ROGER SOWARDS and JOHN COLLINS,

Grievants,

v. Docket Nos. 02-DOH-273, 274, 275

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, Roger Sowards and John Collins, each filed two grievances against their employer, the Division of Highways ("DOH"), on July 2, and August 7, 2002, on the same issue. Grievants allege DOH was required to provide them transportation to Level IV hearings, and failure to provide this transportation was discrimination and favoritism. The relief sought was for DOH to provide transportation and for the favoritism and discrimination to stop.

Level I was waived, and no evidence was presented at Level II. At Level III, the first set of grievances was denied, and the second set was dismissed, noting the requested relief was within the discretion of the Grievance Board. Grievants appealed to Level IV on September 3, 2002, the grievance were consolidated, and a Level IV hearing was held on January 2 and 3, 2002. (See footnote 1) **This case became mature for decision at that time, as the parties elected not to submit proposed findings of fact and conclusions of law.** (See footnote 2)

Issues and Arguments

Grievants assert Respondent must provide them transportation to all Level IV hearings, and DOH's failure to do so is a form of intentional favoritism and discrimination.

Respondent states it is simply following its past practice which has been in place for many years, based on the Division of Personnel's advice. No grievants have been allowed to or told

they may, drive state vehicles to Level IV hearings, and any grievants who have done so have engaged in this activity without permission. Respondent points to W. Va. Code § 29-6A-5(b) which states the allocation of costs at Level IV is within the discretion of the Level IV Hearing Examiner.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants, who work in District II, have filed numerous grievances within the last year and appealed the majority of these grievances to Level IV.

2. DOH does not provide state vehicles to grievants to attend their own grievances, and this decision is based on advice from the Division of Personnel. Test. Jeff Black, Director of DOH's Human Resources, Level IV Hearing.

3. Witnesses and parties for DOH are allowed to drive state vehicles to grievance hearings when they are required to attend either through an agency requested subpoena or an agency requirement that they attend.

4. At a Level IV DOH grievance hearing in 1999 involving District 2 employees, some grievants drove state vehicles to the hearing. They did so without expresspermission, as they did not ask before the hearing if they could do this. These grievants did not receive any discipline for this act.

5. Although there have been numerous grievances filed from District 2 since 1999, Grievants did not cite any other time grievants drove state vehicles to a Level IV hearing. (See footnote 3)

Discussion

As these grievances do not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Costs Grievants' request for the agency to provide them transportation to Level IV hearings can be seen as a request for costs. A decision on this issue requires an examination of the statutes discussing costs, and the Grievance Board's past rulings on this matter.

W. Va. Code § 29-6A-5(b) states:

> **(b) Hearing examiners (See footnote 4) may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.**

(Emphasis Added.)

W. Va. Code § 29-6A-8 referred to above does not discuss costs at Level IV hearings, but discusses the allocation of costs at Levels I through III and states:

> **Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses.**

W. Va. Code § 29-6A-7(e) provides for the allocation of costs in certain situations as follows:

> **Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.**

(Emphasis Added.) Under this statute, the Grievance Board has explicit authority to allocate costs only in "extreme instances" of bad faith conduct by one of the parties. See

Knight v. W. Va. Dep't of Tax & Revenue, Docket No. 91-ABCC-221 (June 16, 1992). Any determination of extreme bad faith must be made on a case-by-case basis. See Sullivan v. School Bd., 773 F.2d 1182, 1188-90 (11th Cir. 1985); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1977). No bad faith on the part of Respondent has been demonstrated here.

Incidences not involving bad faith are covered under W. Va. Code § 29-6A-5(b), which states an administrative law judge "may" allocate costs. The Grievance Board has generally followed the standard that "[i]n the absence of specific statutory authority, litigants are normally responsible for their own fees and costs. See generally Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)." Cremeans v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1996). See also Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (Mar. 16, 2000); Parsons v. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-289R (May 6, 1999); Cutright v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-270 (Feb. 24, 1999); Hall v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-433 (Sept. 12, 1997); Chafin v. Boone County Health Dep't, Docket No. 95-BCHD-362 (June 21, 1996).

One purpose of the grievance procedure to provide a forum for a state employee to resolve problems and issues that concern their employment without the cost being unduly burdensome. Most of the costs of the grievance procedure are sustained by the agency, and the costs for a grievant are usually limited. The agency pays the salary of all state employees who are subpoenaed for hearing, including those employees who have been subpoenaed by a grievant. A grievant is allowed four paid hours of work time toprepare for each grievance, may use the employer's photocopying and fax machines, and is paid for all their time involved in grievance conferences and hearings, all of which are held at a grievant's work site through Level III. The only cost within the grievance procedure to be borne by a grievant is transportation to Level IV, if they choose to pursue their grievance to this level, and travel costs, and witness fees at a rate set by the state, for any witnesses they subpoena. **(See footnote 5)**

Grievants involved in these grievances have filed numerous grievances, and the Grievance Board has attempted to process the cases efficiently and decrease the cost to both parties by consolidating like issues and scheduling more than one grievance per day. While Grievants still bear some expenses, and pay for their transportation to the Level IV grievance hearings,

this is the same expense borne by DOH. The expectation that Grievants provide their own transportation to Level IV is not unduly burdensome and is equitable. The undersigned Administrative Law Judge finds no basis to grant the relief requested by Grievants.

II. Discrimination and favoritism

Grievants also argue that failure to provide them transportation demonstrates discrimination and favoritism because some employees have driven state vehicles to their grievance hearings. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." W. Va.Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 6) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> **(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.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs

v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). Grievants have not met their burden of proof and established a prima facie case of discrimination or favoritism. The fact that once, in 1999, some employees drove their state vehicles to a grievance hearing without permission, does not establish this is a common practice, and Grievants are being treated differently from others.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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. W. Va. Code § 29-6A-5(b) states:

> **(b) Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.**

(Emphasis Added.)

4. W. Va. Code § 29-6A-7(e) provides for the allocation of costs in certain situations as follows:

> **Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.**

(Emphasis Added.)

5. "In the absence of specific statutory authority, litigants are normally responsible for their own fees and costs. See generally Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)." Cremeans v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1996). See also Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (Mar. 16, 2000); Hall v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH- 433 (Sept. 12, 1997).

6. Under the grievance procedure for state employees, this Grievance Board has explicit authority to allocate costs only in "extreme instances" of bad faith conduct by one of the parties. W. Va. Code § 29-6A-8. See Knight v. W. Va. Dep't of Tax & Revenue, Docket No. 91-ABCC-221 (June 16, 1992).

7. Any determination of extreme bad faith must be made on a case-by-case basis. See Sullivan v. School Bd., 773 F.2d 1182, 1188-90 (11th Cir. 1985). See Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1977).

8. Grievants have not established bad faith on the part of Respondent.

9. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." 10. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

11. A grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> **(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

12. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

13. Grievants have not met their burden of proof and established a prima facie case of discrimination or favoritism as they did not demonstrate DOH provides transportation to other grievants, or they have been treated differently from other similarly situated employees.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 28, 2003

Footnote: 1

Grievants were represented by Grievant Sowards, and Respondent was represented by its Attorney Barbara

Baxter.

Footnote: 2

Grievants also wished to place into evidence Grievant Collins' statement about what he believed to be misrepresentation on the part of Respondent's attorney which resulted in a continuance. This statement was not accepted, as these type of issues are not within the purview of the Grievance Board. Additionally, the continuance was granted by the undersigned Administrative Law Judge who saw no problem with the request, asit was based on illness.

Footnote: 3

Grievant Collins indicated he had heard Grievance Evaluator Brenda Ellis tell District Engineer Wilson Braley, in an off-the-record discussion at Level III, that other districts provided transportation to grievants at Level IV, and he should think about doing the same. Mr. Braley does not recall this conversation. Since this testimony was hearsay, not part of the record, Mr. Braley does not remember any such discussion, the Grievance Evaluator was not a witness and sworn at the time, and this information conflicted with the sworn testimony of Mr. Black, this hearsay was given little to no weight.

Footnote: 4

W. Va. Code § 29-6A-2(m) defines a "Hearing examiner" as "the individual or individuals employed by the board in accordance with section five [§ 29-6A-5] of this article." The Grievance Board refers to its Hearing Examiners as Administrative Law Judges, the Division of Personnel classification.

Footnote: 5

Typically, if a grievant subpoenas a non-state employee, the grievant must pay a witness fee, if the witness requests it. Frequently, this witness fee is not requested.

Footnote: 6

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).