DAN BREWER,

Grievant,

v. **Docket No. 05-27-310R**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance comes before the Grievance Board on remand from the Circuit Court of Kanawha County, having reversed the decision finding the matter had not been timely filed at level one, and directing a ruling be made on the merits of the case. (See footnote 1) Consistent with the level four proceedings conducted on October 19, 2005, the parties agreed to submit the grievance for decision based on the lower-level record. For administrative reasons, the grievance was transferred to the undersigned by letter dated July 27, 2006. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law on August 2, 2006, filed by Ben Barkey, West Virginia Education Association Consultant, on behalf of Mr. Brewer, and by John H. Shott, Esq., counsel for the Mercer County Board of Education.

The following findings of fact have been derived from a preponderance of the credible evidence made part of the record at the lower levels.

Findings of Fact

1. Dan Brewer ("Grievant") has been employed by the Mercer County Board of Education ("MCBE") as a Bus Operator since 1979.

2. Grievant filed a level one grievance in June 2005, in which he allegedviolations of *W. Va. Code* §§ 18A-4-8b and 18-29-2 when he was transferred for the 2005- 2006 school year. For relief, Grievant requests reinstatement to the run he held during the 2004-2005 school year.

3. By letter dated March 3, 2005, MCBE Superintendent, Dr. Deborah Akers, notified Grievant that he was being considered for transfer due to changes in numerous programs in the upcoming school year. Following a preliminary hearing, MCBE approved Grievant's placement on the transfer list at its March 22, 2005, meeting.

4. At a regular meeting on April 26, 2005, MCBE approved Grievant's administrative transfer to

the Montcalm/Bramwell Area, effective August 23, 2005.

5. The previous three years Grievant had been assigned one of three routes in Bluefield which had been created in 2000 to assist with the opening of a new school. Since then, the student population in this area had declined, leaving Grievant with only nine stops in the morning and five stops in the afternoon during the 2004-2005 school year.

6. Grievant's Bluefield run was absorbed by the remaining two runs which had previously existed in the Bluefield area.

7. Grievant has disagreed with William Hopkins, Coordinator of Transportation, on a number of matters over the years.

Issues and Argument

Grievant argues that as the most senior of the three Bluefield bus operators he should not have been transferred, and that the action was taken in retaliation for having disagreed with the Coordinator of Transportation. MCBE asserts that transfer decisionsare not governed by seniority, and that the Superintendent, not the Coordinator of Transportation, made the recommendation to reduce the number of Bluefield runs and transfer Grievant.

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 (2004); *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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Grievant cites *W. Va. Code* § 18A-4-8b(h), which states that “[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority,” to support his claim that the least senior of the three Bluefield bus operators should have been transferred. MCBE argues that *W. Va. Code* § 18A-2-7, which provides for employee transfers, does not require that seniority be a determinative factor in which employee is reassigned.

In this case, the record does not clearly establish that a reduction in force occurred. MCBE determined that only two buses were required to transport students in the Bluefield area, and the route held by Grievant was eliminated. Grievant was then placed on the transfer list for reassignment. The decision to eliminate Grievant's route was based onvalid criteria: he had the least number of stops which could be absorbed by the remaining bus operators. Moreover, it is well-settled that employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. (See footnote 2)

As to Grievant's claim of retaliation, *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.” (See footnote 3) A grievant claiming retaliation may establish a *prima facie* case of reprisal by establishing:

(1) that he engaged in protected activity,

(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 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 (See footnote 4).

Grievant testified that he believed the transfer was in fact retaliation by Mr. Hopkins for a series of events which had occurred over the years. Specifically, Grievant had acted as a representative for another employee in the grievance procedure in the early 1990's, and that he had objected to a memorandum issued by Mr. Hopkins in 2003 which he interpreted to mean that he could not talk to his family, friends, or attorney about his work. This memorandum had been followed up with a questionnaire consisting of thirty questions regarding a number of work-related issues. Grievant refused to answer three of the questions:

What is the most difficult situation you have been faced with involving another person and how did you deal with it?

Have you ever had a strong disagreement with another person (adult or student) and how did you handle the conflict?

Do you discuss anything that pertains to your job with a private investigator or attorney without proper approval?

Grievant also complained about a Driver's Data Form issued by Mr. Hopkins which requested general personal information usually found on a personal drivers license. Grievant apparently had no objection to listing his height and weight, but found the inquiry regarding “hair” “really wasn't explanatory in this day and time when people dye their hair and lose their hair and everything else,” so he simply responded “yes.” Generally, hefound the questions were an invasion of privacy and a violation of his rights. Grievant opined that Mr. Hopkins, who was planning to retire, wanted to get even before he left. (See footnote 5)

Mr. Hopkins denied the transfer was recommended to satisfy any retaliatory motive on his part, but that the decision had been based solely on the fact that it was the most recent run created in the Bluefield area, and the one with the least stops. Superintendent Akers noted in the level two hearing that the recommendation to eliminate the run had been hers, not Mr. Hopkins'.

MCBE provided documentation which established that the direction to “not discuss with a private investigator or an attorney anything that pertains to your job without the approval from this [Transportation] office or from the Superintendent's office,” was part of a memorandum relating to accidents while driving a county vehicle. Bus operators were also advised that they were required to provide their name, address, driver's license number, vehicle information and insurance company name and policy number in case of an accident. The questionnaire later presented to the Bus Operators was to ascertain how they would handle various situations involving students and others. Notwithstanding Grievant's perception to the contrary, neither of these documents were directed solely to him.

Grievant's representation of another employee in the grievance process was the only protected activity in which he had engaged, and that was approximately fifteen yearsago. There is absolutely no evidence that Mr. Hopkins ever held that against Grievant, much less carry a grudge until he was ready to retire. The evidence does establish that Grievant's run in the Bluefield area was not needed, and his transfer to another run was an effort to best utilize limited resources.

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 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 (2004); *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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

2. *W. Va. Code* § 18A-4-8b(h), which states that "[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority," applies only when there is a reduction of personnel. It does not apply when a position is eliminated and the employee is simply transferred.

3. *W. Va. Code* § 18A-2-7, which provides for employee transfers, does not require that seniority be a determinative factor. 4. *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."

5. A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:
(1) that he engaged in protected activity,

(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 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
Crookshanks v. Wood County Bd. of Educ., Docket No. 02-54-289 (2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant failed to prove that his transfer was reprisal for having represented a co- worker in a grievance approximately fifteen years earlier, or that the action was motivated by anything other than an efficient use of resources.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha or Mercer 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 GrievanceBoard 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: AUGUST 30, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Brewer v. Mercer County Bd. of Educ., Kanawha County Circuit Court Case No. 06- AA-12 (June 12, 2006).

Footnote: 2

State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); Riddle v. Ritchie County Bd. of Educ., Docket No. 05-43-450 (Apr. 26, 2006); Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990).

Even if a reduction in force did occur, W. Va. Code § 18A-408b(h) does not support Grievant's claim that the least senior bus operator in the Bluefield area should have been transferred.

Footnote: 3

Grievant did not specifically allege a violation of section (p), nor was this issued addressed in his proposed findings of fact and conclusions of law. Mr. Shott interpreted the claim to be that of discrimination; however, it appears to the undersigned to be retaliation, and will be reviewed as such.

Footnote: 4

Crookshanks v. Wood County Bd. of Educ., Docket No. 02-54-289 (2002); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (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 (1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (1989).

Footnote: 5

Mr. Hopkins changed his mind about retiring when his position was posted as Supervisor of Transportation and Safety, with a considerable increase in salary. Both he and Grievant applied for the position for which Mr. Hopkins was selected. This decision is the subject of another grievance, Brewer v. Mercer County Bd. of Educ., Docket No. 05- 27-432 (Aug. 25, 2006).