CHRISTINA GARY and PEGGY GILLESPIE,

Grievants,

v. DOCKET NO. 97-HHR-461

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievants, Christina Gary and Peggy Gillespie, each filed a grievance against Respondent, West Virginia Department of Health and Human Resources ("HHR"), on or about May 28, 1997, alleging they were discriminated against when a co-worker was paid for three days of travel to a training session in Charleston, while each of the Grievants was paid for one day. As relief they sought payment for travel expenses for the other two days, in the amount of $64.48 each, and Grievant Gillespie sought verification of the policy on carpooling, and that unfair treatment be ceased. The grievances were combined at Level II. Grievant Gillespie filed a second grievance on July 23, 1997, seeking reimbursement for an additional $64.48 for mileage to attend training in Charleston on July 8 and 9, 1997, stating she was "forced to drive mypersonal vehicle at my expense." At Grievant Gillespie's request, the parties agreed to waive Levels I and II, and combine this grievance with her earlier grievance. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievants are employed by HHR, in the Mason County HHR office in Point Pleasant, as Economic Service Workers.

2. HHR has not adopted a written carpooling policy, but expects its employees to carpool to conserve resources.

3. Dave Pardue is the Community Service Manager for Mason District, and is responsible for

determining who will be exempt from carpooling. He makes this decision on a case-by-case basis. He considers valid excuses to carpooling to include, a need for a personal vehicle for a medical appointment, the employee lives so muchcloser to the destination than other employees that it does not make sense for them to carpool, and some employees may be able to return to the office earlier than others.

4. On March 24, 25, and 26, 1997, Grievants and a co-worker, Evelyn Fitzwater, also an Economic Service Worker, were required by HHR to attend training in Charleston, West Virginia. They were told they had to carpool to the training; however, each Grievant chose to drive her own vehicle from her home to Charleston all three days. Grievants worked out a deal with Mr. Pardue for each of them to be paid for one travel day, and each was reimbursed for her mileage by HHR for one day.

5. Ms. Fitzwater was not asked by Grievants if this deal was acceptable to her, she was not involved in the discussions among Grievants and Mr. Pardue, and Mr. Pardue did not intend to include her in this arrangement, as she had agreed to carpool with Grievants for all three days. Ms. Fitzwater was reimbursed for her mileage by HHR for all three days.

6. Grievant Gary has a child in private school in Ohio, and the school does not open until 7:30 a.m. She did not want to carpool because she drops her child at school, and cannot get to Charleston by 8:30 a.m., which makes her late for training in Charleston. She did not make arrangements for someone else to take her child to school on March 24 through March 26, 1997. She also did not want to carpool to Charleston because she wanted to leave immediately after training, and did not want to wait for her co-workers. Ms. Fitzwater was agreeable to leaving at any time Grievants wished to leave. 7. Grievant Gillespie did not wish to carpool because she wanted to smoke on the trip, she wanted to go shopping after the training, and she did not want to be late.

8. Grievants do not wish to ever drive a carpool because of concerns with liability. Grievant Gary believes she would need to carry additional personal insurance in order to transport others in her car. No one required Grievants to drive a carpool.

9. Grievant Gillespie attended mandatory training in Charleston on July 8 and 9, 1997. She was told if she was not willing to carpool, she would have to travel at her own expense. She decided to drive herself. She was reimbursed for one day of travel because she had a medical appointment in Charleston that day.

Discussion

Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

Grievants argued HHR's unwritten carpooling policy violates the Division of Personnel's Policy on Policies (Grievant's Exhibit 17). That policy provides that Personnel policies are to be adhered to by all affiliated agencies. Grievants apparently believe the unwritten carpooling policy is contrary to state travel regulations which outline that personal vehicles may be used when traveling on state business, and mileage will be reimbursed for actual miles traveled using the shortest practicable route (Grievant's Exhibit 16). They suggested they could not carpool because it would require them to go to the office, which they would not normally do if they were goingfrom their homes to Charleston. Obviously, this rule is not designed to address carpooling. The travel regulations do not address carpooling.

Respondent pointed to W. Va. Code § 5F-2-2, which provides that the Secretary of each department has the power and authority to "[c]ause the various agencies and boards to be operated effectively, efficiently and economically, and develop goals, objectives, policies and plans that are necessary or desirable for the effective, efficient and economical operation of the department." It further provides the Secretary is to conduct a "comprehensive review of the practices, policies and operations of the agencies . . . to determine the feasibility of cost reductions and increased efficiency which may be achieved therein, including, but not limited to, the following: (1) The elimination, reduction and restrictions in the use of the state's vehicle or other transportation fleet; . . .." Respondent argued that this Code Section gives the Secretary the authority to implement cost-saving measures, such as carpooling. Further, HHR's Policy Memorandum 3400 provides, "[a]ll travel arrangements should be designed to incur the minimum expense required for the successful completion of the mission." HHR's unwritten requirement that employees carpool is consistent with the statutory directive to the Secretary, and with Policy Memorandum 3400.

This Grievance Board has previously addressed HHR's lack of a clear, written carpooling policy. In Blackburn v. West Virginia Department of Health and Human Resources, Docket No. 92-HHR-293 (October 30, 1992), the Administrative Law Judge suggested that a clear, uniform policy be

developed, but upheld the agency decision that employees must carpool. Apparently, that advice was not heeded, andthis policy void has arisen again as a grievance. The undersigned, however, can understand HHR's hesitancy to draw lines about carpooling, as it would be difficult to anticipate every possible scenario for which an exception would be reasonable. It would appear to be one of those areas where Grievants perhaps should be careful what they wish for. Hence, HHR has left this simple area to its capable supervisors' discretion.

One of the Grievants in Blackburn simply refused to ever carpool, and expressed the belief that HHR could not require her to do so. The Administrative Law Judge found this thinking to be "patently ludicrous; certainly Respondent can insist upon money-saving measures such as carpooling but, just as certainly, Respondent must take care to make exceptions when necessary or advisable, e.g., for medical reasons."

Certainly, an employee is entitled to reimbursement for necessary travel expenses incurred in the execution of authorized duties. The undersigned finds nothing arbitrary and capricious, or anything inconsistent with this premise, in HHR's requirement that employees carpool. When several employees are traveling from the same office to another location, it is not a reasonable use of taxpayer money, or a valid business expense, to pay each of them travel expenses. If an employee does not wish to travel in the same vehicle with other employees, whether because of personal likes or dislikes, concerns with child care, or concerns with liability, (See footnote 2) that is a personal matter, not a business matter. That employee may certainly choose to travel alone,based upon her personal preferences, or her desire to take care of personal business on the same trip, but it is not reasonable to expect to be paid travel expenses so she can indulge her personal preferences.

Quite frankly, Grievants are fortunate Mr. Pardue agreed to pay them each one day, as the undersigned does not see they are entitled to any payment. They were told up front that if they chose not to carpool, they would not be reimbursed for mileage. For completely personal reasons, Grievants exercised their right to choose not to carpool and not be reimbursed for mileage.

Grievants further argued they were discriminated against. W. Va. Code § 29- 6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

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

(b) that 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) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievants did not prove their claim of discrimination in regard to Ms. Fitzwater being paid for travel March 24, 25, and 26, 1997, while they were each paid only one day. They were told up front if they did not carpool, they would not be paid. Ms. Fitzwater agreed to carpool. She was entitled to be paid for all three days, while Grievants gave up any entitlement to payment by refusing, for completely personal reasons, to carpool.

Grievants pointed to an instance on April 24, 1997, when Mr. Pardue and Julia Donohew Smith attended a health fair in Mason, West Virginia, and took separate cars, and were both reimbursed. While one of the reasons for this was the proximity of her home to Mason, Mr. Pardue also explained if they were not both needed all day, one of them could return to the office. This is not an unreasonable consideration. He testified he almost always carpools with others.

Grievants also pointed to several instances across the state where employees had not carpooled to various meetings. While Grievants introduced travel reimbursement forms, they did not know why these employees had not carpooled, which is key information. HHR admits employees may be excused from carpooling for valid reasons. Grievants did prove that Daisy Clark, a Community Service Manager in Boone County, did not carpool with other employees because she was a smoker, and she did not want to ride with other employees, nor did they wish to ride with her. Even so, she applied to be reimbursed for her mileage when traveling alone for this reason, and was reimbursed. (See footnote 3) Grievants, however, are not similarly situated to Ms. Clark, as she is a Community Service Manager in a different county, and is not subject to Mr. Pardue's decisions. Further, just

because Ms. Clark was improperly reimbursed does not make it appropriate to reimburse Grievants.

This incident, however, does lend credence to Grievants' argument that the carpooling exceptions are not uniformly applied, and that there should be a written policy. The undersigned has no authority to require an agency to adopt a policy, absent some law, rule or regulation which mandates such a policy be developed. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).

In addition, Grievants were each paid for five days of travel to South Charleston to attend mandatory training in June 1996. Mr. Pardue gave some explanation about employees being encouraged to stay in Charleston all week, and he believed they would need their own vehicles for that extended period; however, this does not explain why Grievants were reimbursed when they did not stay overnight. Again, however, Grievants are fortunate they received reimbursement in that instance. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. HHR has the authority to require its employees to carpool, as a reasonable, cost-saving measure, and to refuse to reimburse them for individual travel expenses when they choose not to ride with other employees for personal reasons.

3. A grievant alleging discrimination must establish a prima facie case by demonstrating:

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

(b) that 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) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Once a prima facie case of discrimination has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A

grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id. 5. Grievants failed to prove they were discriminated against when an employee who agreed to carpool was reimbursed her mileage, while they were not reimbursed because they declined to carpool.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: June 9, 1999

Footnote: 1

The first grievances were denied at Level I on May 29, 1997, and Grievants appealed to Level II. A Level II decision denying the combined grievance was issued on June 9, 1997, and Grievants appealed to Level III on June 13, 1997. A Level III hearing was held on September 16, 1997, and a decision denying the grievance was issued on October 16, 1997. Grievants appealed to Level IV on October 22, 1997. Grievants were represented by Kevin D. Church, and Respondent was represented by B. Allen Campbell, Esquire. This matter was first set for hearing on January 8, 1998. Both Grievant and Respondent sought continuances of the hearings set due to illnesses and other reasons, and the hearing dates were continued three times before a Level IV hearing was convened on September 18, 1998. During the course of that hearing, one of the participants became seriously ill, and the hearing was stopped. A second day of hearing was set for November 5, 1998, which also had to be canceled due to an illness. The second day of hearing was convened on January 13, 1999. This matter became mature for decision on March 26, 1999, upon receipt of the parties' post-hearing written arguments.

Footnote: 2

Mr. Pardue believed employees traveling on state business are covered for liability by the state.

Footnote: 3

Ms. Clark's testimony was inconsistent as she testified quite clearly that HHR policy was that employees were to carpool, and the fact that one wished to smoke on a trip, or did not wish to ride with a smoker, were not valid excuses to carpooling.