GARY TOOTHMAN,

Grievant,

v. **DOCKET NO. 98-24-139**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Gary Toothman, challenges the authority of the Marion County Board of Education ("Board") to require bus operators to wear uniforms while performing their job duties. The grievance was filed at level one on February 25, 1998, where it was denied by Grievant's immediate supervisor on March 10, 1998. Grievant appealed to level two, where a hearing was conducted on March 23, 1998, followed by a written denial of the grievance by Ronald Wood, Hearing Examiner. Grievant appealed to level three on April 3, 1998, and the Board voted to deny the grievance at its meeting on April 20, 1998. A level four appeal was filed on April 27, 1998. (See footnote 1) After a continuance jointly requested by the parties, a level four hearing was conducted in this Grievance Board's office in Morgantown, West Virginia, on August 17, 1998, at which time Grievant was represented by attorney Brent Beveridge, and the Board was represented by attorney Stephen Brooks. This matter became mature for decision on September 14, 1998, upon receipt of the parties' written briefs. The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Board as a regular bus operator.

2. In the spring of 1997, a transportation committee, made up of bus operators elected by their peers and representatives from service personnel associations, began investigating the possibility of having the bus drivers wear uniforms. They took bids from uniform providers, and held meetings with the bus operators to discuss the issue.

3. In May of 1997, a majority of the bus operators voted to ask the Board to provide them with uniforms, which the bus operators would wear while engaged in their official duties. During this meeting, there was no discussion of the uniforms being optional. Grievant voted against wearing a uniform.

4. At its regular meeting on September 15, 1997, the Board approved the rental of bus operator uniforms from the low bidder, UniFirst Corporation.

5. Pursuant to the agreement with UniFirst Corporation, each bus operator was issued 11 pants and shirts, 2 jackets with zip-out lining, and optional coveralls and shorts. The bus operators were also provided with lockers in which to keep the uniforms, and UniFirst Corporation handled the weekly cleaning of the uniforms.

6. The uniforms became available for wear in late 1997.

7. In a memorandum to all bus operators dated January 5, 1998, Transportation Supervisor Harold Moran instructed drivers to inform him if there were any problems with the fit of their uniforms. He further stated "If your uniforms fit (sic) you are to wear them."

8. It came to the attention of Grievant's supervisors in January of 1998 thatGrievant was not wearing his uniform. On January 22, 1998, Grievant was called into a meeting with Mr. Moran and Dennis Edge, Assistant Superintendent. Grievant admitted he had not been wearing his uniform. (See footnote 2) Mr. Edge told Grievant that he had to wear the uniform, that continued refusal to wear it would be insubordination, and that disciplinary action would be taken.

9. After the January 22 meeting, Grievant began wearing his uniform, and he has worn it ever since.

10. Grievant has not been disciplined in any way for not wearing a uniform.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). The original grievance statement alleged "harassment, misinterpretation of written or unwritten policies, as well as discrimination by classification and, discrimination to service personnel in general."

"Harassment" is defined by W. Va. Code §18-29-2(n) as "repeated or continual disturbance,

irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Grievant was told on only one occasion that he had to wear his uniform, a directive which he obeyed. Additionally, it was not unreasonable of Grievant's superiors to expect him to wear the uniform which the Board had supplied at great expense and at the majority of bus operators' request. Therehas been no "repeated or continual" annoyance or irritation in this case, and the Board's actions were not contrary to normal expectations. There was no harassment of Grievant.

"Discrimination" is defined by Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant seeking to establish a prima facie case of discrimination under this statute must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees:
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular;

and

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employees and were not agreed to by the grievant in writing.

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994).

The Board has stipulated that no other employees wear uniforms. Accordingly, Grievant appears to contend (although not argued in his level four brief) that bus operators are being discriminated against, because they are the only service personnel required to wear uniforms. However, it is patently obvious that bus operators are not "similarly situated" to other personnel in this regard. No other group of employees expressed a desire to wear uniforms, voted on it, and had a contract for provision of the uniforms approved by the Board. In addition, transportation supervisors provided testimony that part of the reason for having bus operators wear uniforms was that they are the onlypersonnel who travel away from school with the children on a regular basis, and uniforms would make it easier for the children to identify bus operators in unfamiliar surroundings. For these reasons,

Grievant has not established he and the other bus operators are similarly situated to other service personnel, and he has not established a prima facie case of discrimination.

Finally, Grievant alleges in his level four brief that a mandatory uniform requirement is an official policy which must be in writing to be enforceable. West Virginia Board of Education Policy 5300, Section 2.8 provides that "[a]ll official and enforceable personnel policies must be written and made available to every employee of each county board of education." See Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). However, Respondent contends that this was not a personnel policy, but a benefit provided to the bus operators.

The problem with Respondent's argument is that Grievant was specifically told that failure to wear the uniform would result in discipline. Accordingly, wearing of the uniform was clearly a "requirement" of all bus drivers, so it is a "personnel policy." Although the Board did vote on approval of the contract for provision of the uniforms, there is no evidence of record that it voted specifically to require all bus operators to wear the uniform or face discipline. Therefore, per Section 2.8 of Policy 5300, this policy was unwritten and unenforceable. Of course, if the Board wishes to adopt a mandatory uniform requirement for bus operators, it may do so by voting to adopt the policy and issuing it in writing to its employees.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary cases, the grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. See W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. "Harassment" is defined by W. Va. Code §18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

3. Grievant did not prove by a preponderance of the evidence that the Board engaged in harassment.

4. "Discrimination" is defined by Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees." A grievant seeking to establish a prima facie case of discrimination under this statute must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees:

(b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular;

and

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

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994).

5. Grievant did not establish a prima facie case of discrimination. 6. West Virginia Board of Education Policy 5300, Section 2.8 provides that "[a]ll official and enforceable personnel policies must be written and made available to every employee of each county board of education."

7. Because all bus drivers were required to wear uniforms, and this policy was unwritten and had not been officially adopted by the Board, it was unenforceable.

Accordingly, this grievance is **GRANTED,** and the Board is hereby directed not to discipline Grievant for failure to wear a uniform, until such time as this policy is adopted by the Board, placed in written form, and distributed to all employees.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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.

Date: October 7, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant's level four appeal was filed as a "Motion for Default Hearing and/or Level IV Hearing." During a phone conference conducted on May 26, 1998, the parties agreed to proceed with a level four hearing on the merits of the grievance, the grievant preserving his right to pursue a default judgment in circuit court.

Footnote: 2

Grievant's only explanation of his resistance to wearing a uniform is that he "is not a uniform person" and that it should be no one's business what he wears.