JANET SWINLER and CATHY TAYLOR,

Grievants,

v.

Docket No. 04-T&R-052

DEPARTMENT OF TAX & REVENUE/

STATE TAX DEPARTMENT,

Respondent.

D E C I S I O N

Janet Swinler and Cathy Taylor ("Grievants"), employed by the State Tax Department ("Tax") as Revenue Agent 2s, filed a level one grievance on July 17, 2003, alleging a breach of contract and past practice, discrimination, and harassment, as a result of a change in their official headquarters from their homes to a regional office in Clarksburg, West Virginia. Grievants request reinstatement of their official headquarters to their homes, payment of their travel expense vouchers, with the same interest rate as that levied upon delinquent taxpayers, and to be made whole in all ways. Grievants filed a second grievance on October 7, 2003, asserting that they were denied substantive and procedural due process, pursuant to the Disciplinary Guide compiled by the Division of Personnel, when their headquarters were changed. Grievants requested the restoration of their state and federal Constitutional rights, reinstatement of their official headquarters to their homes, reimbursement for unpaid travel expense vouchers, with ten percent interest, costs, and to be made whole. The grievances were denied at levels one and two. After a claim of default was denied, the grievances were consolidated for hearing at level three. The grievance was denied and appeal was made to level four on January 26, 2004. A hearing was conducted in the Grievance Board's Westover office on April 13, 2004. Grievants were represented by Ann L. Ballard, Esq., and Tax was

represented by SeniorAssistant Attorney General Stephen Stockton. The grievance became mature for decision upon receipt of post-hearing filings on or before May 18, 2004.

The essential facts of this grievance are not disputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievants have been employed by the Tax Department as Revenue Agent 2s in the Compliance Division, at all times pertinent to this grievance. The Division of Personnel classification description for Revenue Agent 2 provides that the employee works in the collection of delinquent taxes and the enforcement of any other aspects of the State's tax laws. "Considerable and frequent travel throughout an assigned region is required." Under "Distinguishing Characteristics," it is noted that the Revenue Agent 2 performs field collections, traveling throughout a region contacting taxpayers in person to collect delinquent taxes and serve legal notices.

2. At the time Grievants were first employed as Revenue Agents, they were required to use their residences as their official headquarters. Revenue Agents were reimbursed for travel expenses (mileage) for the use of their personal vehicles from their homes to the location of the taxpayer, and to the Tax Department regional, satellite, or main offices.

3. Grievant Swinler lives in Morgantown and covers Monongalia and Preston counties. Grievant Taylor lives in Weston, Lewis County. The record does not reflect the geographic area covered by Grievant Taylor.

4. By memorandum dated March 28, 2003, James Dixon, Director of the Compliance Division, notified Grievants that effective May 1, 2003, their officialheadquarters would be the North Central Regional Office in Clarksburg. Changes in technology, business operations, and budgetary stringency were motivating factors for this change.

5. By memorandum of April 22, 2003, Mr. Dixon notified Compliance Division employees that the change of their official headquarters would affect the reimbursement of their travel expenses. Specifically, travel to and from the regional office would become commuting mileage, which is not reimbursable under the state travel regulations. If an Agent visits the location of a delinquent taxpayer on the way to the regional office, or simply spends the day in the field, going directly from her home, visits the taxpayer(s) and then returns home, she may

be reimbursed only for the mileage and parking expenses in excess of those incurred on a normal commuting day.

6. Travel expense account forms filed by Grievants after May 1, 2003, seeking reimbursement for commuting mileage after that date between their residences and their assigned headquarters have been rejected by the Tax Department.

7. Tax Department employees assigned to other divisions continue to use their residences as their official headquarters.

8. Grievants were offended by comments made, and the tone of voice used, by the Compliance Division Director at the level two conference.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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.

At level four, Grievants argue that the change of their official headquarters was a breach of the employment contract they entered into with the Tax Department, resulting in a decrease of pay, unnecessary travel, and a loss of efficiency. Grievants further argue that the Tax Department has engaged in discrimination and/or favoritism by allowing certain employees in the Auditing and Property Tax Divisions to continue using their residences as their official headquarters. Finally, Grievants assert that Mr. Dixon has engaged in harassment by speaking to them in a manner they found to be offensive during the level two conference for the due process grievance.

Tax argues that the discretionary change of official headquarters was not bargained away in contract negotiations, and was not a breach of Grievants' contracts of employment. The claim of discrimination/favoritism was also denied, based upon the different types of work completed by the employees in the other divisions. Tax denies that any of the circumstances described by Grievants constitute harassment.

Violation of contract and past practice

Understandably, Grievants would like for their assignments to remain unchanged.

However, their employment contract with Tax, in essence, requires that they perform the duties of Revenue Agents, as directed, for which they receive compensation and benefits. Grievant Swinler recalls that when she was employed in 1998, she was required to live in Monongalia County, to have a valid driver's license, and to use her personal vehicle in the performance of her duties. Grievants do not allege that Tax ever promised them that their assignments would remain unchanged during the period of their employment. Becausestate agencies must function within budgetary constraints while fulfilling their statutory obligations, changes in resources, including personnel, are not unusual.

Grievants remain employed as Revenue Agents 2s, for which they receive the same salary, and are responsible for the same geographic territory as before. There has been no breach of contract. The change in official headquarters is most comparable to a transfer. It has long been held that an agency may transfer employees to a geographic location where they are needed, so long as they remain in the same classification and pay. Zigmond v. Civil Service Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972); Childers v. Civil Service Comm'n, 155 W. Va. 69, 181 S.E.2d 22 (1971); Ali v. Dep't of Health & Human Resources, Docket No. 97-HHR-474 (June 30, 1998).

Discrimination/Favortism

It is undisputed that some employees assigned to the Auditing and Property Tax sections of the Compliance Division are still using their residences as their official headquarters. "'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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h). Grievants seeking to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), must demonstrate the following:

> **(a) that they is 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.

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

If the grievants establish a prima facie case, a presumption of discrimination/favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievants may still prevail if they can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Because Grievants work in a different section, they are not similarly situated to employees who continue to use their residences as their official headquarters. Therefore, Grievants have failed to established a prima facie case of discrimination/favoritism. Even if Grievants should be considered similarly situated as other employees in the Compliance Division, Tax has provided a legitimate, non-discriminatory reason for the difference in treatment. Employees in the Auditing and Property Tax sections must complete their work at the taxpayer's location, while Grievants can do much of their work at the regional office. Grievants do not dispute this explanation. (See footnote 1)

Harassment **Grievants also believe that they have been subjected to harassment, which is defined by W. Va. Code § 29-6A-2(l) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." In order to establish harassment in violation of W. Va. Code § 29- 6A-2(l), the Grievants must show a pattern of conduct, rather than a single improper act. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Pub. Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also Thompson v. Bd. of Trustees, Docket No. 96-BOT-097 (Dec. 31, 1996). Grievants' complaint involves the tone of voice used, and statements made by Mr. Dixon at a level two conference. This is viewed as a single incident rather than a "pattern of conduct," and simply does not constitute harassment.**

Deprivation of Due Process

Grievants argue that the change in headquarters forces them to use their personal vehicles for public business without just compensation, i.e., there has been a of “taking” of

their privately-owned property by Tax. Using herself as an example, Grievant Swinler notes that she must drive eighty miles to and from work daily, at an approximate cost of $144.00 per week. Indeed, this is a substantial number of miles for one who did not previously commute. However, Tax has acted within its discretion to change Grievants' official headquarters. Mileage to and from work is a normal incident of employment, and is not subject to reimbursement as travel expenses. See Frame v. Dep't of Health & Human Resources, Docket No. 00-HHR-240/330 (Apr. 20, 2001); Gwinn v. Dep't of Health & Human Resources, Docket No. 00-HHR-064 (May 22, 2000). Grievants are still eligible for reimbursement for travel beyond their regular daily commute, but insist uponcalculating mileage from their homes. Tax has declined to pay these expenses as submitted. When Grievants complete the expense forms using the regional office as their headquarters, they shall receive the reimbursements to which they are entitled.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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.

2. The change in official headquarters is not a violation of the employment contract, and is comparable to a transfer. An agency may transfer employees to a geographic location where they are needed, so long as they remain in the same classification and pay. Zigmond v. Civil Service Comm'n, 155 W. Va. 641, 186 S.E.2d 696 (1972); Childers v. Civil Service Comm'n, 155 W. Va. 69, 181 S.E.2d 22 (1971); Ali v. Dep't of Health & Human Resources, Docket No. 97-HHR-474 (June 30, 1998).

3. Discrimination is defined 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." W. Va. Code § 29-6A-2(d)

4. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

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

> **(a) that they is 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.**

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

If the grievants establish a prima facie case, a presumption of discrimination/favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievants may still prevail if they can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievants have failed to meet their burden of proof and demonstrate they are treated differently than other similarly situated employees. Respondent has offered a legitimate, non-discriminatory reason for the difference, in any case.

7. Harassment, is defined by W. Va. Code § 29-6A-2(l) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

8. In order to establish harassment in violation of W. Va. Code § 29-6A-2(l), the Grievants must show a pattern of conduct, rather than a single improper act. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Pub. Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also Thompson v. Bd. of Trustees, Docket No. 96-BOT-097 (Dec. 31, 1996). 9. Grievants' complaint involves a single incident rather than a "pattern of conduct," and does not constitute harassment.

10. Mileage to and from work is a normal incident of employment, and is not subject to

reimbursement as travel expenses. See Frame v. Dep't of Health & Human Resources, Docket No. 00-HHR-240/330 (Apr. 20, 2001); Gwinn v. Dep't of Health & Human Resources, Docket No. 00-HHR-064 (May 22, 2000).

11. Grievants were not deprived of their substantive or procedural due process when their official headquarters were changed.

Accordingly, the 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.

DATE: JUNE 24, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievants also claim they are the only employees who must pay for parking at the regional office. Tax is directed to review this situation, and make any necessary corrections.