LINDA EASTHAM and LARRY EASTHAM

v. DOCKET NOS. 95-06-317/318

CABELL COUNTY BOARD OF EDUCATION,

D E C I S I O N

Grievants Linda Eastham and Larry Eastham each filed a grievance against the Cabell County Board of Education ("CBOE"), alleging:

> Violations of WV Code 18A-2-7, 18A-2-8, and 18-29-2, section m in regard to grievant's suspension for five working days without pay. The grievant was treated different than other employees being late for work.

The relief sought by each was compensation "for the wages lost and any benefits due", and that the suspensions be removed from their personnel files.

Grievants filed their grievances at Level IV of the grievance procedure on July 19, 1995, and the grievances were consolidated for hearing and decision. The Level IV hearing was held on August 18, 1995, and this matter became mature for decision on October 24, 1995, with receipt of the last of the parties' submissions of proposed findings of fact and conclusions of law.

Issues Presented

Several issues were presented by Respondents and Grievants. These issues will be set forth in this section and addressed in the Discussion below.

The first issue raised by CBOE was that these grievances were not timely filed. CBOE argued first, Grievants should have filed their grievances within five days of the date they were suspended by the superintendent, May 5, 1995, rather than the date in July 1995, when Grievants were notified that CBOE had ratified the superintendent's action. Second, CBOE argued the grievances were not filed within five days of the date Grievants received notice of CBOE's ratification of the suspensions. CBOE argued the five day period for filing at Level IV began to run as soon as Grievants knew of CBOE's action, not from the date they received written notice. CBOE further argued that it sent

written notice of CBOE's action to Grievants on July 7, 1995, and that receipt of the grievances by the Grievance Board on July 19, 1995, was an untimely filing. Grievants argued the grievances were timely filed and noted that the CBOE notice was defective, because it did not tell Grievants they could file a grievance or where to do so.

It appears Grievants are arguing they were denied a hearing before CBOE. This issue will be addressed below.

As to the discipline imposed, the charge is that Grievants were late on May 5, 1995, and they were on an Improvement Plan on that date as a result of prior tardiness. Grievants admit their tardiness on May 5, 1995, admit that they were on an ImprovementPlan on that date for prior tardiness, acknowledge that the Improvement Plan provided that the next time they were tardy they would be suspended, and that they were aware of this provision in the Improvement Plan. Grievants challenge only the severity of the penalty. (See footnote 1)

Linda Eastham stated that a five day suspension was too severe in her case, because she had only one previous incidence of tardiness, and other employees had not been suspended for tardiness. She believed a one or two day suspension was more appropriate based upon the discipline imposed upon other employees for tardiness. She pointed out that five days without pay amounts to a lot of money for over-sleeping twice. Mr. Eastham felt he should not have been suspended for more than three days. Grievants further argued they were treated different from other employees. CBOE argued the five day suspension was not excessive, because Grievants were on an Improvement Plan when they were late the second time. CBOE disputed Grievants' claims of different treatment.

The following findings of fact are necessary to the determination of the issues in this matter, and were properly made from the Level IV record.

Findings of Fact

1. Larry Eastham has been employed by CBOE as a regular bus operator for 17 years.

2. Linda Eastham has been employed by CBOE as a regular bus operator since 1993. Prior to that, she was a substitute bus operator from 1989 to 1993.

3. CBOE regular bus operators are required to report to work one-half hour prior to the time their buses are scheduled to leave the bus garage. Grievants' buses are scheduled to leave the bus garage at 6:30 a.m.

4. On February 21, 1995, Grievants were approximately one hour late in reporting to work, and 30 minutes late in getting their buses on the road. (See footnote 2)

5. On February 22, 1995, each Grievant was placed on an Improvement Plan. The deficiency noted on the Plans was that Grievants had reported to work 25 minutes late on February 21, 1995. (See footnote 3) The Improvement Plans were to be in effect through the end of May 1995. The stated expectation was that Grievants report to work on time. The Plan stated the next time Grievants were late, they would be suspended. 6. Gregory Porter, Director of Transportation, Patty Pauley, Supervisor of School Transportation, and Dwight Blake (See footnote 4) met with each Grievant on March 10, 1995, and went over the Improvement Plans and what was expected of Grievants. Grievants were not told how many days they would be suspended for a second offense.

7. On May 5, 1995, Grievants reported to work at 6:45 a.m., 45 minutes late, which made them 15 minutes late in getting their buses on the road. R. Ex. 19.

8. By separate letters, both dated May 5, 1995, Grievants were notified that each was being suspended for five working days without pay, effective May 8 through 12, 1995, for the second offense of being late. The letters notified Grievants they could request a hearing before CBOE within ten days. The letters did not inform Grievants they could request a Level IV hearing and appeal pursuant to W. Va. Code §§ 18-29-1, et seq. Grievants did not request a hearing before CBOE.

9. CBOE met on July 3, 1995, and ratified the superintendent's action of suspending Grievants for five days. Grievants were not notified of the CBOE meeting.

10. By separate letters dated July 7, 1995, Grievants were notified that CBOE had ratified the superintendent's suspension recommendation. The letters did not inform Grievants they could request a Level IV hearing and appeal pursuant to W. Va. Code §§ 18-29-1, et seq. The letters were placed in the mail on July 7,1995, certified. Grievants' representative was not sent a copy of the letters. Grievants did not know the date they received the letters. They sometimes have trouble with their mail being delivered in a timely fashion.

11. Mr. Eastham was aware that Grievants were on the CBOE meeting agenda for July 3, 1995, and had been told sometime shortly after the meeting by a Principal at a Cabell County School, that the suspensions had been ratified by CBOE.

12. Grievants' representative signed the grievance forms on Grievants' behalf on July 18, 1995, and they were stamped received by the Grievance Board on July 19, 1995.

13. CBOE does not have a written policy on employee tardiness. As the new Transportation Director, Ms. Pauley's current policy is to give one verbal reprimand. The second offense would warrant a plan of improvement, and the third time suspension. 14. Mr. Eastham had a history of reporting to work late in the early 1980's, but had not reported to work late since 1984.

15. Prior to 1995, Mrs. Eastham had never reported to work late.

16. When evaluated on March 16, 1995, Mrs. Eastham received ratings of "good" or "excellent" in every category except promptness, and cooperation with bus aides. She received a rating of "below average" in promptness, and an "NA" in cooperation withbus aides. (See footnote 5) Prior to this evaluation, Mrs. Eastham had received satisfactory evaluations.

17. When evaluated on March 16, 1995, Mr. Eastham received an "average" rating in four categories, and ratings of "good" or "excellent" in every other category except promptness, and cooperation with bus aides. He received a "below average" rating in promptness, and an "NA" in cooperation with bus aides.

18. It is important that a bus leave the garage at the scheduled time, because children are standing outside waiting for the bus to arrive at a particular time, and are exposed to the elements and to traffic hazards while waiting.

19. Kim Frye is a bus aide for CBOE with a record of being late to work. However, except for one occasion, she has always arrived before the bus is scheduled to leave. She has received a reprimand for her tardiness, and on the one occasion when she did not arrive before the scheduled time for the bus to leave, her pay was docked for the day.

20. Two weeks prior to February 21, 1995, Roger Clagg was tardy, and was 30 minutes late picking up students. He received a verbal reprimand. Grievants were told when they were placed on an Improvement Plan that, from then on, all employees who were late would be placed on an Improvement Plan. Okey Bates, Jerry Adkins and George Picard were each late once after that, and were not placed on an Improvement Plan. Each received either a verbalreprimand or no punishment. None of these employees was so late that his bus left the garage late.

Discussion

A. Timeliness of the Filing.

The burden of proof is on the party asserting that a grievance was not timely filed to prove this

affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

CBOE first argued that the grievances were not timely filed because Grievants had five working days from receipt of the May 5, 1995 suspension letter to file their grievances. That letter represented notice of the superintendent's action, not CBOE's action. A county superintendent's authority to suspend an employee is temporary only, pending a hearing, and is subject to approval by the board of education. W. Va. Code §§ 18A-2-7, 18A-2-8. In this situation, Grievants were entitled to the opportunity for hearing before CBOE before filing their grievances. See Duruttya v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40 (W. Va. 1989); Wirt v. Bd. of Educ. of County of Mercer, 192 W. Va. 568 (1994); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

CBOE's argument that Grievants had to file their grievances within five working days after hearing by word of mouth that the suspensions had been ratified by CBOE, is rejected. W. Va. Code § 18A-2-8 allows grievants five days from receipt of written notice to file a grievance. See also, Morefield v. Mercer County Bd. of Educ., Docket No. 91-27-481, 482 (Aug. 19, 1992). CBOE finally argued that the grievances were not filed within five working days of receipt of the July 7, 1995 suspension letters. However, no evidence was presented to establish the key date, when Grievants received these letters, even though CBOE had sent the letters certified mail. Mr. Eastham testified Grievants sometimes do not receive their mail in a timely fashion. CBOE has not met its burden of proving that the grievances were not timely filed after receipt of the letters. See Hale and Brown, supra.

Finally, neither the May 5 or July 7, 1995 letters, notified Grievants of their right to request a Level IV hearing, or instructions on where to file their grievances. CBOE cannot assert the grievances were not timely filed when it failed to provide this notice to Grievants. See Duruttya, supra.

B. Notice of Right to a Hearing Before CBOE.

Grievants were entitled to a hearing before CBOE prior to its decision to ratify the temporary suspension. W. Va. Code § 18A-2- 7. (See footnote 6) See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Wirt v. Bd. of Educ. of County of Mercer, 192 W. Va. 568 (1994); May v. Cabell County Bd. of Educ., Docket No. 92-06-438 (May 20, 1993). Although Mr. Eastham became aware sometime on July 3, 1995, that Grievants' suspensions were on the agenda, Grievants were not notified of the July 3, 1995 CBOE meeting. Grievants were, however, notified on May 5, 1995, that they could request a hearingbefore CBOE. Grievants declined to make a request for a hearing,

because they felt it would be futile. The question is whether this requirement that they could have a hearing only if requested within ten days amounts to an opportunity for hearing. Grievants presented no evidence that this requirement was unduly burdensome, or in any way obstructed their opportunity to a hearing. The undersigned finds that Grievants were not denied due process.

Grievants were entitled to be given the opportunity to respond to the charges before CBOE, either orally or in writing. W. Va. Code § 18A-2-7. A full-blown hearing was not required. See Wirt supra.; Scragg v. W. Va. Bd. of Directors, Docket No. 93-BOD-436 (Dec. 30, 1994); and, May, supra. Grievants were given an opportunity to respond to the charges before CBOE, and chose not to do so.

C. Penalty Imposed.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

In this case, the Improvement Plans made it clear to Grievants that tardiness was prohibited, even though CBOE had no written policy in place. Both Grievants were long time employees withsatisfactory evaluations prior to 1995, and even the 1995 evaluations rated the Grievants as good to excellent employees in most areas.

Grievants presented evidence that other employees who had been late once had received a verbal reprimand, rather than being placed on an Improvement Plan. This evidence is not helpful, because it goes to the punishment for a first offense, not the punishment for a second offense. One bus aide who was late repeatedly was docked a days' pay when she was so late that the bus left the garage without her. (See footnote 7) This incident cannot be compared to Grievants' tardiness, because their buses cannot leave the garage without them. When they are more than 30 minutes late, their buses will not be running on schedule. Even Grievants thought the suspensions should have been for more than one day.

In Grievants' jobs tardiness directly affects the safety of the children they are transporting. CBOE made it clear to Grievants that it was critical they be on time. Grievants were given clear direction that they were not to be late again, and that if they were, they would be suspended. Nonetheless, while the Improvement Plan was still in place, Grievants once again were so late that their buses were 15

minutes or more behind schedule. Even with Grievants' long work records and satisfactory evaluations, the undersigned cannot find the penalty imposed to be clearly excessive. To the contrary, the evidence shows Grievantsknew how to take those basic actions necessary to assure they did not over-sleep, yet failed to do so.

Finally, Mr. Eastham had been disciplined in the early 1980's for repeated tardiness, while Mrs. Eastham had never been tardy before 1995. (See footnote 8) The undersigned finds that it was not unreasonable for CBOE to disregard Mr. Eastham's record from 11 years before, and assess the same penalty to both Grievants.

D. Differences in Treatment - Discrimination.

W. Va. Code § 18-29-2(m) defines discrimination 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (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.Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case of discrimination has been established, a presumption of discrimination exists which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievants have failed to establish that they were treated in a manner different from that of other employees to their detriment; and have, therefore, failed to establish a prima facie case of discrimination. Grievants established that other regular bus operators were given verbal reprimands for one instance of tardiness, whereas Grievants were placed on Improvements Plans. However, none of the other bus operators were late twice as were Grievants. CBOE did not have to place any

employee on an Improvement Plan prior to imposing suspension as a penalty, and could have suspended any of these other bus operators had they been late a second time. Ms. Frye, the bus aide, was, in fact, docked one days' pay for her tardiness, and she was not on an Improvement Plan at the time.

The discussion is supplemented by the following Conclusions of Law.

Conclusions of Law

1. The grievances were timely filed. 2. In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). CBOE proved the charges against Grievants.

3. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

4. The penalties imposed were not clearly excessive under the circumstances.

5. Grievants were provided the opportunity to respond to the charges before CBOE.

6. Grievants failed to establish a prima facie case of discrimination. Grievants were not, to their detriment, treated in a manner different from other employees.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 9, 1996

Footnote: 1

Grievants also asserted they should not have been placed on an Improvement Plan for a first time offense in February 1995, because other employees were not placed on an Improvement Plan after reporting late one time. The undersigned ruled at the hearing that the issue raised by this grievance was whether the suspension was proper, and that the issue of whether Grievants should have been placed on an Improvement Plan could not be addressed in this grievance.

Footnote: 2

Linda and Larry Eastham are husband and wife, and ride to work together.

Footnote: 3

CBOE's Director of Transportation at this time was Gregory Porter. On July 19, 1995, Patty Pauley became CBOE Director of Transportation. Mr. Porter was not called to testify. Ms. Pauley could not explain why the Improvement Plans stated Grievants were 25 minutes late, when in fact they had been one hour late.

Footnote: 4

The record does not identify Mr. Blake's position with CBOE.

Footnote: 5

While there is some discussion in the record about a "not acceptable" rating, the record does not clearly reflect the meaning of the rating "NA" in the category cooperation with bus aides.

Footnote: 6

"The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board." W. Va. Code § 18A-2-7.

Footnote: 7

Ms. Pauley rode the bus herself when it became apparent that Ms. Frye was going to be late.

Footnote: 8

CBOE asserted that Grievants had been late in reporting they were taking leave on an in-service training day in December 1995. While Mr. Eastham should have requested his annual leave 24 hours in advance as required by CBOE, Mrs. Eastham was requesting leave to be with her sick child, and reported in as soon as possible on that date. There was no indication that Grievants were punished. This incident is a case of Mr. Eastham not following proper procedure, not an

instance of tardiness, and was not considered by the undersigned in this decision.