VALERIE TIBBS,

Grievant,

v. DOCKET NO. 98-15-016

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Valerie Tibbs, alleges as follows:

> **By increasing my daily bus schedule by 29 extra miles and an hour work time daily this is in violation of WV Code 18A-4-8a,b. (See footnote 1) With this action proceeding previous actions I feel this is retaliation and harassment on Mr. Allison part, which is in violation of WV Code 18-29-N,P (sic).**

She requests as relief that she be compensated for the extra one hour of driving time the change has added to her schedule, along with having her bus run returned to its 1996-1997 schedule. A level one decision denying the grievance was issued on October 10, 1997. (See footnote 2) Grievant appealed to level two, where a hearing was conducted on November 19, 1997, followed by a written decision denying the grievance. Level three was bypassed, and Grievant filed a level four appeal on January 10, 1998. A hearing was held in the Grievance Board's office in Wheeling, West Virginia, on March 18, 1998, where Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent was represented by its attorney, William Fahey. Grievant's representativefiled a post-hearing brief on April 6, 1998, at which time this matter became mature for decision. (See footnote 3)

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is regularly employed by the Hancock County Board of Education (HCBOE)

as a bus operator.

2. At the end of the 1996-1997 school year, HCBOE placed several bus operators, including Grievant, on the transfer list, due to needed changes in various bus schedules.

3. Grievant was notified on July 29, 1997, of two changes in her bus run, which would add one hour of driving time to her schedule and 29 miles of driving distance for the upcoming 1997-1998 school year.

4. HCBOE employs bus operators under 5¾-hour contracts, and these employees are expected to perform all of their duties within a 5¾-hour workday.

5. Grievant's total driving time since the alterations in her schedule were implemented is five hours, and she has not had any difficulties in completing all of her required duties within the allocated 5¾-hour period.

6. Grievant has not challenged the procedure by which changes were made in her bus schedule for the 1997-1998 school year.

7. The changes in bus schedules for 1997-1998 were made due to problemswith Vo-Tech runs and traffic congestion caused by closure of a bridge in downtown Weirton.

8. One of the new runs added to Grievant's schedule has had a history of disciplinary problems. Grievant's only specific disciplinary problems on the run occurred during the first few days of the 1997-1998 school year.

9. Grievant filed two grievances in January and February of 1997 regarding being "passed over" for extracurricular bus runs. She prevailed in both grievances at the lower levels of the grievance procedure.

10. On two separate occasions, once during the second week of February and again during the first week of March, 1997, Mr. Allison watched Grievant "pre-trip" her bus.

11. Mr. Allison was subpoenaed to testify in Grievant's Workers' Compensation hearing in February of 1994, and his testimony was unfavorable to her case.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. See W. Va. Code §

18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). Grievant contends that the alterations in her bus schedule constituted both reprisal (retaliation) and harassment.

"Reprisal" is defined by W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case by presenting evidence as follows:

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

(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). However, 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 action. 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.

Grievant has established a prima facie case of retaliation. HCBOE has not refuted Grievant's allegations that she filed two successful grievances in early 1997. In addition, as Grievant's supervisor, there can be no question that Mr. Allison would have been involved in and had direct knowledge of those grievances.

Grievant's establishment of a prima facie case of reprisal shifts the burden of proof to the employer to establish legitimate, nonretaliatory reasons for the actions taken. See Mace, supra; Shepherdstown, supra. In this regard, HCBOE has explained, through Mr. Allison, the reasons for the changes needed in several bus schedules, including Grievant's, for the 1997-1998 school year. Specifically, students on a particular bus were arriving lateto the Vo-Tech Center, so another available bus was needed to take at least one portion of that bus run. Because Grievant's run placed her in the right area at the right time, her bus was chosen to take the additional run. In turn, part of Grievant's previous afternoon run was exchanged for a run to the Vo-Tech Center in the afternoon. Additionally, HCBOE has established that at least eight bus runs were altered in order to alleviate the Vo-Tech problem and to accommodate traffic congestion caused by the closure of the Main Street bridge. HCBOE has established legitimate, job-related reasons for its actions. See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Conner, supra.

Grievant has also attempted to establish that Mr. Allison engaged in conduct which would constitute harassment. "Harassment" is defined by W. Va. Code § 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Grievant contends that, because Mr. Allison watched her pre-trip her bus on two occasions in early 1997, he was engaging in harassment. Mr. Allison testified that, if he happens to be in the bus garage in the morning when drivers are doing pre-trip inspections, it is his responsibility as their supervisor to observe them performing these duties. He stated that he certainly did not single out Grievant, and, in fact, he had watched another driver do a pre-trip inspection on the morning of the level two hearing. It is certainly within Mr. Allison's discretion and responsibility to observe the drivers he supervises while they are engaged in their assigned duties. Without further evidence, a supervisor observing an employee in the normal course of business does not constitute harassment. See Falls v. Greenbrier County Bd. of Educ., Docket No. 97-13-119 (July 2, 1997).

In further support of her harassment allegations, Grievant contends that Mr. Allison'spattern of conduct was exhibited in 1994 when he testified against her in a Workers' Compensation hearing. Mr. Allison explained that he was subpoenaed as a witness and gave

factual testimony, which happened to be unfavorable to Grievant. He was a mechanic at the time, and did not have any supervisory authority over Grievant. This incident does not demonstrate harassment.

Finally, Grievant contends that two comments were made by Mr. Allison which also show a pattern of harassment. In 1994, Grievant complained about excessive vibration in her bus and was referred to Mr. Allison, a mechanic at the time. In response to her inquiries, Mr Allison stated that he also had dealt with this problem. Grievant contends that Mr. Allison commented that "women should think twice before taking a job as a bus driver," which Mr. Allison denies. Whether or not Mr. Allison made such a comment, it still does not rise to the level of harassment. He was a mechanic at the time with no supervisory authority over her, and, if made, it was merely an off-hand comment. It certainly cannot be said to be something "contrary to the demeanor expected by law, policy and profession."

The second comment made by Mr. Allison occurred in 1997 after Grievant's bus run had been altered for the upcoming school year. While discussing the matter, Mr. Allison commented that even more changes may be made for the 1998-1999 school year, and that Grievant was lucky to have a job. Mr. Allison testified that he merely made this comment to indicate to Grievant that she is fortunate to have a job, and that she will likely continue to be employed because of her many years of seniority. It does not appear that this comment was meant as a threat, because Grievant clearly has more seniority than most drivers and will continue to work, even in the event of a reduction-in-force. Again, Grievanthas not established conduct rising to the level of harassment.

Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997). Similarly, repeated comments of a sexual nature by a supervisor have been found to constitute harassment. Hall v. W. Va. Dept. of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997). The incidents described by Grievant hardly rise to this level.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. See W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

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

3. Grievant established a prima facie case of reprisal.

4. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its action. 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.

5. HCBOE established legitimate, job-related reasons for the alterations in Grievant's bus schedule for the 1997-1998 school year.

6. "Harassment" is defined by W. Va. Code § 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

7. Grievant did not prove by a preponderance of the evidence that HCBOE or the Supervisor of Transportation engaged in conduct constituting harassment.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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: June 16, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

At level four, Grievant only presented evidence and arguments concerning harassment and retaliation; accordingly, the other violations contained in the grievance statement are deemed abandoned.

Footnote: 2

Respondent successfully argued at level two that the grievance was untimely. However, the timeliness issue was not addressed at level four, so it is deemed abandoned.

Footnote: 3

Respondent filed no level four post-hearing submission.