THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KEITH JENKINS,
Grievant,

v. **DOCKET NO. 2008-0158-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

This grievance was filed by Grievant, Keith Jenkins, on or about July 12, 2007,[1] against his employer, West Virginia University. The statement of grievance reads: "During my 15 years at WVU, I have always been required to pay to park at my work site. I have recently discovered that other WVU employees do not have to pay." The relief sought by Grievant is "I want all WVU employees to be treated equally. I believe that no one should have to pay to park to work at WVU."

Two days of hearing were held at level one, on July 25 and September 25, 2007. The grievance was denied at level one on October 11, 2007. Grievant appealed to level two on October 17, 2007,[2] and a mediation was held on September 5, 2008. The parties

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[1] The grievance form was dated July 12, 2007, but was not received by the Grievance Board until July 25, 2007, by fax. It is clear that Respondent had received the grievance form prior to July 25, as the first day of hearing was held on that date.

[2] Grievant's representative at level one, Mary Snelson, submitted a list of names at the level one hearing as Exhibit 11, stating that the seven people listed also wished to be Grievants. The record does not reflect that anyone other than Grievant Jenkins appealed the level one decision.

were unable to reach a settlement of the issues, and Grievant appealed to level three on September 12, 2008. A level three hearing was held before the undersigned Administrative Law Judge on March 31, 2009, in the Grievance Board's Westover office. Grievant was represented by Steve Angel, Staff Representative, AFT-West Virginia/AFL-CIO, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' written arguments on May 1, 2009.

Synopsis

Grievant believes some West Virginia University ("WVU") employees receive an unfair benefit because they are not charged a fee to park in certain lots or at certain times of the day, while he is required to pay to park in a lot owned by WVU near his work site during the day. Grievant is not similarly situated to all other WVU employees. The parking situation and parking rates vary widely across the expansive WVU campus, and some lots where employees are allowed to park are not owned by WVU. No permit is required to park in any lot during certain hours, so employees may choose to park in any lot for free during those hours. Those employees who work at the same work site as Grievant, during the same hours, for the same department as Grievant, and who park in the same lot as Grievant are similarly situated to Grievant, and all these employees are charged a fee if they wish to park in this lot.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU") as a Trades Specialist Lead II, on the day shift, in the Facilities Management Department.

2. Grievant chooses to drive to work, and park in a lot owned and maintained by WVU. A permit is required to park in this lot, and Grievant is charged a monthly parking fee by WVU for this permit.

3. Other WVU employees who work day shift in the Facilities Management Department, and choose to park in a lot owned and maintained by WVU, are charged a monthly parking fee for their permit. Those who park in the same lot as Grievant are charged the same monthly parking fee as Grievant.

4. WVU does not require a permit to park in any lot it owns between the hours of 5:00 p.m. and 6:00 a.m. Anyone may park in any WVU owned lot during these hours without charge, including employees who park on campus during these hours.

5. WVU leases some buildings where employees work, but does not lease the parking lots. It is the lot owner's choice whether to allow WVU employees to park in these lots and whether to charge them a parking fee. WVU employees who work at the Preet Building, which WVU leases, are allowed by the building owner to park in the adjacent lot free of charge.

6. There are parking lots close to the work site of those WVU employees who work for the athletic department, the PRT (public rapid transit), and for the agriculture

department, and there is no charge for parking in these lots. The record does not reflect whether WVU owns these lots.[3]

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's argument is essentially that he has been discriminated against. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination 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);

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[3] There was some discussion at level one which led the undersigned to believe that free parking was available to any employee at the Coliseum, but this was not clear. If this were the case, any WVU employee could choose to park at the Coliseum and take the PRT to other areas on campus.

(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); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Apparently, Grievant believes he is similarly situated to every employee at WVU. He is not. The WVU campus extends over a large area, both downtown, where parking is at a premium, and at the Evansdale/Health Sciences campus. There are also offices at the Waterfront, and at the WVU farm, and possibly other locations. There are many different parking areas. Some areas are paved, some areas are gravel lots, and there are a few parking garages. Parking rates vary depending upon the location of the lot, and the condition of the lot. The rate for garage parking is significantly higher than the rate in other lots. "The pertinent characteristic in this analysis is the [Grievant's] assigned worksite and/or parking conditions, not [his] job function." *Nelson, et al., v. W. Va. Dep't of Health and Human Res.*, Docket No. 00-HHR-385 (May 14, 2001). Grievant is similarly situated to other employees who work at the same work site in the Facilities Management Department, and park in the same location as he. *See, Nelson, supra.* Other employees in the Facilities Management Department, who work day shift at the same work site as Grievant, and park in the same lot, are charged the same rate Grievant is charged for parking.

In particular, Grievant is not similarly situated to employees who park in parking lots that are not owned by WVU. Grievant has chosen to park in a lot owned by WVU, which is apparently convenient to his work site, and WVU charges anyone who uses that lot

during certain hours of the day a parking fee. It is not up to WVU to decide whether any other lot in or near the WVU campus not owned by WVU is subject to a parking fee, including lots which are adjacent to leased buildings. If the lot owner decides to let WVU employees use his lot free of charge, that is not something over which WVU has any control.

As to employees of the Facilities Management Department who work at the same work site as Grievant, but during different shifts, Grievant likewise is not similarly situated to these employees as it relates to parking, because the parking situation is not the same. WVU has determined that it must regulate parking during the day because of the demand. However, after 5:00 p.m., apparently there is ample parking available, and parking does not need to be regulated. Obviously the parking situation during the day is quite different from that during the evening. Employees who choose to park in any WVU owned lot between the hours of 5:00 p.m. and 6:00 a.m. do not pay to park because no one does. This is not a rule related to employees, it is a valid parking rule, which the undersigned has no authority to change. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Finally, the relief requested by Grievant is not available through the grievance procedure. Grievant seeks free parking for all employees. WVU Policy WVU-P&TS-02, entitled "Paid Employee Parking," states:

> WVU does not offer employer paid parking as part of its benefit package. As such, Departments are not permitted to purchase parking permits for any employee, including students.

The undersigned has no authority to require WVU to change its policy.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent

> some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999).
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> > While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.
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> *Board, et al., v. W. Va. Dep't of Health and Human Resources,* Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 a discrimination 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);
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> (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); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant is not similarly situated to all other WVU employees.

4. "The pertinent characteristic in this analysis is the [Grievant's] assigned worksite and/or parking conditions, not [his] job function." *Nelson, et al., v. W. Va. Dep't of Health and Human Res.*, Docket No. 00-HHR-385 (May 14, 2001). As it relates to parking, Grievant is similarly situated to WVU employees who work at the same work site as Grievant, during day shift, for the Facilities Management Department.

5. Grievant did not demonstrate discrimination by WVU in parking charges.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: June 2, 2009