JOHN L. FITZWATER

v. DOCKET NO. 95-MCVTC-427

JAMES RUMSEY TECHNICAL INSTITUTE

DECISION

This grievance was filed by John Lower Fitzwater, III, (Grievant), against his employer James Rumsey Technical Institute (JRTI). Grievant alleges that "I have been denied reimbursement of travel expenses for my approved Updating Workshop which was held in Texas. Other employees have been reimbursed mileage for similar training updates."

The parties agreed to submit this grievance on the record which consists of the Level I decision, the transcript and decision from Level II. The following facts are derived from that record.

BACKGROUND FACTS

Teachers at JRTI are required to take classes of instruction or on-site observations in order to update and maintain their certification. Apparently, to that end, Grievant, a teacher in carpentry and building construction, began planning a trip to view certain manufacturing facilities. Originally, Grievant planned togo to North Carolina to visit a Georgia Pacific Plant that made structural parts for homes. However, "this did not work out," so Grievant spoke with Mr. Bruce Dorsey, a member on Grievant's Craft Committee, and Mr. Dorsey indicated that Antrim windows and doors, located in Dallas, Texas, and the Williamsport Coldwell Manufacturing Company, which supplies parts for Antrim's products, also located in Texas, would welcome a visit. Grievant also set up visits in San Antonio, Texas, at the Crest Metal Doors, Inc., and Stevens & Son, Inc.'s door plant.

Grievant not only visited the aforementioned manufacturing facilities, but also visited various job sites of Antrim in Dallas and Houston. Grievant was accompanied on this trip by his wife and mother, and they visited his son, who lives in Houston, a couple of evenings.

Reimbursement for expenses for trips, such as Grievant's, that teachers take for "industry update"

are negotiated with their immediate supervisors and ultimately with the Director. Page two of Grievant's Exhibit No. 2, entitled "Agreement" dated June 9, 1995, states that travel expenses will not be reimbursed and page
three of the same exhibit provides for out-of-state subsistence of $35.00 per day.

After Grievant learned that he was not going to be reimbursed for mileage and "after finding out that the Berkeley County Board of Education did not have the forms," he wrote Mr. James Spears, Director of JRTI, a letter, dated August 1, 1995, requesting an informal conference concerning his travel expenses. Grievanttestified that "the first step was I understood the grievance procedure was to talk with the Director from the forms that I had in my Teacher Handbook. That was the immediate supervisor, an informal discussion and also questions before Level I whether you had an informal discussion with the Director. That has to be filled out before you start the Level I hearing." (T. p 10).

On August 2, 1995, a check was issued to Grievant in the amount of $533.70, which apparently covered the out-of-state subsistence and certain hotel expenditures, but nothing for travel (mileage) which is the basis of this grievance.

Director Spears responded by letter dated August 8, 1995, in which he scheduled a meeting with Grievant for August 11, 1995, at 9:00 a.m.

Harvey M. Bane, Consultant, WVEA, by letter dated September 7, 1995, informed Director Spears that Grievant had prevailed on his grievance by default since Director Spears had not responded to the grievance within the prescribed timelines established by W.Va. Code §18-29-4(a)(1). Director Spears responded to Mr. Bane by letter dated September 12, 1995, which states:

> On September 15, 1995, Grievant filed a formal grievance form at Level I. On that same date the Grievant's immediate supervisor denied the grievance stating that he was without authority to resolve the grievance. Grievant appealed and on September 18, 1995, Director Spears, without having held a hearing, by letter, to Mr. Bane informed him that the grievance was denied because the grievant had not timely filed his grievance.

Grievant, through his representative Mr. Bane, appealed the Level II decision to Level IV by letter dated September 21, 1995,which was received by the West Virginia Education and State Employees Grievance Board on September 25, 1995, said letter also contained a motion to remand the grievance to Level II for a proper hearing and decision. Whereupon, an administrative law judge remanded the grievance to Level II for a hearing by an Order dated October 31, 1995. On November

7, 1995, a Level II hearing was held by Director Spears who denied the grievance at Level II on November 8, 1995. By letter dated November 14, 1995, Grievant, through his representative, again appealed to Level IV and requested that a decision be rendered upon the record created at the lower levels. The respondent did not object to submitting the case on the record, and this case became mature on December 20, 1995, upon receipt of proposed findings of fact and conclusions of law from the parties.

Discussion

Grievant seeks reimbursement for mileage because he alleges that "other employees have been reimbursed mileage for similar training updates." (See footnote 1)

The inference from the record is that everyone involved in this grievance understands the "negotiation process" as it relates to scheduling a trip of this nature. The only explanation of saidprocess occurs within the testimony of Ms. Custer, at page 29 of the transcript, and is as follows:

> The trips that teachers take for industry update are negotiated with their supervisors and ultimately with the Director, then they submit to the state to see how much the state will pay, and then when they travel they come back and submit their expenses based upon what has been approved. I had nothing on Mr. Fitzwater, so I had to immediately go to the Director and say we have this request for reimbursement, what are we reimbursing.

Grievant freely acknowledges the fact that he was told that he would not be reimbursed for the full cost of the trip on June 9, 1995; six (6) full weeks before the scheduled trip. Grievant also testified that even if his expenses would not be reimbursed that he would have taken the trip anyway.

Grievant does not seriously pursue his allegation of discrimination. (See footnote 2) A prima facie showing of discrimination, under W.Va. Code §18-29-2(m), shall consist of Grievant establishing:

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

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> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him;

and,

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

If the grievant successfully proves a prima facie case, a presemption of favoritism exists, which respondent can rebut byarticulating a legitimate reason for its action. (See footnote 3) However, Grievant may still prevail if he can demonstrate the reason proffered by Respondent was mere pretext. See W.Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E.2d 490 (W.Va. 1989), Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

In this case, Grievant's claim fails for several reasons. First, Grievant failed to prove that he is similarly situated to other employees who may have received reimbursement for mileage. Second, Grievant failed to prove that any employee of Respondent has been treated with any type of preference which was not afforded to him. Third, Grievant failed to prove any inequity to him.

The following testimony is all that was elicited at Level II in reference to the allegation of discrimination/favoritism. During the Grievant's case-in-chief, at page 11 of the transcript:

Bane: Mr. Fitzwater, could you name any other employees or employee of James Rumsey - or do you have first hand knowledge who have received travel expense for a similar trip like yours?

Fitzwater: Yes - Paul Creek received reimbursement a few years ago. I know some of the others have either received air fare or mileage, I think. I don't know who all for example. But most everyone I know has been paid for the mileage.

Bane: Ok - can you think of any other ...

Fitzwater: I think Wayne Easton had taken a trip recently that he received the air fare.

Then on cross-examination, at page 19 of the transcript,

Grievant testified:

> Spears: ... You mentioned that Mr. Easton has also gone on a trip - how did he go?
>
> Fitzwater: I don't recall.
>
> Spears: Well you testified here a minute ago that he flew.
>
> Fitzwater: I think he did, I was told prior to that he was talking about driving, and one way or the other - I do know that Paul Creek drove. He told me that he did.

Fourth, even if Grievant established a prima facie case of discrimination, Respondent has given the following reasons which would rebut the inference: (1) Director Spears thought and established that there were closer updating workshops or seminars that Grievant could attend; (2) the most economical mode of transportation would have to be considered; (3) each trip of an employee such as this one is negotiated; and (4) the "subsistence rate" allowed increases from $25.00 to $35.00 per day.

Likewise, although not necessarily the same as discrimination (See footnote 4) , Grievant's allegation of favoritism must fail. In order to support a showing of favoritism under W.Va. Code §18-29-2(o)'s broad definition of the term (See footnote 5) , this Board has held that a grievant must initially establish that he is similarly situated, in a pertinent way, to one or more other employees who have been unjustifiably treated with preference. See Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1991).

Grievant did not establish that he was similarly situated to other employees who may have been reimbursed for mileage, nor did Grievant demonstrate how such reimbursement, or lack thereof, was unjustifiably a preference to another employee. Therefore, Grievant simply did not prove any of the

elements required to establish a claim of favoritism.

In addition to the foregoing narration and background historical facts, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has worked for JRTI for 23 years and currently teaches carpentry and building construction.

2. Grievant was allowed to visit manufacturing companies and work sites in Texas as a part of his "Updating Workshop" requirement.

3. Upon return from his trip, Grievant submitted two Berkeley County Board of Education Travel Expense Reimbursement forms (See footnote 6), seeking reimbursement for meals, hotel and mileage expenses.

4. Grievant asked for a conference with Director Spears to discuss being reimbursed for mileage on August 1, 1995.

5. Prior to the trip, Grievant was told by administrators at JRTI that he would be reimbursed only in the amount which was provided or reimbursed by the State.

6. At no time, prior to or after the trip at issue, wasGrievant told that his mileage would be reimbursed.

7. Grievant was advised on June 9, 1995, that mileage would not be reimbursed.

8. Grievant was reimbursed $533.70 for certain expenditures by a check issued on August 2, 1995.

Conclusions of Law

1. The legislative intent expressed in this section is to provide a simple expeditious, and fair process for resolving problems. Fayette County Bd. of Educ. v. Lilly, 184 W.Va. 688, 403 S.E.2d 431 (1991); Triggs v. Berkeley County Bd. of Educ., 425 S.E.2d 111 (W.Va. 1992).

2. The legislature did not intend the grievance process to be a procedural quagmire where the merits of the cases are forgotten. Spahr v. Preston County Bd. of Educ., 182 W.Va. 726, 391 S.E.2d 739 (1990).

3. Grievant made a good faith attempt to follow the procedural rules for filing a grievance by writing a letter to Director Spears and initiating a conference concerning the reimbursement of his expenditures. Therefore, the instant grievance was timely filed pursuant to the spirit and provisions of W.Va. Code §18-29-4(a)(1). Therefore, the Respondent's affirmative defense of timeliness is hereby DENIED.

4. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Napier v. Logan Co. Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

5. W.Va. Code §18A-5-4 provides, in pertinent part, that

> [a] county board of education may approve the attendance of any or all teachers at educational conventions, conferences, or other professional meetings of teachers on school days when in the judgment of the superintendent it is necessary or desirable. ... Further, the board is authorized to pay all or any part of expenses of any personnel whom it may designate to represent the board at any such professional or educational meetings or in visitation to another school system.

6. Discrimination is defined in W.Va. Code §18-29-2(m) 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".

7. Favoritism is defined in W.Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees".

8. Grievant failed to establish a prima facie case of discrimination under W. Va.Code §18-29-2(m).

9. Grievant did not show by a preponderance of the evidence that his failure to be reimbursed for mileage resulted from any form of favoritism prohibited under W. Va. Code §18-29-2(o).

10. Assuming that Grievant did establish a prima facie case of discrimination or favoritism, Respondent articulated legitimate, nondiscriminatory reasons for its actions sufficient to refute such charges.

11. Grievant failed to prove by a preponderance of the evidence that he was entitled to reimbursement for mileage as a matter of law.

12. Grievant failed to show a violation, misapplication or misinterpretation of any statue, policy, rule, regulation or written agreement relative to his reimbursement for mileage.

Accordingly, the grievance is DENIED.

DATED: 12/29/95 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE

Footnote: 1Grievant has failed to prove that paying mileage for a "negotiated" trip for an "Update Workshop" is a past practice of JRTI. However, it should be noted that evidence that an employer has deviated from an established past practice regarding personnel matters is not, in and of itself, sufficient to demonstrate wrongdoing on the employer's part. Cowger v. Webster Co. Bd. of Educ., Docket No. 92-51-348 (Mar. 12, 1993) and Justice, et al., v. W. V. Dept. of Health and Human Resources, Docket No. 91-HHR-255/277 (Mar. 11, 1993).

Footnote: 2The text of W.Va. Code §18-29-2(m) which defines discrimination appears in the Conclusion of Law section of this decision.

Footnote: 3While the burden of production may shift, the overall burden of proof never does. See Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).

Footnote: 4For a good discussion on the difference between discrimination and favoritism see Prince, v. Wayne Co. Bd. of Ed., Docket No. 90-50-281 (Jan. 28, 1991).

Footnote: 5The text of W. Va. Code §18-29-2(o) which defines favoritism appears in the Conclusion of Law section of this decision.

Footnote: 6Berkeley County is the fiscal agent for JRTI.