KAREN YEAGER AND KEITH ANNE BASFORD,
Grievants,

v. **Docket No. 98-20-362**

KANAWHA COUNTY BOARD OF EDUCATION ,
Respondents,

and

LARRY COBBS AND MARTHA GREEN,
Intervenors.

D E C I S I O N

Grievants, Karen Yeager and Keith Anne Basford, employees at the East Bank Bus Terminal, allege the Kanawha County Board of Education ("KCBOE"), through their supervisor, Larry Cobbs, violated W. Va. Code § 18-29-2 (a), in that they "have been subjected to undue harassment and [their] health and safety has been threatened." The requested relief was for Mr. Cobbs and a co-worker, Martha Green, to receive written reprimands.[1]

The Level II Decision granted Grievants part of the requested relief, and set out the following conclusions. First, "[c]onflict resolution and team-building training shall be conducted for all employees at the terminal to improve relationships. Grievants Basford and Yeager and Ms. Green shall be required to attend." Second, "Ms. Green shall receive

[1]These grievances were originally filed as two separate grievances but were consolidated in the lower levels.

a written warning that use of such language in the workplace is prohibited and any further such incidents will result in disciplinary action." Third, "Mr. Cobbs shall receive training on improving supervisory skills".

Grievants appealed to Level IV contending that the relief received was insufficient, and again asserting Mr. Cobbs should receive a written reprimand for his behavior. Additionally, Grievants complained that requiring them to attend the conflict resolution and team-building training was a disciplinary action[2] and should be removed from the decision reached by the Level II Grievance Evaluator. At Level IV, Ms. Green and Mr. Cobbs intervened and argued they were not represented below. Intervenor Green wished to have her written reprimand removed, and Intervenor Cobbs was present to argue that the relief requested by the Grievants, for him to receive a written reprimand, should not be granted.

Grievants were represented by Mr. Perry Bryant, from the West Virginia Education Association, Intervenors were represented by Attorney David Cecil, and Respondent was represented by KCBOE's General Counsel, James Withrow. Mr. Withrow indicated Intervenor Green should not be allowed to intervene to protest her written reprimand, but eventually agreed that allowing her to do so would shorten the grievance process and assumed the burden of proof on this disciplinary issue. This case became mature for decision on November 24, 1998, after receipt of the parties' proposed findings of fact and conclusions of law.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

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[2]Grievants presented no evidence to support their contention that requiring them to attend the training was disciplinary; thus, this argument is considered to be without merit.

Findings of Fact

1. Grievants and Intervenor Green work out of the East Bank Bus Terminal. Grievant Basford and Intervenor Green are bus operators and Grievant Yeager is an aide. Intervenor Cobbs is the supervisor for all the employees at the East Bank Terminal.

2. During the 1997-1998 school year, there was a division between two groups of employees at the East Bank Terminal. Grievants are in one group and Intervenor Green is in the other.

3. By the end of the school year, this division had reached such proportions that Grievants' group had their own end of the year picnic across the road at another employee's house, while the other group continued to have the party at the transportation building.

4. Grievants are sisters.

5. On June 8, 1998, the last day of school and the day of the end of the year party, a situation occurred that resulted in Grievants filing this action and Intervenor Green's suspension.

6. Grievants were among a group of employees who decided to wash a spare bus, without asking Intervenor Cobbs and receiving his prior permission. They undertook this action to show initiative and to help out. Unbeknownst to Grievants, Intervenor Cobbs had made arrangements to have the bus cleaned by a substitute employee.

7. Because of chemicals in the water at the East Bank Terminal, bus operators are not allowed to mop their buses with water.[3]

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[3]It was unclear from the testimony whether this rule is because these chemicals are unhealthy for students, to equipment, or both.

8. Intervenor Cobbs was in the garage, when several employees came to tell him that Grievants and their group were using water to clean a spare bus.

9. Intervenor Cobbs came out to check on this story and found water dripping out of the back of the bus. Intervenor Green came out of the garage at the same time. She had been trying to get Intervenor Cobbs to let them leave early on this last day of work, if the work was finished. She saw water dripping out of the bus as well.[4]

10. Intervenor Cobbs asked Grievant Yeager who had put the water on the bus and indicated that this action was against the known rules. Grievant Yeager became immediately angry, and asked for the rest of her group to join her at the bus, said she wasn't going to take this flack by herself, and kept asking Intervenor Cobbs in a loud voice who were the "SUCKS" who told.

11. Intervenor Cobbs would not answer this question, and Grievant Yeager informed Intervenor Cobbs that by the school laws in her book, she had the right to confront her accusers.[5]

12. Grievant Yeager knew the bus video tape was on and stepped aside so the camera would get a good view of Intervenor Cobbs's angry face and could clearly see how she was being treated.

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[4]The fact that water was dripping out of the bus was confirmed by several witnesses. Several witnesses stated the water was not running out of the bus, but they had used water to clean the bus floor because it was so dirty. The key issue is the use of the water, not the amount.

[5]Grievant Yeager had her copy of the school laws with her at the time. Apparently, she was confused between the rights granted the criminally accused and the laws regulating the rights of a school employee.

13. This tape was presented as evidence and had both poor auditory and visual quality. The body of the individual at the back of the bus was revealed from the waist down only. The tape did show Grievant Yeager's angry reaction to this individual at the back of the bus. The tape also demonstrates a lot of female voices yelling and hollering, but the majority of the conversations were unintelligible. Pieces of the fairly discernable conversation are listed below:

a. Grievant Yeager hollers at someone, "You're harassing me. You're harassing me."

b. A man, presumably Intervenor Cobbs, states. ". . . Debbie is to clean the bus. . ." . This same voice later says "just forget about it."

c. Grievant Yeager yells "Are we all here? Martha did you hear how he talked to me? I've got the tape running. I've got the tape running."

14. Intervenor Cobbs told Grievant Yeager he was not going to write her up for the infraction, but was not pleased with this breach of known safety rules. He told Grievant Yeager to leave him alone and to "Shut up!" Grievant Yeager continued to follow Intervenor Cobbs from inside the bus to the outside of the bus while Intervenor Cobbs was walking toward the front of the bus on the outside. Grievant Yeager and Intervenor Cobbs continued arguing, and Grievant Yeager did not heed Intervenor Cobbs' continued directions to "Shut up."

15. At some point in time, Grievant Yeager asked Intervenor Green if she would be a witness to how Intervenor Cobbs was talking to her. Intervenor Green responded that she did not hear anything. Then Grievant Yeager's sister, Grievant Basford, got into the

fray and into Intervenor Green's face and stated that Intervenor Green was a "Suck" and "had her head up Cobbs's hiney"[6], and "of course, she wouldn't be a witness."

16. These last statements and Grievant Basford's being in her face greatly irritated Intervenor Green, and she turned and pointed at Grievant Basford and told her to "Get out of my fucking face or I will move your fucking face for you." When Intervenor Green pointed at Grievant Basford, she touched Grievant Basford's face, but Grievant Basford was not injured in any way. Grievant Basford did not tell Intervenor Cobbs that Intervenor Green had touched her until the summer when she had her informal conference in this grievance.

17. After Intervenor Green touched Grievant Basford's face, Grievant Yeager started jumping around saying she now owned Intervenor Green's house, and she was "gonna" call Intervenor Green's husband.

18. Intervenor Green does not remember saying the F word, but agrees she could have said it because she was "that mad", and other people from Grievants' group told her she did.

19. Several employees parted Intervenor Green and Grievant Basford. Intervenor Cobbs came from the front of the bus where he had been talking to Grievant Yeager, but the confrontation was over by that time. He then turned to go up in the field to finish checking the buses.

20. Intervenor Cobbs did not hear Intervenor Green use profanity.

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[6]There was a difference of opinion as to whether Grievant Basford said butt or hiney.

21. Later that same day in an East Bank Bus Terminal final meeting, Intervenor Cobbs indicated he was not going to write anyone up for the incident that occurred that afternoon. He stressed the need for all employees to get along.

22. The video tape in a bus can only be removed by the driver of the bus. Even the supervisor must inform the bus operator before he removes the tape and watches it.

23. Grievant Yeager removed the tape from this spare bus, without prior permission, and kept it without letting anyone know. The first KCBOE knew that the tape had been removed was when a copy of it was presented as evidence in the Level II hearing.[7]

24. Grievant Yeager removed the tape because she believed that if she left it there, it would be removed and destroyed and could not be used as evidence. KCBOE did not discipline Grievant Yeager for this act.

Issues and Arguments

Grievants believe Intervenor Cobbs has failed to maintain a safe environment. They also think Intervenor Cobbs heard Intervenor Green curse and failed to take any action. They want him to receive a written reprimand for this failure to act. Although Intervenor

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[7]KCBOE presented this tape at hearing as it had not been forwarded to Level IV with the rest of the record. This tape had been accepted by the Level II Grievance Evaluator apparently as the original tape. At hearing, the undersigned Administrative Law Judge was informed that this tape was clearly a copy as there was a soap opera recorded on it. The undersigned Administrative Law Judge indicated to the parties that it would be necessary to submit the original if she were going to consider it. This tape was later submitted by agreement of the parties with a sworn statement indicating the tape was the original.

It is noted that a portion of the tape showing employees on the spare bus with mops and buckets was not on the tape originally submitted by Grievants at Level II.

Green had the confrontation only with Grievant Basford, both Grievants requested she receive a written reprimand.

Respondent believes that the decision of the Level II Grievance Evaluator should be upheld as correct.

Intervenor Green wants her written reprimand removed, and Intervenor Cobbs wants to ensure that he does not receive any disciplinary action because it is unwarranted. Intervenor Green does not object to attending the training, and Intervenor Cobbs does not object to receiving additional supervisor's training.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Clearly this mess was generated by the inability of the employees at the East Bank Bus Terminal to be civil to each other. Apparently, there are multiple personality clashes among the employees in the two groups. Also it is clear that Intervenor Cobbs and Grievant Yeager do not get along, and Grievants have little respect for Intervenor Cobbs as their supervisor.

As to whether Intervenor Green should receive a written reprimand for profanity, even she agrees that this would be inappropriate behavior in the workplace. Thus, on its face, Intervenor Green's written reprimand would appear appropriate.

As to whether Intervenor Cobbs should receive a written reprimand pursuant to Grievants' request, for his failure to provide a safe workplace, it is unclear what Intervenor Cobbs should have done that he did not do. Much of Grievants' argument is based on Grievants' belief Intervenor Cobbs heard Intervenor Green's language and failed to penalize her for it. The undersigned Administrative Law Judge believes Intervenor Cobbs when he says he did not hear Intervenor Green curse. The tape does demonstrate there was a tremendous amount of female yelling. Additionally, Intervenor Cobbs was upset and engaged in a conversation with a loud and insubordinate employee; that he did not hear the words of the other conversation, but only heard the tone, is not difficult to believe.

No other behavior was cited by Grievants on the safety issue. As for the harassment issue, Grievants presented little evidence in this regard. Grievant Yeager believed it was harassment for Intervenor Cobbs to speak to her in a loud tone when he found her breaking a clearly defined rule which was instituted to protect the safety of the school children, or the equipment, or both. Grievant Yeager then proceeded to have an argument about Intervenor Cobbs' failure to tell who complained and to accept his answers. Certainly, it would have been better for Intervenor Cobbs not to tell Grievant Yeager to "Shut up!" However, Grievant Yeager should not have responded to her supervisor's question about a rule violation in such a hostile manner. This is why the decision for Intervenor Cobbs to attend supervisor training will be upheld, but the undersigned Administrative Law Judge finds insufficient evidence to warrant a written reprimand.

As for Grievants, especially Grievant Yeager, it is amazing that they should request written reprimands to be issued against these Intervenors, and then be righteously

indignant about the complaints made against them. Grievants should not have put water on the bus, Grievant Basford should not have called Intervenor Green a "Suck" and gotten in her face, Grievant Yeager should not have yelled at her supervisor and should not have ignored his direction to shut up, and Grievant Yeager should not have removed the tape and hid it until she chose to inform KCBOE of its presence. KCBOE would have been well within its rights to discipline Grievant Yeager and Grievant Basford for their behavior.

The main issue in this case is one of equity. Here, when the parties cannot agree, the undersigned is required to examine the issue logically and fashion an equitable remedy that meets the requirements of the statute. W. Va. Code § 18-29-5(b) states an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . . ." It is important to see that all parties involved in this case are treated fairly.

The above-stated facts require the undersigned Administrative Law Judge to review the Code definition of discrimination. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

It is clear Intervenor Green was treated differently from Grievants. Grievants were guilty of a variety of inappropriate behaviors on June 8, 1998. Intervenor Green was guilty of responding in kind to "fighting words" from Grievant Basford. Her response was inappropriate and incorrect. However, she should not be punished alone; this would be an example of "differences in the treatment of employees", and such differences in treatment are prohibited by statute.

Accordingly, KCBOE is directed to re-examine the events in light of the Findings of Fact set forth in this case, and to select whether it wishes to either remove Intervenor Green's written reprimand or to give Grievants written reprimands as well. To do otherwise would be to engage in discrimination. The undersigned Administrative Law Judge realizes that this ruling is unusual, but is of the opinion it is a fair and equitable one. Further, all employees at the East Bank Terminal are still required to attend the designated training and this includes Intervenor Green, Grievant Yeager, and Grievant Basford.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Since both Grievants and Intervenor Green engaged in inappropriate behavior, it would be an act of discrimination to issue a written reprimand to only Intervenor Green and not to Grievants.

3. Intervenor Cobbs did not subject Grievants to harassment on June 8, 1998.[8]

[8]Indeed, it is unclear what Grievant Basford's complaint is in this area.

4. Intervenor Cobbs did not fail to provide a safe work environment for Grievants. Much of what occurred was directly related to their own behavior, including their name calling and insubordination.

Accordingly, this grievance is **DENIED**, and the actions to be taken by KCBOE are indicated below.

KCBOE is directed to assess the events of June 8, 1998, in light of the findings in this Decision, and to select whether it wishes to give Grievants and Intervenor Green written reprimands, or whether it wishes to remove all record of Intervenor Green's written reprimand from her personnel file. No written reprimand is to be issued against Intervenor Cobbs, but he is still directed to attend supervisor training. All employees at the East Bank Terminal are still directed to attend conflict resolution and team-building training, and this training is still mandated for Grievants and Intervenor Green. This action of requiring training is not disciplinary in nature and is for the purpose of improving the quality of the interpersonal relationships at East Bank Terminal which are clearly in need of repair.

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

JANIS I. REYNOLDS
Administrative Law Judge

Dated: December 30, 1998