DENNIS C. RUNYON and .

JAMES C. MARKLE, .

.

Grievants, .

.

v. . Docket Nos. 94-DOH-376 & . 377

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION/DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a grievance by Dennis C. Runyon and James C. Markle (Grievants) against the West Virginia Department of Transportation, Division of Highways (DOH), alleging discrimination in violation of W. Va. Code § 29-6A-2(d) in regard to their not being provided DOH vehicles to commute from the DOH headquarters nearest their residence to their place of employment, a benefit purportedly extended to other DOH employees holding the same job title. Grievants further allege that this discrimination is motivated, at least in part, based upon their Republican political affiliation. Grievant Markle's grievance was initiated on December 6, 1993, while Grievant Runyon filed his grievance on December 12, 1993. After their grievances were denied at Levels I and II, a joint hearing was held at Level III on May 12, 1994. On July 26, 1994,Fred VanKirk, Commissioner of the Division of Highways, denied the grievances at Level III. Thereafter, Grievants timely appealed to this Grievance Board where the grievances were duly consolidated on August 12, 1994, and a Level IV hearing was conducted in this Board's Charleston office on September 14, 1994. Upon receipt of Respondent's post-hearing submission on October 31, 1994, this matter became mature for decision. (See footnote 1)

DISCUSSION

Grievant Markle has held the position of Area Maintenance Manager since being transferred to Charleston in 1989. Prior to that time, he was the County Supervisor in Clay County. Grievant Markle testified that County Supervisor positions were eliminated on a statewide basis at that time. He further testified that all County Supervisors who were transferred to Area Maintenance Manager positions, with the exception of himself and Mr. Runyon, were provided with a DOH vehicle to drive to their place of employment from the DOH Headquarters nearest their homes. (See footnote 2) Grievant Markle specifically identified a "Mr. Hanlon" as one of the former County Supervisors who was provided a "commuting" vehicle upon becoming an Area Maintenance Manager.

Grievant Runyon testified that he was similarly transferred from County Supervisor in Boone County to Area Maintenance Manager in Charleston. He further testified that he had been promised a "commuting" vehicle at the time of his transfer but no vehicle was ever assigned. However, Grievant Runyon's testimony differed slightly from Grievant Markle in that the only former County Supervisors who were issued vehicles were the ones "that we have been in contact with." Grievants both indicated that they were registered as Republicans and acknowledged that they agreed to accept their transfers in 1989. However, Grievants were the only former County Supervisors transferred to Area Maintenance Manager positions in District One at Charleston. Grievant Runyon acknowledged that there are two other Area Maintenance Managers in District One, one of whom has a "commuting" vehicle assigned while the other does not.

DOH initially argues that since Grievants have been denied a vehicle to commute to their work site in District One since their transfer in 1989, this grievance was not timely filed in December 1993. If Grievants were simply grieving their transfer, DOH would have a valid defense as to timeliness. See Magnone v. Hancock County Bd. of Educ., Docket No. 15-87-007-3 (Sept. 3, 1987). However, W. Va. Code § 29-6A-4(a) permits an employee to file a grievance "within ten days of the most recent occurrence of a continuing practice giving rise to a grievance."

Grievants have never had a "commuting" vehicle assigned since they transferred to District One although the evidence indicatesthat they have made repeated requests, receiving varying responses that may best be summarized as "we'll see." The undersigned administrative law judge is persuaded by the evidence of record that failure to assign a "commuting" vehicle to each of the Grievants, under the circumstances here, (See footnote 3) constitutes a "continuing practice" within the meaning of §

29-6A-4(a). See Blankenship v. Summers County Bd. of Educ., Docket No. 92-45-133/134/135 (Nov. 30, 1992). Accordingly, Respondent DOH's defense of timeliness is rejected and this grievance will be considered on its merits.

Grievants complain that other DOH employees who are classified as "Area Maintenance Managers," the same job title held by Grievants, are assigned DOH vehicles which they are permitted to drive from a DOH headquarters or other facility near their homes, while Grievants do not receive such a benefit. Grievants submit that this represents discrimination against them by DOH, and further contend that this discrimination is politically motivated.

Discrimination is defined 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." W. Va. Code § 29-6A-2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

Applying this prima facie analysis to the facts presented here, Grievants have demonstrated that they are similarly situated to one or more other employees who are employed by DOH as Area Maintenance Managers. Likewise, the fact that DOH has not assigned them a state-owned vehicle for their use under terms comparable to other employees, represents detrimental treatment in a significant particular. See Sullivan v. Jackson County Bd. of Educ., Docket No. 93-18-369 (Jan. 26,

1994). (See footnote 4) However, Grievants' evidence falls short of meeting the third requirement for establishing a prima facie case.

DOH notes that state-owned vehicles are assigned in accordance with written policies set forth in Volume IV, Chapter 8, of the DOH's Administrative Operating Procedures (A Ex 6 at L III), andthat these policies only authorize assignment of such vehicles based upon job duties assigned to an individual and not the job title of the individual. Beyond demonstrating that their job title is the same as one or more DOH employees assigned a state-owned vehicle, Grievants have not met the third requirement for establishing a prima facie case by demonstrating that the assignment of vehicles is unrelated to the job duties of any employee allegedly receiving this benefit. The record here indicates that Grievants are now "district-based employees" and that such employees are only to be issued vehicles "for commuting to and from work" in accordance with the DOH Administrative Operating Procedures. A Ex 6 at L III. Beyond requiring that anyone holding the classification of Area Maintenance Manager must hold a valid West Virginia driver's license, the Area Maintenance Manager position classification specification does not indicate that all Area Maintenance Managers are necessarily assigned duties that qualify them for a "commuting" vehicle under the DOH vehicle assignment policy. See A Ex 3 at L III.

The undersigned administrative law judge has reviewed DOH's written policies on assignment of vehicles and finds that these policies are consistent with DOH's claim that the primary basis for assigning vehicles is the assigned job functions of the employee. Thus, the fact that one Area Maintenance Manager is assigned to snow removal duties and another Area Maintenance Manager's duties do not include snow removal, establishes a rational basis for differentiation in assigning a "commuting" vehicle for purposes of"emergency response" or similar job-related reasons. Grievants did not provide any credible evidence that this explanation was merely pretextual. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

It is noted that DOH offered a new theory at Level IV why some Area Maintenance Managers were issued vehicles and some were not. DOH's counsel presented evidence, primarily through cross-examination of Grievants, that former County Supervisors who declined to accept their transfers in 1989 may have been given "commuting" vehicles while employees who voluntarily accepted their transfers, such as Grievants, were not given this benefit. While this may have been a

prudent and pragmatic consideration at the time the transfers were effected, it does not relate to "the actual job responsibilities of the grievant[s] and/or the other employee(s)" as required by § 29-6A-2(d). Had Grievants established a prima facie case of discrimination, and DOH proffered this theory as the sole justification for its actions, Grievants would have prevailed. Thus, if DOH has modified its policies on assigning vehicles since this grievance was initiated, the employer is encouraged to review the assignment of vehicles to all Area Maintenance Managers, including Grievants, and determine if circumstances now warrant authorizing vehicles for Grievants and other similarly-situated Area Maintenance Managers.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. In 1989 Grievants Runyon and Markle were transferred from County Supervisor positions for Boone and Clay counties, respectively, to Area Maintenance Manager positions in District One of the Division of Highways (DOH) in Charleston.

2. Some former County Supervisors transferred to Area Maintenance Manager positions at other locations were issued state-owned vehicles which allowed them to commute to work at their new duty location from the DOH headquarters or facility nearest to their home.

3. Under DOH policies in effect at the time, such "commuting" vehicles may only be assigned to district-based employees if they perform certain duties which warrant issuance of such a vehicle. A Ex 6 at L III.

4. In addition to Grievants, at least one other individual employed in District One as an Area Maintenance Manager does not have a "commuting" vehicle assigned.

CONCLUSIONS OF LAW

1. In order to prevail, Grievants must prove the allegations in their complaint by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

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

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

3. Grievants did not establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in that they failed to demonstrate that other Area Maintenance Managers who were assigned "commuting" vehicles had substantially similar job responsibilities.

4. If, for the sake of argument, Grievants did establish a prima facie case of discrimination in regard to DOH's assignment of "commuting" vehicles to individuals employed as Area Maintenance Managers, DOH established legitimate, non-discriminatory reasons for its differentiation based upon the specific job duties of the personnel assigned vehicles. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which 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 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: February 23, 1995

Footnote: 1At the close of the hearing on September 14, 1994, the parties agreed that any post-hearing briefs would be postmarked not later than October 28, 1994. Inexplicably, Grievants' post-hearing submission was not submitted until February 15, 1995, and received in this office until February 16, 1995. Nonetheless, this submission was given appropriate consideration.

Footnote: 2Such vehicles will be referred to as "commuting" vehicles, as we are not addressing vehicles which are provided to employees for official use once they arrive at their assigned work location.

Footnote: 3The only remedy Grievants seek is prospective relief in the form of assignment of a "commuting" vehicle, consistent with their position that this is a continuing violation.

Footnote: 4Sullivan involved issuance of school-owned vehicles to school service employees. Although Sullivan arose under the education grievance procedure, W. Va. Code § 18-29-1, et seq., provisions in the education employee grievance procedure are generally parallel to those in the state employee grievance procedure. See Hays v. W. Va. Div. of Employment Sec., Docket Nos. 91-ES-505 & 92-ES-003 (Dec. 31, 1992).