C. RUSSELL RADER,

Grievant,

v.

DOCKET NO. 01-DOH-534

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS

and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, C. Russell Rader, filed the following grievance against his employer, the West Virginia Department of Transportation/Division of Highways on January 8, 2001:

> On April 5, 2000, I was requested by the Commissioner to be in charge of the Waste Tire Program. This was followed up by a memo 4-6- 2000 from the Commissioner were by (sic) I was "temporarily assigned the duties of implementing the new Waste Tire Program as outlined in SB 427." The program was to be administered in the Operations Division.
>
> At the start of the May 16, 2000 payroll period, I was officially transferred to Operations from Engineering. Mr. Jim Sothen, Eng. Dir., asked if I were being promoted to an HE IV like I would have in his division with the marked increase in duties. My position and position number were transferred to Operations. I noted to Mr. Sothen that the Commissioner said I would supposedly be promoted by the Division after the temporary part was over - the inference was July 1, 2000 when the actual account was setup with funds - BUT never specifically noted as to when.
>
> On December 21, 2000 my previous supervisor noted my old slot had been permanent(sic) filled - thus eliminating any going back. This action meant my position in Operations was now permanent.
>
> On Jan. 2, 2001, I was transferred within Operations thus also noting my position here is permanent. With the end of the "temporary" assignment which is now 9 months old [it] is not temporary but permanent.
>
> The duties, responsibilities and requirement of the SB 427 and accompanying regulations are significant increases from my previous duties as well as those assigned by the Commissioner.

The other three issues are that (1) I would have been promoted to an HE IV with these major responsibilities, and (2) it would be discriminatory to be inconsistent between the two divisions not to promote me, and (3) with my speciality and environmental background with a P.E. in Environmental Engineering (as well as Civil Eng.) and a licensed Land Surveyor. These items put me in the area of specialist which uses the administrative and technical sides of Civil Service Classifications, as others in DOH have done.

This is filed within the 10 ten day period from first knowledge on Dec. 21, 2000, as well as the Jan. 2, 2001 memo from Carl Thompson as well as this is continued and ongoing.

RELIEF -

The relief sought is to be promoted to a HE IV (4) with an effective date of Dec. 1, 2000 with the raise consumate(sic) with the increase(sic) work load and civil service requirements for increase in Pay Grades.

I am sure Commissioner Beverage and Jim Sothen, Eng. Director, could provide any additional information need(sic).

The grievance was denied at level one by Bruce E. Leedy, Regional Operations Engineer, on January 12, 2001, and at level two by Carl O. Thompson, Deputy State Highway Engineer, on January 26, 2001. A level three hearing was held on April 25, 2001, at which time Grievant amended his grievance to include a claim of retaliation. The grievance was denied by Grievance Evaluator Brenda Craig Ellis on September 28, 2001. Grievant's appeal was received at level four on October 9, 2001, where the Division of Personnel was joined as indispensable party. The matter came on for hearing on January 9, 2002, in the Grievance Board's Charleston, West Virginia office, and became mature for decision at the close of the level four hearing. Grievant appeared pro se, and Highways was represented by Jennifer E. Francis, Esq. The Division of Personnel did not make an appearance.

SUMMARY OF EVIDENCE

Grievant's Exhibits (LIII and LIV)

Ex. 1 -

April 19, 2001 letter from Jeff Black to Russ Rader, with enclosures: email from Julian Ware to Al Hammonds; Employee Time Reports for period May through December, 2000; Weekly Vacancy Reports, December 28, 2000 and July 17, 2000; Responses to various document requests; functional duties of Jim Riggs; functional job description for Bruce Leedy; April 16, 2001 memorandum from Julian Ware to Jeff Black; computer printout for Waste Tire Program; April 12, 2001 memorandum from Julian Ware to Jim Hash; response dated April 12, 2001 from Alice Taylor; April 16, 2001

memoranda from Julian Ware to Jeff Black; January 2, 2001 memorandum from Carl O. Thompson to C&H Level District Administrators 1-10; January 12, 2001 memorandum from Joseph T. Deneault to addressees; Transaction Form dated January 16, 2001; April 12, 2001 memorandum from Julian Ware to Jim Hash; Waste Tire Program Expenditure Authorizations.

Ex. 2 -

Senate Bill No. 427.

Ex. 3 -

August 18, 2000, Proposed Rule for Waste Tire Remediation/Environmental Clean Up.

Ex. 4 -

June 28, 2000, Notice of Emergency Rule, Waste Tire Remediation/Environmental Clean Up.

Ex. 5 -

June 28, 2000, Notice of a Comment Period on Proposed Rule, Waste Tire Remediation/Environmental Clean Up.

Ex. 6 -

July 27, 2000 memorandum from Russ Rader to All District Administrators re: Waste Tire Collection.

Ex. 7 -

January 2, 2001 memorandum from Carl O. Thompson to C&H Level, District Administrators 1-10 re: Waste Tire Program.

Ex. 8 -

Undated memorandum from Russ Rader to Carl O. Thompson re: work schedule.

Ex. 9 -

January 12, 2001 memorandum from Joseph T. Deneault to various addressees re: Waste Tire Program.

Ex. 10 -

January 9, 2001 memorandum from Russ Rader to Norman Roush; January 10, 2001 memorandum from Russ Rader to Normal Roush.

Ex. 11 -

April 6, 2000 memorandum from Samuel H. Beverage to various addressees re: Senate Bill 427, Waste Tire Program.

Ex. 12 -

Certificate of Environmental Engineering dated July 5, 1994.

Ex. 13 -

Professional Engineer license; Professional Surveyor license.

Ex. 14 -

June 23, 2000 Fiscal Note for Proposed Rules.

Ex. 15 -

Undated memorandum from Russ Rader to Sam Beverage.

Ex. 16 -

W. Va. Division of Personnel Temporary Classification Upgrades Policy.

Ex. 17 -

Handwritten draft fiscal notes for waste tire program.

Ex. 18 -

July 10, 2000 memorandum from Russ Rader to Barbara Thaxton.Ex. 19 - Waste Tires proposed work checklist.

Ex. 20 -

December 21, 2000 memorandum from DD (initialed by Jim Sothen) to Districts 1-10; TODA, TODOE, Division Directors, FHWA.

Ex. 21 -

July 19, 2000 memorandum from Jim Rubenstein to Russ Rader re: Interagency Agreements; various email and memoranda.

Ex. 22 -

Legislative Update, Waste Tire Program, Senate Bill 427.

Ex. 23 -

February 1, 2001 letter from Normal H. Roush to Eleanor Casto, enclosing January

30, 3001 Legislative Update.

Ex. 24 -

Engineering Division Organization Charts.

Ex. 25 -

Travel Authorization for Russell Rader.

Ex. 26 -

Employee Performance Appraisal for Russell Rader, dated March 27, 2000.

Ex. 27 -

GL-5 Transaction Form for Russell Rader, effective January 16, 2001.

Highways' Exhibits

Ex. 1 -

Classification Specification for Highway Engineer III.

Ex. 2 -

Classification Specification for Highway Engineer IV.

Testimony

Grievant testified in his own behalf, and presented the testimony of Lowell Basford, Alan Cuervo, Jeff Black, James Riggs, Bruce Leedy, Fred Van Kirk, Norman Roush, Jim Sothen, Joseph Deneault, and Carl Thompson. Highways presented no additional witnesses.

FINDINGS OF FACT

1. Grievant has been employed by Highways since September 30, 1999. He is currently classified as a Highway Engineer III.

2. Grievant was temporarily transferred from the Engineering Division to the Operations

Division on April 6, 2000, by directive of former Commissioner Samuel Beverage. (G. Ex. 11).

3. The purpose of Grievant's transfer to the Operations Division was to implement the new Waste Tire Program enacted through Senate Bill 427. See G. Ex. 2. 4. Grievant's duties with the Waste Tire Program included writing the applicable rules and regulations required by SB 427. Grievant performed all duties associated with implementing the Waste Tire Program in a satisfactory manner.

5. In January 2001, as a result of a change in Administration, former Commissioner Beverage was replaced by Commissioner Fred Van Kirk.

6. In early January 2001, Carl Thompson, Deputy State Highway Engineer, Operations Division, asked Bruce Leedy, Regional Operations Engineer, to make a recommendation regarding the direction of the Waste Tire Program. Mr. Leedy had conversations with Grievant, Julian ("Tony") Ware, former Commissioner Beverage, and Joseph Deneault, State Highway Engineer, about the program.

7. Mr. Leedy concluded that the Waste Tire Program should remain in the Operations Division, and that the day-to-day operations could be handled best out of the District offices, rather than from a centralized location. Mr. Leedy further concluded that the Waste Tire Program Coordinator did not need to be a full-time job, and communicated his recommendations to Mr. Thompson.

8. On January 8, 2001, Grievant filed this grievance seeking reclassification to an HE IV.

9. On January 12, 2001, Grievant was verbally informed of Mr. Leedy's conclusions regarding the future direction of the Waste Tire Program.

10. That same day, January 12, 2001, Mr. Deneault sent out a memorandum notifying Highways' staff that Grievant's assignment with the Waste Tire Program would be completed effective January 16, 2001. 11. Effective January 16, 2001, Grievant was transferred back to the Engineering Division. However, his old position had since been filled, and Grievant was placed into another existing vacant position, with no loss in pay or classification.

DISCUSSION

As this is a non-disciplinary grievance, Grievant bears the burden of proving the allegations in his grievance by a preponderance of the evidence. Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995). Grievant asserts that when he agreed to the Waste Tire Program

assignment, former Commissioner Beverage told him the project would last from 5 to 7 years, and that he would promote Grievant to a Highway Engineer IV ("HE IV") classification. Grievant also asserts that his transfer back to Engineering and out of the Waste Tire Program was the result of political retaliation when the new Commissioner was appointed by the Wise Administration. Grievant seeks to be reclassified as an HE IV, with all commensurate back pay and benefits from December 1, 2000, as well as disciplinary action against those who allegedly retaliated against him.

Highways argues that its decisions to assign the operations of the Waste Tire Division to the districts, and transfer Grievant back to Engineering, were the result of ongoing discussions and consultations, and had nothing to do with the new Administration. Further, Highways contends that Grievant's duties in implementing the Waste Tire Program did not fall within the classification specification of an HE IV, and that Grievant has failed to prove any promise was made by former Commissioner Beverage that Grievant would be promoted to an HE IV, or that the Waste Tire Program would last under his direction for any certain duration. Regarding Grievant's claim that he should have been classified as an HE IV while overseeing the implementation of the Waste Tire Program, the authority for effectuating a reclassification, reallocation, or promotion rests with the Division of Personnel. Grievant provided no evidence that Mr. Beverage submitted a request to promote, reallocate, or reclassify Grievant to the Division of Personnel. If he had, it would still have to be reviewed and approved by the Division of Personnel, and Lowell Basford, Assistant Director of Classification and Compensation, testified that no such request had been made, nor any paperwork processed through the Division of Personnel to reclassify Grievant. Inasmuch as no request had ever been made, no review or audit of Grievant's position with the Waste Tire Program was ever made by Personnel.

In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited Personnel classification specification than that under which he is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88- 038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is its most critical section.

Atchison v. W. Va. Dept. of Health, Docket No. 90-H-444 (Apr. 22, 1991); see generally, Dollison v. W. Va. Dept. of Employment Sec., Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the “best fit” for his requiredduties. Simmons v. W. Va. Dept. of Health & Human Res., Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

The job specifications for a **Highway Engineer III**, are reproduced in pertinent part as follows:

Nature of Work:

> An employee in this class performs advanced level professional engineering work as a head of a major unit within a section, or serves at a comparable level which calls for demonstrated expertise within an engineering specialty. The incumbent acts on behalf or, or at the direction of, the District Engineer, Division Director, or other department executive. The incumbent makes or aids in making broad decisions in setting objectives and goals, the development of which may require the supervision of subordinates or other support staff personnel. Performance review of the incumbent is usually confined to acceptance or rejection of results at major or final stages. Performs related work as required.

Distinguishing Characteristics:

> The dual track career concept allows for progression through the Highway Engineer series in recognition of (1) demonstrated expertise in a specialized area of transportation/civil engineering or (2) the assignment of administrative/supervisory duties as determined by the organizational setting of the position.
>
> At the advanced level, applies theories, principles and practices of transportation/civil engineering to complex engineering problems in the area of assignment or supervises the work of a major engineering unit within the division or as a staff assistant at the division or district level.

Examples of Work:

> Evaluates the performance of subordinate engineers.
>
> Represents the division at internal and external meetings.
>
> Performs liaison activities between division and district organizations to ensure continuity of efforts required to obtain maximum efficiency in meeting established goals.

Reviews on-going work at major decision points with regard to problems or alternatives under consideration at that time.

Trains and evaluates personnel to ensure quality work.

Plans, schedules and coordinates the activities of subordinate personnel.

Investigates and responds to citizen complaints or requests.

Performs advanced level professional duties in a transportation engineering specialty such as concrete, steel, bituminous materials, environmental measurements, geotechnical evaluations, instrumental analysis, computer applications, structure analysis, electronics, metalography, corrosion, location, project evaluation, transportation planning, design, pavement, hydraulics, or other related fields.

The job specifications for a **Highway Engineer IV** are reproduced in pertinent part, as follows:

Nature of Work:

An employee in this class performs professional engineering work at the expert level as a staff assistant to a Chief Engineer, or as an assistant to District Engineer, or as the administrative head of a major engineering unit, or at a comparable level calling for demonstrated expertise within an engineering specialty. The responsibilities of the incumbent may extend to developing and implementing working policies and procedures for the area of assignment. Incumbent may be responsible for organizing, staffing, administering programs, and providing day-to-day direction according to the needs of the operation and the procedures of the Department. Performs related work as required.

Distinguishing Characteristics:

The dual track career concept allows for progression through the Highway Engineer series in recognition of (1) demonstrated expertise in a specialized area of transportation/civil engineering or (2) the assignment ofadministrative/supervisory duties as determined by the organizational setting of the position.

At the expert level, applies theories, principles and practices of transportation/civil engineering to the most complex engineering problems in the area of assignment or serves as staff assistant to the Chief Highway Engineer.

Examples of Work:

Supervises section activities and personnel in engineering and non- engineering areas.

Visits projects and makes on-site engineering decisions.

Trains and evaluates personnel to ensure quality work.

Plans, schedules, and coordinates the activities of subordinate personnel.

Reviews on-going work at major decision points with regard to problems or alternatives under consideration at that time.

Investigates and responds to citizen complaints or requests.

Represents the Department at internal and external meetings.

Serves as a senior level professional with recognized expertise which may include papers and/or credits published in nationally recognized transportation literature; presentations to national, regional or State professional groups, active membership in recognized national organizations or professional groups dealing with transportation engineering or other demonstrated expertise in a transportation engineering specialty such as concrete, steel, bituminous materials, environmental measurements, geotechnical evaluations, instrumental metalography, corrosion, welding and mathematical analysis, transportation systems analysis, route location, project evaluation, transportation planning, design, pavement, hydraulics, and other related fields.

Grievant's duties with the Waste Tire Program centered primarily on the implementation of the

new program, including writing applicable rules and regulations. He worked with legal counsel in preparing inter-agency contracts with the Division ofCorrections, the Department of Natural Resources, and the Department of Health and Human Resources. He was involved in land surveys to determine ownership of the tire piles. He addressed environmental issues relating to the tire piles, including ground water quality and air pollution standards. Grievant worked with the Division's legislative liaison, Norman Roush, in drafting, revising, and finalizing the legislative rules for the program. Grievant participated in various meetings with administration defining the scope of operations for the program, and although he was under the supervision of Tony Ware in Operations, Grievant essentially performed all functions relating to the Waste Tire Program by himself with no additional staffing assistance.

Grievant acknowledges that the Waste Tire Program is an atypical engineering project, and that his role with the program was more an administrative function than an engineering function. Nonetheless, he asserts that his expertise in environmental engineering and land surveying were crucial to the satisfactory operations of the program, and that is why he was chosen by Commissioner Beverage to implement the program. Grievant argues that the dual track career concept included in the Highway Engineer classification series was designed to encompass duties and responsibilities like those associated with the Waste Tire Program, and to recognize individuals like himself, who possess special expertise and training in non-traditional engineering fields.

The HE III and HE IV classification specifications are broad and each could encompass many duties, including the tire program. However, in misclassification grievances, in order for the Grievant to be reclassified, proof is required that his duties ***more closely match another DOP classification specification than that under whichhe is currently assigned***. The undersigned cannot find that the duties performed by Grievant during his assignment to the Waste Tire Program more closely match the duties of an HE IV than those of a HE III.

Grievant also claims he was taken out of the Waste Tire Program and placed back in the Engineering Division as reprisal for filing this grievance. W. Va. Code § 29-6A-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.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

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

(2)

that he 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, 179 W. Va. 53, 365 S.E.2d 251 (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, nonretaliatory reasons for its actions. 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, supra.

In his original statement of grievance filed on January 8, 2001, Grievant claims he had been working out of classification as Manager of the Waste Tire Program, and sought as relief to be reclassified to an HE IV. On January 11, 2001, Grievant met with his immediate supervisor, Bruce Leedy, to discuss his grievance. Mr. Leedy asked Grievant what it would take to get him to drop his grievance, to which Grievant replied reclassification to an HE IV. On January 12, 2001, Mr. Leedy issued his level one response denying the grievance. That same day, Joseph Deneault, State Highway Engineer, issued a memorandum notifying various agencies and DOH staff that Grievant's assignment with the Waste Tire Program would end effective January 16, 2001. Grievant claims his transfer out of the Program was in direct reprisal for his filing this grievance, and that Mr. Leedy's

asking him to drop his grievance is evidence of this reprisal.

Applying these facts to the legal test, Grievant has successfully established a prima facie case of reprisal, and the burden shifts to the Highways to rebut the presumption by offering a legitimate, nonretaliatory motive for its action. At this point, the reprisal allegation dovetails with Grievant's allegation that his removal from the Waste Tire Program was an unlawful political retaliation stemming from his relationship with former Commissioner Beverage, and the appointment by Governor Wise of a new Highways Commissioner, Mr. Van Kirk.

West Virginia Department of Transportation Administrative Procedures, Volume 3, Chapter 18 - Political Activities, and W. Va. Code §§ 29-6-20 and 17-2A-5, prohibitfavoritism or discrimination on the basis of politics. The DOT policy states in pertinent part the following:

1. Employees cannot appoint, promote, demote, or dismiss (from any position in the classified service under the State Division of Personnel), or in any way, favor or discriminate against anyone in the classified service on the basis of politics. (All employees).

2. Employees cannot seek or attempt to use any political endorsement in connection with any appointment in the classified service. (All employees).

3. Employees cannot use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any reason an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position for the purpose of influencing the vote or political action of any person, or for any consideration. (All employees)

Other than the simple fact that a new Administration took over government operations in January 2001, Grievant has offered no direct evidence other than timing that his removal from the Waste Tire Program was in any way related to his relationship with Commissioner Beverage. Even if the new Commissioner, Mr. Van Kirk, had decided to go a different direction with the Waste Tire Program than Mr. Beverage had, it would be entirely within his authority as Commissioner to do so.

Highways has offered proof that discussions regarding the future of the Waste Tire Program were

ongoing, culminating in a final decision being made in early January 2001, to decentralize the program, and delegate operational responsibility to the individual districts. It is clear that Grievant took his job with the Waste Tire Program very seriously, and worked hard to implement the rules and regulations necessary to get the program operative. Grievant believed the program should be centrally administered, and felt it would require several full time staff, including himself, to manage in a satisfactory manner. Grievant also believed the program, as he designed it, would be operational for several years. Ultimately, the administration decided the program would be run out of the district offices, and no full time staff would be needed. James Riggs, Project Development Supervisor, was assigned responsibility for the program after Grievant returned to the Engineering Division. Mr. Riggs testified that management of the Waste Tire Program is a part-time job, and most of the responsibility for the program's operations lies in the district offices. There is no need for centralized management of the program, and the program, by its very nature, will be sunsetted once the tire piles are cleaned up. Therefore, Highways has articulated a legitimate, nonretaliatory reason for transferring Grievant out of the Waste Tire Program and back to the Engineering Division.

With regard to Grievant's allegations that Mr. Leedy retaliated against him as evidenced by his inquiries during the level one meeting what it would take to get Grievant to drop his grievance, Grievant has failed to prove that Mr. Leedy was in any way attempting to coerce him or threaten him by asking this question. Mr. Leedy testified that he merely was attempting to try to resolve the grievance at the lowest possible level as dictated by statute, and by asking Grievant what it would take for him to drop the grievance, was merely trying to get to the core of Grievant's complaint. While Grievant obviously interpreted this question as a threat of some sort of retaliation, the undersigned does not. How else would a supervisor attempt to settle a grievance if he or she were unable to ask the grievant exactly what he or she wanted as relief? There is no evidencethat Mr. Leedy's question was a “drop the grievance or else” ultimatum - it was simply an attempt to foster a settlement of the grievance at his level of authority.

CONCLUSIONS OF LAW

1. As this is a non-disciplinary grievance, Grievant bears the burden of proving the allegations in his grievance by a preponderance of the evidence. Tucci v. W. Va. Dept. of Transp., Docket No. 94-DOH-592 (Feb. 28, 1995).

2. In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited Personnel classification specification than that under which he is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

3. Grievant has failed to prove by a preponderance of the evidence that his position with the Waste Tire Program more closely fit within an HE IV classification than an HE III classification.

4. W. Va. Code § 29-6A-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." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

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

(2) that he 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, 179 W. Va. 53, 365 S.E.2d 251 (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).

5. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. 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, supra.

6. Grievant successfully established a prima facie case of reprisal by showing he filed this grievance on January 8, 2001, and was subsequently notified on January 12, 2001, that he would be transferred out of the Waste Tire Program effective January 16, 2001.

7. West Virginia Department of Transportation Administrative Procedures, Volume 3, Chapter 18 - Political Activities, and W. Va. Code §§ 29-6-20 and 17-2A-5, prohibit favoritism or discrimination on the basis of politics.

8. Highways established a legitimate, nonretaliatory, nonpolitical motive for moving the Waste Tire Program to the Districts for operation, and for transferring Grievant back to the Engineering Division.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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: January 28, 2002