RUBY KELLY

v. Docket No. 96-34-059

NICHOLAS COUNTY BOARD OF EDUCATION

DECISION

The grievant, Ruby Kelly, is employed by the Nicholas County Board of Education (Board) as a bus operator. She filed a grievance at Level I, on October 6, 1995, protesting her supervisor's decision to deny her request to change the designated parking site for her bus. The grievance was denied at the lower levels, and appeal to Level IV was made February 8, 1996. A hearing was held October 25, 1996, and the parties submitted proposed findings of fact and conclusions of law by January 21, 1997.

Background

Much of the background of the case is not in dispute. The Board's postings for bus operator vacancies designate a parking site for the operator's bus during the “midday” period between his or her morning and afternoon runs and a “P.M.” site where the bus is parked at the completion of the work day; in some cases the two sites may be the same. The Board has an unwritten policy whereby bus operators can submit requests to Director of Transportation Bernard Lindsey for a change in either or both locations. It is not uncommon for operators to seek accommodations which are more convenient to the location of their homes or otherwise more amenable to their daily personal schedules. Mr. Lindsey has authority to grant a change but generally discusses it with Superintendent of Schools William Grizzell. Mr. Lindsey can and has directed changes without a request because of vandalism at particular designated sites; bus safety is necessarily one of his chiefconcerns. The operator's reasons for the request, the proximity of the new location to the operator's route, and whether or to what extent the proposed site might add or decrease the operator's total daily mileage are other considerations.

At times, Mr. Lindsey has made accommodations for bus operators which included some personal

benefit to the operator, e.g., permission to park his or her bus at home or other convenient location, and a benefit to the Board, e.g., the operator's agreement to assume additional bus stops or other duties which were not originally part of his or her schedule. Board policy provides that “[a]ny personal use of any Board of Education owned vehicles, property, equipment, facilities, or tools is prohibited. Facilities, vehicles, equipment, etc. are purchased for the exclusive use in the educational mission of the Nicholas County Schools.”

When the grievant bid on and was awarded her current position, she was aware that her midday parking location would be Panther Creek Elementary School (PCES), and her P.M. location would be the Board's central bus garage at Nicholas County High School (NCHS) in Summersville. On August 30, 1995, shortly after assuming the position, she submitted a written request to Mr. Lindsey asking that she be allowed to “bring [her] bus back to the Summersville bus garage.” She indicated that “[t]he mileage is fourteen miles,” and asked “[c]ould there be another place I could park closer than Panther Creek?” Her letter did not provide further explanation of the mileage involved or indicate whether the change would benefit her or the Board. Mr. Lindsey apparently understood that she was asking to change her midday parking site to NCHS or other location nearer to the garage than PCES, and that the change would add fourteen miles to the total daily mileage on her bus.

Mr. Lindsey discussed the matter with Superintendent Grizzell and recommended that he not approve the change. Mr. Lindsay denied the grievant's request in a September 19, 1995 letter. Heindicated that it was the superintendent who had rejected the change, but provided no reasons for the decision.

On September 22, 1995, the grievant submitted a second written request in which she specifically asked that both her midday and P.M. parking sites be changed to a “Happy Handy” grocery store; she did not state where the store was located, but indicated that her first and last passengers of the day boarded and disembarked there. The grievant also did not explain whether this change entailed greater or less convenience or savings to either party than the first proposal. Believing that she had ten days to protest the September 19 denial, she filed the grievance on October 6, before Mr. Lindsey or Superintendent Grizzell could act on this second request.

Mr. Lindsey also did not provide any reason for the decision to deny the August 30 request in his Level I response to the grievance. He noted only that the grievant was aware when she accepted her position, that NCHS and PCES would be her parking sites.

Argument

The parties agree that by granting employees of a county board of education a right under W.Va. Code §§18-29-2(a), to protest incidents of favoritism as that term is defined in W.Va. Code 18-29-2(o), (See footnote 1) the Legislature has imposed a duty on county boards to apply its personnel policies consistently and fairly, and insure that any differences in treatment of similarly situated employees under a particular policy are based on practical concerns. They also agree that because there is usually little or no direct evidence that the disparity was the result of motives which are not generally accepted in the workplace as fair or conducive to good working relationships, once an employee establishes that he or she and other employees were similarly situated and were treated differently,the county board must provide justification for the disparity.

The grievant concedes that her ultimate burden in the case is to show, by a preponderance of the evidence, that the reasons given for denying her request for a change in parking sites and granting similar requests of other employees are pretextual. Prior Level IV decisions have followed this approach to analyzing disparate treatment claims which do not allege age, sex, race or religion as the motivation. See, e.g., Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997). (See footnote 2) Generally, an employee who charges an administrator with cronyism must show that the administrator was affiliated in some manner with those employees who were treated more advantageously or had some ill-will toward those who were slighted. See, Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995).

The grievant's claim is focused on bus operators Jerry Brake, Charles Rose, Delmas McCutcheon, Arvil Wiley, and Carl Brannon, who were permitted to change their midday or P.M. parking sites; some were permitted to park their buses at their homes. The grievant claims that she and they were similarly situated, and the board's justification for the difference in treatment is pretextual. She does not allege that Mr. Lindsey had other than a working relationship with the other drivers, and does not offer any reason why he would disfavor her. The Board denies that the grievant was similarly situated to these operators, and contends that if she was, she failed to show that the reasons offered for the disparity in treatment were not legitimate.

Findings and Conclusions Initially, it is noted that the analysis in the case is hindered because the record is unclear and confusing on the extent of the benefits the grievant would enjoy if her first

request was granted. Her evidence was focused on the other drivers almost to the exclusion of information on the advantages or disadvantages of the change she proposed. It is even difficult to determine the proximity of her home to any of the sites involved. Since Mr. Lindsey at no time represented that mileage was a concern in his decision to reject her request, and the record otherwise supports that bus safety was not a problem, it is accepted that the rejection was not based on those factors. It is clear that if the grievant's proposal had advantages for the Board, she did not explain them in her written request and Mr. Lindsey did not discern what they were.

Mr. Lindsey's testimony at Levels II and IV and the remaining evidence of record on the circumstances surrounding the approval of the targeted drivers' requests establishes that on several occasions, Mr. Lindsey and Superintendent Grizzell have conditioned approval on the operator's assumption of additional duties. It is a fair characterizartion of the evidence to say that they have incorporated this component into the process for reviewing requests, and that they have generally sought to offset any benefits which might accrue to the driver with a benefit to the Board. It is a fair characterization of the grievant's claim to say that she does not take issue with this approach, but disputes that Mr. Lindsey and the superintendent applied it evenly.

A preponderance of the evidence establishes that operator McCutcheon was permitted a change in sites because of legitimate concerns over the potential for vandalism at his designated P.M. site and his willingness to provide electricity at his home, at no cost to the Board, to maintain the proper battery charge level for the bus' diesel engine. Jerry Brake's request to make his home his designated P.M. parking site was approved by the superintendent after he filed a grievance over an initial denial, and then entered into a settlement agreement whereby he agreed to assume additionalstops following a consolidation of schools which was to occur some months later.

For a period of six months, operator Charles Rose was allowed to drive his bus to and from Jim's Used Cars where he held a part-time job. The bus was parked there between his morning and afternoon runs. He apparently began this practice without Mr. Lindsey's approval, but was allowed to continue in exchange for his agreement to make additional, infrequent bus runs and be an “on- call” operator for drivers who had mechanical difficulties.

Arvil Wiley was given approval to park his bus at home by Superintendent Grizzell without Mr. Lindsey's knowledge. The superintendent was not called as a witness at any level, but Mr. Wiley's Level II testimony establishes that he persuaded him that he would wash and clean his bus at his

own expense, and the Board would realize a savings since he would normally be required to take his to the NCHS bus garage to perform these tasks. In a September 25, 1995 letter, Mr. Lindsey admonished Mr. Wiley to adhere to his specified parkings sites, but withdrew his directions after learning of the superintendent's approval.

Operator Brannon also was permitted to park his bus at his home. The record is unclear on the reasons for the approval, but it appears that he agreed to significant mid-year changes in his bus route which were necessitated by a school closure.

Mr. Lindsey's most succinct, reliable and credible testimony concerning his reasons for approving the identified operators' requests and rejecting the grievant's proposal was that he had no available “extra-duty” assignments for her at the time, and was concerned that if approval was given to an arrangement which benefited the employee only, he would have to make the same accomodation for all operators. It is accepted that these were the true reasons for denying the request, and that they are legitimate for the purpose of examining the grievant's rebuttal evidence.

The grievant presented no evidence to establish that there were additional assignmentsavailable at the time of her request, and Mr. Lindsey's prediction about future requests seems reasonable. It is accepted that he would have had approved the grievant's request had there been some additional duties he could have assigned her. In short, the grievant has not shown that Mr. Lindsey harbored any ill-will toward her or had some affiliation with the other drivers which would cause him to favor them.

While the grievant complains of the inconsistencies between Board policy and the accommodations made for the other drivers, it appears that to the extent that the parking arrangement she proposed provides her a personal benefit, it is also inconsistent with the policy. The policy, in and of itself, provides no basis for finding that the grievant's request was rejected for improper reasons.

It is, however, understandable that the grievant sees inequity in Mr. Lindsey's approval of requests which arguably conflict with Board policy and his rejection of her proposal which may also be inconsistent with the policy, but does not involve driving her bus to and from home or a part-time job. After a careful review of the evidence in the case and the parties' arguments, the undersigned concludes that the grievant has not shown that the denial of her request was so unfair as to constitute favoritism. Nevertheless, she has raised valid questions regarding the policy on personal

use of public vehicles, and has demonstrated sufficient inequities in the application of the Board's unwritten policy on changes in parking sites to warrant the Board's review of both policies.

Accordingly, the grievance is **GRANTED** only to the extent that the Nicholas County Board of Education if hereby **ORDERED** to review the provisions of "Nicholas County File: GCR, Improper Use of Board of Education Property," its practices regarding changes in designated bus parking sites, and the parking site arrangements discussed herein, and determine whether thearrangements are permissible under Board policy. The Board, at its discretion, may reconsider the grievant's August 30, 1995 request for a change in her midday parking site. No other relief is provided.

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

August 12, 1997

Footnote: 1 *"Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."*

Footnote: 2 *The review at least appears particularly intrusive in relatively minor personnel matters. Prior Level IV decisions adopted a necessary rule which essentially requires an employee making a disparate treatment claim under Code §§18-29-1 et seq., to show that he was treated differently in a "significant manner." See, Bennett v. Fayette County Bd. of Educ., Docket No. 95-10-256 (Aug. 31, 1995). There is no assertion here that the alleged disparity in treatment was not significant.*