BENNY VANDEVANDER

v. DOCKET NO. 94-DOH-505

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

Grievant, Benny Vandevander, employed by the Division of Highways (DOH or Respondent), advanced a grievance to level four on December 8, 1993, in which he alleged, "I am being discriminated against by Mr. Phillips in regards to my work locations. I'm offically [sic] assigned to Parsons but I'm working temp. on the Dist. Force in Elkins while someone else operates the Grader I'm assigned to." Grievant requests that he be returned to the Parsons worksite assigned as primary operator of the Grader. He additionally requests that discrimination and harassment directed towards him be stopped. (See footnote 1) A level four hearing was conducted on June 2, 1994; the parties' respective fact-law proposalswere filed on July 12 and 13, 1994, at which time the matter became mature for decision. Respondent asserts that the transfer was arranged after Grievant became involved in numerous incidents which disrupted the workplace, most of which were related to his addiction to alcohol. Specifically, Respondent charges that Grievant threatened the County Supervisor with bodily harm, that he appeared at headquarters intoxicated and claiming to have killed his wife, on another occasion he called to advise his co-workers that he was about to kill himself, he challenged a co-worker to a fight, and he became involved in an extramarital affair with a clerk in Respondent's office, which led to the appearance of the clerk's irate husband at the county headquarters.

The record further reflects additional problems suffered by Grievant as a result of the alcohol abuse. In January 1992 Grievant was treated for psychiatric problems and alcohol abuse at St. Joseph's Hospital. Employee Assistance Officer Kenneth Cross visited Grievant while he was hospitalized, and at the job site on a weekly basis for approximately a month after his release. Mr. Cross stated that his efforts to get Grievant into continued counseling failed.

In March 1992 District Engineer Thomas Staud transferred Grievant to the Thomas substation

after getting reports from County Supervisor Hayward Phillips regarding the deteriorating situation. Grievant was later returned to Parsons and the disruptive behavior continued. On January 15, 1993, Grievant appeared at the county headquarters intoxicated and bloody, claiming to have killed his wife. The police were called and their investigation revealed Mrs. Vandevander was unharmed. As a result of this incident Mr. Staud met with Grievant who agreed to the transfer to DISFORCE until he could demonstrate that he had gained control over his problem. (See footnote 2)

Subsequent to his transfer, Grievant lost his CDL license after being convicted of driving under the influence of alcohol. On June 15, 1993, Grievant entered a substance abuse program at Appalachian Mental Health Center, a prerequisite for reclaiming his driver's license. (See footnote 3) It wasalso after the transfer to DISFORCE that Grievant made an obscene and threatening telephone call to his supervisor's wife. On April 30, 1994, Grievant was charged with a second offense DUI after he made obscene gestures to a state policeman while driving near the home of the aforementioned clerk.

Respondent argues that it acted within its discretion to transfer an employee for reasons in the public interest and that it was an appropriate managerial response to Grievant's disruptive behavior. Respondent further asserts that Grievant has failed to prove that the problems which gave rise to the transfer have been resolved or that the change in assignment was discriminatory.

Grievant argues that notwithstanding the fact that he initially agreed to the transfer, DOH policies require that work assignments be made on the basis of work load or needs. Since Respondent has never indicated that Grievant's work performance was less than satisfactory, he claims that it must abide by its written policies rather than relying upon unwritten policy or practice. Grievant also notes that Respondent has not cooperated in developing an Employee Assistance Plan and, subsequently, the failure to set guidelines for his return to Parsons renders the transfer discriminatory. Finally Grievant asserts that the use of information regarding his private life "crossed the line" when Respondent began basing decisions on speculation regarding his "romantic involvement."

At level three Grievant submitted several of Respondent's personnel policies into the record. DOH Administrative Operating Procedures, Volume IX, Chapter 14, Section No. B, (See footnote 4) specifically provides that "reassignment within District may be made by the District Engineer."

Respondent has perhaps exceeded any duty it has to accommodate an employee with alcohol addiction by giving him an opportunity to maintain his employment, even after the loss of a driving

license required for his position classification. Although many of the incidents cited by Respondent occurred when Grievant was off duty, a clear nexus to his assignment was created by Grievant when he called or appeared at headquarters in an intoxicated condition. Conflicts with other employees and a romance with a married office clerk are directly disruptive to the workplace.

Utilizing the prima facie test for discrimination, Grievant has failed to prove that(a) he is similarly situated, in a pertinent way, to one or more employees(s);

(b) he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) such differences were unrelated to the actual job responsibilities of the Grievant and/or the other employees(s) and were not agreed to in writing by the Grievant.

Grievant has not shown that he is similarly situated to any other employees or that he has been treated in a detrimental fashion. Further, the evidence indicates that any differences in treatment were related to actual job responsibilities since Grievant could no longer operate equipment after losing his CDL license. Therefore, the transfer, made for a legitimate, business related reason, is not discriminatory as defined by W.Va. Code §29-6A-2(d).

Findings of Fact

1. Grievant is employed by the DOH as an Equipment Operator III.

2. Beginning in January 1992, Grievant's alcohol addiction, in whole or in part, led to behavior which affected the functioning of Respondent's Parsons' headquarters.

3. In January 1993, Grievant agreed to a temporary transfer to Respondent's DISFORCE in Randolph County. 4. The transfer allowed Grievant to continue working after losing his driver's license subsequent to a conviction for DUI.

5. Grievant has since been charged with a second offense of driving while under the influence.

Conclusions of Law

1. The appointing authority may transfer a state employee to any geographical area in which the employee is needed. See Zigmond v. Civil Services Commission, et al., 186 S.E.2d 696 (W.Va. 1972), and Childers v. Civil Service System, 181 S.E.2d 22 (W.Va. 1977).

2. Discrimination means 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. W.Va. Code §29-6A- 2(d).

3. Grievant has failed to prove that his transfer from Parsons to Elkins was the result of discrimination as defined by W.Va. Code §29-6A-2(d).

Accordingly, the grievance is DENIED.

JULY 29, 1994 SUE KELLER

SENIOR ADMN. LAW JUDGE

Footnote: 1

The record does not reflect any activity at level one; the grievance was denied at levels two and three.

Footnote: 2

DISFORCE is a special unit dispatching from Elkins in which several employees work together on assignments covering a four county area. This assignment relieved Grievant of the responsibility of working on heavy equipment. The transfer required that Grievant travel only three miles further than the daily commute from his home to Parsons and provided an additional benefit in that a co-worker was able to provide him transportation after the loss of his license.

Footnote: 3

Nathan Sommerville, Substance Abuse Therapist, testified that Grievant enrolled in the West Virginia Alcohol Safety Treatment Program on July 15, 1993, and satisfactorily completed the program approximately six weeks later on July 29. At this time Mr. Sommerville recommended the reinstatement of Grievant'slicense.

Footnote: 4

This policy was dated 1980 and included a hand written notation questioning whether it was current. Since no more recent policies were submitted at level four it must be presumed that none exist.