PATTI S. CLATTERBUCK, ET AL.,

Grievants,

v. DOCKET NO. 96-02-278

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) are employed by the Berkeley County Board of Education (Respondent) as bus operators or mechanics. They allege:

> An accident review committee has been formed for the purpose of evaluating accidents and recommending disciplinary action. We feel that it is improper and outside the scope of the job for bus operators to serve on this type of committee. Further, we object to Service Personnel Representatives being on this committee because of their membership in a particular employee organization.
>
> Because the recommendation of disciplinary action is a management function, we request, as relief, that only management personnel serve on this type of committee, or in any other way to be made whole.

On November 7, 1995, Grievants were denied relief at Level I by their immediate supervisor, Mr. Larry Carte, Director of Transportation. Reproduced below is Director Carte's response:

> The Transportation Department Accident Review Committee was formed to evaluate accidents involving school buses. The duties of the committee may include, but is not limited to[,] recommending disciplinary action if negligent driving practice has occurred, or recommending continuing education training if a pattern of deficient driving practice is observed.
>
> The committee is composed of a Transportation Department Administrator, a school principal, a law enforcement officer, and two school bus operators. All members are donating their time on a voluntary basis to this effort. The two bus operators who were asked to participate on this committee were chosen based upon their experience and that they had been duly elected by their peers to represent them.

> The Accident Review Committee may submit recommendations to the Director of Transportation, who may or may not be influenced by them when implementing any procedures he deems appropriate.

> The formation of this committee, with the members being chosen at his [the Director of Transportation's] discretion, is within the scope of the responsibilities of the Director of Transportation. It is on this basis that the relief requested in this Level I [g]rievance is denied.

On March 22, 1996, a Level II hearing was held, and a decision was issued denying the grievance on June 19, 1996. Pursuant to W. Va. Code §18-29-4(c), Respondent waived its right to conduct a Level III hearing in this matter. Subsequently, Grievants appealed to Level IV on July 1, 1996. By letter dated November 5, 1996, the parties advised the undersigned Administrative Law Judge of an agreement to submit this case on the record, with the right to simultaneously exchange proposed findings of fact and conclusions of law postmarked by December 1, 1996. This case became mature fordecision on December 3, 1996, with the receipt of Grievants' proposal.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievants are employed within Respondent's Department of Transportation.

2. Grievant Clatterbuck was the only Grievant who testified.

3. Director Carte formed an Accident Review Committee (ARC) to review all accidents involving school buses. The purpose of ARC is to review all school bus accidents, and to make recommendations (on matters including training, and disciplinary action) to Director Carte.

4. ARC is composed of two principals, two bus operators, law enforcement officers, and a traffic safety coordinator. Tr. 59.

5. Director Carte is not bound by ARC's recommendations.

6. Ms. Riker has 22 years of bus operator experience.

7. Ms. Seibert has 24 years of bus operator experience.

8. Respondent's Department of Transportation uses several different types of buses, including large and small conventional buses, transit buses, and special education buses. Ms. Riker has

experience in driving all of the above listed types of buses. Ms. Seibert has experience driving both transit buses (which are the largest) and special education buses.

9. Director Carte chose Ms. Riker and Ms. Seibert to serve on ARC because of their years of experience in operating buses, theirvaried experience in operating different types of buses, and their election by other service employees.

DISCUSSION

Grievants do not pursue the issue of whether employees can volunteer their time. Furthermore, the record fails to contain evidence that any Grievant has been harmed by this committee, and none of the Grievants are on ARC. The record also fails to contain any evidence that Grievants desire representation on this committee.

Grievants, however, do not like bus operators being on ARC because they feel that only "management" should be involved in disciplinary actions. However, Grievants fail to cite any authority supporting their assertion that fellow bus operators should not or cannot serve on this committee.

Grievants also assert that Respondent showed favoritism toward two Service Personnel Representatives, Linda Riker and Dorothy Seibert, by choosing them "because of their membership in a particular employee organization." A prima facie showing of favoritism, (See footnote 2) under W. Va. Code §18-29-2, consists of a grievant establishing:

> (a) that s/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 her/him;
>
> and,
>
> (c) that the difference in treatment has caused a substantial inequity to her/him and that there is no known or apparent justification for this difference.

If Grievants successfully proves a prima facie case, a presumption of favoritism exists, which Respondent can rebut by

articulating a legitimate reason for its action. (See footnote 3) However, Grievants may still prevail if they can demonstrate the reason proffered by Respondent was mere pretext. McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).

Assuming arguendo that Grievants established a prima facie case of favoritism, Respondent rebutted it with legitimate reasons. First, Respondent did not choose Ms. Riker and Ms. Seibert because they were members of a particular union, but because these two bus operators were elected by their peers. Although this election occurred during a West Virginia School Service Personnel Association (WVSSPA) meeting, at that time only the WVSSPA represented bus operators. Simply because some bus operators have subsequently joined other unions which have been recognized, does

not eliminate the fact that they were chosen by their peers (other service employees, including bus operators). Furthermore, Director Carte believes, that based on their election, these two women will "voice their opinion" and will not "back off" but will "tell whatthey [think] from a driver's perspective." Tr. 46. Finally, Ms. Riker and Ms. Seibert have driven different types of buses for many years.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievants have the burden of proving their case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. Favoritism is defined in W. Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

3. Grievants failed to prove, by a preponderance of the evidence, that Respondent engaged in any form of favoritism prohibited under W. Va. Code §18-29-2.

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

5. Grievants failed to prove by a preponderance of the evidence that they were entitled to the relief they sought.

Accordingly, the grievance is **DENIED**.

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

Berkeley County and such appealmust 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 are 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 April 21, 1997 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

This case has twenty-four grievants: Patti S. Clatterbuck, Teri Bingaman, Bruce Duckworth, Daniel Clingerman, Pamela Kees, Lissa Wood, Stuart Lentz, Carlton Adams, Susan Burnes, Karolyn Moore, Tina Allen, Richard McDaniel, Mary Murray, George Viands, Donald Pittsnogle, Marna Cloud, Delores Haynes, Pamela Ring, Donna Siford, Bonnie Young, Anthony Nethers, Gary Hayes, Jeffrey Catlett, and Timothy Bennett.

Footnote: 2

W. Va. Code §18-29-2(o) provides:

> *"Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.*

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).