LARRY EASTHAM, et al.,

Grievants,

v.

DOCKET NO. 97-06-317

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Larry Eastham, Linda Eastham, and David Browning, filed this grievance against their employer, Cabell County Board of Education ("Board") on May 7, 1997, as follows:

> Violations of WV Code 18-29-2, section o "favoritism" in regard to writing letters dated March 27, 1997 and taking of air brake tests that were scheduled. Testing was treated differently for some employees.
>
> Relief sought is to have letters removed from grievants' personnel files.

The grievance was denied at level one by Patty L. Pauley, Director of Transportation, and a level two hearing was held on June 12, 1997, and again denied by decision of Superintendent Richard Jefferson, dated July 2, 1997. Level three was waived, and Grievants appealed to level four on July 14, 1997. The grievance was originally submitted on the record, with proposed findings of fact and conclusions of law to be submitted by August 29, 1997. Subsequently, this matter was reassigned to the undersigned Administrative Law Judge, and Grievants' representative requested a level four hearing, which was held on January 13, 1998. This case became mature for decision on February2, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Joint Exhibit

Ex. 1 -

Grievance documents

Board Exhibits

Ex. 1 -

West Virginia State Board of Education School Transportation Regulations Handbook, pp. 3-4.

Ex. 2 -

Daily Pre-trip Inspection Report.

Ex. 3 -

March 27, 1997 letter from Patty Pauley to Larry Eastham.

Ex. 4 -

March 27, 1997 letter from Patty Pauley to Linda Eastham.

Ex. 5 -

March 27, 1997 letter from Patty Pauley to David Browning.

Testimony

Grievants testified in their own behalf, and presented the testimony of Patty Pauley, Bobbie Bidinger and Timothy Runyon. The Board presented the testimony of Gary Lusher.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1.

Grievants are regularly employed by the Board as bus operators.

2. In January 1997, a Staff Development Day was held to conduct an in-service training for all bus operators on air brake testing procedures. (See footnote 1) The operators were informed at this

meeting that they would be required to demonstrate physically their ability to perform the air brake test. They were also informed that scheduling would begin to perform the air brake test, and that they should be prepared at all times to perform the demonstration. LII, Pauley, p. 9. 3. Grievants Larry and Linda Eastham were not present at the January in- service meeting. Grievant Browning was present at the meeting.

4. The first group of bus operators was scheduled to test air brakes on the next Staff Development Day, February 21, 1997.

5. Grievant Browning performed the air brake test that day and received an unsatisfactory rating.

6. Grievants Eastham were not scheduled to perform the air brake test that day.

7. Grievants Eastham were provided with copies of the materials that were handed out at the January in-service meeting, except for a videotape, on or about February 21 or 22, 1997.

8. Other bus operators approached the two air brake test instructors from time to time indicating they would be willing to take the test at times other than their scheduled times, or on their “own time”. Initially, those operators were accommodated, but the Board became concerned about overtime and told the instructors not to give the test at any time other than the regularly scheduled test dates. LII Tr., pp. 11, 33-35, 98.

9. On March 21, 1997, a Staff Development Day, Grievants Eastham and Browning (taking the test for the second time) were informed they were scheduled to perform the air brake test that afternoon at the bus garage.

10. Grievant Larry Eastham stood up in the meeting and announced that he was not going to perform the air brake test because he was not prepared. LII Tr., pp. 15, 20, 59. 11. Grievants Linda Eastham and Browning did not say anything to Ms. Pauley or Mr. Lusher at the March 21, 1997 meeting. Nevertheless, they failed to appear that afternoon to perform the air brake test.

12. None of the Grievants offered any explanation for their failure to appear, did not ask permission to be absent, did not attempt to reschedule a time to perform the air brake test, nor had they attempted at some earlier to time to arrange to perform the air brake test on their “own time”, before that practice was disallowed by the Board.

13. Other operators had asked permission in advance to be excused from their scheduled time to perform the air brake test, giving valid reasons for their inability to perform the test at that time.

Those operators were granted permission to reschedule their test time.

14. On March 27, 1997, Ms. Pauley wrote each Grievant a letter of reprimand for insubordination for failing to show up at their scheduled test time on March 21, 1997. Larry Eastham's letter also reprimands him for possibly falsifying pre-trip documentation with regard to air brake testing. R. Exs. 3-5.

15. The letters of reprimand were personally delivered to each of the Grievants by either Ms. Pauley or Mr. Lusher.

16. As of the date of the level two hearing, June 12, 1997, Grievants Eastham had satisfactorily performed the air brake test. Grievant Browning had not taken the air brake test again as of that date.

DISCUSSION

Although this is a disciplinary matter, and the burden of proof lies with the Board to prove the charges against Grievants by a preponderance of the evidence, the Grievantspresented their case first at the level two hearing, and it was agreed at level four to continue in that procedural fashion for continuity's sake. Even though procedurally, the Board should have presented its case first, it does not affect the outcome of this grievance, as the Board provided ample evidence to support the charges filed against Grievants.

A county board of education may discipline an employee who is insubordinate. W. Va. Code § 18A-2-8; Clagg v. Cabell County Bd. of Educ., Docket No. 90-06-220 (Sept. 25, 1990). Insubordination has been defined as the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997); Dilley v. Cabell County Bd. of Educ., Docket No. 97-06-164 (Sept. 19, 1997); McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989); rev'd other grounds, Mason Co. Bd. of Educ. v. Webb, Civil Action No. 89-AA-107 (Circ. Ct. Kan. Co., Oct. 1989).

“Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Dilley, supra; Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). An employer has the right to expect subordinate personnel “to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and

authority. . . ". Huffstutler, supra; McKinney, supra.

Here, Grievants were clearly insubordinate when, without so much as asking permission, chose not to appear, on work time, to perform the brake test demonstration which they were unequivocally directed by Transportation Department officials to attend. Further, Grievant Larry Eastham, by his announcement in the March 21, 1997, StaffDevelopment meeting that he "was not prepared" to perform the air brake test, called into question his knowledge and ability about the air brake test, which he had been recording as having been performed by him on his daily pre-trip inspection reports. Thus, Ms. Pauley's indication in his March 27, 1997 letter of reprimand, that he was possibly falsifying pre-trip inspection reports, is also substantiated.

Grievants allege in their grievance statement that the Board engaged in favoritism in giving them letters of reprimand for not performing the air brake test on March 21, 1997. "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." To prove favoritism, Grievants must demonstrate a prima facie case. This requires Grievants to establish:

(a) that they are similarly situated in a pertinent way to one or more employee(s);

(b) that they have to their detriment been treated by their employer in a manner that the other employee(s) have not, in a significant particular; and;

(c) that such differences were unrelated to actual job responsibilities of Grievants and/or the other employee(s), and were not agreed to by Grievants in writing.

Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1051 (May 31, 1995); citing Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants have offered no evidence to show that any other bus operator, without asking permission, chose not to perform, on work time, the brake test demonstrations which they were unequivocally directed by Transportation Department officials to complete. Further, Grievants have

offered no evidence that they asked to perform the brake testdemonstrations on their “own time”, as other operators did, before the Board decided to not allow that practice.

CONCLUSIONS OF LAW

1. The Board has proven by a preponderance of the evidence that Grievants were insubordinate in failing to appear for the air brake test demonstration which they were unequivocally instructed by Transportation Department officials to complete.

2. Grievants have failed to prove the Board engaged in “favoritism” when it gave them letters of reprimand for failing to attend the air brake test demonstration as instructed.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 27, 1998

Footnote: 1 *Staff Development Days are employment days for bus operators, for which they receive a full-day's pay.*