HOWARD CURRENCE and LONNIE ANDREWS

v. Docket No. 94-DOH-052

WEST VIRGINIA DIVISION OF HIGHWAYS

D E C I S I O N

Grievants are mechanics employed by Respondent West Virgin ia Department of Highways (DOH). On or about February 15, 1994, they advanced a level four complaint that they are being treated unfairly when compared to other maintenance employees who make the same wages but are not required to furnish work tools. The stated relief was, "Receive wage increase and lump sum payment for tool expense, change wage scale and in any other way be made whole." Grievants requested that a decision be based on the record adduced at level three. (See footnote 1)

The underlying facts which gave rise to this grievance arebasically uncontested. Based on all matters of record, the following formal findings of fact are made:

Findings of Fact

1. Grievants are employed as mechanics at DOH's Upshur County maintenance headquarters.

2. Per DOH's "Personnel Operating Procedures, Departmen tal Policy Concerning Mechanic Tools," mechanics are required to furnish specified "common mechanic tools" for which to perform their duties at their own expense. (See footnote 2) This policy apparently was in effect when Grievants were hired. See T.2.

3. The policy contains a list of tools that a mechanic must supply for his work use, approximately eight tool sets and nineteen various other tools. According to Grievants, these tools cost approximately $900.00.

4. Of record is a document, "Mechanic Tool List for Howard Currence," which lists approximately thirty-three tool sets and forty individual tools and notes that the cost of the tools comes to a "grand total" of $2506.65. Grievants' Exhibit B.

5. Another document of record, "Lonnie Andrews Tool List," contains a list of more than 150 individual and/or sets of tools; this list contains no cost figures. Grievants' Exhibit B. 6. In order to perform their duties, Grievants must possess tools other than those listed on DOH's policy.

7. No other classes of employees within DOH are required to furnish and do not furnish tools for which to perform their job duties.

8. The issue of whether DOH should furnish its mechanics with basic shop tools has been addressed within DOH via the Governor's "INSPIRE" program. As of September 13, 1993, a recommendation had been made that the list of required mechan ics' tools be expanded, that DOH supply some basic shop tools for mechanics and that mechanics with at least one year's service receive a yearly tool allotment of $175.00. DOH's Exhibit 2.

Discussion

W.Va. Code §29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, excep tional or advantageous treatment of another or other employees." Grievants contend that the evidence in this case satisfies the standards set forth in Prince, et. al. v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1991), for a grievant to establish a prima facie showing of favoritism. According to Prince, a grievant must show

(1) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(2) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(3) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Grievants essentially attack the DOH tool policy and argue that mechanics are being treated unfairly by being required to furnish a specific amount of tools while being paid the same as operators and craftsworkers. The DOH furnishes all necessary equipment and tools for operators and craftsworkers. This is a great finan cial disadvantage for the mechanics. Therefore, operators and craftsworkers are receiving preferen tial, exceptional and advantageous treatment greater than the Grievants. DOH have provided no apparent justification for this difference in treatment.

DOH's position in this matter was contained in DOH Commis sioner Fred VanKirk's February 2, 1994, level three decision. According to Mr. VanKirk, DOH's current tool policy is "appropriate, considering the common industry practice that mechanics provide their own personal tools." He also stated that DOH's Legal Division advised that DOH has no authority to reimburse mechanics for their personal tools. He concluded that recent INSPIRE sessions have addressed the problem and may prompt "a change in the policy in the near future." (See footnote 3) Mr. VanKirk presumably referred to the pending recommendation that mechanics receive some type of yearly cash allowance for tools.

It would appear from the record that Grievants have not necessarily established a prima facie case of favoritism. Certainly, the primary question is whether Grievants, as mechan ics, are "similarly situated, in a pertinent way," to the classes of employees to whom they compare themselves. Grievantsattempt to establish similarity by pointing out that operators, craftsworkers and mechanics, paid comparably, all use tools to perform their duties but only mechanics must purchase their own tools. However, it is noted that these three classes of employ ees have quite dissimilar job functions and their need and use of on-the-job tools differs accordingly.

As found in the job specifications for a mechanic, this class of employee constantly uses mechanic's tools, on a daily and ongoing basis, to repair all of DOH's highway equipment and machinery. In contrast, the primary function of an operator is to operate a variety of highway equipment. An operator is only called upon to use tools to service his equipment when necessary while "in the field" to make "minor repairs . . . such as changing tires, blades or filters."

A DOH craftsworker appears to be somewhat of a "jack-of- all-trades" whose primary responsibility is generally to produce something. A craftsman may have more tool-oriented repair duties than an operator; however, the craftsman's representative duties are still more closely associated with overall highway maintenance and production than with the ongoing, highly-dedi cated repair of highway equipment. When tools are used by a craftsworker, the tools are frequently highly-specialized trade tools and/or equipment related to the task at hand. (See footnote 4)

Assuming for purposes of argument that, despite these work- related differences among the three classes of employees, Grievants have established they are similarly situated to other DOH maintenance employees who earn comparable wages but who are not required to furnish their own work tools, the inquiry is not over. While it may be that the other maintenance employees have been given an advantage not afforded mechanics, and that the difference in treatment has caused a substantial monetary inequity to mechanics, Grievants' case fails nonetheless. This is because DOH has articulated a legitimate reason or justifi cation for this difference in treatment among its maintenance workers. Prince.

While no "evidence" was presented at the level three hearing on the issue of whether a "common industry practice that mechanics provide their own personal tools" exists, and the undersigned has no personal knowledge of this practice, Mr. VanKirk's assertion to that effect in his level three decision was not addressed, disputed or rebutted in Grievants' level four brief. (See footnote 5)

Therefore, it is concluded that said "common industry practice" exists and that automotive mechanics on an industry- wide basis are required to furnish their own on-the-job smalltools. This essentially explains the difference in treatment of operators, craftsworkers and mechanics with respect to the tool requirement issue. Finally, Grievants never alleged that the stated rationale for DOH's mechanics' tool policy was merely pretext.

In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. W.Va. Code §29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, excep tional or advantageous treatment of another or other employees."

2. While Grievants have shown that other maintenance personnel are not required to furnish small on-the-job tools necessary to perform their specified duties, the difference in treatment is based on an industry-wide practice that mechanics obtain their own personal tools; accordingly, a violation of W.Va. Code §29-6A-2(h) was not established.

3. Grievants failed to establish, under any theory of law, that they were entitled to receive a wage increase, change in wage scale, or award of a "lump sum payment for tool expense" in this controversy.

Based on the above findings and conclusions, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county inwhich the grievance occurred," 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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

NEDRA KOVAL

Administrative Law Judge

Date: August 3, 1994

Footnote: 1 Grievants initially requested a level four hearing when the case was assigned to the Elkins, West Virginia, Grievance Board office. Later, the case was transferred to the undersigned for administrative reasons on or about May 16, 1994. The record consists of the pleadings, lower level decisions, transcript and exhibits of the September 23, 1993, level three hearing and Grievant's April 18, 1994 fact/law proposals. DOH apparently waived its right to submit a brief at level four.

Footnote: 2 According to the policy, mechanics are permitted to file claims for reimbursement with the "Board of Risk and Insurance Management" upon the loss by theft of their personal tools kept on DOH premises if certain requirements are met, such as filing an accurate tool inventory with DOH.

Footnote: 3 Interestingly, although the grievance was heard at level three on September 23, 1993 by a committee of three evaluators, there is no record of the committee's written recommendations to Mr. VanKirk, in keeping with DOH's usual practice in rendering decisions at the third level. In fact, Mr. VanKirk sets forth no factual particulars or legal conclusions whatsoever in his level three decision.

Footnote: 4 The list of "Examples of Work" which may be performed by craftsworkers is extensive. Among other things, a craftsworker might be assigned to fabricate engine and machinery parts from blueprints using lathes, drills, grinders and milling machines; perform carpentry, masonry, printing, plumbing, electrical, air conditioning and heating work on buildings, building equipment and property; clean, sand and tape vehicle bodies in preparation for painting; paint vehicles and equipment using air compressors and paintsprayers; install steel piling, sign posts, traffic control signs and barricades; and set and detonate explosive charges for earth removal purposes, to name but a few of the listed jobs.

Footnote: 5 When a grievant requests a decision based on the lower-level record and the respondent waives it right to file a level four brief, it is in the grievant's best interests to at least rebut the lower-level findings and conclusions, especially those made at the final grievance level prior to the level four appeal.