MICHAEL JORDAN,

Grievant,

v. **Docket No. 03-DOH-057** (See footnote 1)

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Michael Jordan ("Grievant") initiated this proceeding on May 31, 2002, alleging he has been assigned to the survey party in retaliation for a former grievance. He alleges he has suffered health problems due to the stressful nature of his job, and seeks restoration of sick leave, a 15% pay raise, reassignment as a Small Bridge Inspector, and the right to similar overtime hours as other workers. The grievance was denied at level one on June 7, 2002, and at level two on June 19, 2002. A level three hearing was held on November 12, 2002, and the grievance was denied on January 31, 2003. Grievant appealed to level four on February 10, 2003, and a hearing was held in the Grievance Board's office in Elkins, West Virginia, on May 22, 2003. Grievant was represented by counsel, Bernard Mauser, and Respondent was also represented by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on September 2, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") since 1991 and is currently classified as a Transportation Engineering Technician Associate in District Seven.
2. Grievant's original assignment with DOH was with a construction survey crew.
3. In early 1999, Grievant was temporarily assigned to work in the Orphan Roads Program.

When that program concluded, Grievant was then assigned to work as a small bridge inspector.

4. During the spring of 2002, Grievant was informed by his superiors that a college student would be working with him for the summer. Grievant refused to ride with the student and stated that he would rather go back to construction. Therefore, Grievant was reassigned to a construction survey crew. Grievant was placed on a survey crew because of his previous experience and the need for surveyors due to upcoming retirements.

5. The survey crew that Grievant was assigned to included David Messinger, whom Grievant had worked with on a survey crew in approximately 1996. Mr. Messinger had displayed some anger control issues, which were directed toward Grievant and another employee on one specific occasion. Grievant and Mr. Messinger had not spoken since.

6. At the time he decided to reassign Grievant to the survey crew, Mr. Myers had no knowledge of the altercation between Grievant and Mr. Messinger six years before.

7. Grievant filed a previous grievance in October of 1991, claiming entitlement to higher pay since working in the small bridge inspection program. He claimed that otheremployees performing similar work were receiving higher salaries. This grievance was withdrawn by Grievant.

8. When it was first proposed to Grievant that he be returned to the survey crew, he produced a physician's statement dated May 29, 2002, from Dr. Frank Scattaregia. It stated that Grievant had been suffering blood pressure problems for several years, which had responded well to medication. He further stated that Grievant “subsequently discontinued the medication on his own and without notifying me of this action. Because of this it is hard to determine whether the present blood pressure problem is a result of his work, . . . or whether it is due to the noncompliance with his previous hypertensive regiment [sic].”

9. Small bridge inspections were concluded in 2002 and were expected to be up to date through the spring of 2003. DOH has no future plans for utilizing a small bridge inspector as a full-time position in District Seven.

10. Grievant has been offered at least two opportunities, since the beginning of 2003, to transfer to a different assignment, and he has turned down those opportunities.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his

grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

The essence of Grievant's claim is that he does not believe he should have been reassigned to the survey crew. He believes that he has been retaliated against for filinghis prior grievance and is being “punished” for refusing to ride with a college student. Grievant contends that there is a need for a small bridge inspector, and he feels entitled to be placed in that position. He believes that his assignment to the survey crew will result in missed opportunities for overtime work, and he contends that he has used a large amount of sick leave due to his job-related stress. Grievant has not explained why he feels entitled to a pay raise.

“Reprisal” means 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. W. Va. Code § 29-6A-2(p). To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
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> that he was subsequently treated in an adverse manner by the employer or an agent;
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> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
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> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
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> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See W. Va. Dept. of Natural Resources v. Myers, 443 S.E.2d 229 (W. Va. 1994); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Webb v. Mason County Bd. of

Educ., Docket No. 89-26-56 (Sept. 29, 1989). See also Frank's ShoeStore v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Frank's, supra; Myers, supra; Webb, supra.

Grievant has not established a prima facie case of retaliation. The supervisors who testified about the events which led up to his reassignment stated that Grievant's reassignment was the result of his own reluctance to work with a summer student employee. In addition, Grievant's immediate supervisor testified that he had no knowledge of Grievant's prior altercation with Mr. Messinger, which appears to be the chief reason why Grievant feels his reassignment was an adverse action. Nevertheless, even if the proximity of Grievant's first grievance and his reassignment were sufficient to establish a prima facie case of reprisal, Respondent has provided legitimate reasons for its actions.

Grievant has provided no basis for awarding the relief he has requested. His physician's statement does not relate his blood pressure problem to his work, and he has provided no further medical documentation that he has a work-related medical problem, so there is no basis for reinstating Grievant's sick leave. Likewise, Grievant has introduced no evidence regarding his request for a pay raise, and his allegation of “lost opportunities” for overtime has not been addressed or substantiated.

The small bridge inspector position Grievant seeks no longer exists. Respondent has established that Grievant is working within his assigned classification in an area wherehis services are needed. The Division of Personnel's Administrative Rule states in Section 11.6(a) that “appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.” The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971).

Grievant has failed to prove that his assignment to the survey crew was the result of retaliation or

any other improper motive. He has been placed in a position within his classification where his services are needed, which was a decision within his employer's discretion to make. The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. To demonstrate a prima facie case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
>
> that he was subsequently treated in an adverse manner by the employer or an agent;
>
> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
>
> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
>
> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See W. Va. Dept. of Natural Resources v. Myers, 443 S.E.2d 229 (W. Va. 1994); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

3. Grievant has failed to prove that his reassignment to the survey crew was the result of reprisal.

4. State agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971).

5. Grievant has failed to prove by a preponderance of the evidence that he is entitled to the relief requested.

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, and 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.

Date: September 15, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The previously used Docket Number 03-DOH-042 was the result of a clerical error.