CHRISTOPHER NELSON, et al.,

Grievants,

v.

DOCKET NO. 00-HHR-385

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES and OFFICE OF INSPECTOR GENERAL, and WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,

Respondents.

D E C I S I O N

On May 10, 2000, Grievants filed a level one grievance against their employer, the West Virginia Department of Health and Human Resources/Children & Families ("DHHR"), Office of Inspector General ("OIG"), and the West Virginia Department of Administration ("DOA") alleging "[f]avoritism and discrimination regarding parking facilities for employees - see attachment." As relief, Grievants requested that DHHR "provide parking or equivalent - see attachment."

The grievance was denied at level one due to lack of authority, and at level two due to lack of authority, and on the belief the grievance was untimely filed. The grievance was appealed to level three, where the Department of Administration was joined, and it was consolidated with approximately seventy (70) grievances pertaining to the same matters. A level three hearing was conducted on November 12, 2000, and the grievance wasdenied on December 1, 2000, by Grievance Evaluator Robert P. Rodak, Esq. Thereafter, the grievance was appealed to level four on December 11, 2000, and the parties subsequently agreed to submit the grievance on the record developed at the lower levels. This matter became mature for decision on April 20, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote

1) Grievants appeared pro se, DHHR was represented by Anthony D. Eates, II, Esq., Assistant Attorney General, and DOA was represented by Heather Conley, Esq.

SUMMARY OF EVIDENCE

Level Three Grievants' Exhibits

Ex. 1 -

Proof of Payment of Monthly Parking Fees.

Ex. 2 -

Letters and responses from other offices in Region IV regarding parking facilities.

Ex. 3 -

December 21, 1990 DHHR Policy Memorandum 2101 re: Department-Wide Dress Policy.

Ex. 4 -

July 24, 1998 memorandum from Jack Tanner to Virginia Tucker re: Parking Letter, with attached July 24, 1998 draft letter from Virginia Tucker to Joseph Marcus.

Respondents' Exhibits

None.

Testimony

Grievants presented the testimony of Christopher Nelson, Virginia Tucker and Tammy Goad. Respondents presented no testimony.

FINDINGS OF FACT

The essential facts in this grievance are undisputed and are set forth in the following formal findings of fact.

1. Grievants are all employed in DHHR's Region IV, Beckley, West Virginia, office.

2. DOA owns the building in which the Beckley DHHR Region IV offices are housed, located at 407 Neville Street, Beckley, West Virginia.

3. When DHHR began leasing this office space, the City of Beckley parking lot was adjacent to the building and had approximately 300 free parking spaces.

4. Soon after DHHR began leasing this office space, the City of Beckley converted the spaces to approximately 100 free spaces with a two-hour limit, and approximately 200 paid spaces, available for between twelve dollars ($12.00) and fifteen dollars ($15.00) per month.

5. In 1996, the Federal government purchased the afore-mentioned parking lot from the City of Beckley for the purpose of constructing buildings. All available parking spaces on the former city lot were eliminated when construction began.

6. Grievants now pay between ten dollars ($10.00) and thirty dollars ($30.00) per month for parking.

7. Statewide, some DHHR employees, such as those working in the Diamond Building in Charleston, West Virginia, and the Capitol Complex, pay for parking, while others do not. 8. All other DHHR employees within Region IV have free parking spaces available to them.

9. There are no state-owned office buildings in any of the other locations within Region IV.

10. When the state leases a building from a private landlord, the state has some control over the availability of parking at the site.

11. However, when the state owns a satisfactory building in the area in which the particular agency needs office space, the agency must use the state-owned building, whether or not it includes parking.

12. In response to the concern that the new Federal building would cause the elimination of parking for the occupants of the Raleigh County office building, DOA evaluated the area in 1998 and 1999 in order to determine whether there was adequate parking. DOA found that, even considering the Federal building, there was adequate parking. LIII Tr., p. 33.

DISCUSSION

Grievants allege they are the victims of favoritism and discrimination because other employees within Region IV have free parking available to them while Grievants must pay for their parking.

Respondents contend Grievants have failed to establish a prima facie case of discrimination, or in the alternative, that there is a legitimate, non-discriminatory reason why Grievants must pay for parking while other DHHR employees in Region IV do not. W. Va. Code § 29-6A-2(d) defines "discrimination" 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

(a)

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

(b)

that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism, Grievants must establish the following: (a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded them; and

(c)

that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if Grievants establish a prima facie case of favoritism, the agency may rebut this showing by articulating a legitimate reason for its action. However, the grievants can still prevail if they can demonstrate that the reason proffered by the agency was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievants have failed to demonstrate a prima facie case of either discrimination or favoritism because they are not similarly situated, in a pertinent way, to the other employees in DHHR's Region IV. The pertinent characteristic in this analysis is the Grievants' assigned worksite and/or parking conditions, not their job function. Grievants are not similarly situated to their Region IV counterparts because they work in a different building.

The Grievance Board addressed this issue in Hays, et al. v. West Virginia Division of Employment Security and West Virginia Department of Administration, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992). In Hays, the grievants, who were all housed in the state-owned Clarksburg Employment Security office building, claimed discrimination and favoritism because they had to pay for parking while the employees in the privately-owned Charleston and Martinsburg Employment Security offices did not. In finding the grievants were not similarly situated to the employees in the other buildings, the Administrative Law Judge in Hays stated:

To consider employees in different geographic locations “similarly situated” for the purpose of this case would be to open the floodgates to any number of complaints not

> found to be contemplated by the [statutory definition of "favoritism"] and to bootstrap Respondent Administration into the near- impossible situation of having to provide essentially identical parking (and perhaps other worksite related) arrangements for its staffers around West Virginia.

The ALJ concluded that the Hays grievants were not "similarly situated" to other state employees "save those at their own worksite." Id.

Grievants in the present case have presented no evidence demonstrating that the reasoning in Hays should not apply. Grievants are comparing themselves to employees in different buildings, in different cities, and are, therefore, not similarly situated to them. Even assuming that Grievants established a prima facie case of discrimination and favoritism, DHHR has offered a legitimate reason for its actions. The other offices in Region IV are privately-owned and leased by the state. As a result, the buildings have parking lots included in the lease. On the other hand, the Raleigh County office building is state-owned and has no included parking lot, a circumstance over which DHHR has no control. W. Va. Code § 5A-3-40 [1994] provides the following:

> The secretary [of the Department of Administration] shall have the sole authority to select and to acquire by contract or lease, in the name of the state, all grounds, buildings, office space or other space, the rental of which is necessarily required by any spending unit, upon a certificate from the chief executive officer or his designee of said spending unit that the grounds, buildings, office space or other space requested is necessarily required for the proper function of said spending unit, that the spending unit will be responsible for all rent and other necessary payments in connection with the contractor lease and that satisfactory grounds, buildings, office space or other space is not available on grounds and in buildings now owned or leased by the state.

DOA found the parking conditions surrounding the Raleigh County office building to be adequate. Therefore, DHHR does not have the freedom to relocate, even if it wished to in order to provide free parking for its employees in Raleigh County.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, the grievant must prove all of the allegations in the grievance by a preponderance of the evidence. Owens v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 90-ABCC-003 (Apr. 30, 1990).

2. Grievants have failed to establish a prima facie case of either favoritism or discrimination because they are not similarly situated to other employees in DHHR's Region IV.

3. Even assuming Grievants established a prima facie case of favoritism or discrimination, DHHR offered a legitimate reason for its actions.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 14, 2001

Footnote: 1

This grievance was reassigned to the undersigned Administrative Law Judge on March 16, 2001 for administrative reasons.