ROGER MCVICKER, .

Grievant, .

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v. . Docket Number: 95-20-339

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KANAWHA COUNTY BOARD OF EDUCATION, .

Employer. .

D E C I S I O N

Roger McVicker, Grievant, is an employee of the Kanawha County Board of Education (KCBE). He was employed as a Bus Operator until his termination from the position by the KCBE on January 31, 1995. He filed a grievance with this Grievance Board on February 6, 1995, pursuant to the provisions of West Virginia Code §§18-29-1, et seq., challenging his dismissal. By decision dated June 5, 1995, the Undersigned granted the grievance and remanded the case to the KCBE requiring it to evaluate the charges sustained against Grievant and to reassess the penalty imposed. By letter of July 21, 1995, Grievant's attorney was notified that the KCBE had decided to demote Grievant from his position of Bus Operator and assign him to the classification of Custodian, along with imposing upon him a twenty-day suspension without pay. Grievant now challenges the appropriateness of this adverse action by appealing to the Grievance Board. (See footnote 1)

Grievant contends that the penalty imposed was too severe given the nature of the established wrongdoing; therefore, the KCBE abused its discretion. He further asserts that his demotion is too severe a penalty because it requires that he be paid pursuant to a lower pay scale, and because he

no longer has seniority in his current assignment. He contends that the discipline imposed upon him is evidence of discrimination or disparate treatment because of the length of the suspension, and because no other KCBE employee has been demoted because of established misconduct. (See footnote 2) The KCBE contends that the discipline imposed was appropriate given the number of original charges proven, the nature of the misconduct and Grievant's disciplinary history.

In the June 1995 decision, it was concluded the KCBE had established by a preponderance of the evidence that Grievant habitually did not open his bus door, while at a complete stop, prior to crossing railroad tracks. This was found to be in violation of applicable regulations and the KCBE's training for Bus Operators. It was found that he had expelled a student passenger from his bus without following the appropriate county procedure. And, it was established that he had lost his temper and used foul language while driving bus more than once. In 1990, Grievant was given a written warning for having usedinconsistent and inappropriate discipline procedures and inappropriate language. In 1991, he was suspended for five days for use of inappropriate language, using tobacco products on his bus and for having failed to stop at a stop sign.

Grievant's claim of discrimination (often referred to disparate treatment in cases where discipline has been imposed) will be addressed first. (See footnote 3) It is recognized that mostly, like penalties should be given for like offenses, and that employees should be treated uniformly unless a consideration of their job duties support a difference in treatment. In analyzing this type of case, it is helpful to look to other jurisdictions' discussions on the doctrine of disparate treatment. In these cases, the burden is on the employer to come forward with a reason why a difference in treatment exists once the grievant identifies a disparity in the result for the same offense. Drummer v. General Services Administration, 22 MSPR 432 (1984). Only when the established misconduct is sufficiently egregious is the disparate treatment doctrine immaterial. In other words, if an employee's punishment is appropriate to the seriousness of the offense, an allegation of disparate treatment presents no basis for reversal. Quander v. Dept. of Justice, SF07528311002 (1984). An agency may impose valid sanctions that are different if its decision is based upon management's full consideration of all relevant factors. Gilmore v. Dept. of Army, 7 MSPB 155 (1981).

For an employee to prevail on a claim of disparate treatment, he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more seriousthan that with which the

grievant is charged. Clark v. Dept. of Navy, 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. Clancy v. Dept. of Navy, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. Rohn v. Dept. of Army, 30 MSPR 157 (1986).

Here, Grievant contends that his penalty should be decreased. He argues that an appropriate penalty would be a ten-day suspension without the accompanying demotion. He bases his argument on a comparison of his penalty to that of other employees within the county who have been disciplined since 1990. The only evidence presented to support such a comparison is a documented, but brief summary of all adverse action taken by the KCBE. (See footnote 4) This summary contains an office file number, a stated reason for the discipline of usually five words or less and the penalty imposed. Grievant draws direct attention to the fact that one Bus Operator has been suspended for three days for "neglecting to make proper stop at railroad crossing and report known road hazard." He also compares his penalty to an employee who was suspended for five days for insubordination (improper language), and an employee who was suspended for 10 days for making inappropriate comments during a basketball practice.

Grievant's claim must fail. He has not presented sufficient evidence upon which it can be concluded that other employees have been given lesser discipline for the same orsimilar misconduct. Grievant's demotion and suspension were based upon three instances of misconduct, one of which was a repeated violation of instructions and policies. He has not presented any evidence to establish that other disciplined employees had a substantially similar history of discipline. Finally, he has not proven that other employees charged with the same responsibility have engaged in similar misconduct. Grievant has simply made a cursory allegation that he has been treated unfairly; however, the evidence does not establish that the KCBE failed to consider all of the relevant facts in imposing a penalty upon him, in comparison to its past imposition of punishment.

It must now be determined whether the KCBE abused its discretion in imposing a penalty upon Grievant that was too severe for the offenses charged, then sustained. The imposition of a penalty on an employee requires a review of the facts and an exercise of administrative discretion. Generally, such an exercise of discretion can be found arbitrary and capricious only if the board did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem,

explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). In this case, it cannot be concluded that the KCBE abused its discretion by imposing a penalty upon Grievant that was too severe, when compared to the misconduct established and his prior disciplinary record.

Grievant was disciplined based upon two of the three original charges that were proven in the previous case. He was also disciplined based upon what was perceived as an intentional refusal to comply with training and instructions given to him concerning theproper procedures Bus Operators are to use upon encountering railroad tracks. Apparently, the Board demoted him based upon its concern for the safety and welfare of the students for whom he would be responsible if he would continue to drive a school bus. The Board has presented a reasonable explanation for the discipline imposed which, although strict, cannot be found too severe. Grievant has failed to prove by a preponderance of the evidence that his discipline was the result of an abuse of discretionary decision-making authority. Therefore, its decision was not a result of arbitrary or capricious decision-making or discrimination.

Conclusions of Law

1. Grievant has failed to meet his burden of proving by a preponderance of the evidence the affirmative defense of discrimination (disparate treatment).

2. Grievant has failed to establish by a preponderance of the evidence that the discipline imposed upon him was too severe or the result of an abuse of the KCBE's discretionary authority.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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.

ALBERT C. DUNN, JR.

Administrative Law Judge

February 9, 1996

Footnote: 1

Grievant appealed to level four on July 31, 1995, pursuant to W. Va. Code §18A-2-7. An evidentiary hearing was held on January 2, 1996, at this Board's Charleston, West Virginia office. Only the parties' counsel attended this hearing. They stipulated to the admissibility of a document and presented their legal arguments. Notice is taken of the facts established in the first case.

Footnote: 2

Grievant does not contest whether a board of education may, as a form of discipline, demote an employee from one classification to another as a matter of law.

Footnote: 3

Discrimination is defined by 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."

Footnote: 4

This document, admitted as a joint exhibit, is not an official KCBE document but was created for purposes of the hearing upon request of Grievant's counsel.