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JOHN E. COOK

v.

Docket No. 55-87-257-1

WYOMING COUNTY BOARD OF EDUCATION  
and/or WEST VIRGINIA DEPARTMENT  
OF EDUCATION

D E C I S I O N

Grievant, John Cook, was employed by the Wyoming County Board of Education as a bus operator continuously from 1962 through the end of the 1986-87 school term. Mr. Cook reached seventy (70) years of age on April 24, 1987 and was taken off his regular bus run for a short time and then allowed to resume his duties for the remainder of the 1987-88 school term. He was informed about a West Virginia School Transportation Regulation requirement that he have a valid School Bus Operator's Certification and that such certifications would not be issued to anyone who had reached the age of seventy (70). His application for renewal of his certification was subsequently denied by the West Virginia Department of Education and

his employment with the Wyoming County Board of Education was terminated.<sup>1</sup> Mr. Cook then filed a grievance and after an adverse Level I decision he appealed directly to Level IV where an evidentiary hearing was conducted on December 22, 1987. Prior to this hearing, grievant made a motion to join the West Virginia Department of Education as an indispensable party and the motion was granted.<sup>2</sup>

The single issue of this grievance, as all parties agree, is the legality of the regulation adopted by the West Virginia Department

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<sup>1</sup>At the Level IV hearing the testimony of the grievant and that of witnesses for the Wyoming County Board of Education were conflicting on the issue of whether grievant was terminated, resigned or applied for retirement benefits. The Board took the position that Mr. Cook could have applied for other positions but produced no evidence that there were existing vacancies or that he was offered any other jobs. After the testimony of Gerald Short, Superintendent of Schools, revealed he had instructed the Board's payroll division to stop paying Mr. Cook's salary it was ruled grievant's employment was terminated by the Wyoming County Board of Education.

<sup>2</sup>Counsel for the department filed a written response to grievant's motion opposing its joinder in the grievance and renewed the objections at the beginning of the Level IV hearing. The West Virginia Education Employees Grievance Board has previously ruled it does have jurisdiction of a grievance involving the State Department of Education and a county employee when the basis of the grievance is an interpretation of law or policy affecting the grievant, upon which interpretation the county board of education relied. Walker v. Kanawha County Board of Education and/or West Virginia Department of Education, Docket No. 20-86-157-1; Lucas v. West Virginia Department of Education, Docket No. 02-87-069-2; Liebold and McCartney v. Tyler County Board of Education and/or West Virginia Department of Education, Docket No. 48-86-171-3.

of Education and applicable to all school bus operators in West Virginia which denies certification to persons who reach the age of seventy (70). This regulation is contained in the West Virginia School Transportation Regulations at page 18 and is specifically stated:

1. Candidate must be at least nineteen (19) years of age and shall not be certified or recertified after his or her 70th birthday.

W.Va. Code, 17C-14-12 subjects every county board of education, its officers and employees, and every person employed under contract by a board of education to these regulations and even provides civil penalties for any violation thereof. To the extent the Wyoming County Board of Education is merely adhering to the provisions of this section of the W.Va. Code it is a nominal party in this grievance and the grievant's legal arguments are necessarily directed to the West Virginia Department of Education. The specific allegation is that the department's regulation restricting bus operator certification to persons over the age of nineteen (19) and under the age of seventy (70) is discriminatory and therefore in violation of the Age Discrimination in Employment Act (ADEA), as amended, 29 U.S.C. §§621, et seq.<sup>3</sup> Section

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<sup>3</sup>Chapter 18, Article 29 of the W.Va. Code allows a school employee to initiate grievances alleging discrimination through the procedure therein provided and W.Va. Code, 18-29-2(m) specifically 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."

4(a)(1) of the ADEA provides:

(a) It shall be unlawful for an employer --

1. to fail or refuse to hire or discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age.

Sections 4(f)(1) provides an exception to this rule:

It shall not be unlawful for an employer, employment agency or labor organization --

1. to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.

Courts have generally held any employer's reliance on the latter provisions must be closely scrutinized and any exemptions must be narrowly construed. EEOC v. City of Janesville, 630 F.3d 1254 (1980). A two-pronged test has been established when an employer does claim the bona fide occupational qualification (BFOQ) exception which places the burden of proof upon said employer to show first that it has reasonable cause to believe that all or substantially all of a class of employees would be unable to perform a job safely and efficiently. If an employer cannot meet this requirement it may apply a reasonable general rule to satisfy the first prong. The

second prong of the test requires the BFOQ to be reasonably necessary to the essence of the business operation. Adams v. Janis, et al., 526 F. Supp. 80 (1981); Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978); Usery v. Tamiami Tours, Inc., 531 F.2d 224 (5th Cir. 1976). Some Courts have also held the employer's burden of proof in this regard is minimized when there is the presence of an overriding safety factor, i.e., where safety is "the essence" of a particular business such as the transportation of passengers by bus or airplane. Murrname v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981); Touhy v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir. 1982); Brennan v. Greyhound Lines, Inc., 419 U.S. 1122, 95 S.Ct. 805, 42 S. Ed.2d 822 (1975). It would therefore appear that the safety of students on school buses would be the essence of the business involved in the present grievance and the West Virginia Department of Education's burden of proving its claim that the regulation at issue is a bona fide occupational qualification would be lessened. The department, however, chose not to present any evidence at the Level IV hearing to establish any factual foundation that the age of school bus operators is a BFO. There was simply an assertion to this effect made by counsel for the department and while there are some conflicting interpretations of the pertinent provisions of the NDEA it has consistently been held that a factual foundation is necessary to show the impact of aging on one's ability to perform the required tasks of a particular job. EEOC v. City of Santa Barbara,

666 F.2d 373 (9th Cir. 1982); Usery v. Tamiami, supra. It cannot be assumed, when no evidence of any kind as to the effect upon safety is presented, that age limitations for school bus drivers is per se a bona fide occupational qualification. EEOC v. KDM School Bus Company, 612 F. Supp. 369 (D.C. N.Y. 1985); Ramirez v. Puerto Rico Fire Services, et al., 757 F.2d 1357 (1st Cir. 1985); Johnson v. Mayor and City Council of Baltimore, \_\_U.S.\_\_, 105 S.Ct. 2717, 86 L. Ed.2d 286 (1985). It is clear the mere assertion of the West Virginia Department of Education is not sufficient to justify its position in the present case.

It should also be noted that while there is no direct employment relationship between the West Virginia Department of Education and the grievant, the lack of a such a relationship does not insulate that department from liability since it controls his access to such employment through the use of its regulations. In such circumstances it has been ruled such departments are statutory employers and may be held liable for violations of the Age Discrimination in Employment Act. EEOC v. KDM School Bus Company, supra.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

### FINDINGS OF FACT

1. Grievant, John Cook, was employed by the Wyoming County Board of Education as a bus operator from 1962 through the end of the 1986-87 school term.

2. Mr. Cook reached the age of seventy (70) on April 24, 1987.

3. The West Virginia School Transportation Regulations prepared by the West Virginia Department of Education and approved by the West Virginia Board of Education pursuant to W.Va. Code, 17C-14-12 prohibits certification of bus operators who have reached the age of seventy (70).

4. Grievant's employment with the Wyoming County Board of Education was terminated at the end of the 1987-88 school term solely because of the refusal of the West Virginia Department of Education to grant him certification pursuant to said regulations.

5. Medical and personnel records indicate grievant is physically fit to operate a school bus, has always received personnel evaluations indicating above average performance on his job and is otherwise fully qualified and eligible for certification as a school bus operator.

6. Grievant appealed an adverse decision to his grievance at Level I directly to Level IV on September 18, 1987.

7. By order dated December 14, 1987 the West Virginia Department of Education was made a party to the grievance and by notice dated December 15, 1987 said department was informed that Level IV proceedings in the matter would be held on December 22, 1987.

8. The West Virginia Department of Education had no direct employment relationship with the grievant but did control his access to such employment through the use of its transportation regulations.

9. The West Virginia Department of Education, through counsel, was represented at the Level IV evidentiary hearing and was given the opportunity to question and cross-examine witnesses, provide rebuttal and otherwise present a case in defense of the West Virginia School Transportation Regulations.

#### CONCLUSIONS OF LAW

1. The Age Discrimination in Employment Act prohibits an employer from refusing to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because



of such individual's age unless age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business in which that individual is engaged. 22 U.S.C. §§621, et seq.

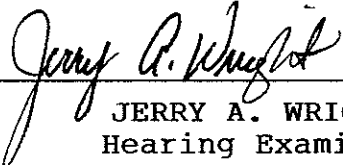
2. A lack of direct employment relationship between the West Virginia Department of Education and the grievant does not insulate it from liability under the Age Discrimination in Employment Act. EEOC v. KDM School Bus Company, supra.

3. The West Virginia Department of Education had the burden at the Level IV hearing to establish some factual basis for its claim that the age limitation for school bus operators contained in the West Virginia School Transportation Regulations is a bona fide occupational qualification and a mere assertion to that effect was not sufficient. EEOC v. City of Santa Barbara, supra; EEOC v. KDM School Bus Company, supra.

4. The grievant, John Cook, established a prima facie case of age discrimination and the West Virginia Department of Education failed to present any evidence in support of its claim to a bona fide occupational qualification and said regulation is therefore discriminatory and in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§621, et seq.

Accordingly, the grievance is **GRANTED** and the West Virginia Department of Education is hereby **ORDERED** to issue a valid bus operator certification to the grievant, John Cook, and upon receipt of said certification the Wyoming County Board of Education is hereby **ORDERED** to reinstate the grievant to his former position as bus operator and to further compensate him for any loss of wages incurred as a result of his improper termination, less any appropriate set-off.

Either party may appeal this decision to the Circuit Court of Wyoming County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
JERRY A. WRIGHT  
Hearing Examiner

DATED:

March 8, 1988