THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASPER BOTKIN AND JASON ALLEN,

Grievants,

v. **Docket No. 2021-0897-CONS**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Jasper Botkin and Jason Allen, are employed by Respondent, Kanawha County Board of Education, at Ben Franklin Career and Technical Center as auto mechanic and diesel technology instructors, respectively. They instruct students in classroom and shop settings.

On October 5, 2020, Grievants filed a grievance alleging they are the only instructors without an effective cooling system in their shops, which results in excessive temperatures. Grievants claim discrimination, favoritism, and an unsafe work environment. As relief, Grievants request that an effective cooling system be installed.

A level one conference occurred on October 16, 2020, and a level one order was issued on September 17, 2021.[1] Grievants appealed to level two on December 6, 2021. Mediation occurred on January 11, 2022. Grievants appealed to level three on January 18, 2022.

[1]The parties agreed to place the grievance in abeyance pending the installation of an airflow system and the opportunity to determine its effectiveness.

On April 4, 2022, a level three hearing was held before Administrative Law Judge Carrie LeFevre[2] at the Charleston office of the Public Employees Grievance Board. Grievants appeared in person and were represented by Sean Miller, AFT-West Virginia/AFL-CIO. Respondent was represented by Lindsey McIntosh, General Counsel. This action became mature for decision on May 2, 2022. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Respondent as auto mechanic and diesel technology instructors at Ben Franklin Career and Technical Center. The shops assigned to Grievants lack adequate cooling systems and get uncomfortably hot. Grievants allege discrimination, favoritism, and an unsafe work environment. They request the installation of adequate cooling systems. Respondent has spent thousands to alleviate the heat, to no avail. Respondent contends that a minimum of half a million dollars is necessary to equip Grievants' shops with adequate cooling systems, rendering it cost prohibitive. While some shops at the facility have effective cooling systems, it is unclear when these were installed or how the cost compares with estimates for Grievants' shops. Grievants thus failed to prove discrimination or favoritism. While it is likely that extreme heat interferes with job performance and safety, Grievants failed to prove they are entitled to an expenditure of funds by Respondent necessary to adequately cool their shops. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of

[2]For administrative reasons, the task of preparing this Decision was assigned to Administrative Law Judge Joshua Fraenkel.

the record created in this grievance:

Findings of Fact

1. Grievants, Jasper Botkin and James Allen, are employed by Respondent, Kanawha County Board of Education, at Ben Franklin Career and Technical Center as auto mechanic and diesel technology instructors, respectively.

2. Grievants teach in assigned classrooms and shops.

3. All classrooms have adequate air conditioning.

4. While no shop has air conditioning, most have temperate air systems. Temperate air is less effective than air conditioning but provides some relief to the shops that have it.

5. The shops assigned to Grievants are among the few that do not have temperate air or any other adequate cooling system. Consequently, Grievants' shops can reach temperatures between 85 and 102 degrees in April and May, causing substantial discomfort. This persists even when shop doors are kept open in violation of safety protocol.

6. Students have been sent to the infirmary as a result of the high temperatures.

7. At times, Grievants accommodate themselves and their students by moving to airconditioned classrooms or permitting students who overheat to take breaks away from the shops.

8. Respondent has been aware of the temperature problem for at least a few years.

9. Respondent attempted to alleviate the problem by installing new ventilation

systems in Grievants' shops at a cost of $34,253. However, the high temperatures persist.

10. A couple of years ago, estimates for cooling Grievants' shops started at half a million dollars. With current inflationary conditions, costs have increased by 30 percent.

11. There are no levies to fund the project and local funds are limited.

12. Respondent deems the project to be cost prohibitive and has deferred implementation indefinitely.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent concedes that Grievants' auto mechanic and diesel technology shops lack adequate cooling systems, resulting in extreme discomfort in April and May when indoor temperatures can hover between 85 and 102 degrees. At times, this necessitates medical care. Other shops at Ben Franklin Career and Technical Center have more moderate temperatures because they are connected to an adequate cooling system. Grievants allege this disparity is discrimination and favoritism.

Discrimination and favoritism have very specific definitions for purposes of the grievance process. "'Discrimination' means 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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish 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'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants were unable to prove that they were treated differently than any similarly-situated employee. It is unclear whether the cooling system for the other shops was installed while Grievants were employed at the facility, whether the auto mechanic and diesel technology shops occupied their current spaces prior to Grievants' arrival, whether the cooling system for the other shops had a funding source that is no longer available, and whether the inflation adjusted cost of the cooling system for other shops compares with the more than half a million dollar estimate for Grievants' shops. Respondent showed that it spent $34,253 to improve airflow in an attempt to alleviate the high temperatures, that this did not ease the heat, and that it would cost more than half a million dollars to provide Grievants with adequate cooling. Grievants did not challenge these figures or

show that Respondent expended similar amounts on a prorated basis for other employees. Thus, Grievants failed to prove discrimination or favoritism.

Grievants further assert that the high temperatures in their shops interfere with their job performance and affect safety. "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including . . . [a]ny action, policy, or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee." W. VA. CODE § 6C-2-2(i)(1)(v). The Grievance Board has long held that this type of claim is grievable. *See Miller v. Brooke County Bd. of Educ*., Docket No. 2010—0969-BroED (Feb. 22, 2011); *Adams, et al., v. Harrison County Bd. of Educ*., Docket No. 03-17-025 (July 21, 2003); *Guerin and Tenney v. Mineral County Bd. of Educ*., Docket Nos. 92-28-422, 459 (Jan. 31, 1996).

Grievants cite W. VA. CODE § 18-9F-1(a)(2), which states: "All school facilities in the state should be designed, constructed, furnished and maintained in a manner that enhances a healthy learning environment and provides necessary safeguards for the health, safety and security of persons who enter and use the facilities."

It is undisputed that the temperature in Grievants' shops gets extremely uncomfortable at times, hindering instruction and leading to medical attention. Grievants have been able to ease the situation by relocating from their shops to airconditioned classrooms. There is no evidence that Respondent discourages this accommodation. While the undersigned encourages Respondent to continue accommodating Grievants, Grievants only specifically request as relief that their shops be equipped with adequate

cooling systems. Respondent presented uncontested evidence that the cost would be over half a million dollars and that these funds have not been earmarked. Grievants have not provided any support for overriding Respondent's determination that this is cost prohibitive.

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), aff'd Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Grievants have not shown that Respondent was arbitrary and capricious in this determination.

Further, Grievants ignore the only enforcement mechanism set forth in the code section they cite in support of requiring safe and healthy facilities. W. VA. CODE § 18-9F-1(b) states: "It is the intent of the Legislature to empower the School Building Authority to facilitate and provide state funds for the design, construction, renovation, repair and upgrading of facilities so as enhance school access safety and provide secure ingress to and egress from school facilities to pupils, school employees, parents, visitors and

emergency personnel." Grievants did not attempt to include the School Building Authority in this action either as a party or a witness. Grievants failed to prove by a preponderance of the evidence that they are entitled to an expenditure of funds by Respondent necessary to adequately cool their shops.

Accordingly, this grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. In order to establish 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'n*, 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. Grievants failed to prove discrimination or favoritism by a preponderance of the evidence.

4. "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including . . . [a]ny action, policy, or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee." W. VA. CODE § 6C-2-2(i)(1)(v).

5. While Grievants showed that it is likely that the lack of an adequate cooling system in their shops interfered with their performance and affected their safety, they did not prove by a preponderance of evidence that they are entitled to an expenditure of funds by Respondent necessary to adequately cool their shops.

Accordingly, the 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: June 15, 2022

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Joshua S. Fraenkel
Administrative Law Judge