GREG and PATTY KEYS

v. Docket No. 97-DEP-176

WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION

DECISION

The grievants Greg and Patty Keys, are husband and wife, employed by the West Virginia Division of Environmental Protection (DEP) in its Oak Hill Regional Office. Greivant Greg Keys is an Engineer III, and Grievant Patty Keys is an Office Assistant. They filed a grievance on October 24, 1996, complaining that Deputy Assistant Chief Joe Parker had violated certain portions of the agency's Alternative Work Schedule (AWS) policy. The grievance was denied at the lower levels, and appeal to Level IV was made April 15, 1996. During a May 20, 1997 telephone conference call, with the grievants appearing pro se, and the agency represented by Assistant Attorney General Rex Burford, the undersigned, for the reasons discussed herein, ruled that the relief sought was unavailable from the Education and State Employees Grievance Board (ESEGB).

Background

There is no dispute over the facts of the case. The record developed at the Level III hearing reflects that DEP's AWS policy permits employees to work ten hours per day, within a 7:00 a.m. to 7:00 p.m. range, for four days, and be off on Friday or Monday. The policy allows the employeethe whole day off if a holiday falls on one of his designated work days, but he is required to “make up” two hours later in the week.

In October 1996, the grievants' work schedules provided that they would be off on Friday, and work from 7:00 a.m to 5:00 p.m. on Monday, and from 7:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Thursday. Prior to Columbus Day, October 14, 1996, the grievants had chosen to work make up hours on Friday mornings.

On October 7, 1996, the grievants submitted their proposed schedules for the October 14 to 18 work week to their supervisor, Bob Grafton. Mr. Grafton subsequently advised that Mr. Parker was reviewing their request to work their make up hours from 5:00 p.m. to 7:00 p.m., on Friday, October

18. In an October 8 memorandum, Mr. Parker informed the grievants that their request to work two hours on Friday was approved but, “because [their] normal starting time was 7:30 a.m,” the approval was for two hours beginning at 7:30 a.m. The grievants adjusted their personal plans, and complied with Mr. Parker's directions.

Argument

The grievants essentially allege that Mr. Parker had no valid reason for denying their request, and his decision was, therefore, arbitrary and capricious. They concede that, except for the inconveniences associated with the changes in their personal schedules for the week in issue, they suffered no injury by having to work on Friday morning. They seek a ruling that Mr. Parker acted contrary to the policy and an order enjoining him or other DEP official from future misapplications. DEP denies any abuse of discretion, and asserts that the ruling requested would be purely advisory in nature.

Conclusions of Law

After careful consideration of the evidence presented at the Level III hearing, the parties' arguments and prior Level IV decisions, the undersigned makes the following conclusions:

1. Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the ESEGB. Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993). De minimus relief is also unavailable. Carney v. W.Va. Div'n of Rehab. Svcs., Docket No. VR-88-055 (Mar. 28, 1989). Since the grievants incurred minimal or no damages by working as directed on the morning of October 18, a ruling that Mr. Parker acted contrary to the agency's AWS policy would serve no useful purpose.

___2. Injunctive relief is an extraordinary remedy, particulary in administrative proceedings. Appalachian Power Co. v. W. Va. Public Service Commission, 296 S.E.2d 887 (W.Va. 1982). In the few cases in which cease and desist orders have been issued at Level IV, it was established that the employer had engaged in a pattern of harassment, discrimination or other egregious conduct, and that it was likely that the conduct would continue. See, Helvey v. W.Va. Workers' Compensation

Fund, Docket No. 91-WCF-034 (Mar. 30, 1992); White v. Monongalia County Bd. of Educ., Docket No. No.93-30-371 (Mar. 30, 1994). (See footnote 1)

3. The grievants herein do not allege that the rejection of their proposed October 18 work schedule was more than an isolated incident, and the evidence presented at Level III does not reflectthat they have had prior disputes with Mr. Parker. They have failed to show entitlement to injunctive or other relief.

Accordingly, the grievance is **DENIED**.

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Any party may appeal this decision to the Circuit Court of Fayette County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code 18-29-7. Neither with 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.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated:

September 4, 1997

Footnote: 1 *Several decisions have questioned whether the ESEGB has the authority to enforce such orders. See, Coddington v. W.Va. Dept of Health and Human Resources, Docket No. 93-HHR- 265 (May 19, 1994); Finnegan v. West Liberty State College, Docket No. 95-BOD-350 (Oct. 31, 1995)*