VICKY FARLEY/SHARON STOVER

v. Docket No. 94-26-639

MASON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, bus operators employed by Respondent Mason County Board of Education (MCBE), filed a grievance at level four in November 1994 alleging, "Favoritism toward other drivers by the past Transportation Department Supervisor and Superinten dent of [MCBE]." As relief, Grievants requested, "[Grievants'] [b]uses be parked (895 & 902) for the better of bus safety & well-being of students or the others [operators' buses] to be moved to the end of their routes also." MCBE disavows wrongdo ing and maintains that res judicata should apply.1

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1Adverse decisions were rendered at levels one, two and three on October 1, 20 and 25, 1994, respectively. Although Grievants requested a record decision at level four, MCBE requested a hearing to augment the record, and said hearing was conducted December 15, 1994. MCBE filed a brief on the res judicata issue on January 9, 1995; however, neither Grievants nor MCBE filed rebuttals by the agreed-upon cut-off time of January 20, 1995, the date the case would become mature for judgment.

Based on the probative record as a whole, the following findings of fact are made:2

Findings of Fact

1. Prior to the beginning of the 1993 school year, MCBE's Transportation Department conducted a detailed study to identify

and curtail or eliminate unnecessary mileage when school buses were not transporting students, commonly called "deadheading."

2. As a result of the study, some bus operators' nightly parking places were changed for the 1993-94 school year. All bus operators received a written directive as to where their buses were to be parked at the end of the work day.

3. From the beginning, Grievants found fault with their designated parking sites and sought changes. A grievance filed on the issue in September 1993 was ultimately dismissed at level four because Grievants failed to timely perfect the level four appeal. See Stover/Farley v. Mason County Bd. of Educ., Docket No. 93-26-521 (Mar. 17, 1994).

4. Subsequent to 1993 and into the 1994-95 school year, parking locations other than those designated in August 1993 were modified to meet changing needs and circumstances. T2.25-27.

5. At some point prior to filing the within grievance, Grievants began scrutinizing the schedules of other operators,

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2A level two hearing was conducted October 10, 1994, and the transcript and exhibits of that proceeding contain the relevant facts leading to the dispute.

even making personal forays to ascertain where other drivers were parking.

6. Grievant Stover claimed her designated spot at "Alan Hart's on Ten Mile," unchanged since 1993, was not safe because diesel fuel allegedly had been removed from her bus and because she injured her knee getting on or off her bus at the site. T2.8-9.

7. Grievant Farley's parking site had been altered at least twice since 1993 because the first designated site and a later assigned area were either unavailable or otherwise unsat isfactory. She claimed her presently assigned parking area at "Mr. Roush's building" in New Haven creates a transportation problem for her. T2.11.

8. At the level two hearing, Grievants asserted that other drivers were permitted to deadhead in order to park at safer, more accessible locations.

9. During the level two hearing, Grievants posed ques tions of Transportation Director Gene Haer as to why certain buses were presently parked at sites other than those designated in 1993. In every instance, Mr. Haer responded with reasonable reasons for approved changes. See T2.27-36.

10. Documents introduced by Grievants at levels two and four, i.e., copies of individual bus operators' 1993 letters of assignment and parking and other selected driving records, were inconclusive as to whether or not other bus operators received favored treatment over Grievants relative to parking assign ments. Rather, these documents simply established that some operators parked at various locations, including their own homes in some cases, and/or that some operators no longer parked at the parking areas previously designated in 1993.

MCBE argues vigorously that res judicata should apply at level four in this case because Grievants had an opportunity to litigate the matter in another grievance and, with respect to Grievant Stover, she had a case presently pending on the issue of insubordination because she refused to comply with the parking directive and instead parked her bus at her home. The bottom line is that Grievants have never had their favoritism

claim, relative to the parking assignments made in 1993 or thereafter, addressed or decided at level four.3 Therefore, MCBE's motion to dismiss this case is denied.

Unfortunately, for Grievants, they have not met their burden of proof that MCBE engaged in unlawful favoritism. That Grievants are not pleased with their present parking areas is not compelling evidence that everyone else has received favored treatment. Rather, the record supports that MCBE has made reasonable attempts to eliminate or reduce deadhead driving and to curtail transportation costs and not simply to accommodate its drivers with preferred parking sites.

3Generally, res judicata will be applied by the Grievance Board only when the grievance "involves the same parties, cause of action, relief requested, and factual situation as that of a prior matter" which has actually been decided by the Board. Woodall v. W.Va. Dept. of Transportation, Docket No. 93-DOH-393 (Feb. 2, 1994).

Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Favoritism is defined in W.Va. Code 29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferen tial, exceptional or advantageous treatment of another or other employees."

3. In order to support a showing of favoritism under

18-29-2(o)'s broad definition of the term, a grievant must initially establish that "[s]he is similarly situated, in a pertinent way, to one or more other employee(s)" who has/have been unjustifiably "treated with preference." Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1991).

4. Grievants failed to show that any of MCBE's bus operators have been granted parking designations, however accessible or otherwise more favorable in Grievants' view, that were not based upon MCBE's current transportation needs and circumstances.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing 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.

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NEDRA KOVAL

Administrative Law Judge

Date: February 28, 1995