

**DOUGLAS BUTTS and
SHERRY MITCHEM,
Grievants,**

v. Docket No. 00-02-147

**BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievants, Douglas Butts and Sherry Mitchem, employed by the Berkeley County Board of Education (BCBOE) as Custodians assigned to Hedgesville High School (HHS), filed individual level one grievances on March 29, 2000, in which they alleged, "I am being singled out and discriminated against by being ordered to wear uniform shirts during working hours. Other service personnel (Aides, bus drivers, cooks, secretaries) are allowed to wear apparel of their choice." The relief sought by Grievants was "[a]bolishment of mandatory wearing of uniform shirts for all service personnel employees and restore my right to individuality."

HHS Principal Don Dellinger denied the greivances at level one. The grievances were consolidated at level two, and were denied by hearing evaluator Susan K. Paugh following an evidentiary hearing. Grievants elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced their appeal to level four on May 4, 2000. A level four hearing was conducted on August 29, 2000, at the BCBOE offices in Martinsburg, West Virginia, at the request of BCBOE counsel, and with Grievants' agreement. Grievants represented themselves, BCBOE was represented by Laura Lilly, Esq., Director of Legal Services. The grievance became mature for decision at the conclusion of the hearing when both parties waived the opportunity to file post- hearing proposed findings of fact and conclusions of law.

The facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievants are employed by the Berkeley County Board of Education as Custodians, and were assigned to Hedgesville High School at all times pertinent to this decision.

2. BCBOE initially purchased uniform shirts for employees in the Maintenance Department, and during the 1999-2000 school year expanded the program to include Custodians, at their request.
3. In addition to constituting a financial benefit to the employees, the blue and white pinstripe uniform shirts also serve as a security measure, making Custodians, who may work both in and outside the school facilities, easily identifiable as BCBOE employees.
4. Grievants have suffered no harm from wearing the uniform shirts.
5. BCBOE has not adopted a policy requiring that the uniforms be worn.

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. LoganCounty 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.

Grievants argue that they are subject to discrimination because they are forced to wear a uniform shirt while other service personnel are not. BCBOE asserts that it has provided the uniforms under the authority of W. Va. Code §18-5-13, which allows it to provide appropriate uniforms for service personnel, and denies that Grievants are treated in a discriminatory manner because all Custodians are required to wear the uniforms.

County boards of education have been given specific statutory authority regarding this issue. W. Va. Code §18-5-13 states, “[t]he boards, subject to the provisions of this chapter and the rules of the state board, have authority: . . .(13) To provide appropriate uniforms for school service personnel”. Of course, this authority may not be exercised in a manner which would result in discrimination.

W. Va. Code §18-29-2(m) defines discrimination 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.” Employees seeking to establish unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

- (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
- (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and,

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

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions.

Thereafter, grievants may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

This facts and issues in this case are nearly identical to those in Toothman v. Marion County Board of Education, Docket No. 98-24-139 (Oct. 7, 1998), in which Mr. Toothman, a bus operator, complained that he was required to wear a uniform while service employees in other classifications were not. MCBOE asserted that the uniforms were provided at the request of the bus operators, and that the uniforms were a safety mechanism which allowed the children to identify bus operators in unfamiliar surroundings. It was determined that for these reasons, grievant and other bus operators were not similarly situated to other service personnel, and had not established a prima facie case of discrimination.

However, just as in the present matter, MCBOE had not adopted an official policy requiring that the uniforms be worn. Relying upon West Virginia Board of Education Policy 5300, Section 2.8, the Administrative Law Judge in Toothman held that a mandatory uniform requirement is an official policy which must be in writing to be enforceable. Unlike Mr. Toothman, there is no evidence that Grievants herein have been told that their failure to wear the uniform would result in discipline, but the testimony of both Assistant Superintendent James Welton and Superintendent Manuel Arvon left no doubt that the uniforms were required. Under these circumstances, Grievants' failure to wear the uniforms would likely result in some form of discipline. Therefore, BCBOE must adopt a mandatory uniform requirement for the appropriate employees before it can enforce any mandatory usage.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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. W. Va. Code §18-5-13 provides that, “[t]he boards, subject to the provisions of this chapter and the rules of the state board, have authority: . . . (13) To provide appropriate uniforms for school service personnel”. 3. Employees seeking to establish unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

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

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

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

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievants have failed to prove that they are similarly situated to employees who are not required to wear a uniform, and have failed to establish a prima facie case of discrimination.

5. 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.”

___6. Respondent's unwritten policy requiring Maintenance and Custodial employees to wear uniforms is unenforceable until such policy is officially adopted.

Accordingly, this grievance is **GRANTED**, and the Board is hereby directed not to discipline Grievants 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 to the Circuit Court of Berkeley County. Any 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 14, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE