WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JACKIE BARLOW,

Grievant,

v. **Docket No. 07-27-163**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Jackie Barlow ("Grievant") initiated this proceeding on November 14, 2006, alleging he should have received an extra duty assignment. He seeks compensation for lost wages, plus interest. The grievance was denied at all lower levels, and Grievant appealed to the Grievance Board on May 14, 2007. Due to legislative changes affecting the Grievance Board, this case was held in abeyance for some time, then a level four hearing was held in Beckley, West Virginia, on February 11, 2008. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, John Shott. The parties submitted fact/law proposals by March 3, 2008. In order to expedite the decision in this matter, on September 15, 2008, this grievance was reassigned to the undersigned administrative law judge for a final decision.

Synopsis

Grievant contends he should have been given an extra duty assignment, which was awarded to another bus operator who had the same potential schedule conflict asGrievant. Respondent argued

that Grievant refused the trip, but the evidence did not support this contention. Grievant merely pointed out that he had a potential conflict, which the transportation secretary interpreted as a refusal of the assignment. She then offered the assignment to the next driver in line, who had the same conflict, but stated he would “work around it.”

Under these circumstances, Grievant and the other driver were similarly situated, and the difference in treatment was unrelated to their job duties, which were identical on the day in question, and was not in writing. Therefore, Grievant proved discrimination and/or favoritism, so the grievance is granted.

Findings of Fact

1. Grievant is employed by the Mercer County Board of Education (“the BOE”) as a bus operator.

2. In early November of 2006, the BOE's transportation department was asked to provide a bus to take students to a volleyball competition in Charleston, West Virginia, on November 9, 2006. Because the date of the students' departure from Charleston was unknown, depending on how well they did in the tournament, the bus operator who accepted the assignment would have to be “on call” to return to Charleston at a moment's notice at any time on November 10 or 11 to retrieve the students and drive them home. (See footnote 1)

3. On Saturday, November 11, 2006, many of the local high school bands were participating in a Veteran's Day parade, requiring bus transportation provided by the BOE. Therefore, many of the bus operators were already committed to those assignments on November 11.

4. Grievant had accepted an extra duty assignment on November 11, 2006, to transport students to and from the Veteran's Day parade.

5. Jo White, a secretary in the transportation department, called bus operators from the seniority list in order to find a driver to take the volleyball tournament assignment.

6. When Ms. White called Grievant, he asked her if she knew that he already had an assignment on November 11, which she did. He then made a statement to the effect that, if she wanted him to take the trip, call him back to let him know.

7. Ms. White interpreted Grievant's response as a refusal of the trip, while Grievant believed that he indicated to her that he would take the trip, if the transportation department decided he could

coordinate it with his other assignment on November 11. (See footnote 2)

8. The next driver on the seniority list who was called regarding the assignment was Doug Cook.

9. Mr. Cook was also committed to an extra duty assignment associated with the Veteran's Day parade on November 11.

10. When asked whether he could accept the volleyball tournament trip, Mr. Cook stated that, although he had another extra duty assignment on November 11, he “could work around it” in order to take the assignment. 11. Mr. Cook was awarded the extra duty assignment to take students to the volleyball tournament.

Discussion

Because this is not a disciplinary case, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant contends that it constituted discrimination and favoritism for Mr. Cook to be given the assignment in question, when he and Grievant both had the same potential schedule conflict. He has stated that he never refused the assignment, but merely pointed out his potential conflict on November 11. Respondent counters that Grievant did not “unequivocally” accept the assignment, prompting Ms. White to conclude that he was refusing the run. (See footnote 3) W. Va. Code § 18-29-2(m) (See footnote 4) defines discrimination as "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 § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee." In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the

employees; and,

c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).

In the instant case, Grievant argues that, because he and Mr. Cook both had a commitment for the Veteran's Day parade on November 11, they were similarly situated when called regarding the volleyball trip. However, Respondent believes that Grievant's alleged “refusal” of the trip distinguishes his situation from that of Mr. Cook. The BOE hasalso argued extensively that it had no reason to favor Mr. Cook over Grievant and that no improper or discriminatory motive has been proven.

Unfortunately for Respondent, motivation is not a factor to be considered when determining whether or not discrimination has occurred under the grievance statutes. Ms. White knew that both drivers had the same commitment for the Veteran's Day parade. The fact that they responded somewhat differently when asked if they could accept the volleyball tournament trip does not change the fact that they were similarly situated. Moreover, as Grievant has testified, he only pointed out to Ms. White that he had an assignment for the parade, leaving it to her to respond as to how that would affect the situation. At this point in the conversation, he contends that he heard a male voice in the background state that “he” (presumably Mr. Weeks) wanted someone who did not have an assignment on Saturday, prompting Grievant to say: “Well, if you decide you want me to take the trip, call me back and let me know.” While Respondent has a point that this was not an “unequivocal acceptance,” neither was it an unequivocal refusal.

When Mr. Cook responded to Ms. White's call, he stated that, although he did have an assignment to drive a bus on Saturday, he could “work around it” to take the volleyball trip. There has been no explanation in the record of this grievance as to how Mr. Cook proposed to perform both assignments, if they occurred at the same time. (See footnote 5) It is perplexing that Ms. White did not question Mr. Cook as to how he was going to do this, or why sheassumed his situation was any different from all the other drivers who had commitments for the parade.

As Grievant has pointed out, he and Ms. White have testified to different versions of the

conversation that took place between them on November 9. Ms. White repeatedly testified that Grievant stated that, because he had the other commitment on November 11, he could not take the assignment. Grievant states he never said this, but merely reminded Ms. White of his other assignment, assuming he was not expected to do both, and told her to call him back if she decided he could do it.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'sinformation. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Because Ms. White called several different people regarding this particular assignment, and, indeed, calls bus operators on a frequent basis to inquire whether they will accept extra trips, it is understandable that her recollection of the conversation would not be as specific as Grievant's. Therefore, when Grievant did not immediately say “I'll take the assignment,” but instead mentioned his other commitment, it is quite possible that she would recall this as a refusal. However, at none of the three hearings in which she testified did she explain why Mr. Cook's other commitment was not grounds for concluding that he likewise could not perform the assignment.

Accordingly, the undersigned concludes that Grievant and Mr. Cook were similarly situated, in that they both had the same potential schedule conflict on November 11, and Mr. Cook received the assignment over Grievant. Awarding the trip to Mr. Cook was not in any way related to his or Grievant's job duties, in that their duties would have been the same on the day in question.

Therefore, Grievant has proven discrimination in this case.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary case, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).

3. Grievant has proven by a preponderance of the evidence that he did not receive the assignment in question as a result of discrimination and/or favoritism.

Accordingly, this grievance is **GRANTED**, and Respondent is ORDERED to award Grievant all applicable back pay and benefits, with interest at the statutory rate, for the extra duty trip that occurred on or about November 9-11, 2006. (See footnote 6)

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 4, supra)*. Neitherthe West Virginia Public 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: October 21, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Many drivers also turned this assignment down because it was not an overnight trip.

Footnote: 2

Grievant testified that, while he was on the phone with Ms. White, he thought he heard a male voice in the background say that he wanted someone without a trip on Saturday to take the assignment. Grievant believed it to be Mr. Weeks, Transportation Director, who said this, but neither Mr. Weeks nor Ms. White recalled this.

Footnote: 3

Extra duty assignments are given to service personnel pursuant to the provisions of W. Va. Code § 18A-4-8b, which requires that these assignments be offered to employees on a rotating basis, according to seniority, unless the employees in a particular classification have voted upon an alternative for awarding such assignments. There is no dispute in this case regarding the order in which the assignment was offered to employees.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 5

None of the witnesses who testified seemed to know how the situation played out regarding when the volleyball

tournament ended or whether Mr. Cook actually ended up having to perform both assignments on November 11.

Footnote: 6

In the event that the volleyball return trip did, in fact, occur at exactly the same time as Grievant's previous commitment on November 11, 2006, then Grievant should not receive compensation for both trips on that day.