JAMES M. KINGSBURY

v. DOCKET NO. 95-HHR-330

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DECISION

Grievant (See footnote 1) , James M. Kingsbury, is employed by the West Virginia Department of Health and Human Resources (Respondent) as an Employment Service Worker, of the Work and Training Unit. Grievant filed his grievance on April 13, 1994, alleging that hewas forced to use annual leave while attending a public hearing scheduled by Respondent addressing a new pay plan and employee classification system for classified service.

On the Level IV grievance form, Grievant alleges that:

> Vacation time was extracted from Grievant because he attended the Clarksburg Reclassification hearing. He attended under the belief that he represented the agency. Vacation time was taken by agency, agency claiming otherwise. Grievant has been discriminated against by agency.

As relief, Grievant desires to be credited with the return of eight hours of annual leave which he used to attend the public meeting. Grievant was denied relief at Levels I, II, and III, and appealed to Level IV by letter dated July 27, 1995. At Level IV, an evidentiary hearing was held at the Grievance Board's Elkins office on November 28, 1995. The case became mature on January 18, 1996, upon receipt of Respondent's reply brief.

FINDINGS OF FACT

1. Grievant is employed by Respondent as an Employment Service Worker.

2. Five public hearings were scheduled by Respondent to address the new pay plan and employee classification system for classified service.

3. Mr. Robert L. Stephens, Jr., Director of the Division of Personnel, issued a memorandum in

regard to the public hearings to all Cabinet Secretaries and Agency Heads, dated March 4, 1994, which states, in pertinent part:

> Employees who are speaking on behalf of their employing agencies shall be permitted to perform that duty as work time. Otherwise, employees wishing to attend the public hearings either as a presenter or viewer will be required to use annual leave for any time off work. Written comments may also be made on the proposed plan. All comments, oral or written, will be considered by the [Personnel] Board. 4. Grievant was not selected by his supervisor, or Respondent, to represent his work unit or Respondent at the public hearing.

5. Grievant requested to take annual leave prior to attending the April 5, 1995, public hearing.

6. Grievant attended the April 5, 1995, public hearing and spoke at the hearing.

7. Grievant attended the public hearing: (1) because he desired to see that a public hearing actually since he initiated litigation against Respondent for its failure to hold public hearings on the employee classification and pay plan (See footnote 2) , and (2) because he did not want to submit written documentation, but wanted to express his concerns orally at the public hearing.

DISCUSSION

In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR- 116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989). In this case, Grievant alleges discrimination. W.Va. Code §29-6A-2(d) 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 prima facie showing of discrimination, under W.Va. Code §29-6A-2(d), shall consist of Grievant establishing:

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

If Grievant successfully proves a prima facie case, a presumption of discrimination exists, which respondent can rebut by articulating 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). (See footnote 4)

Grievant failed to prove by a preponderance of the evidence that he was similarly situated to other employees who attended the April 5, 1995, public hearing. Grievant did prove the second prong of the test, by establishing that some employees were allowed to attend the meeting without taking annual leave, while other employees had to take annual leave. While Grievant testified that "a show of hands was 50-50" as to those employees that were taking annual leave as opposed to those that were being credited with work time for attending the April 5, 1995, public hearing. That "neutral" testimony unsupported by otherevidence, e.g., evidence of non-representatives being credited with work time, does not advance Grievant's claim of discrimination. Furthermore, Grievant failed to provide the Undersigned with any specific evidence of a non-representative who attended the public hearing while being credited with work time.

Grievant also established the first half of the third prong of the test by proving that he had to take annual leave while other employees in attendance were allowed to count this same attendance time as work time. However, Grievant failed to prove beyond a preponderance of the evidence, the second half of the third prong of the test, that there was not an apparent justification for this difference. Therefore, Grievant failed to establish a prima facie case of discrimination.

Furthermore, the record is also clear: (1) that Grievant was not asked by anyone to represent his unit or Respondent; (2) that Grievant's response to this lack of directive by Respondent was "no one told me I wouldn't be [representing the agency]"; (3) that Grievant asked his supervisor for annual leave in advance of attending the April 5, 1995, public hearing; and (4) Grievant could have resolved any misunderstanding or questions that he might have had before asking for the annual leave. However, as discussed above in Finding of Fact number seven, Grievant had his own motives for attending the April 5, 1995, public hearing.

Furthermore, Grievant explained his position, at the Level IV hearing, as follows:

> I feel there needs to be guidelines. Now, if you're going to send out a memorandum like that, make it clear what's expected. As I read that memorandum, if I felt that I was

representing the Agency, representing my unit, I was representing that unit. I didn't write the memorandum. Even though Respondent did not issue guidelines for unit supervisors to use in selecting which employees would represent Respondent at the public hearing, the record is clear that Grievant realized that he had questions concerning the memorandum and failed to inquire. However, Grievant's misunderstanding of the memorandum is not a proper reason to grant his grievance.

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

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

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

3. Grievant failed to establish a prima facie case of discrimination under W. Va.Code §29-6A-2(d).

4. Grievant failed to prove by a preponderance of the evidence that he was entitled to the relief sought as a matter of law.

5. Grievant failed to show a violation, misapplication or misinterpretation of any statute, policy, rule, or regulation.

Accordingly, the grievance must be DENIED.

DATED 2/21/96 Jeffrey N. Weatherholt, Admn. Law Judge

Any party or the West Virginia Division of Personnel 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.

DATED: 2/21/96 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE

Footnote: 1

At the Level IV hearing, Grievant made a motion to add Harold Langevin and Juanita Simmons as grievants. All three grievances were consolidated at Level III, however, neither Mr. Langevin nor Ms. Simmons appealed to Level IV. That motion was taken under advisement and is DENIED by the Undersigned. It should be noted that Mr. Kingsbury was the only grievant below: (1) to complete a grievance form at Level IV, (2) to notify the Grievance Board of his desire to appeal the Level III decision, and (3) to appear for the Level IV hearing. Furthermore, before Grievant made his motion, there was nothing in the Grievance Board's file which indicated that Mr. Langevin or Ms. Simmons desired to appeal the Level III decision.

Footnote: 2

See generally, State Ex Rel. Kingsbury v. Caperton, 190 W.Va. 699 (1994).

Footnote: 3

While 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: 4

Even though "school" cases are cited, the applicable law in determining discrimination is the same, whether it is analyzed under W.Va. Code §18-29-2(m) or W.Va. Code § 29-6A- 2(d).