ANDREW MacDONALD,

Grievant,

v.

Docket No. 04-DOH-155

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

This grievance arises out of the decision by his employer, the respondent Division of Highways ("DOH"), to reassign the grievant, Andrew MacDonald ("MacDonald"), to a different work location within the same work unit. MacDonald, who characterizes the action as a transfer rather than a reassignment, claims that the move was in reprisal for other grievances he had filed. For relief, MacDonald asked "to be made whole." (See footnote 1) This included 1) being transferred back to the Market Road location in Beckley, which is where he worked before the contested reassignment to the Bolt location in Raleigh County, and 2) being compensated for the difference in mileage for his trips to the Bolt location as opposed to the Market Road location in Beckley. MacDonald further requested that, if he were to prevail in this grievance, the decision include a recommendation for disciplinary action to be taken against MacDonald's superior, Jeff Lilly ("Lilly"). (See footnote 2) This grievance was initiated at Level Two on November 26, 2003, where it was denied. MacDonald then appealed to Level Three, where an evidentiary hearing was conducted on February 19, 2004. By correspondence, dated April 14, 2004, DOH adopted the recommended Level Three decision

denying MacDonald's grievance on the grounds that, although MacDonald established a *prima facie* case of reprisal, he did not prove that DOH's legitimate, non-retaliatory grounds for the reassignment to Bolt (See footnote 3) were merely pretextual. The lower level record is incorporated into the Level Four record. (See footnote 4)

On April 22, 2004, MacDonald filed his Level Four grievance with the West Virginia Education and State Employees Grievance Board ("the Grievance Board"). A Level Four hearing was held in the Grievance Board's hearing room in Beckley on June 17, 2004. The tape recording of the June 17 hearing was defective. Upon being informed of the defect in the hearing tape, the parties elected to conduct a new Level Four hearing in its entirety. After continuances for a variety of reasons, the second Level Four hearing was held on June 29, 2005, in the Grievance Board's hearing room in Beckley.

During the June 29 hearing, MacDonald was represented by fellow DOH employee, William Robinson. (See footnote 5) DOH was represented by attorney Barbara Baxter. This grievance matured for decision at the conclusion of the June 29 hearing, although findings of factsand conclusions of law submitted on behalf of the parties after the initial Level Four hearing were reviewed and considered.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. MacDonald is employed by DOH as a Transportation Worker 2/Equipment Operator in Raleigh County.

2 2. While MacDonald was assigned to the Beckley location, his immediate supervisor was Roger Fisher ("Fisher"), the General Foreman of Raleigh County.

3 3. Lilly is the Administrator for Raleigh County.

4 4. At the time pertinent to MacDonald's reassignment, Bill Bennett ("Bennett") was the District Engineer for District 10.

5 5. While working at the Beckley location, MacDonald was having personality conflicts with Lilly and Fisher.

6 6. MacDonald was working at the Beckley location when he and other DOH employees in Raleigh County filed one or more grievances relating to perceived problems in the employee

appraisal process and in the distribution of merit raises.

7 7. On or about November 19, 2003, Bill Bennett was present for a Level Two hearing in one of the grievances in which MacDonald was a participant. At the conclusion of the hearing Bennett and Lilly used the opportunity, since they were all together, to meet with MacDonald.

8 8. During the meeting with Bennett and Lilly, MacDonald acknowledged that he was not happy with his supervisors.

9 9. There was a vacancy for a truck operator at the Raleigh County DOH substation at Bolt and, during their post-hearing meeting, Lilly and Bennett informed MacDonald that he was being reassigned to Bolt to fill that position.

10 10. By reassigning MacDonald to Bolt, Lilly gave MacDonald an opportunity to work under a different immediate supervisor.

11 11. During his meeting with Lilly and Bennett in November 2003, MacDonald did not voice any clear objection to being reassigned to Bolt. (See footnote 6) At most, he complained that it was not his turn. (See footnote 7)

12 12. There were several grievants involved in the Level Two hearing that took place on or about November 19, 2003, but only MacDonald was reassigned. Tr.17.

13 13. Bolt is still within Raleigh County and MacDonald's work unit.

14 14. There is no dispute that MacDonald was not happy working in the Beckley location due, in the main, to his personality conflicts with Lilly and Fisher.

15 15. There is no dispute that MacDonald's working relationship with John Neeley, his direct supervisor at Bolt, is much better than his working relationship with Lilly and Fisher had been when MacDonald worked out of Beckley.

16 16. Reassigning MacDonald to Bolt did not remove Lilly from MacDonald's supervisory chain but it did reduce the amount of contact between the two.

17 17. Lilly has perceived improvement in MacDonald's work performance since he has been working in Bolt.

18 18. Upon reassignment, MacDonald remained a Transportation Worker 2/Equipment Operator working within Raleigh County. There does not appear to have been any change in his status or conditions of employment other than reporting to Bolt, rather than Beckley, and working under the supervision of Neeley, rather than Fisher.

DISCUSSION

This is not a disciplinary grievance. Therefore, MacDonald bears the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1- 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 619 S.E.2d 274, 290 n.26 (2005).

Reassignment

MacDonald claims that he was "transferred" to Bolt in retaliation or reprisal for filing or participating in various grievances. This assertion muddies the water a bit in the sense that MacDonald describes his reassignment to Bolt as a "transfer," which is inaccurate. Under the DOH Administrative Operating Procedures ("Operating Procedures"), a transfer is defined as "the movement of an employee from the jurisdiction of one organizational unit (See footnote 8) within the Division of Highways to another." Resp.Exh.2. By contrast, the Operating Procedures define "reassignment" as "the movement of an employee within the sameorganizational unit." Resp.Exh.2. MacDonald remained within Raleigh County and, therefore, was subject to a reassignment rather than a transfer.

Such reassignment has been recognized as within the purview of the employing agency, where 1) there is a need, 2) the employee remains in the same classification and pay grade, and 3) is neither demoted nor reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). In fact, moving an employee to a different location has been recognized by the Grievance Board as a legitimate method of resolving certain location-specific problems in an employee's performance. *Craig v. Div. of Natural Res*., Docket No. 05-DNR-030 (July 20, 2005)("[D]ue to his loss of credibility with the citizens and hunters of Grant County," the grievant, a Conservation Officer, was transferred to Raleigh County.).

Reprisal

West Virginia Code section 29-6A-2(p) defines reprisal as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To present a *prima facie* case on a claim of reprisal, a grievant must establish, by a preponderance of the evidence,

18.1 1.
that he engaged in a protected activity, *e.g*., filing or participating in a grievance;

18.2 2.
that he was subsequently treated in an adverse manner by the employer or an agent;

18.3 3.
that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

18.4 4.
that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and

18.5 5.
that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Kitchen v. Dep't of Health & Human Res., Docket No. 05-HHR-175 (Oct. 18, 2005)(citing *Jordan v. Dep't of Transp*., Docket No. 03-DOH-057 (2003)).

There is no dispute that members of MacDonald's supervisory chain at DOH are well aware that MacDonald is among a group of employees who are not shy about using the grievance process to resolve their conflicts with management. Therefore, it is clear that MacDonald engaged in a protected activity, and that DOH had actual knowledge of such participation.

Adverse Action

Whether there is a causal connection between MacDonald's participation in various grievances and his reassignment to Bolt is a question that will be set aside for the moment in favor of ascertaining whether the reassignment is an adverse action for purposes of establishing a *prima facie* case of reprisal. Unless the reassignment is deemed to be an adverse action, any causal connection between MacDonald's protected conduct in participating in grievances and the move to Bolt would lack legal significance. *Hearl v. Dep't of Transp*., Docket No. 05-DOH-100 (June 23, 2005); *Collins v. W. Va. Dep't of Transp.*, Docket No. 02-DOH-276 (June 27, 2003).

"A key element to reprisal is that the treatment received by the grievant be adverse." *Hunting v. Lincoln County Bd. of Educ*., Docket No. 02-22-288 (Dec. 23, 2002). *Erby v. Dep't of Admin*., Docket No. 04-ADMN-385 (Jan. 25, 2005)("Technically speaking, nothingnegative happened to Grievant, so even if Respondent had not had a good, job-based reason for the shift switch, it would not be considered a punishment."). Adverse would require an action that is "unfavorable; harmful." *Hunting, supra*. For instance, a *prima facie* case of reprisal has been found in grievances where the adverse treatment was that the employee's pay was docked, *Gilbert v. W. Va. Dep't of Admin*., Docket No. 03-ADMN- 100 (May 29, 2003), or the employee was terminated, *Malcolm v. Workers Comp. Office of Judges*, Docket No. 04-WCC-291 (Jan. 25, 2005)("She was terminated by her employer, an adverse action."). (See footnote 9)

Upon his reassignment to fill the vacancy at Bolt, MacDonald remained a Transportation Worker 2/Equipment Operator in Raleigh County. There is no evidence to suggest that he suffered any reduction in pay, loss of seniority, alteration in basic duties, or loss of any earned benefit. The Grievance Board has previously recognized the concept of a functional demotion, which "occurs when an employee is reassigned to duties of less number and responsibility" because, even without a salary reduction or other changes, a diminution of responsibility could "affect an employee's opportunities for further job advancement." *Gillispie v. W. Va. Dep't of Corr*., Docket No. 89-CORR-105 at n.8 (Aug. 29, 1989). (See footnote 10) However, MacDonald's reassignment has not adversely impacted his opportunities for career advancement. To the contrary, the move to Bolt was actually beneficial to MacDonald. Although he may drive a bit further to report to work, MacDonald now reports to an immediate supervisor with whom he has a good working relationship. Lilly has observed that MacDonald is doing a better job at Bolt. This should inure to MacDonald's benefit in terms of evaluations and merit raises throughout the rest of his tenure at DOH.

As to MacDonald's displeasure that his commute to Bolt is longer than his former commute to Beckley, such inconvenience does not rise to the level of an adverse action for purposes of proving reprisal. "[A]gencies under civil service regulations have wide discretion in the reassignment of employees." *Vance v. W. Va. Bureau of Employment Programs*, Docket No. 01-BEP-610 (Apr. 30, 2002). Consistent with such wide discretion, personal preferences or inconvenience have not been deemed sufficient to upset a DOH decision as to the appropriate placement, in terms of location, of personnel. *See, Johnson v. W. Va. Dep't of Transp*., Docket No. 02-DOH-310 (Mar. 24, 2003). (See

footnote 11) DOH's Operational Procedures expressly states that "[e]mployees transferred or reassigned at management direction will be expected to accept such transfers [sic] or reassignment." Resp.Exh.2 at 2.

Furthermore, MacDonald's reassignment, to which he did not initially object, comports with the requirements that DOH "constantly strive to use all of its resources - material, financial, and human - in the most efficient manner possible." Resp.Exh.2. The reassignment has resulted in a perceptible improvement in MacDonald's performance at work. This is undoubtedly a more efficient use of MacDonald's skills. In sum, there has been no meaningful way in which the reassignment could properly be characterized as unfavorable or harmful in terms of MacDonald's employment. Therefore, it cannot be characterized as an adverse action. This means that MacDonald has failed to establish an essential element of a *prima facie* case of reprisal.

In light of the determination that the move to Bolt was not adverse to MacDonald, there is no need to address MacDonald's efforts to prove that Lilly engaged in a pattern of reassigning employees to Bolt whenever an employee confronted or angered Lilly. (See footnote 12)

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. In this non-disciplinary grievance, MacDonald bears the burden of proving reprisal by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 619 S.E.2d 274, 290 n.26 (2005). MacDonald has failed to reach this level of proof.

3 3. West Virginia Code section 29-6A-2(p) defines reprisal as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participantin the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

4 4. To present a *prima facie* case on a claim of reprisal, a grievant must establish, by a preponderance of the evidence, 1) that he engaged in a protected activity, *e.g*., filing or participating

in 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 grievant engaged in the protected activity; 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and 5) that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. *Kitchen v. Dep't of Health & Human Res*., Docket No. 05-HHR-175 (Oct. 18, 2005)(citing *Jordan v. Dep't of Transp*., Docket No. 03-DOH-057 (2003)).

5 5. "A key element to reprisal is that the treatment received by the grievant be adverse." *Hunting v. Lincoln County Bd. of Educ*., Docket No. 02-22-288 (Dec. 23, 2002). One of the cited definitions for adverse is "unfavorable; harmful." *Hunting, supra*. Because MacDonald failed to prove that he was treated in an adverse manner when he was reassigned to Bolt, he failed to establish a key element of a reprisal case.

Accordingly, this grievance is **DENIED**.

Any party 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 itsAdministrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 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:

December 12, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Originally MacDonald had also requested that certain other employees be fired. However, he abandoned this aspect of his request for relief before the Level IV hearing took place on June 29, 2005. At the Level Three hearing, MacDonald's

representative stated "MacDonald just wants the reprisals to cease and not happen again." Tr.4.

Footnote: 2

MacDonald acknowledged that any effort by the Grievance Board to impose discipline on Lilly would be improper.

Footnote: 3

In using MacDonald to fill the vacancy in Bolt, Lilly also hoped to alleviate the problems that were being caused by MacDonald's personality conflicts with his immediate supervisor and with Lilly at the Beckley location.

Footnote: 4

References to pages in the Level Three transcript shall appear herein as "Tr.__."

Footnote: 5

MacDonald had previously been represented by Richard Patrick of AFSCME, who submitted proposed findings of fact and conclusions of law after the June 17, 2004, Level Four hearing, but before it was discovered that the recording was defective.

Footnote: 6

An employee's acquiescence is not required for a reassignment.

Footnote: 7

MacDonald had been sent to Bragg for a period of time during the previous winter and, when he objected, was told that it was his turn to go. Tr.9-10, 38-39.

Footnote: 8

The definition further specifies that organizational units for purposes of a transfer are "each County, each District, and each Expressway Maintenance Section."

Footnote: 9

In both grievances, the employer prevailed by proving a non-retaliatory basis for the adverse action.

Footnote: 10

The term "functional demotion" may no longer be viable with respect to classified employees in light of the limited definition of "demotion" found in the Division of Personnel's rules. Jarrett v. Dep't of Admin., Docket No. 98-ADMN-165 (Jan. 29, 1999).

Footnote: 11

The terms transfer and reassignment appear to have been used interchangeably in this earlier decision.

Footnote: 12

In any event, the evidence on this issue was not persuasive. Remote in time, tenuous in substance, and lacking in corroboration, Lloyd Webb's testimony, albeit seemingly sincere, did not provide a solid predicate for MacDonald's theory that Lilly uses the Bolt location as a Raleigh County version of Siberia, to which he exiles employees who displease him.