1997.

6. Respondent provided legitimate, nonretaliatory reasons for eliminating Grievant's position, which Grievant did not prove were pretextual. 7. Respondent did not engage in reprisal against Grievant.

8. Decisions based upon financial and economic factors regarding how to best serve the needs of schools are determinations which should be left to the Board, and should not be disturbed unless arbitrary or erroneous. Sammons v. Mingo County Bd. of Educ., Docket No. 96-29-336 (Jan. 17, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Upshur 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.

DATE: December 23, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

Although harassment was stated on the original grievance form, no arguments regarding harassment have been made at any level of the grievance process, so that claim is deemed to have been abandoned. Likewise, Grievant made allegations at level two regarding payment for sick days, which were not mentioned or asserted at level four, so they are also deemed abandoned.

Footnote: 2

Pursuant to Grievance Board policy, this grievance was given priority on the decision docket, because Grievant lost his job as the result of a reduction in force.

Footnote: 3

The state requires that an instructor be assigned to supervise and teach students who have been expelled from school. The Board used Grievant's position to hire such an individual for the 1997-1998 school year.