JOANNA COSTELLO,

Grievant,

v. Docket No. 04-30-130

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Joanna Costello ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as an Aide, filed a level one grievance on November 7, 2003, in which she alleged violations of W. Va. Code §§ 18-29-2 (m), (n), (o), and (p), when her assignment was changed. For relief, Grievant requests that the harassment, discrimination, favoritism, and retaliation cease, and that she be reinstated to the Kingwood Pike bus run. (See footnote 1) **The grievance was denied at levels one and two. MCBE waived consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and appeal to level four was made on April 2, 2004. A hearing to supplement the level two record was conducted in the Grievance Board's Westover office on June 28, 2004. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before July 29, 2004. The following facts have been derived from a preponderance of the evidence made part of the record at levels two and four.**

Findings of Fact

1. Grievant has been employed by MCBE for approximately twenty-five years, and has held the classification of Supervisory Bus Aide at all times pertinent to this grievance.

2. In the summer of 2003, Paul Christopher, School Bus Supervisor, called Grievant at her home to advise her that she would have to begin her summer assignment at the bus garage instead of at her home. At that time, Grievant was assigned to a bus driven by Charlene McMillen, who parked her bus at her home, and picked Grievant up at her home at the start of the run. Grievant found Mr. Christopher's attitude to be domineering and rude, and

felt harassed. Grievant and Ms. McMillen's starting locations were returned to their homes after further discussions.

3. Effective the 2003-2004 school year, Grievant was removed from the Kingwood Pike run, which she held the prior year, and was assigned to a different run. Grievant did not grieve the change in assignment.

4. All special needs bus operators and bus aides were notified by memorandum from Transportation Director Irv Schuetzner and Supervisor Duane Prickett, that beginning October 23, 2003, all special needs buses were to be kept at the Transportation Center, rather than at their homes, or elsewhere. Grievant and other special needs transportation employees were required to begin and end their assignments at the main bus garage. The reason given for the change was that with limited resources, there was at times "a problem staffing the buses with substitute aides on short notice. Our job is providing timely andadequate transportation for special needs children and not providing a convenience for employees. Unfortunately, we can no longer do both."

5. Grievant asserts herself through the use of the grievance procedure and other methods when a problem arises. Grievant has pursued three grievances through level four of the procedure, the most recent decision being dated June 2001.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant argues that Transportation Department administrators have spoken to her rudely, have been nonresponsive to her requests for information, discussed her employment situation with other bus operators, treated her coldly, acted "snotty" and changed her bus

route, resulting in harassment, and in retaliation for her having pursued prior grievances and other actions to preserve her rights. Grievant also argues that the administrators have engaged in discrimination and favoritism as evidenced by the fact that other employees have been exempt from the requirement they begin work at the busgarage, and have otherwise been treated in a more beneficial manner. MCBE denies that it has engaged in discrimination, favoritism, harassment or 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).

"Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Similarly, "favoritism" is defined

as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18- 29-2(o).

To establish a prima facie case of discrimination or favoritism Grievant must prove by a preponderance of the evidence:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to thedemeanor expected by law, policy and profession." See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999).

The specific incidents cited by Grievant in support of her claim are as follows:

(1) Mr. Christopher called her at home in Summer 2003 and advised her in a rude manner that her run was to begin and end at the bus garage. When asked to elaborate on his attitude, she stated that he was nasty, and laughed, like he was glad it was happening. When she asked if everyone was required to be at the garage, he told her not to worry about everyone else, just herself.

(2) Grievant heard that Mr. Christopher was talking about her with other employees in the garage, explaining that she would have to start coming to the garage because another aide had complained that she could not be dropped at her house.

(3) Mr. Schuetzner had his secretary call the bus driver to ask where he dropped her off, or the location of her car.

(4) Grievant called Mr. Prickett to advise him that she would not be at work. Within a few minutes he called Grievant and asked if she had reported off on the automated system, because it was not on his computer screen, and she needed to call again. He had acted "snotty" and "like he was mad," on other occasions she had requested time off.

(5) Mr. Prickett is nonresponsive to Grievant's questions when she believes he knows the answers.

(6) Her afternoon run was changed.

(7) She has not been allowed to substitute for an extended run, and was advised that a substitute must be called, but other regular aides have taken the assignment. (8) Grievant's mid-day run was shortened, and her compensation was reduced.

Grievant testified that she spoke with Assistant Superintendent Jacob Mullett following Mr. Christopher's call to her home, and that he no longer calls her residence. MCBE provided valid reasons for many of the remaining issues. Director Scheutzner had his secretary call to locate Grievant to forward her a message. The mid-day run was shortened because some students were on the bus too long, a regular aide was allowed to substitute on the extended run on an emergency basis, Grievant's call had not been properly processed by the computer system. The change of work location was applied to all special education transportation employees. While there had been some instances of noncompliance, Director Scheutzner testified at level four that they were addressed when he became aware of them. While Grievant sincerely feels that she is being targeted for harassment, discrimination/favoritism, and reprisal, the evidence presented does not support such a finding.

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. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. 2. 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."

3. 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).

4. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

5. "Favoritism" is the "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o).

6. To establish a prima facie case of discrimination or favoritism Grievant must prove by a preponderance of the evidence:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

7. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance,

irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

8. Grievant has failed to prove by a preponderance of the evidence that MCBE has violated W. Va. Code §§ 18-29-2 (m), (n), (o), or (p).

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 Judgesis 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: AUGUST 31, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.MCBE argues that the request for reinstatement to the Kingwood Pike run is untimely, and was not part of the written grievance until level three. However, the level two record establishes that Grievant requested the relief at level two, and it was denied in the decision. MCBE did not raise the timeliness issue at level two, and is barred from doing so at this time.