WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

REX TONEY,

Grievant,

v.

Docket No. 2008-0535-LinEd

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Rex Toney ("Grievant") filed this grievance on September 8, 2006, alleging that the "[s]upplemental bus run for gifted students given to a driver without posting in violation of WV Code § 18A-4-8b. When posted later, it was awarded to Mr. Toney, then discontinued immediately, in violation of WV Code § 18-29-2 related to reprisals" and for relief requested "[p]ayment for the supplemental run for the 2006-2007 school year." Thereafter, the procedural history of this grievance becomes murky at best. The record does not reflect any other filings in this matter until September 24, 2007, when the Grievance Board received a request to transfer the grievance to the new Public Employees Grievance Procedure as set out at W. Va. Code §§ 6C-2-1, *et seq*. (See footnote 1) However, this form is not signed by a representative of the Lincoln County Board of Education, and is not dated by the Grievant. The parties filed yet another transfer form on October 9, 2007, in which bothparties request the grievance be scheduled for a level one conference under the new procedure.

In accordance with this request to use the new procedure, a level one conference was held with Superintendent David Roach. (See footnote 2) Superintendent Roach denied the grievance by decision issued on November 16, 2007. Grievant appealed this ruling on November 20, 2007, and a

level two mediation session was held on March 19, 2008. Level two was unsuccessful. A level three hearing was conducted before the undersigned Administrative Law Judge on August 13, 2008, at the Board's Charleston Office. Grievant appeared in person and by his counsel, William McGinley, West Virginia Education Association. The Lincoln County Board of Education ("Respondent") appeared by its counsel, Rebecca Tinder, Bowles Rice McDavid Graff & Love LLP. The matter became mature for consideration on September 15, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

A supplemental bus run was posted by the Respondent on August 31, 2006, to transport two students in the gifted program from the Hamlin Elementary-Middle School to the Lincoln County High School and back each day. Grievant expressed an interest in applying for the supplemental bus run to the assistant superintendent. During the time of the posting, one of the parents of the two gifted students indicated that the parent intended to be responsible for transporting the students to and from Lincoln County High School. As a result, there was no longer a need for the bus to transport the students. Grievant asserts that the supplemental bus run transporting the students in the gifted program was cancelled to keep him from getting the position in retaliation for his history of filing grievances against the Respondent. Grievant failed to prove that this was an act of reprisal. Respondent had a legitimate reason for eliminating the bus assignment.

After a thorough review of the entire record, the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant is employed by the Respondent as a school bus operator, and has been in that position for more than twenty years.

2. On August 31, 2006, the Respondent posted a supplemental bus run to transport two students in the gifted program from the Hamlin K-8 school to the Lincoln County High School and back. The students were to be taken to the High School at 10:46 a.m. and returned to Hamlin K-8 at 11:38 a.m. each day.

3. Gary Nelson, bus operator, began performing the duties prior to and during the time of the posting.

4. During the time of the posting, one of the parents of the two gifted students indicated that she would be responsible for transporting the students to and from Lincoln County High School. This

parent was also a teacher at Hamlin K-8.

5. It was determined there was no longer a need for the posted supplemental bus run position. Consequently, the position was not filled after the close of the posting on September 7, 2006. 6. Grievant had expressed an interest in the position to Assistant Superintendent Huffman some time after the position was posted. However, the posting was abolished and reported to the Board of Education at the meeting held on September 18, 2006.

7. An informal conference was held on January 23, 2007, and a discussion was had with Grievant regarding the supplemental bus run to transport the gifted students. The conference was requested pursuant to the former grievance procedure found in W. Va. Code §§ 18-29-1, *et seq*.

8. On May 31, 2007, and June 16, 2007, Grievant's representative mailed a correspondence to the known mailing address of Mr. Huffman stating that no decision had been issued in the matter. Grievant requested Mr. Huffman render a written decision so that the grievance could proceed to the next level.

9. By correspondence dated September 21, 2007, Grievant's representative indicated he was forwarding a level one grievance and transfer form intending to transfer the matter from the old grievance procedure to the new procedure. Grievant also requested a level one conference in this form.

10. The level one grievance form and transfer form relating to the supplemental bus assignment for the gifted students was signed by the parties and filed on October 9, 2007.

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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *Holly v. Logan County Bd. ofEduc.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). “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).

Respondent argues that the grievance is untimely pursuant to W. Va. Code § 18-29- 4, as the informal conference was held on January 23, 2007, and the level one grievance was not filed until October 9, 2007, more than nine months later. Further, Respondent asserts that even with a finding

that Grievant's filing was done timely, Grievant's claim of reprisal should fail in that he did not meet his burden of proof. Respondent asserts under the applicable legislation, W. Va. Code § 18-29-4(a)(3), within 10 days of the response from the immediate supervisor following the informal conference, any written grievance is to be filed with that supervisor. Grievant relies exclusively on W. Va. Code § 18-29-3(h), in asserting that the Respondent's action in canceling the supplemental bus run assignment was an act of reprisal against him. (See footnote 3)

The response, if it even exists in this grievance, following the informal conference is ambiguous at best. Mr. Huffman conceded at level three that it is his normal procedure to issue a written decision after the informal conference. Nevertheless, no response, oralor written, was made to the various written requests of Grievant that Mr. Huffman communicate a decision that the grievance had been granted or denied.

The undersigned tends to agree with Grievant that, in the absence of a response from the informal conference, his request for a level one conference on October 9, 2007, was in compliance with the statute that was applicable at the time of filing the grievance. (See footnote 4) Assistant Superintendent Huffman either failed to render a decision, or failed to respond to Grievant's request to clarify his position, after the informal conference. Thereafter, Grievant exercised his right to appeal the grievance to the next level. Given the somewhat unique circumstances of this grievance, the undersigned finds that Respondent has failed to prove the timeliness defense by a preponderance of the evidence. (See footnote 5)

Turning to the merits, Grievant alleges that he was retaliated against for having previously filed grievances. In particular, Grievant mentioned that he was interested in applying for the supplemental bus run assignment to Assistant Superintendent Huffman. Grievant asserts that Mr. Huffman responded to Grievant that he would cancel the run rather than give it to him. Respondent counters that, having a legitimate reason for the elimination of the position, it did not have a retaliatory motive in eliminating the supplemental bus run for the gifted students.

West Virginia code § 18-29-3(h), in effect at the time of the incidents giving rise to this grievance, provides:

> No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, *e.g*., filing or participating in 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;

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

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

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *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).

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 bya preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*.

Based upon the facts of this case, Grievant has failed to establish a *prima facie* showing of reprisal. Respondent clearly had a legitimate reason for eliminating the bus run position, and did not have a retaliatory motive for eliminating the supplemental run for the gifted students. As discussed above, the need for bus transport no longer existed. In addition, Grievant has failed to establish by a preponderance of the evidence that the reasons offered by the Respondent for eliminating the

supplemental bus run for the gifted students were merely pretextual. No reprisal has been demonstrated in this grievance.

The following Conclusions of Law support the Decision reached.

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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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).

2. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

3. Assistant Superintendent Huffman either failed to render a decision, or failed to respond to Grievant's request to clarify his position, after the informal conference. Thereafter, Grievant exercised his right to appeal the grievance to the next level. Giventhe somewhat unique circumstances of this grievance, the undersigned finds that Respondent has failed to prove the timeliness defense by a preponderance of the evidence.

4. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, *e.g*., filing or participating in 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;

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

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

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *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).

5. Grievant did not demonstrate that he was the subject of reprisal.

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 befiled within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (*See* Footnote 1*, supra)*. Neither the West Virginia Public 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: November 7, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

This transfer only applies to the procedure of the matter, the substantive law in effect at the time of filing the

grievance continues to control the outcome of this matter. (See footnote 1, supra). This is not contested by the parties, as evidenced by their respective proposals which continue to reference the old statutory provisions.

Footnote: 3

No evidence was offered to prove any elements of the assertion that the bus run for the gifted students should have been posted. That assertion in the original Statement of Grievance need not be addressed. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. Church v. McDowell County Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987).

Footnote: 4

". . . if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level . . ." W. Va. Code § 18-29-4(a)(3).

Footnote: 5

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).