

KAREN SUE CONNER,

Grievant,

v. Docket Number: 94-01-201

BARBOUR COUNTY BOARD OF EDUCATION,

Employer.

DECISION

On January 24, 1994, Karen Sue Conner (Grievant) requested an informal conference with her supervisor pursuant to the provisions of the Grievance Procedure for education employees, West Virginia Code §§18-29-1, et seq., to discuss the following issues: "Bus not repaired when parts are in stock; some drivers don't have to make all of run but I do; threats; destruction of personal property by subs; etc.; favoritism, harassment, discrimination, reprisal, retaliation, etc." After Grievant and Director of Transportation Charles Zinn met to discuss these issues, a formal grievance was filed at level one alleging as follows: "Favoritism, harassment, discrimination, reprisal/retaliation and damage to personnel property and failure to provide requested public information, etc." After that, a level one decision was issued by Mr. Zinn denying the grievance and appeal to level two was perfected.

A level two hearing was held on March 22, 1994, and concluded on April 6, 1994. At this hearing, a myriad of issues and allegations was discussed and argued, including the assignment of extra-duty bus runs to regular and substitute bus operators. Grievance evaluator Sharon Harsh issued the following decision on April 25, 1994:

Exhibits and testimony taken at the level II hearing produced conflicting, and sometimes, unsubstantiated evidence regarding favoritism, harassment, discrimination, reprisal or retaliation toward the grievant. It is recommended, however, that the grievant be issued a new pen and seating chart to replace the loss of personal property. It is further recommended that county and state policies and regulations be followed in providing copies of public documents and in establishing voting procedures when creating separate lists for calling drivers on extra-curricular trips.

The level one decision is affirmed.

Grievant appealed to level three but the Board waived participation in the grievance pursuant to W.

Va. Code §18-29-4(c). She then appealed to level four on or about May 19, 1994, and requested that a hearing be held on the issues raised; such was held on October 6, 1994, in the Grievance Board's office in Elkins, West Virginia. [\(See footnote 1\)](#) At the conclusion of the level four hearing, the parties were given time to submit post-hearing briefs.

The case became mature for decision upon receipt of Grievant's brief on November 9, 1994. Prior to a decision being issued, Grievant's employment was terminated on January 23, 1995. Grievant appealed her termination directly to level four. The instant case has been held in abeyance pending resolution of the dismissal grievance as most of the claims at issue would be rendered moot upon a denial of that grievance. By decision dated September 30, 1995, Grievant's appeal of her termination was granted in part and denied in part. [\(See footnote 2\)](#) It was ordered that Grievant be reinstated to employment with only a suspension being deemed an appropriate penalty for the established wrongdoing. Therefore, this case must now be decided.

Nature of Grievant's Claims

As is apparent from the statement of grievance at level one, Grievant makes several allegations of wrongdoing, most, if not all, on behalf of Mr. Zinn. At the beginning of the level two hearing, Grievant submitted as an exhibit a statement, in narrative form, detailing her various complaints. The Undersigned has derived the following list of grievances (complaints) from the record developed through level three:

1.

A particular bus operator is being given extra-duty work, out of rotation, violating Code §18A-4-8b.

2.

Mr. Zinn has followed Grievant while making her bus runs.

3.

Mr. Zinn has prevented mechanics from fixing the automatic chains on Grievant's bus.

4.

Grievant was ordered to complete her bus run on a day when the roads were icy and snow covered but other drivers were not required to do so.

5.

Mr. Zinn has verbally threatened Grievant.

6.

Grievant had her seating chart and a pen thrown out of her bus window by a substitute.

7.

Mr. Zinn has not communicated changes in student pick-ups and drop-offs to Grievant.

8.

Neither Grievant nor her husband (also a bus operator for the county) have been given notice of the opportunity to take extra-duty trips three to four days in advance.

9.

Extra-duty trips have been offered and assigned to substitutes when they should have been offered to regular drivers.¹⁰

When asked, Mr. Zinn refused to provide Grievant with copies of documents relating to extra-duty assignments.

11.

Mr. Zinn told other bus drivers that Grievant has videotaped their driving, causing dissension in the work place.

12.

Other drivers are cussing in the presence of students and not being disciplined.

13.

Other drivers are not using safe driving techniques when picking up students at the elementary school in Phillipi and are not being disciplined.

14.

Various extra-duty bus runs are not being posted for bid as required by Code §18A-4-8b.

15.

Grievant has been reprimanded for missing a turn-off while other drivers have not been disciplined for failing to report accidents.

16.

Some drivers are not being disciplined for failure to wear their seat belts.

17.

Some drivers are not being disciplined for using tobacco products while on duty and on school property.

18.

Grievant has not been presented with a National Safety Counsel pin that she has earned.

19.

Some drivers have been given preferential treatment by Mr. Zinn in the form of better bus routes, newer buses and by having received paid for lunches and dinners.

20.

Grievant has been retaliated against in violation of the West Virginia Whistle Blower statute.

In essence, Grievant claims that these facts and allegations establish she has been the victim of discrimination (disparate treatment), favoritism, harassment, retaliation and/or reprisal. She also maintains that extra-duty work is not being offered and awarded to bus operators in rotating order based on seniority as required by Code §18A-4-8b. Finally, she maintains that the safety of the students is at risk due to the procedures used by the Transportation Department, relating to the delivery and pick-up of children in front of Philippi Elementary School.

At the level four hearing, Grievant's case-in-chief mainly consisted of her attempt to review the transcript of the level three hearing and refer to instances where she contends either Mr. Zinn lied or engaged in behavior consistent with her theory that he has been harassing her. She also admitted into evidence documents she claims establish that extra-duty runs have not been properly awarded to drivers since July 1993, creating a snowball effect. She also attempted to present evidence concerning claims not previously addressed at level three that have been or currently are issues in other grievances. Any evidence of this nature was excluded.

Grievant requests the following relief: That she and her husband be granted back pay for the extra-duty runs they should have been given; that assignment sheets for extra-duty runs be posted for all drivers to review; that all regular drivers be offered extra-duty work prior to substitutes; that the

Employer adopt a policy clearly stating the law prohibits the use of tobacco and foul language, and that a monitoring system is implemented to regulate this policy; that all bus operators be required to wear their seat belt; that all job postings be made to comply with Code §18A-4-8b; that a policy be adopted to cover the assignment of new buses to drivers; that Grievant be paid for the time she spent on Saturday or Sunday checking the condition of the roads during the winter; that she be awarded a "stick on pen" and paper, and further, that she be awarded four hours' pay for work preparing her seating chart; that the Employer take steps to assure that she is given an opportunity to maintain her bus operator instructor's certification up-to-date; that all harassment, threats and cruel remarks cease and desist, and that she be compensated for mental, emotional and physical distress caused by such conduct; and finally, that all school laws and regulations are strictly complied with in favor of the employees they are designed to protect.

The Board maintains that Grievant has failed to establish her claims of harassment, favoritism or retaliation/reprisal by a preponderance of the evidence. With regard to the tire chains on Grievant's bus, it contends the evidence shows they malfunctioned on at least one occasion but were timely fixed by a mechanic. It argues that the assignment of extra-duty work has been in conformance with Code §18A-4-8b, and that substitutes have only been used when Grievant has been off work due to illness. Finally, it admits that Grievant's pen and three sheets of paper were destroyed by a substitute and agrees to supply Grievant with the replacement of these materials.

Discussion

To begin, a grievance is defined in W. Va. Code §18-29-2(a), very generally, as follows:

[A]ny claim by one or more affected employees of the . . . county boards of education . . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieve application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Regardless, a grievant must still have standing to challenge an employer's action in order to invoke the jurisdiction of this Grievance Board. With the exception of claims alleging that the health and safety of students or employees are at issue, the Grievant must have suffered some personal injury.

Akers v. Raleigh Co. Bd. of Educ., Docket No. 94-41-1076 (Apr. 27, 1995). Finally, except for cases involving disciplinary or discharge actions, a grievant bears the burden of proving the facts supporting her claims by a preponderance of the evidence. W. Va. Code §18-29-6; Kent v. Jackson Co. Bd. of Educ., Docket No. 90-18- 418 (Jan. 25, 1991).

Regarding the allegations numbered 12, 16 and 17 above, Grievant does not have standing to contest the Board's action or lack of it in dealing with the behavior of other busdrivers. Grievant has suffered no direct, personal injury from other bus operators cussing, not wearing their seat belts or using tobacco products on school property, if indeedm these allegations are true. Contrary to Grievant's belief, the grievance procedure was intended to be used to address complaints employees have against their employers, not complaints from employees against their co-workers. The grievance procedure should not be used as a tool to police the work place.

Concerning Grievant's allegation that Mr. Zinn has not assigned extra-duty bus runs pursuant to the seniority based rotation list, the evidence presented is not sufficient to allow the Undersigned to make any findings one way or the other. Grievant, as a senior bus operator, must be aware that the offering and assigning of extra-duty runs is necessarily affected by many uncontrollable factors such as, but not limited to, the length of the run, the day the run is made known to the Transportation Department, the area of the run and the availability of the drivers. Notice is taken that an extra-duty assignment may be offered to more than one driver before the run is accepted. Also, the school may attempt to contact drivers but may be unsuccessful.

The charts prepared by Grievant, the trip tickets and the seniority lists cannot prove that certain drivers have or have not been properly offered any number of extra-duty runs during a school year. Grievant contends specifically that at least two errors (in July and December 1993) have occurred in the assignment of these runs, resulting in harm to both her and her husband. The evidence presented is not sufficient to allow the Undersigned an opportunity to resurrect what should have been the entire 1993-1994 school year's assignment of extra-duty work to bus operators, to determine the cumulative effect that thealleged errors would have had on Grievant's ability to accept extra-duty work. Grievant's allegations listed as 1 and 9 above are not supported by the evidence.

Concerning Grievant's contention that she has not been provided three to four days notice of the availability of extra-duty work, and that Mr. Zinn has not been posting extra- duty or supplemental bus runs for bid, these claims must also be denied. The Undersigned is unaware of any legal

requirement that these things occur as Grievant alleges and she has failed to present support for her arguments. Notice is also taken that Mr. Zinn may not always have three to four days notice of the request for extra-duty work; therefore, he could not comply with Grievant's request. Further, extra-duty bus runs are not "jobs" as referred to in Code §18A-4-8b and are not required to be posted for competitive bid. The work to which Grievant refers is made by assignment and not by the hiring of employees. Therefore, Grievant has failed to meet her burden of proving items numbered 8 and 14.

The same ruling is applied to Grievant's complaint (number 18) that she has not been provided with a National Safety Council pin. There is no evidence to establish that Grievant is entitled to receive this pin at a certain time or that she has been denied the presentation of this pin based upon any ill motive on behalf of Mr. Zinn. This assertion of fact, along with the complaints concerning Grievant's missing pen and seating chart (6), and Mr. Zinn's communication or lack of it concerning her student assignments (7), are prime examples of the type of complaints that should be resolved by communication between the parties and not through the grievance procedure. The Grievance Board will not attempt to become involved in every minor detail of the day-to-day operations of a school system that is not controlled by some law, policy, rule, regulation or written agreement. Grievant contends that Mr. Zinn has harassed her. She attempts to establish this through various allegations and inferences from facts she believes exist. [\(See footnote 3\)](#) She also seems to contend that Mr. Zinn is harassing her in retaliation for having filed many grievances. Allegations numbered 2, 3, 4, 5, and 11 are related to this complaint.

It is apparent from the record that consists of the testimony given at both level hearings that Grievant bases many of her complaints upon hearsay, as opposed to on that which she has personal knowledge. Many statements of fact are only supported by her inferences from certain events. For example, she contends that Mr. Zinn has followed her; however, she admits she was only told this. With regard to the repair of her bus's chains, she contends that it was Mr. Zinn's fault that her chains were not fixed earlier than they were, although there is no evidence to support such a finding.

With regard to the issue of Mr. Zinn following Grievant, even if he has followed her, this conduct would not seem inherently objectionable because he is the Transportation Director and Grievant's supervisor. Concerning the chains, the evidence establishes that Mr. Zinn requested that the mechanics fix the chains on the buses based upon how long the drivers had been waiting for them to be fixed. The evidence does not establish that Grievant has had trouble with her chains because Mr.

Zinn wanted her to have non-working chains.

Grievant asserts that Mr. Zinn has attempted to cause dissention in the work place by telling the other drivers in the garage that she has videotaped them. First, she states that she knows he has done this because he learned that she had videotaped drivers during a grievance hearing. She then states that she asked the grievance evaluator if she had said anything to this effect and was told no; therefore, she infers that Mr. Zinn had to be guilty. In this instance, Grievant is correct. Mr. Zinn stated that he told the drivers Mr. Conner was videotaping them; however, the Undersigned is unaware of any prohibition against Mr. Zinn telling his employees that a co-worker is videotaping their activities to get them into trouble. In any event, this conduct is not contrary to the demeanor expected of a transportation director.

Grievant alleges that once she was required by Mr. Zinn to complete her entire bus run on a day during the winter of 1994 when the roads were snowy and icy, although other drivers were not required to complete their runs. Again, this is an example of the type of general allegation made, unsupported by dates and times. It is obvious that the parties assume the Undersigned is aware of facts which have not been made part of the record. Further, Grievant testified that she learned another driver had not made her entire route by virtue of information from students and parents. In response to this allegation, Mr. Zinn testified that he had checked the three bus routes at issue the night before school and decided that the roads were passable. Thereafter, he said that he learned in the morning part of another driver's route was icy; therefore, he did not require her to complete that portion of the run.

The record supports the simple conclusion that on the date in question, Mr. Zinn made a decision concerning the condition of the roads in Barbour County. He then assigned Grievant the responsibility of completing her normal run. This is not an abuse of his discretion or evidence of harassment. To believe Grievant's argument, one would have to believe that Mr. Zinn wanted Grievant to drive her entire route, knowing that it was dangerous. Otherwise, there is no reason to question why Grievant had to complete her run and another driver did not. No inferences from the evidence can support such a conclusion. It would be unconscionable for Mr. Zinn to risk the safety of the students on Grievant's bus to make her job more difficult or to harass her.

Grievant maintains that Mr. Zinn has threatened her by making a statement similar to the following: I cannot continue with this dissension, it's either you or me and I don't know about you but I

like my job and plan on keeping it. She also contends that Mr. Zinn has made disparaging remarks about her during meetings they have had. Regarding the threat, Mr. Zinn testified that he was not threatening Grievant but merely said he liked his job and he was going to assure, as a part of his job, all of the bus operators, including Grievant, followed the laws and policies they are required to follow. He testified that Grievant took his statement "out of context."

The Undersigned is aware of the tension and anxiety many participants experience during the grievance process. However, the tone and atmosphere during the processing of Grievant's grievances have been far from normal. Unfortunately, but typically, in many of Grievant's hearings, the parties have spent more time arguing, interrupting or talking over each other and making accusatory statements than presenting legitimate testimony and evidence. Since 1987, at least 12 grievances filed by either Mr. or Mrs. Conner have been decided by this Grievance Board. [\(See footnote 4\)](#) This figure does not reflect the number of other grievances either settled or pending as of the date of this decision. While the Undersigned is in no way implying that either Grievant or her husband intentionally abuse the grievance process, it is painfully clear that the working relationships between Grievant and others within the Board's Transportation Department (peers and supervisory personnel) have become strained. Regardless, tempers have tended to flare during meetings and hearings, and statements are made which are not appropriate. The Grievance Procedure was intended to provide a mechanism for a simple and quick resolution of disputes between employees and employers in the work place; here, the conduct of the parties during the process has either created or enhanced the problem. [\(See footnote 5\)](#)

The Undersigned believes that Mr. Zinn did make a statement similar to the one attributed to him; however, the context of the statement is not known because it was not said at the level three hearing in this case. It is also understood that Grievant interpreted this statement as a threat, though it may not have been intended as such. Grievant is correct that retaliation for participation in the grievance procedure is strictly forbidden and shall not be tolerated. Also, there is a statutory prohibition against retaliating against an employee for "blowing the whistle" (complaint number 20). However, as of this date, there is no evidence upon which to conclude that Mr. Zinn has taken any affirmative action to retaliate against Grievant. This statement alone is not such proof. And in this situation, the Undersigned feels compelled to recognize that Grievant has also engaged in unprofessional behavior during grievance hearings before him. She has made inappropriate comments to Mr. Zinn and his

predecessor, Mr. Larry. She has been argumentative and accusatory in an attempt to try to "bring the truth to light." Just as Mr. Zinn is expected to act professionally, so should Grievant be expected to exhibit the same courtesy. For example, Grievant should be aware that calling a witness a liar is neither proper cross-examination nor helpful to a fact finder in determining the credibility of a witness.

On another issue, Grievant contends that Mr. Zinn has refused to provide her with documents she has requested for use in the presentation of her case (complaint number 10). This is not the type of claim that is cognizable under the Grievance Procedure. If Grievant has trouble with discovery prior to a hearing, she should go to circuit court to compel the Board to provide the documents that are required, or she should bring the matter before an administrative law judge if the case has proceeded to that level. Such does not give rise to a grievable event.

Grievant claims that other drivers are not using safe driving techniques and offers the supporting testimony of her husband who provides the same opinion. She opines that bus operators are passing parked buses and accepting or unloading children at Philippi Elementary School; thereby, creating a dangerous situation for the children. Charles Sheick, Principal at Philippi Elementary, testified as to the bus activity at his school which he is required to monitor. Mr. Zinn also testified about this issue.

The record establishes that the activity of the buses has both been monitored and evaluated at this school. Further, a bus lane has been created to allow for the depositing and accepting of students, while other traffic continues past the school. Both Mr. Zinn and Mr. Sheick testified that the situation is not what they would like but other solutions are dependent upon money being received from the School Building Authority for renovations to the existing facilities. The evidence does not establish that any children have been harmed because of the plan adopted for this school. While Grievant may feel that an unsafe situation exists at this school, the evidence does not establish any violation of law, policy, regulation or written agreement. Further, the only evidence presented to establish that the health and safety of the students are at risk was Grievant's and her husband's opinion testimony. This is insufficient evidence to prompt this Grievance Board to force either Mr. Zinn or Mr. Sheick to take further action to address a problem they do not perceive exists. About whether other drivers should be disciplined for their driving behavior in this area, again, Grievant does not have standing to demand such and there is no evidence that this is warranted.

Grievant contends that she has been discriminated against by being reprimanded for missing a

turn-off in the fog, although other drivers have not been disciplined for failing to report accidents (number 15). First, the record does not establish that Grievant has been formally disciplined for any misconduct as she contends. But further, to establish that she has been treated differently because she was disciplined for conduct that other drivers have not, she must show that other drivers have engaged in the same or similar behavior and that her employer was aware of this misconduct. Grievant has failed to meet her burden of proof on this issue.

Grievant's final complaint (number 20) is that Mr. Zinn has engaged in favoritism by giving other drivers better routes, newer buses and that he has bought them lunches. Favoritism is defined by Code §18-29-2(o) as the "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." This is the type of allegation Grievant makes without supporting, competent evidence to back it up. Grievant has not established by a preponderance of the evidence that buses or routes are given to specific drivers as rewards or because of preferential treatment. In fact, no evidence on this issue was presented except for Grievant's conclusory allegation. Mr. Zinn has admitted he has either purchased coffee or meals for various drivers when he has been with them away from the bus garage and on school business. He denied that he has given any of the bus operators preferential treatment. With regard to what Mr. Zinn has admitted, Grievant has not established that she has been denied such hospitality when in the same situation. The record will not support a finding of favoritism.

In conclusion, Grievant has failed to meet her burden of proof in establishing that she has been the subject of discrimination, harassment or retaliation. Further, she has failed to establish a violation of W. Va. Code §18A-4-8b with regard to the assignment of extra-duty runs. It is also found that Grievant lacks the proper standing to contest the conduct of the other drivers in her garage. Consistent with the findings of the level three grievance evaluator, Grievant should be presented with an ink pen to replace the one that was lost while a substitute was driving her bus. However, Grievant shall not be awarded four hours' wages because her seating chart was lost.

Based upon the discussion above, both Mr. Zinn and Grievant are requested to deal with problems they encounter while at work in a professional and courteous manner. It is hoped that the communication within the Transportation Department can become more effective and that the Grievance Procedure is not used as a tool to learn why administrative decisions are made or to challenge every exercise of discretionary authority. All other claims and requests for relief are hereby

expressly denied.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Mr. Zinn has not harassed Grievant by following her during the completion of her bus runs.

2. Grievant's bus has been equipped with automatic chains for use during the winter months.

During late December 1993 or early January 1994, these chains malfunctioned. The chains were eventually fixed by a mechanic in the Philippi bus garage based upon general instructions from Mr. Zinn that bus's chains were to be fixed in the order in which they became non-operational.

3. In early January 1994, Grievant was told to complete her bus run on a day after Mr. Zinn had verified the amount of ice and snow present on the roads in question. Mr. Zinn had also checked other drivers' routes and had made independent decisions about whether they were each passable in whole, or in part. Each driver was told which routes he/she were required to follow.

4. Both Mr. Zinn and Grievant have used unprofessional language, aimed at each other, during grievance hearings.

5. During winter days when school is scheduled to end early due to bad weather, the principals of the various schools, in cooperation with Mr. Zinn, have made arrangements for the transportation of the children home to save time and effort. On one such occasion, Grievant was required to transport some high school students to a scheduled meeting point with their regular driver to eliminate duplicate bus trips.

6. Bus operators are rarely able to be given notice of the availability of extra-duty work days in advance.

7. Extra-duty work is only assigned to substitute bus operators when regular drivers are not available to perform the work.

8. Mr. Zinn has told bus drivers under his supervision that either Grievant or her husband has attempted to videotape their driving and conduct.

9. At the Philippi Elementary School, a bus lane has been created to allow for the pick-up and delivery of students at that school. Bus Operators are allowed to pass the buses that are parked in the bus lane on the adjoining lane designated as a thruway. This situation has been and is monitored

daily for safety by the Principal of the school.

10. At times, Mr. Zinn has bought his subordinates lunches or beverages at restaurants when they have been away from the bus garage to transact school business. Grievant has not been present at any of these instances.

Conclusions of Law

1. Grievant bears the burden of proving the facts supporting her claims by a preponderance of the evidence. W. Va. Code §18-29-6; Kent v. Jackson Co. Bd. of Educ., Docket No. 90-18-418 (Jan. 25, 1991).

2. Grievant has failed to prove that she has been subjected to discrimination, harassment, retaliation, reprisal or favoritism as those terms are defined in W. Va. Code §18-29-2.

3. Grievant has failed to prove a violation of W. Va. Code §18A-4-8b with regard to the assignment of extra-duty runs.

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

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour 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

January 16, 1996

[Footnote: 1](#)

This case was initially set for hearing on June 29, 1994. Grievant requested that a continuance be granted and, for good cause shown, the hearing was cancelled. The parties were ordered to provide the Undersigned with alternative dates for hearing but, after no response, a Show Cause Order was issued on August 23, 1994. Thereafter, the case was set for October 6, 1994.

[Footnote: 2](#)

The case is styled Conner v. Barbour Co. Bd. of Educ., Docket No. 95-01-031.

[Footnote: 3](#)

Harassment is defined by Code §18-29-2(n) as the "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

[Footnote: 4](#)

Ms. Conner typically represents Mr. Conner in his grievances.

[Footnote: 5](#)

Part of the blame for this must rest squarely upon the shoulders of the various grievance evaluators who have presided over the lower level hearings in these cases. It is noted that very little control is ever exerted over the parties in these meetings, and therefore, the presentation of evidence is often replaced with argument.