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JAMES R. GRATE

v.

DOCKET NO. 89-CID-146

GOVERNOR'S OFFICE OF COMMUNITY & INDUSTRIAL DEVELOPMENT

D E C I S I O N

The issue in this grievance involves whether parking spaces are being allocated fairly between two groups of employees employed by the Governor's Office of Community & Industrial Development (GOCID).

The grievant, James R. Grate, filed a grievance at level I in January, 1989, seeking to eliminate an alleged discriminatory practice relating to the assignment of parking spaces. The grievance was denied at levels I and II. The level III grievance evaluator conducted a hearing on February 27, 1989, and rendered a decision favorable to the grievant on March 6, 1989, which directed that an equitable and fair parking plan be implemented within thirty days from the date of the decision. On April 10, 1989, the grievant appealed here because no parking plan had been implemented and requested a decision be rendered on the evidence presented below. Upon the request of GOCID, a

level IV hearing was conducted on May 15, 1989, and the case was submitted for decision.¹

The material facts are not in dispute and will be briefly summarized. The grievant is employed in the Criminal Justice-Highway Safety (CJHS) Division² of GOCID and has been so employed during the entire time period relevant to this grievance. In 1975 the Commissioner of Finance and Administration leased a building from the Sarah and Pauline Maier Scholarship Foundation, Inc., to provide office space for GOCID. The lease provided GOCID a parking area adjacent to the building. Shortly after the lease was executed, the Employment and Training Division (ETD) of GOCID moved into the building.

In December 1981 or January 1982, GOCID moved the CJHS employees into the building. The lease was not changed, but

¹ The parties agreed that the level III transcript could be considered at level IV, even though the witnesses had not been placed under oath. The grievant, however, raised some question about the total accuracy of the transcript and was instructed to submit a "corrected" transcript which was received on May 23, 1989. The suggested corrections make no material change in the content of the transcript but do, as the grievant recognized, contribute to its readability.

² There is some disagreement concerning whether CJHS is a separate division within the organizational structure of GOCID or is only a section within the Community Development Division. Although resolution of this dispute is not necessary to properly determine the issues raised in this grievance, the agreement between ETD and CJHS discussed later in this decision refers to CJHS as a division of GOCID. In any event, CJHS will be described as a separate division of GOCID for purposes of this decision.

ETD and CJHS entered into a written agreement at that time specifying their respective responsibilities. This agreement basically provided that ETD would be responsible for paying the rent and maintaining the building, and CJHS would reimburse ETD by payment of a fixed monthly rental amount, plus utilities and other specified expenses. The agreement did not mention parking for the CJHS staff.

Sometime later ETD placed gravel over a grassy area in front of the building and permitted CJHS employees to park in this area on a first-come, first-serve basis. The paved parking area provided under the lease was reserved for ETD employees. ETD employees, regardless of position or seniority, are assigned parking spaces in the paved parking area. CJHS employees may only park in the unpaved parking area on a first-come, first-come basis which requires a few employees to find alternative parking elsewhere.³ There is no dispute that the parking spaces provided CJHS employees are inferior to those provided ETD employees, especially during wet weather when the unpaved area becomes muddy. This method of allocating parking spaces between ETD and CJHS has continued until the present.

³ There are three exceptions to this practice which are not important here. The evidence reveals that a former ETD employee who transferred to CJHS was permitted to retain her paved parking space, and an exception was granted by the director of ETD upon request for a woman based on her age and other factors.

The grievant contends this method of assigning parking spaces constitutes favoritism to ETD employees and discrimination against CJHS employees. The Director of ETD takes the position that there is no provision in the agreement between ETD and CJHS concerning parking and, therefore, he is not required or obligated to provide parking anywhere on the site for CJHS employees. He also stated that he did not intend to discriminate against CJHS employees and expressed concern that if the present method of assigning parking spaces is changed and parking spaces are completely reassigned, there will be complaints by ETD employees. He admits that there are a number of parking spaces currently available in the paved area due to vacancies, but indicates that several new employees will be hired in the immediate future.

This hearing examiner agrees with much of the grievant's argument and concludes that he has established by a preponderance of the evidence that GOCID has engaged in a practice constituting favoritism within the meaning of W.Va. Code §29-6A-2(h), which is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." After several years of service as a GOCID employee, the grievant must park in a first-come, first-serve unpaved parking area, while new employees in the ETD division have an assigned parking space in the paved area. No valid

justification has been offered for continuing this preferential practice in favor of ETD employees.

The uncontroverted evidence also supports a finding that the employer's practice amounts to discrimination, a closely-related concept defined in W.Va. Code §29-6A-2(d) as follows: "[A]ny 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." Regardless of intent CJHS employees are treated differently with regard to a term, condition or privilege of employment without valid justification or excuse. The disparate treatment is obviously unrelated to the responsibilities of the employees and has not been agreed by CJHS employees in writing. Certainly nothing in the lease or the agreement between ETS and CJHS justifies or sanctions the differential treatment.

The present system for assigning parking spaces between ETD and CJHS employees is neither fair nor equitable. To refuse to modify the current method of assigning parking spaces on the basis of possible complaints by ETD employees is not a sufficient justification for the continuance of the existing practice.

In the circumstances of this case, it would not be fair or equitable to ETD employees or in the interest of good employee relations, however, to order a complete reassignment of parking spaces as proposed by the grievant as a

remedy.⁴ At the time of the level III hearing, the record indicates that there were enough parking spaces in the paved area for most, if not all, employees of both divisions to park there. In addition, there were a large number of vacancies in the ETD division at the time of the level IV hearing. Consequently, the appropriate remedy in these circumstances is a new parking policy implemented on a prospective basis only. This new policy should be designed to treat ETD and CJHS employees as equally as possible in the future.⁵

In addition to the preceding narrative, this hearing examiner makes the following findings of fact and conclusions of law.

⁴ In view of this determination as to the scope of the appropriate remedy and all the circumstances of this case, the evidence does not support a finding that the Director of ETD has acted in bad faith.

⁵ This hearing examiner agrees with the grievant's contention that since the office building is leased for the benefit of GOCID, the Director of GOCID, not the director of one particular division, should have decided how parking spaces were allocated to ETD and CJHS employees. This was simply a management decision which was in no way controlled by the terms of the lease or the agreement between ETD and CJHS.

Findings of Fact

1. The Commissioner of Finance and Administration leased an office building for the use of GOCID in 1975. Since at least January 1982, this office building has been occupied by ETD and CJHS, two divisions of GOCID.

2. Since approximately January 1982, ETD employees have been assigned parking spaces in a paved parking area adjacent to an office building. CJHS employees have been provided parking on an unpaved area covered with gravel on a first-come, first-serve basis.

3. The parking accommodations provided to CJHS employees are inferior to those provided ETD employees, especially during rainy weather when the unpaved area becomes muddy.

4. New employees of ETD are provided better parking accommodations than long-term employees of CJHS.

5. Neither the lease of the office building occupied by ETD and CJHS, nor the agreement between these two divisions vests the Director of ETD with the authority or the right to provide parking spaces on the paved lot exclusively to employees in the ETD division.

Conclusions of Law

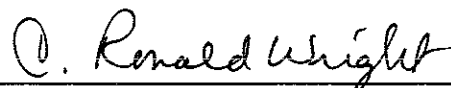
1. The grievant has established by a preponderance of the evidence that GOCID has engaged in favoritism in the assignment of parking spaces to ETD employees within the meaning of W.Va. Code §29-6A-2(h). The evidence shows that CJHS employees have been treated unfairly in the assignment of parking spaces as demonstrated by the preferential or advantageous treatment of ETD employees.

2. The grievant has established by a preponderance of the evidence that GOCID has discriminated against CJHS employees by treating them differently with regard to the assignment of parking spaces without any valid justification or excuse. The disparate treatment of CJHS employees is entirely unrelated to the actual job responsibilities of such employees and was not agreed to in writing. See W.Va. Code §29-6A-2(d).

Accordingly, the grievance is **GRANTED**. The Director of GOCID, is therefore **ORDERED** to promptly cause the implementation of a new parking policy with the objective of fairly and equally allocating parking spaces between ETD and CJHS employees on the paved lot. This plan must include at a minimum that any existing vacancies on the paved lot will be filled by CJHS employees based on seniority and/or rank.

Furthermore, as vacancies become available on the paved lot in the future, CJHS employees must be afforded additional paved parking spaces based on seniority and/or rank until such time as the CJHS division has attained a proportionate share of the paved parking spaces. Thereafter, parking spaces must be assigned to GOCID employees regardless of the division in which they are employed.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



C. RONALD WRIGHT
DIRECTOR

Dated: June 9, 1989