DOUGLAS BUTTS, et al.

Grievants,

v. **Docket No. 01-02-052**

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Douglas Butts, Sherry Mitchem, and Tammy Miller, employed by the Berkeley County Board of Education (BCBOE) as Custodians assigned to Hedgesville High School, filed a level one grievance on December 6, 2000, in which they alleged, "I am being singled out and discriminated against by being ordered to wear a uniform shirt during working hours." For relief, they requested the "immediate abolishment of all discriminatory practices where uniform dress is being applied to only a segment of service personnel." After the grievance was denied at levels one and two, Grievants elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced their claim to level four on February 8, 2001. By agreement of the parties, a level four hearing was conducted by telephone on March 27, 2001. Grievants represented themselves, and BCBOE was represented by Laura Lilly Sutton, Esq., Director of Legal Services. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

The facts of this matter are undisputed, and may be set forth as follows:

Findings of Fact

1. Grievants are employed by BCBOE as Custodians, and were assigned to Hedgesville High School at all times pertinent to this grievance. 2. BCBOE adopted Policy GBY: Uniforms for Custodians and Mainetenance Personnel, effective November 6, 2000. This policy states in its entirety,

All custodians and maintenance personnel shall be required to wear uniforms, as provided, while performing duties for the Berkeley County Board of Education. Failure to wear the provided uniform will result in disciplinary action, which may include a warning, suspension or termination.

3. During the 2000-2001 school year BCBOE purchased and required all Custodians to wear uniform shirts. The purchase was made at the request of the county service personnel association, and was for the purpose of identification and safety since Custodians work both in and outside the school, and are not otherwise immediately recognizable.

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 §4.21 (2000); 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. Grievants argue that they are subject to discrimination because they are forced to wear uniform shirts while most other service employees are not. They assert that the uniforms interfere with their freedom of choice in clothing, and subject them to harassment by other employees. BCBOE denies that it has engaged in discrimination because the shirts are to be worn by all Custodians, pursuant to policy.

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 discrimination must first establish a prima facie case of discrimination 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

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

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant 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. ofCommunity 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).

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. Although Grievants compare themselves to all service personnel when making their claim, in fact they are not similarly situated to secretaries, aides, or cooks. While these employees may travel throughout the school during the day, their work is centralized in a defined area of the school. Grievants, by contrast, work both in and outside the school.

Further, Grievants have failed to prove that wearing the uniform shirts has been detrimental to them. While Grievant Butts indicated that he had been harassed by other employees, he stated that he had not reported or complained of the behavior. In a prior grievance involving this issue, he indicated the other employees were acting in a teasing manner, and he had suffered no real harm. (See footnote 1) On the contrary, Grievants receive a valuable benefit in that they are not required to purchase clothing to wear to work. While Grievants' desire to wear their own clothing is understandable, BCBOE has now promulgated a policyrequiring them to wear uniform shirts, and Grievants have failed to prove the policy results in discrimination.

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 §4.21 (2000); 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 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, or that wearing the uniform has caused them any actual harm. Therefore, they have failed to establish a prima facie case of discrimination.

Accordingly, this grievance is **DENIED.**

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: April 3, 2001 _____

SUE KELLER

Senior Administrative Law Judge

Footnote: 1

Grievants previously filed an identical grievance during the 1999-2000 school year regarding the uniforms. Grievants prevailed in Butts and Mitchem v. Berkeley County Bd. of Educ., Docket No. 00-02-147 (Sept.14, 2000), because BCBOE did not have a policy regarding uniforms at that time. Upon adoption of Policy GBY in November 2000, Grievants were again required to wear the uniforms, prompting the pending action.