THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CARL WARD,

Grievant,

v. **DOCKET NO. 06-41-104**

M. Paul Marteney,

Administrative Law Judge

RALEIGH COUNTY BOARD

OF EDUCATION,

Employer.

DECISION

Grievant Carl Ward filed this grievance on December 23, 2005, claiming discrimination based on race and age, with such discrimination being apparent in the assignment of a new bus to another driver.

A level four hearing was held in the Grievance Board's Beckley office on May 12, 2006. Grievant was self-represented, and Respondent was represented by Gregory W. Bailey of Bowles Rice McDavid Graff & Love, LLP. The matter became mature for decision on May 19, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant alleges he is being discriminated against due to his race and age, in that a new bus that was acquired by Respondent was assigned to another bus operator who already had an adequate bus, instead of to Grievant, whose bus needed an upgrade. Grievant received the bus formerly operated by the other driver, who is also the county School Service Personnel Association president. Respondent's position is that the bus assignment was made in the best interests of the school system, and that Grievant had not demonstrated a tangible harm that would be grievable. Respondent specifically avers thedecision was not made based on the status of the drivers involved.

For the reasons stated below, Grievant has not met his burden of proving discrimination.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by the Raleigh County Board of Education (Employer) as a school bus operator, and has been for seventeen years.

2. Grievant, at the beginning of the 2005-2006 school year, drove bus 34, a 1990 model equipped with a wheelchair lift and suitable for use by special education students. The lift on this bus had some mechanical defects. Another, similarly-situated bus operator, Phyllis Davis, drove bus 103, a 1998 model also equipped with a wheelchair lift.

3. Respondent ordered a new bus, bus 15, that was equipped with a wheelchair lift. Although bus 34 was older than bus 103, and Ms. Davis had not complained that bus 103 was in need of replacement, on December 8, 2005, she was assigned bus 15 and Grievant inherited bus 103.

4. Respondent has no written policy on new bus assignments, but in the past has assigned new buses to the drivers who are driving the oldest buses at the time.

5. On Grievant's regular run, he has no wheelchair-bound students.

6. When Grievant asked Jerry Redden, Director of Transportation, why he was not assigned the new bus, Mr. Redden did not tell him a specific reason, but just stated that was his decision.

7. Other than the fact that bus 15 only has a place for one wheelchair, there is no significant difference between buses 15 and 103, except that 15 is newer, has fewer miles on it and has an air-ride suspension, which makes the ride a little smoother.

8. In addition to Ms. Davis and Grievant, another driver told Mr. Redden that he wanted the new bus when it was put into service. The other driver needed to transport more than one wheelchair-bound student at a time, and the new bus did not have that capacity. Ms. Davis needed the use of a wheelchair lift on her daily run, but only had one wheelchair-bound student.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. (See footnote 1) In his

Statement of Grievance, Grievant alleges discrimination based on race and age. For purposes of grievance filings, "W. Va. Code § 18-29-2(m) 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.'" (See footnote 2) In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" (See footnote 3) "[T]o prevail in a claim for discrimination under W. Va. Code § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actualjob responsibilities of the employees and not agreed to in writing by the employee." (See footnote 4) In other words, the supreme court has determined that the Grievance Board should not look at whether a difference in treatment is based on protected factors such as race or age, but instead look to whether the difference is related to a business necessity.

Grievant has not, in this case, stated a claim for which relief could be granted. Here, there was a clear necessity to treat one employee differently than others _ there was only one new bus. Such necessary distinctions are not the types of differing treatments contemplated by the prohibition against discrimination. The difference in treatment he alleges does not amount to a grievable difference, because he has not shown either that he was harmed by it or that it violated any rule, policy or law. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.'" (See footnote 5)

Grievant does not make any allegation of harm or detriment, just his feeling of general unfairness by his supervisor. Grievant provided no authority establishing a right of a bus operator to claim an entitlement to be assigned to a particular school bus. He has therefore not met his burden of proving entitlement to the relief he seeks.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence.*See*, W. Va. Code §

18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. "The crux of [discrimination] claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). "[T]o prevail in a claim for discrimination under W. Va. Code § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee." *Id.*

3. An employer has not discriminated against an employee within the meaning of W. Va. Code § 18-29-2(m) when it makes a distinction between two employees with regard to a business decision that can necessarily be applied to only one employee.

4. "Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-501 (Feb. 28, 1990); *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ.*, Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing*Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002).

5. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999).

6. A bus operator does not have an entitlement to be assigned to a particular bus.

7. Grievant has not met his burden of proving he was subjected to a grievable event.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any such appeal must be filed within thirty days of receipt of this decision. W. Va. Code § 18-29-7. 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.

August 21, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

Footnote: 3

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

Footnote: 4

Id.

Footnote: 5

Viski v. Preston County Bd. of Educ., Docket No. 99-39-271 (Nov. 30, 1999).