SAMUEL LOPEZ,

Grievant,

v. Docket No. 97-BOT-441

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Samuel Lopez, employed by the Board of Trustees at West Virginia University (Respondent), as a Contract Specialist, filed a level one grievance on June 2, 1997, in which he complained of reprisal when his assignment had been changed following his filing of a prior grievance. After the grievance was denied at levels one and two, Grievant advanced his appeal to level four on September 16, 1997, bypassing consideration at level three, as is permitted by W. Va. Code §18-29-4(c). The parties agreed that a decision could be made based on the lower-level record, supplemented with proposed findings of fact and conclusions of law filed on January 9, 1998. The grievance became mature for decision with the submission of the level two transcript on February 16, 1998.

The following facts relevant to this matter are undisputed, and are presented as formal findings of fact.

Findings of Fact

1. Grievant has been employed by West Virginia University for approximately eighteen (18) years, and is currently assigned as a Contract Specialist in the Purchasing Department.

2. From January 1985 through June 30, 1996, Grievant held the position of Manager of Inventory Control in the Department of Purchasing and Inventory. 3. In September 1995, Grievant received an evaluation which rated him overall as “unsatisfactory”. Grievant filed a grievance relating to the evaluation, but did not pursue the matter beyond level one.

4. In June 1996 Doug Knorr, Director of Purchasing and Inventory Management, determined that Grievant was better suited to work as a Contract Specialist, and facilitated his reclassification, effective July 1996.

5. The change in classification resulted in a demotion for Grievant from paygrade 20 to paygrade 18. Although Grievant did not suffer an immediate loss in pay as a result of the demotion, Grievant will be ineligible for any future salary increases when equity step pay increases are implemented, because his present salary is the maximum for paygrade 18.

6. On July 9, 1996, Grievant filed a complaint relating to the demotion. (Lopez v. Board of Trustees/W. Va. Univ., Docket No. 96-BOT-499 (July 31, 1997)). This grievance was processed through level four where a hearing was held on February 6, 1997. Following this hearing, the parties agreed to submit proposed findings of fact and conclusions of law on or before March 17, 1997.

7. On or about March 24, 1997, Mr. Knorr notified Grievant that he was relieved of duties relating to nonprocurement-generated transactions, including the Procurement Card Project (sometimes referred to as the p-card project) and the staff assigned to that project. (See footnote 1)

8. Following the change in assignment, Grievant's responsibilities consist of processing lease, rental, and utility payments, departmental purchase order payments, hospitality payments,sealed bid sales, library accounts, and motor pool gasoline payments. Grievant's staff was downsized from four (4) to two (2) individuals.

9. Grievant has maintained the same title and paygrade since the change in assignment, and has not suffered a demotion or downgrade.

Grievant asserts that the change in assignment has resulted in a reduction of his staff by fifty percent, and forces him to perform more mundane duties with a reduced staff. Respondent argues that Grievant has not received a demotion or downgrade, and that no reprisal has taken place because his prior grievance was filed against Mr. Knorr, and that the decision at issue was made by Ed Ames, Manager of Procurement Operations. Respondent asserts that the reassignment was simply a business decision made within its discretion to assign duties and responsibilities to its employees.

Discussion

Because changes of work assignments are not disciplinary in nature, the Grievant has the burden of proving each element of his complaint by a preponderance of the evidence. See

generally Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993). In the present case, Grievant claims that the reassignment of duties relating to the Procurement Card Project was made in reprisal, or retaliation, for the earlier grievance he had filed protesting his demotion. Reprisal is defined by W. Va. Code §18-29-1(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 establishing that:

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

(2) he/she was subsequently treated in an adverse manner by theemployer or an agent;

(3) the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) 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); Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). Of course, if a grievant makes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner, supra. 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). If the Respondent rebuts the claim of reprisal, the grievant may then establish by a preponderance of the evidence that the offered reason(s) are merely pretextual. Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

In support of his case, Grievant testified that he had provided his immediate supervisor, Mr. Ames, Manager of Procurement Operations, monthly and weekly up-dates on the progress of the Procurement Card Project, and had received verbal feedback that he was doing a "good

job." Grievant's claim that no evaluation was conducted on his job performance during the period of time in question was undisputed. Grievant also presented the testimony of Mr. Ames who explained the change in Grievant's duties occurred because "[w]e'd been getting feedback, . . . that theProcurement Card Project was not going as well as people would have liked it to go. . . ." When asked who the people were, Mr. Ames stated "I don't know. I don't know. I can't give you specific names. It was, you know, I don't know, maybe it was hearsay or maybe it was, you know, I mean at that particular point it - - - I suppose it was, uh, irrelevant who it was, it was the fact that the feedback that we were getting was - - - wasn't good and we were just - - - we were trying to change that." (L. II Trans. p. 38.)

Grievant has offered sufficient evidence to support a prima facie case of retaliation. Respondent offered no additional evidence, but relied on Mr. Ames' testimony that the reassignment had simply been a business decision made for the best interest of the overall mission of the department. This claim may constitute a legitimate, nonretaliatory reason for the action; however, Grievant has established the reason to be pretextual.

Grievant provided evidence that he had submitted regular reports on his work and that Mr. Ames had not indicated there was a problem, either in response to the reports, or through a performance evaluation. In his testimony, Mr. Ames noticeably did not state that he had brought any difficulties or unsatisfactory performance, related to the p-card project, to Grievant's attention, during the period of time it was assigned to Grievant. Although he claimed to have received some negative feedback, Mr. Ames could not name a single source who had stated that the project was not proceeding properly, nor did he state with any specificity why the project was not proceeding "as well as people would have liked" for it to go. More importantly, Mr. Ames did not state any reason he believed the project was not being satisfactorily managed by Grievant. Grievant recalled that Mr. Ames did advise him at one time that then-Secretary of Finance and Administration Chuck Polen was unhappy with the progress of the p-card project. Grievant stated that he called Secretary Polento investigate his concerns, but that the Secretary responded that he was not familiar with Grievant, or his work. Absent any explanation as to why the change was in the best interest of the department, Respondent's reason for the decision was pretextual.

Respondent also argues that the action could not constitute reprisal because the decision

to reassign the project was made by Mr. Ames, while Grievant's first complaint was directed to an action by Mr. Knorr. Mr. Ames testified that the decision to reassign the project was ultimately his; however, he acknowledged that it had been made with Mr. Knorr's input. Interestingly, it was Mr. Knorr, not Mr. Ames, who notified Grievant that the project was to be reassigned. Therefore, this argument is not persuasive.

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

Conclusions of Law

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Chase v. Bd. of Trustees/W. Va. Univ., Docket No.94-BOT-053R (Feb. 25, 1998); See W. Va. Code §18-29-6.

2. Reprisal is defined 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.” W. Va. Code §18-29-2(p). 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 theemployer or an 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.

Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281(Mar. 6, 1997). 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/ Marshall Univ., Docket No. 94-BOT-088 (Sept. 19,. 1994). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance

of the evidence that the offered reasons are merely pretextual. Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. Grievant made a prima facie case of retaliation or reprisal in regard to Respondent's decision to reassign his duties and staff relating to the procurement card project.

4. Respondent rebutted the prima facie case of retaliation by asserting the changes in Grievant's assignment were made in the best interest of the overall mission of the department; however, Grievant established the reason was pretextual because Respondent did not bring any deficiencies to his attention, either informally or through evaluation, did not name any individual who
had found fault with his performance, and did not provide any specific example of how his performance was unsatisfactory. Accordingly the grievance is GRANTED, and Respondent Ordered to reinstate the duties and staff associated with the procurement card project to Grievant immediately.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: March 20, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievant explained that the p-card allows departments to make purchases under a thousand dollars ($1,000.00) without having to go through the formal procurement process.***