LINDA LILLER,

Grievant,

v. **Docket No. 99-28-270**

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Linda Liller, employed by the Mineral County Board of Education (MCBOE or Respondent) as a teacher, filed a level one grievance on April 13, 1999, in which she alleged violations of W. Va. Code §§18A-4-7a, 18A-4-7b, 18A-2-2, and 61C-1-1, et seq., and Mineral County Policy GBNA-R, when she was released from employment as a result of a reduction in force (RIF). Grievant's immediate supervisor lacked authority to grant the requested relief at level one, and the matter was denied by Superintendent Charles B. Kalbaugh following a level two hearing. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on July 1, 1999. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on August 31, 1999, at which time Grievant was represented by Randy K. Miller, Esq., and MCBOE was represented by Howard E. Seufer, Jr., Esq., of Bowles Rice McDavid Graff & Love. Grievant declined to submit post-hearing arguments, and the matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by MCBOE on October 5, 1999.

The following findings of fact are based upon a preponderance of the credible evidence contained in the record developed at levels two and four.

Findings of Fact

1. Grievant was first employed by MCBOE in 1995, and has been continuously assigned as Coordinator of Cooperative Education at the Clary Street Learning Center (CSLC). This facility which serves special education and at-risk students who are not classified as students with disabilities.

2. Student enrollment in Grievant's career preparation and work activities classes during the Fall Semester, 1996-97, was 26. Spring Semester enrollment was 30. During the 1997-98 school year, enrollment was 23 during the Fall Semester, and 10 in the Spring Semester. In the 1998-99

school year, enrollment declined to 15 in the Fall Semester, and 5 students in the Spring Semester. The enrollment capacity of Grievant's classes varied, but was never lower than 25 students, and permitted as many as 70 students, with 50 being the average.

3. In order to comply with the State Aid formula for the allocation of personnel, MCBOE was required to eliminate four professional positions at the end of the 1998-99 school year.

4. David Fritsch, principal at CSLC, recommended that the Cooperative Education position be eliminated as part of the reduction in force. Because Grievant was the least senior employee, she had no bumping rights, and her employment was terminated effective the end of the 1998-99 school year.

5. In October 1998, Grievant filed a complaint with the West Virginia Department of Education (WVDOE), alleging that MCBOE had acted improperly when it awarded a modified diploma to a student with a mild learning disability, and had failed tofollow the appropriate Individualized Education Program (IEP) by developing an IEP for an exceptional student outside an IEP meeting.

6. Following an investigation, WVDOE notified MCBOE by letter dated December 2, 1998, that while it was determined to have been in noncompliance with Policy 2510 by failing to award an appropriate diploma to a student with a learning disability, no corrective action was required for the student in question based upon extenuating circumstances. Because the student's file had disappeared, and was “recreated”, a violation of Policy 2419, which requires that an IEP meeting be held to develop an IEP, was found to have occurred. However, no further corrective actions were required for the student in question.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

At level two, Grievant withdrew her claim relating to W. Va. Code §18A-4-7b. MCBOE Policy GBNA-R was not made a part of the record, and cannot be addressed. There is no Chapter 61C of the W. Va. Code; however, in light of Grievant's claim that Mr. Fritsch “set her up” for dismissal in retaliation for the complaint she filed with WVDOE, it appears that she intended to allege a violation of

W. Va. Code §6C-1-3(a), althoughreference was never made to what is commonly referred to as the "Whistle-blower Law", nor did Grievant refer to herself as such.

The following statutory provisions are pertinent to Grievant's case.

W. Va. Code §18A-4-7a provides in pertinent part:

Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two [18A-2-2], article two of this chapter: Provided, That all persons employed in a certification area to be reduced who are employed under a temporary permit shall be properly notified and released before a fully certified employee in such a position is subject to release: Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure; Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.

The portion of W. Va. Code §18A-2-2 pertinent to this grievance provides:

The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated (1) by a majority vote of the full membership of the board before the first of April of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board prior to the board's action thereon . . . Provided further, That a continuing contract shall not operateto prevent a teacher's dismissal based upon the lack of need for the teacher's services pursuant to the provisions of law relating to the allocation to teachers and pupil-teacher ratios. . . .

W. Va. Code §6C-1-3(a) provides as follows:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by

changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

In Coddington v. Dept. of Health and Human Resources, Docket No. 93-HHR- 265/266/267(May 19, 1994), the Grievance Board held that the type of allegations normally formulated under a "whistle-blower" statute are generically similar to the retaliation or reprisal claims which this Board routinely deals with under W. Va. Code §§29-6A-2(p) and 18-29-2(p). See, e.g., Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Hurst v. W. Va. Dept. of Transp./Div. of Highways, Docket Nos. 90-DOH-093/094/095 (Aug. 31, 1990); Gerstner v. Gilmer County Bd. of Educ., Docket No. 11-88-184 (Jan 31, 1989); Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988); Wyatt v. Marshall Univ., Docket No. BOR2-87-044-1 (Sept. 29, 1987).

Since there is nothing in the statute to suggest that the courts are the exclusive forum for state employees to obtain available relief for a whistle-blower violation, and given the broad definition of a grievance in W. Va. Code §29-6A-2(i), it was determined that a claim by an employee working in a nonjudicial function of a department of the state of West Virginia alleging a violation of this state's "Whistle-blower Law," W. Va. Code§6C-1-1, et seq., is a matter properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. See Graley v. W. Va. Parkways Economic Development and Tourism Authority, Docket No. 91-PEDTA-225 (Dec. 23, 1991). The same reasoning is extended herein to include education employees filing grievances under W. Va. Code §§18-29-1, et seq.

In general, a grievant alleging discrimination or retaliation in violation of W. Va. Code §6C-1-3, must establish a prima facie case, by showing:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Parker v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Graley, supra; Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Applying these general rules to the case at hand, the undersigned accepts that Grievant's conduct in filing a complaint against MCBOE with the WVDOE placed her beneath the protective mantle of the Whistle-blower statute. Likewise, there is no question that MCBOE was aware of Grievant's activities. Grievant has further established that subsequent to this participation, her employment status changed in an adverse manner, and that this action came in such proximity to the protected conduct so as to create an inference that the actions were taken in retaliation for having filed the complaint. Thus, Grievant is found to have established a prima facie case of unlawful retaliation.

Once a prima facie case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. Graley, supra. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1989); Frank's Shoe Store, supra, at 258; Parker, supra. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. Graley, supra. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981);Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26- 56 (Sept. 29, 1989).

Consistent with the burdens discussed above, the Respondent presented the following evidence to show that the decision to terminate Grievant's employment by a reduction in force was based on legitimate, nonretaliatory reasons. At the level four hearing, Mr. Fritsch reviewed a list of students, and provided an explanation of why eachwas removed from Grievant's classes. These reasons included one student who was transferred because Grievant could not supervise him during the necessary time period, while a second transfer resulted from a parent complaint. A third was to accommodate the student's schedule with a math class, and others were completed due to student schedule or program changes, or to place them with special education teachers who were already

working with them. In response to Grievant's claim that he did not make an effort to enroll students in her classes, Mr. Fritsch stated that it was not his policy to recruit students for classes. Mr. Fritsch denied that his recommendation to eliminate Grievant's position was motivated by any factor other than low enrollment.

Robert Miller, Special Education Director for MCBOE, testified that he was not angry that Grievant had filed the complaint with WVDOE. He opined that only six to eight hours of employee work time were involved in the investigation, which was conducted by telephone, and did not disrupt the department. Mr. Miller stated that he had previously perceived an existing conflict between WVDOE rules and a statute, and believed the inquiry finally provided an answer as to when modified diplomas may be awarded.

Robert Mason, Assistant Superintendent for Personnel, testified that in Spring 1999, MCBOE was 4.27 professional positions over the state aid formula. Four professional employees were originally issued RIF letters, but two were later canceled. He confirmed the reason for Grievant's dismissal was lack of enrollment, which he opined was the result of changes occurring in the cooperative education program. Mr. Mason stated that such programs are now offered in every high school, and provide broader, more inclusive, work- based experience, ranging from job shadowing to internships. Based upon the testimony of these administrators, it is determined that MCBOE has provided a legitimate, nonretaliatory reason for the elimination of Grievant's position. No evidence was presented that would reasonably lead to the conclusion that the explanation provided by DHHR as to this reclassification was merely a pretext for retaliation.

The record includes no evidence that MCBOE acted in violation of W. Va. Code §§18A-4-7a or 18-2-2.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. "No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." W. Va. Code §6C-1-3(a). 3. Education employees alleging a violation of this state's "Whistle-blower Law," W. Va. Code §6C-1-1, et seq., is a matter properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. See Coddington, supra, Graley, supra.

4. In general, a grievant alleging discrimination or retaliation in violation of W. Va. Code §6C-1-3, must establish a prima facie case, by showing:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Parker v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Graley, supra; Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

5. 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. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). 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.

6. Grievant established a prima facie case of reprisal.

7. Respondent successfully rebutted the prima facie case of reprisal by showing a legitimate, nonretaliatory reason for the termination of Grievant's employment.

8. Grievant did not prove that Respondent's offered reason was merely pretextual.

9. Grievant failed to prove that MCBOE engaged in any actions which constitute a violation of W. Va. Code §18A-4-7a, or §18A-2-2.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mineral 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 19, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE