MICHAEL ADKINS,

Grievant,

v. Docket No. 01-DOH-420

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Michael Adkins, filed this grievance against his employer, the Division of Highways ("DOH") on May 3, 2001. The Statement of Grievance reads, "Political Favoritism," The initial Relief Sought was "Stop discrimination against me." At Level IV Grievant stated, "I want to know why 371-706 Truck was taken away from me."

This grievance was denied at all lower levels. Grievant appealed to Level IV on June 27, 2001. A Level IV hearing was held on August 23, 2001. This case became mature for decision at that time, as the parties elected not to present post-hearing submissions. (See footnote 1)

Issues and Arguments

Grievant alleges political favoritism occurred when the truck he was driving was taken from him and given to another employee, and he was then given an older model truck to drive.

Respondent asserts no policies or regulations were violated, and the assignment of vehicles is at the discretion of the supervisor. Respondent notes the employee who received the newer truck was more senior, and he had filed a grievance over the truckassignment. Respondent also reports it is the practice of the county supervisor to give the newest piece of equipment to the person whose equipment is replaced.

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

Findings of Fact

1. Grievant is employed as an Equipment Operator III in District II, Lincoln County, and is regularly assigned to the Yawkey substation. Mr. Larry Pauley is the County Highway Administrator for Lincoln County.

2. Vehicle assignments are at the discretion of the County Highway Administrator, and it is Mr. Pauley's practice to give the newest piece of equipment to the person whose equipment is replaced.

3. When Grievant's regular piece of equipment, a new track hoe, was non- operational, Mr. Pauley gave Grievant the choice of driving a truck or the grader driven by Fritz Graley.

4. When Grievant had moved up to the track hoe, Mr. Graley, another Equipment Operator III, was moved up to Grievant's grader.

5. Grievant felt it would be wrong "to take the grader" from Mr. Graley since he had not been driving it very long.

6. Grievant and Mr. Graley agreed Grievant would drive a truck instead of the grader. 7. Prior to being assigned to the grader, Mr. Graley had driven a newer truck, a 1997 or 1998 model. He received this new truck because his was the last truck that had been replaced.

8. After Mr. Graley started driving the grader, this truck was driven by a temporary employee who held the proper Class A CDL license.

9. Grievant received the truck in approximately February 2001, and drove the truck for approximately two months.

10. Mr. Dorsell Baker is the oldest truck driver at the Yawkey substation, and he is an Equipment Operator II. He filed a grievance requesting he be assigned the newer truck. As an Equipment Operator II, he would typically be the individual driving a truck, and Grievant would be driving Equipment Operator III equipment such as the track hoe or grader.

11. Mr. Pauley resolved this grievance by assigning Mr. Baker the new truck because he was more senior.

12. Grievant was then assigned an older truck, a 1995 model, to drive until his track hoe was repaired.

13. Grievant has also operated other pieces of equipment as requested during the time his track hoe has been in for repairs.

14. The only evidence applicable to the issue of political favoritism was presented at Level II when Grievant stated he was a registered Democrat, and he thought/believed Mr. Baker was a registered Republican. The political party of Mr. Graley and Mr. Pauley was not identified.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

Grievant argues that it demonstrates discrimination and political favoritism for Mr. Baker to drive the newer truck.

W. Va. Code § 29-6-20 discusses political favoritism and states:

> **(a) No person shall be appointed or promoted to or demoted or dismissed from any position in the classified service or in any way favored or discriminated against with respect to such employment because of his political or religious opinions or affiliations or race; but nothing herein shall be construed as precluding the dismissal of any employee who may be engaged in subversive activities or found disloyal to the nation.**

The West Virginia Department of Transportation ("DOT") Policy on Political Activities is contained in Volume 3, Chapter 18 in DOT's Administrative Procedures. (See footnote 2) **It states:**

> **1. Employees cannot appoint, promote, demote, or dismiss (from any position in the classified service under the State Division of Personnel), or in any way favor or discriminate against anyone in the classified service on the basis of politics.**
>
> **2. Employees cannot seek or attempt to use any political endorsement in connection with any appointment in the classified service. (All employees).**

> **3. Employees cannot use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or any other advantage in employment in any such position for the purpose of influencing the vote or political action of any person, or for any consideration. (All employees).**

Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 3) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-

215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not met his burden of proof and established a prima facie case of discrimination or political favoritism. It appears Grievant is alleging political favoritism by both Mr. Pauley and Mr. Baker. (See footnote 4) Grievant notes Mr. Baker did not file a grievance over the truck while Mr. Graley was driving it, but waited until he was driving it. As Grievant stated at hearing, he wants to know why Mr. Baker did this. (See footnote 5) He sees this delay as proof that Mr. Baker's actions were politically motivated. Grievant also believes the reason Mr. Pauley gave Mr. Baker the truck was because of political favoritism, and that the whole situation "was just a set up scheme." Test. Grievant, Level II Hearing. Mr. Pauley's political affiliation was not specified, but Grievant may know or have assumed it is different from his own. Although Grievant believes this issue is based on political motivation or the resultof favoritism or discrimination, he has not shown his beliefs to be true. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Since vehicles assignments are based on the supervisor's discretion, and there was no showing Mr. Pauley's decision to assign the new truck to a more senior employee was unreasonable, the undersigned Administrative Law Judge cannot simply substitute her judgement for Respondent. Harrison, supra.

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, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

2. W. Va. Code § 29-6-20 discusses political favoritism and states:

> **(a) No person shall be appointed or promoted to or demoted or dismissed from any position in the classified service or in any way favored or discriminated against with respect to such employment because of his political or religious opinions or affiliations or race; but nothing herein shallbe construed as precluding the dismissal of any employee who may be engaged in subversive activities or found disloyal to the nation.**

3. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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."

4. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

5. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**
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> **and,**
>
> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

6. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

7. Grievant has not met his burden of proof and established a prima facie case of discrimination or political favoritism.

8. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT- 359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of thisdecision. W. Va. Code § 29-6A-7 (1998). 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 31, 2001

Footnote: 1

Grievant was pro se, and Respondent was represented by attorney Jennifer Francis.

Footnote: 2

This policy was not placed into evidence by the parties, but was contained in the Level III Decision.

Footnote: 3

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 4

An employee cannot file a grievance against a co-worker for political favoritism. A co-worker is not in a position to change or modify another employee's terms of employment.

Footnote: 5

Mr. Baker was not called to testify, and there was no evidence presented to show Grievant had asked Mr. Baker this question.