KAREN VANCE,

Grievant,

v. Docket No. 04-19-068

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Karen Vance ("Grievant"), employed by the Jefferson County Board of Education ("JCBE") as a paraprofessional/teacher's aide, filed a level one grievance on November 14, 2003, in which she alleged she had been placed on a plan of improvement which was unjustified on its merits, in violation of W. Va Code §§ 18A-2-8 and 18-29-2, county policy, Policy 5300, and an agreement to expunge her records concerning a previous disciplinary action. Grievant requests that the plan of improvement be rescinded and expunged from her personnel records, and that all acts of harassment, reprisal, and discrimination cease. The grievance was denied at levels one, two, and three. Appeal was made to level four on February 17, 2004, and an evidentiary hearing was conducted in the Grievance Board's Westover office on March 24, 2004. The grievance became mature for decision on April 19, 2004, upon receipt of proposed findings of fact and conclusions of law filed by counsel, John E. Roush, of the West Virginia School Service Personnel Association, for Grievant, and David A. Camilletti, for JCBE.

The facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by JCBE since 1992. During the 2001-2002 school year she was assigned to the position of Special Education/Transportation/GeneralAide - Itinerant.

2. Grievant was placed on the transfer list prior to the 2002-2003 school year, and on August 13, 2002, was assigned to Charles Town Middle School.

3. Grievant did not report to work on August 21, 2002, taking leave without cause (LWC)

one-half day, and Emergency leave the remainder of the day. On August 22 Grievant used Emergency leave, and on August 23, 26 and 27, sick leave. LWC was again used on August 28, 29, and 30, 2002. Grievant used family sick leave on September 3, 4, 5, and 6. On September 3, 2002, Grievant requested a leave of absence. Unpaid leave was granted from September 9 to October 4, 2002, when Grievant was granted professional leave to attend her grievance hearing. Grievant was on sick leave October 15, 16 and 28, 2003.

4. Grievant was granted a transfer to a one-half day assignment in the Transportation Department, effective November 8, 2002.

5. Grievant used sick leave on November 8 and 26, December 9, 2002, and January 3, 2003. She was then on leave without pay January 10, and 23, February 11, March 11, 12, 13, 14, and 17, 2003.

6. In Spring 2003, JCBE Superintendent, Dr. Steven Nichols, notified Grievant that he would recommend her termination. (See footnote 1) **Grievant requested a hearing before JCBE. The hearing began on May 20, 2003, and was scheduled for completion on August 12, 2003. Prior to that date, the recommendation for termination was withdrawn by theadministration.**

7. Grievant's 2002-2003 performance evaluation was completed by Rebecca Stokes on May 20, 2003. Grievant was rated as "Meets Expectations" in seven criteria, and "Exceeds Expectations" in nine criteria. Ms. Stokes further noted, "Karen works part- time for transportation and is willing to do anything she is asked to do and does it well." There were no negative comments or indications that Grievant needed to improve in any way.

8. Grievant was assigned to T.A. Lowery Elementary School for the 2003-2004 school year.

9. In September 2003, Dr. Nichols placed Grievant on an Improvement Plan for the period of September 9, 2003, through June 30, 2004. Grievant filed a grievance and the plan was withdrawn October 29, 2003.

10. T. A. Lowery Elementary School Principal William Askew placed Grievant on an Improvement Plan beginning October 29, 2003, to January 16, 2004. The deficiencies cited in the plan were as follows:

From January 2, 2002 to March 17, 2003 near the time this issue was brought to your attention your time sheets and attendance records demonstrated 30% absenteeism. You utilized 43

days of Leave Without Pay, 16 days of Sick Leave, 7 days of Emergency Leave and Leave Without Cause, 4 days of Vacation Leave (ineligible), and 1 day of Professional leave. You had exhausted your leave options at the time this matter was brought to your attention on May 1, 2003.

You demonstrated a pattern of leave that became questionable as you took leave at times that presented a hardship to the school system, i.e., before and after weekends and before and after holidays.

In the beginning of the 2002-2003 school year you did not report to your duty station, Charles Town Middle School, thusyou created an unnecessary hardship on the school system requiring the hiring of a substitute at a critical time of the school year.

The corrective actions needed to remedy the deficiencies were to: (1) provide documentation for all leave no later than the day of return to duty; (2) provide physician certification for sick leave taken contiguous with a weekend or holiday; (3) request written authorization for all leave other than sick leave; and, (4) provide her supervisor a monthly calendar tracking leave usage.

11. Grievant successfully completed the improvement plan in January 2004.

___12. Grievant has filed four prior grievances while an employee of JCBE, and served as President of the Jefferson County School Service Personnel Association at the time these events took place.

___13. Grievant requested, and was granted, professional leave for October 17, 2003, to attend the WVSSPA Fall Conference. On November 5, 2003, JCBE issued an invoice to "WVSSPA c/o Karen Vance" in the amount of $89.93, the cost of a substitute employee for Grievant on October 17, 2003. At the level four hearing, JCBE counsel advised that no attempt would be made to collect the fee.

Discussion

Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance. Thus, Grievant has the burden of proving her case by a preponderance of the evidence. Rowe v. Kanawha County Bd. of Educ., Docket

No. 99-20-368 (Mar. 30, 2001); Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence todemonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999).

At level four, Grievant argued that JCBE had implemented the plan of improvement without having brought any deficiencies to her attention through evaluation, in violation of Policy 5300, and acted in retaliation for her prior utilization of the grievance procedure. (See footnote 2) **JCBE asserts that there was no violation of Policy 5300 because the possibility of an improvement plan was discussed on August 12, 2003, and Grievant failed to produce any other evidence of reprisal.**

Plan of Improvement

W. Va. State Board of Education Policies 5300 and 5310 clearly require boards of education to evaluate employees, and provide them an opportunity to improve in any areas rated unsatisfactory:

An improvement plan shall be developed by the supervisor and the professional support person when the professional support person's performance is unsatisfactory in any area of responsibility as contained in Section 23 of this policy.

*** * ***

Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of

regular evaluation.

JCBE correctly asserts that a formal evaluation is not required, that substantial compliance will suffice if the employee is provided feedback informing her of the unsatisfactory performance, directions on how to improve, and the potential consequences of continued misconduct. See Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990). However, in this case, Grievant never received such input from her employer. The discussion of a possible plan of improvement after the recommended termination was withdrawn does not constitute substantial compliance with Policy 5300, and the plan of improvement was improperly imposed upon Grievant.

Reprisal

Reprisal is defined by W. Va. Code §18-29-2(p) as "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 presenting evidence as follows:

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

(2) that he/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); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, 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 Dep't 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).

Grievant has established a prima facie case of reprisal by showing that JCBE engaged in an adverse action of placing her on a plan of improvement during a period of time she had filed three grievances. JCBE has failed to present a legitimate, non-retaliatory reason for the action since any concern regarding her attendance was not brought to her attention at the time it was occurring.

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

Conclusions of Law

1. Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance. Thus, Grievant has the burden of proving her case by a preponderance of the evidence. Rowe v. KanawhaCounty Bd. of Educ., Docket No. 99-20-368 (Mar. 30, 2001); Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995).

2. Grievant has proven that JCBE placed her on a plan of improvement without first bringing the unsatisfactory performance to her attention, in violation of Policies 5300 and 5310.

3. Reprisal is defined by W. Va. Code §18-29-2(p) as "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."

4. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

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

(2) that he/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.

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5. Grievant has established a prima facie case of reprisal by showing that JCBE engaged in an adverse action of placing her on a plan of improvement during a period of time she had filed three grievances.

6. JCBE failed to present a legitimate, non-retaliatory reason for the action since any concern regarding her attendance was not brought to her attention at the time it was occurring.

Accordingly, the grievance is GRANTED, and JCBE Ordered to purge Grievant's record of all reference to the plan of improvement, and to cease engaging in acts of reprisal.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson 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: MAY 25, 2004 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

.The record does not specifically state the basis for the recommended termination; however, since a plan of improvement was discussed at the hearing, it appears to have been related to Grievant's absenteeism.

Footnote: 2 ***All other claims included in the statement of the grievance were not addressed by Grievant, and are declared abandoned.***