PEGGY FREEMAN,

Grievant,

v v.

DOCKET NO. 02-10-217

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Peggy Freeman, filed this grievance against her employer, the Fayette County Board of Education ("Board") on June 28, 2002. She filed the grievance directly to level four, but the matter was remanded to level three. Thereafter, the case proceeded again to level four on July 23, 2002. (See footnote 1) Grievant protests her termination, effective July 1, 2002, and seeks reinstatement as Associate Superintendent of Schools.

Subsequent to the level four hearing, the parties agreed that the entire transcript of a previous grievance filed by Grievant could be incorporated into the record. (See footnote 2) The level four hearing was held on August 8, 2002, and this matter became mature for decision on September 8, 2002, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented in all proceedings by Jane Moran, Esq., and the Board was represented by Erwin Conrad, Esq.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

August 6, 2002 subpoena for Charles Garvin.Ex. 2 -

August 6, 2002 letter from Mary Jo Swartz, Administrative Law Judge, to Jane Moran, Esq. and Erwin Conrad, Esq.

Ex. 3 -

August 1, 2002 Notice of Hearing.

Ex. 4 -

July 16, 2002 letter from Manuel Domingues, Superintendent, to Peggy Freeman.

Ex. 5 -

July 12, 2002 letter from Valerie D. Rist, Administrative Officer, to Jane Moran, Esq.

Ex. 6 -

July 10, 2002 letter from Manuel Domingues, Superintendent, to Jane Moran, Esq.

Ex. 7 -

Grievance form dated June 28, 2002; June 25, 2002 letter from Manuel Domingues to Peggy Freeman.

Grievant's Exhibits

Ex. 1 -

March 29, 2002 letter from Charles L. Garvin, III, Interim Superintendent, to Peggy E. Freeman.

Ex. 2 -

April 1, 2002 letter from Peggy E. Freeman to Charles L. Garvin, III.

Ex. 3 -

Not admitted (same as Joint Ex.)

Ex. 4 -

Not admitted (same as Joint Ex.)

Ex. 5 -

July 1, 2002 letter from Manuel Domingues to Peggy Freeman.

Testimony

At level four in the instant proceeding, Grievant testified in her own behalf. (See footnote 3) The testimony incorporated from Freeman I includes Grievant's witnesses, Leon Newman, Ronald Wood, Nancy Price, Betty Salvatore, Harry E. Hoffer, Sr., William Arthur, and Larry Coleman. The Board presented the testimony of Danny Wright, Steve Pilato, and Charles Garvin.

Based upon a careful review of all of the testimony and evidence presented in this matter, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant was employed by the Board for 27 years, and for the last three years, she was Associate Superintendent for Curriculum and Instruction. 2. Grievant served as Associate Superintendent under Superintendent Larry Coleman. Mr. Coleman retired in June 2001, and was replaced by Dr. Harry Hoffer. Superintendent Hoffer resigned as Superintendent in February 2002, and Charles Garvin was selected as Interim Superintendent in March 2002.

3. Grievant filed a grievance on March 18, 2002, over Mr. Garvin's selection as Interim Superintendent.

4. In the meantime, the Board posted the Superintendent vacancy, and Grievant applied for that position.

5. On April 30, 2002, the Board announced its selection of Manuel Domingues, Principal of a Fayette County middle school, as the new Superintendent. Mr. Domingues had no prior Central Office experience.

6. The level four hearing on the non-selection for Interim Superintendent grievance was held on June 26, 2002. (See footnote 4)

7. On Thursday, June 27, 2002, Grievant received a letter from Superintendent- elect Domingues dated June 25, 2002, advising her that, as of midnight June 30, 2002, her contract as Associate Superintendent with Fayette County Schools would end. Mr. Domingues had not yet entered into his duties as Superintendent when he wrote this letter. He wrote this letter to Grievant merely as a courtesy so she would know in advance what to expect when he entered into the duties

of the position on July 1, 2002.

8. At the close of business the next day, Friday, June 28, 2002, Grievant removed all of her belongings from her office. She went to the office of Superintendent-elect Domingues to advise him she was leaving, and asked him why he did not renew her contract. He replied he wanted someone he could work with who shared the same philosophy as he.

9. Grievant filed a grievance over her non-renewal directly to level four on June 28, 2002, which was remanded to the Board because the non-renewal was not disciplinary in nature.

10. On or about July 6, 2002, Grievant received a letter from Superintendent Domingues dated July 1, 2002, notifying her that he would recommend her contract not be renewed to the Board at its meeting on July 15, 2002 commencing at 6:30 p.m. in the Board office.

11. Neither Grievant nor her counsel appeared at the July 15, 2002, Board meeting.

12. The Board approved the recommendation of Superintendent Domingues not to renew Grievant's contract at the July 15, 2002, meeting.

13. On or about July 17, 2002, Grievant received a letter from Superintendent Domingues dated July 16, 2002, which stated in part:

> As you will recall, you were provided an opportunity to appear and be represented by counsel to make any presentation concerning the June 30, 2002 expiration of your assignment as Associate Superintendent at the July 15, 2002 Board meeting. . .although you did not appear and did not have a representative to appear before the Board, I wanted you to be aware that the Board, at said regular meeting simply affirmed the prerogative of the Superintendent to recognize the expiration of an assignment of Associate Superintendent without renewing a former assignment pursuant to W. Va. Code § 18-5-32.

14. Grievant filed a second grievance on July 23, 2002, over her non-renewal which encompassed the June 28, 2002, filing.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 W. Va. C. S. R. 1 § 4.21. Grievant alleges first, that the June 25, 2002 letter from Superintendent- elect Domingues was outside the scope of his authority, as he had not yet entered in his position of Superintendent, and that she was denied her statutory due process rights in that letter. Second, Grievant alleges that she was

terminated in retaliation for her previously filed grievances, that the Board acted in an arbitrary and capricious manner in approving her termination as Associate Superintendent, and that she was the victim of discrimination and/or favoritism. The Board denies the allegations, arguing that, as Associate Superintendent, Grievant acted at the will and pleasure of the Superintendent, and at the expiration of her contract term, it simply was not renewed.

Grievant's first argument, that she was denied her due process rights by Superintendent-elect Domingues' letter of June 25, 2002, fails simply because no action occurred from which her due process rights would naturally flow. By its own terms, the letter is simply informing Grievant of what Mr. Domingues intended to do once he became Superintendent, which, by his own admission, would not occur until July 1, 2002. Mr. Domingues testified he sent Grievant the letter as a courtesy because the time frame of events was so short, and he did not want his recommendation to come as a complete surprise to her. Indeed, the Board selected Mr. Domingues on or about June 25, 2002, and he was to take office on July 1, 2002, a mere four working days later. (See footnote 5) Thus, as noofficial Board action had yet occurred, Grievant was not entitled to any due process at the time of the June 25, 2002, letter.

Grievant also contends she was denied due process following Superintendent Domingues' July 1, 2002 letter. She claims she was not advised of her due process rights, her right to appear before the Board to protest the termination of her contract, and her right to counsel, and thus, did not appear. This argument, too, must fail.

Superintendent Domingues' letter clearly informed Grievant of the date he planned to recommend her contract be terminated to the Board, and the time and place of the Board meeting. Grievant was a 27-year employee of the Board, six of which had been in the Central Office as Associate Superintendent, and had recently filed two grievances with the assistance of counsel, one of which was a due process claim. Her claim that she did not know of her appeal rights, or that she did not know she was entitled to state her case before the Board at the time and place indicated by Superintendent Domingues, simply is not credible. For whatever reason, Grievant and her counsel chose not to attend that Board meeting. If their reason was to try to entrap the Board into a faulty due process claim because Superintendent Domingues did not invite her to the Board meeting, they have failed. The undersigned is not at all convinced by their claim of ignorance in this matter. Grievant and her counsel knew they were entitled to appear at that Board meeting on her behalf, and they chose

not to. Any fault to be attributed must go to Grievant.

Grievant contends that Superintendent Domingues had no authority to terminate her contract, and that the action of the Board in accepting his recommendation was arbitrary and capricious. W. Va. Code §18-5-32 provides, in pertinent part:

> The county board of education, upon the recommendation of the county superintendent, may employ an assistant whose term of employment shall be not less than one nor more than four years: Provided, That such term shall not extend beyond that of the incumbent county superintendent.

Moreover, W. Va. Code § 18A-2-1 provides, in pertinent part, that:

> Professional personnel employed as deputy, associate or assistant superintendents by the board in offices, departments or divisions at locations other than a school and who are directly answerable to the superintendent shall serve at the will and pleasure of the superintendent and may be removed by the superintendent upon approval of the board. Such professional personnel shall retain seniority rights only in the area or areas in which they hold valid certification or licensure.

Reading the above statues *in pari materia*, it is clear that an assistant or associate superintendent serves at the will and pleasure of the superintendent, and any claim by Grievant that Superintendent Domingues did not have the authority to recommend her contract not be renewed is meritless. Additionally, it is clear that an assistant or associate's contract, whether for one or four years, may in no case exceed that of the incumbent superintendent's. In this case, the incumbent superintendent was Interim Superintendent Garvin, whose contract expired June 30, 2002, and Grievant had no entitlement to an extension of her contract past that date, unless the incoming superintendent wished for her to remain in her position. Obviously, Superintendent Domingues did not, and so informed her by his two letters.

Grievant served at the will and pleasure of the Superintendent. W. Va. Code § 18A- 2-1. As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that she is not terminated for a reason that violates a substantial public policy. Roach, supra; Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless v. FirstNat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). In this regard, our Supreme Court of Appeals has declared:

> The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is

> to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Court identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

West Virginia courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations [Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992)], refusing to conceal alleged environmental violations committed by the employer [Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)], filing a workers' compensation claim [Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)], attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act [Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)], and testifying as a witness in a civil action against the employer [Page v. Columbia Natural Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996)], as involving substantial public policy interests. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at- will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996)].

Grievant has alleged her contract was not renewed in retaliation for filing previous grievances, which is prohibited by statute, and if proven, would constitute a substantial public policy violation.

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." 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, 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.

Grievant has established a prima facie case of retaliation. She filed a grievance with the Board over the selection of Charles Garvin for Interim Superintendent in or around March 2002, which was still moving through the grievance procedure when the Board selected Mr. Domingues to the permanent Superintendent position in or about June 2002. Shortly thereafter, Mr. Domingues informed Grievant he was going to recommend to the Board that her contract not be renewed.

Mr. Domingues testified he had no knowledge of the other grievances when he was hired as Superintendent, and when he decided not to renew Grievant's contract. Obviously, the Board was aware of the previous grievances when it approved his recommendation, but the fact remains that at the time he made his initial decision, Mr. Domingues did not know of the grievances. Therefore, that cannot have been the basis of his decision not to renew Grievant's contract. The Board has

demonstrated a legitimate, nonretaliatory reason for Grievant's non-renewal, which is that a new Superintendent was hired who wanted someone whose philosophy was closer to his.

Finally, Grievant also claimed she was the victim of discrimination and favoritism. However, she produced no evidence of others similarly situated who had been receiveddifferent treatment. Grievant was the only Associate Superintendent in the county. No one else was in a position to be treated any differently. Therefore, these allegations need not be discussed any further.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 W. Va. C. S. R. 1 § 4.21.

2. The term of an assistant county superintendent of schools cannot extend beyond that of the incumbent superintendent. W. Va. Code § 18-5-32. In this case, Grievant's term ended as a matter of law on June 30, 2002, when Interim Superintendent Garvin's term expired. McCann v. Lincoln County Bd. of Educ., Docket No. 22-88-202 (June 12, 1989).

3. Grievant has not established any denial of due process per W. Va. Code § 18A-2-7 or any other authority. No adverse action was taken against her, and the Board, through Mr. Domingues, made every reasonable attempt to keep her informed of her status.

4. An assistant superintendent serves “at the will and pleasure of the superintendent and may be removed by the superintendent upon approval by the board of education.” W. Va. Code § 18A-2-1.

5. As an at-will employee, Grievant could be terminated for good reason, no reason, or bad reason, provided that she was not terminated for a reason that violates a substantial public policy. Roach, supra; Williams v. Brown, 190 W. Va. 202, 437 S.E.2d775 (1993). See Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978).

6. Retaliation for filing a grievance under the grievance procedure set forth in W. Va. Code § 18-29-1, *et seq*., constitutes a substantial public policy violation.

7. 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.” A grievant claiming retaliation may establish a prima facie case of

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

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8. Grievant successfully established a prima facie case of reprisal.

9. 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.

10. The Board demonstrated a legitimate, nonretaliatory reason for the termination of Grievant's contract of employment, in that she served at the will and pleasure of the superintendent, and had no entitlement to the continuation of her contract past the expiration of the incumbent superintendent's term of employment, in this case, June 30, 2002, and there was no evidence Superintendent Domingues was aware of her previous grievances when he made his decision not to renew her contract.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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: October 2, 2002

Footnote: 1

Grievant requested that the second filing be consolidated with the first; however, the first grievance filing had not been docketed in at level four, and no consolidation was necessary.

Footnote: 2

Freeman v. Fayette County Board of Education, Docket No. 02-20-154 (Sept. 6, 2002)(hereinafter "Freeman I").

Footnote: 3

Due to operator or mechanical error, the tape from the level four hearing was blank. The parties agreed to allow the Administrative Law Judge to rely upon her notes, as well as the parties post-hearing submissions, rather than convene another hearing.

Footnote: 4

See Freeman I, supra.

Footnote: 5

June 25, 2002, was a Tuesday, and July 1, 2002 was a Monday.