MARIE CARR,

Grievant,

v.

DOCKET NO. 99-31-483

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Marie Carr, filed the following grievance against her employer, the Monroe County Board of Education ("Board") on or about October 13, 1999:

> Grievant, a regularly employed bus operator, applied for the Red Sulphur bus operator's vacancy. This position was awarded to Bill Miller who is less senior than the Grievant as a regularly employed school bus operator. Grievant alleges a violation of West Virginia Code § 18A-4-8b, § 18A-4-8g, § 18-29-2(n)&(p).
>
> Relief sought: Grievant requests instatement into this vacancy and prospective and retroactive payment of wages and benefits since the filling of this vacancy. Grievant additionally requests interest on all monetary sums.

A level two hearing was held on October 29, 1999, and a decision denying the grievance was issued by Lyn Guy, Superintendent for the Board, on November 5, 1999. Grievant by-passed level three in accordance with W. Va. Code § 18-29-4, and appealed to level four on November 16, 1999. A level four hearing was conducted on January 25, 2000, and this case became mature for decision on February 24, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant wasrepresented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Gregory W. Bailey, Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

September 22, 1999 Notice of Vacancy for Bus Operator (Red Sulphur Run).

Ex. 2 -

October 7, 1999 letter from Lyn Guy to Marie Carr.

Ex. 3 -

Applications for Red Sulphur Run Bus Operator vacancy.

Ex. 4 -

Bus Operators Seniority Listing, revised January 12, 2000.

Ex. 5 -

Summary of School Trips from September 9, 1999 through January 24, 2000.

Board Exhibits

None.

Testimony

Grievant testified in her own behalf, and presented the testimony of Lyn Guy and Quince Galford. The Board presented the testimony of Lyn Guy.

FINDINGS OF FACT

The material facts in this case are not in dispute, and are set forth in the following findings.

1. Grievant is employed by the Board as a regular bus operator, and has a seniority date of August 29, 1984.

2. On or about September 22, 1999, the Board posted a vacant bus operator position for the "Red Sulphur Run." G. Ex. 1.

3. Grievant applied for the Red Sulphur Run position. Grievant was qualified for the position, had acceptable evaluations, and was the most senior applicant. 4. Grievant's husband, Homer Carr, had held the Red Sulphur Run until he was suspended and dismissed by the Board for alleged misconduct on the bus in September 1998. Mr. Carr's dismissal was overturned by the Grievance Board, and the Board appealed that decision to the Circuit Court, where it is currently pending. (See footnote 1)

5. The children who accused Mr. Carr of misconduct no longer ride on the Red Sulphur Run.

6. Grievant currently resides in the community served by the Red Sulphur Run.

7. Superintendent Guy recommended Grievant be awarded the Red Sulphur Run. The Board rejected this recommendation, and awarded the run to Bill Miller, the second most senior applicant for the position.

8. Superintendent Guy informed Grievant by letter dated October 7, 1999, that she was not awarded the position, and provided her with reasons for the Board's decision. G. Ex. 2.

9. The Board feared that (a) the safety of Grievant and her passengers might be jeopardized by someone retaliating against Grievant; and (b) Grievant might retaliate against the children and families of the children on the Red Sulphur Run.

10. The letter suggested the Board's fears that Grievant might retaliate against the children and families was based on her actions surrounding the September 1998 allegations against Mr. Carr. 11. On or about February 21, 1996, Grievant was suspended, based in part for allowing her husband to drive her bus during a period of time he had been relieved of his duties pending resolution of allegations of misconduct against him. (See footnote 2)

DISCUSSION

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. A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of witnesses,

but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony. Black's Law Dictionary, 5th Ed., p. 1064. “If the evidence is evenly balanced between the parties, there can be no recovery” by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772 (1957); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the schooland are not arbitrary and capricious. Dillon v. Bd. of Educ. of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). County boards of education must fill school service personnel positions on the basis of seniority, qualifications, and evaluations of past service. W. Va. Code § 18A-4-8b. If the most senior applicant for a job is not selected, the board of education must give the applicant valid cause for the action. W. Va. Code § 18A-4-8b. While W.Va. Code §18A-4-8b mandates that seniority is a factor to be considered, it alone is not the sole factor. Qualifications and past service evaluations of the service personnel applicant must also be considered. However, a county board of education must show valid cause why an employee with the most seniority is not employed in the position for which he applies. Ohio County Bd. of Educ. v. Hopkins, 193 W.Va. 600, 457 S.E.2d 537 (1995). See, Harrison County Bd. of Educ., 430 S.E.2d 331 (W.Va. 1993). See also, Groves v. Randolph County Bd. of Educ., Docket No. 95-42-542 (Mar. 15, 1996).

Grievant was qualified for the position, had acceptable evaluations, and was the most senior applicant for the position. In accordance with Code § 18A-4-8b, the Board provided her with its reasons for not selecting her for the Red Sulphur run position. Grievant argues the reasons given are arbitrary, capricious, and constitute harassment and reprisal. The Board responds that its reasons were valid given the circumstances and notoriety of Mr. Carr's suspension and dismissal.

The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276(1982). A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence

before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Superintendent Guy recommended to the Board that Grievant be hired for the position, and in deciding not to accept her recommendation, the Board reviewed all aspects of Grievant's personnel history, including her qualifications, seniority, and evaluations. In addition, the Board considered the significant amount of notoriety surrounding her husband's dismissal and conviction arising from the charges brought against him. The Board received numerous complaints from concerned citizens about placing Ms. Carr on the bus run, and received threats pertaining to Mr. Carr. Those threats were reported to the authorities by Superintendent Guy, and she testified that those threats served to strengthen the Board's resolve that it would be a potentially unsafe situation to place Ms. Carr in the Red Sulphur bus run.

As part of its review, the Board also considered Grievant's 1996 suspension for allowing her husband to drive her school bus when he had been removed from his bus driving duties by the Board. Grievant argued that it was wrong for the Board to consider this disciplinary action because it was remote in time to the current situation, and because it was not part of her past evaluations. The West Virginia Supreme Court of Appeals rejected this argument in Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990), where it found that, although disciplinary actions against an employeemay not be included on an annual evaluation, those actions are properly relied on in making subsequent personnel decisions. Therefore, it was not inappropriate or arbitrary for the Board in this instance to consider Grievant's prior suspension, especially in light of the fact that it involved poor judgment on her part with respect to her husband.

Grievant testified that the Board's fears of retaliation, either against her or by her, are unfounded, first, because the students and families involved in the accusations against her husband no longer live on the Red Sulphur Run, and second, because she herself lives on the Red Sulphur Run, and no threatening or retaliatory action has occurred to date against her or her husband. Grievant testified that her motivation for applying for the Red Sulphur Run was one of convenience, as it was closer to her home. She also testified that it was a preferable run than her current run, because it serves the high school, while her current run serves the middle school. Grievant testified that there are more extra-duty runs associated with the high school than the middle school.

The Board countered Grievant's last argument by submitting documentation which showed that

Grievant actually makes more money on an extracurricular contract she now has, than she would taking extra-duty trips at the high school. While this is interesting, it has never been a requirement that school service personnel demonstrate their motivation for desiring a different position with a county board of education.

In any event, while Grievant's arguments are meritorious, she has not shown that the Board's action in not selecting her for the Red Sulphur Run was arbitrary and capricious. It is clear the Board seriously deliberated about this situation, considered allfacts necessary to make its determination, and made a reasonable decision in the best interests of the school system.

Grievant also claims her non-selection was the result of harassment and reprisal by the Board. "Harassment" is defined under 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 professionalism." 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). Repeated comments of a sexual nature by a supervisor have also been found to constitute harassment. Hall v. W. Va. Dept. of Transp., Docket No. 96- DOH-433 (Sept. 12, 1997).

Grievant has failed to prove the Board's action in not selecting her for the Red Sulphur Run amounts to harassment as defined in Code § 18-29-2(n). This action was a single act, and Grievant has not shown that she has been subject to repeated or continual irritation, annoyance, or conduct which would be contrary to law or policy. An isolated incident such as this does not rise to the level of harassment. See Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999); Tibbs v. Hancock County Bd. of Educ., Docket No. 98-15-016 (June 16, 1998).

W. Va. Code § 18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for analleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

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

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

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/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). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory 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.

Grievant was involved in her husband's grievance proceeding over his dismissal. She was subsequently treated in an adverse manner in not being selected for the Red Sulphur Run. It is undisputed that the Board knew of Grievant's involvement in her husband's grievance, and that there was a causal connection between her involvement inher husband's grievance and the adverse treatment. Therefore, Grievant has made a prima facie case of reprisal against the Board.

Superintendent Guy testified that one of the concerns of the Board was Grievant's behavior during her husband's grievance, which it believed supported its concern that Grievant might retaliate against the students or families involved in that grievance. Specifically, during her husband's grievance proceeding, an altercation broke out in the witness room, and Grievant became involved in that altercation. Grievant testified that the altercation initially did not concern her, but was between other witnesses. When the confrontation appeared to be getting out of hand, Grievant intervened in an attempt to calm the witnesses down, and ultimately called the police. The Board presented no evidence to contradict Grievant's testimony in this regard, with the resulting conclusion being that Grievant was not responsible for the altercation, but rather, was responsible for putting a stop to it.

Nevertheless, despite this clarification of events surrounding the altercation at her husband's grievance, the Board still has established a legitimate, non-retaliatory motive for its decision not to award her the Red Sulphur Run, as discussed above. While the undersigned certainly understands Grievant's feeling that she has been treated unfairly, she has not met her burden of proving by a preponderance of the evidence that the Board's action was arbitrary and capricious.

CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of theschool and are not arbitrary and capricious. Dillon v. Bd. of Educ. of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

2. County boards of education must fill school service personnel positions on the basis of seniority, qualifications, and evaluations of past service. W. Va. Code § 18A-4- 8b.

3. While W.Va. Code §18A-4-8b mandates that seniority is a factor to be considered, it alone is not the sole factor. Qualifications and past service evaluations of the service personnel applicant must also be considered. However, a county board of education must show valid cause why an employee with the most seniority is not employed in the position for which he applies. Ohio County Bd. of Educ. v. Hopkins, 193 W.Va. 600, 457 S.E.2d 537 (1995). See, Harrison County Bd. of Educ., 430 S.E.2d 331 (W.Va. 1993). See also, Groves v. Randolph County Bd. of Educ., Docket No. 95-42-542 (Mar. 15, 1996).

4. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

5. A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 6. Grievant has failed to prove by a preponderance of the evidence that the Board's action in not selecting her for the Red Sulphur Run was arbitrary and capricious.

7. Evaluations of past service include not only formal evaluations performed in accordance with

W. Va. Code § 18A-2-12 and State Board Policy 5300, but also disciplinary warnings. Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990).

8. "Harassment" is defined under 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 professionalism." 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). Repeated comments of a sexual nature by a supervisor have also been found to constitute harassment. Hall v. W. Va. Dept. of Transp., Docket No. 96- DOH-433 (Sept. 12, 1997).

9. An isolated incident does not rise to the level of harassment. See Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999); Tibbs v. Hancock County Bd. of Educ., Docket No. 98-15-016 (June 16, 1998).

10. Grievant's non-selection for the Red Sulphur Run was an isolated incident, and she has failed to prove by a preponderance of the evidence that the Board's action constitutes "harassment" under W. Va. Code § 18-29-2(n). 11. W. Va. Code § 18-29-2(p) defines "reprisal" as "the 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 redress it."

12. A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

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

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

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/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).

13. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory 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. 15. Grievant established a prima facie case of reprisal under W. Va. Code § 18- 29-2(p); however, the Board has offered a legitimate, non-retaliatory reason for not selecting her for the Red Sulphur Run.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Monroe County. Any 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 9, 2000

Footnote: 1

See Carr v. Monroe County Bd. of Educ., Docket No. 98-31-401 (Apr. 12, 1999), appealed to Circuit Court of Monroe County, Civil Action No. 99-C-24.

Footnote: 2

See Carr v. Monroe County Bd. of Educ., Docket No. 96-31-102 (Oct. 15, 1996).