VERA JONES, et al.,

Grievants,

v. **Docket No. 04-30-129**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) initiated this proceeding on November 14, 2003, alleging they have been the victims of discrimination, harassment, favoritism and retaliation, specifically with regard to changes in parking sites for transportation employees assigned to special education buses, and also with regard to the placement of cameras on some buses. The grievance was denied by their immediate supervisor, and a level two hearing was conducted on February 3 and 9, 2004. The grievance was denied, in part, and granted, in part, in a decision dated March 3, 2004. Level three consideration was waived, and Grievants appealed to level four on April 2, 2004. A hearing was held in Westover, West Virginia, on August 13, 2004. Grievants were represented by counsel, John E. Roush, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 20, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employees of the transportation department for the Monongalia County Board of Education ("MCBOE"), either as bus operators or transportation aides.

2. Beginning in October of 2003, Irv Schuetzner, Director of Transportation, notified all bus operators and aides that special education buses would have to be parked at the bus garage, and that aides would have to begin and end their workday at the garage, also. Previous to the implementation of this requirement, many drivers parked their buses at home or other location, and

the aide was picked up at a location convenient for that individual.

3. The reasons for the alteration in parking sites for special education bus drivers and aides were as follows:

> Problems had occurred when either a driver or aide called off work and a substitute was needed. On some occasions, the substitute did not know where to meet the other party, causing delays in starting the bus run.

> Because of the special needs of the children riding special education buses, it is imperative that delays do not occur, so that children are not kept waiting for the bus for long periods of time.

> Many special education buses are equipped with special devices, such as lifts, so a replacement bus is sometimes not available if the driver has kept the bus at home and will not be working on a given day.

4. Regular bus operators are allowed to park their buses at locations other than the bus garage, with approval. In response to this grievance, Respondent implemented a written policy regarding when this permission will be granted, depending on mileage saved by parking at the alternate site, time savings, security at the location, ownership of the property, snow removal services, and general benefits of parking the bus at the location. 5. Video cameras have been placed on approximately ten of Respondent's buses. Respondent's plan is to eventually place a camera on every bus, but funding will have to be obtained over the next few years. The cameras automatically begin recording when the ignition is turned on, and they continue to record for twenty minutes after the ignition is turned off. The twenty-minute recording after shutoff is a factory setting, which would have to be changed by MCBOE maintenance personnel. Each tape runs for eight hours, then automatically tapes over itself. These tapes are chiefly to be used when students are disciplined for misconduct which occurs on the bus or make allegations of misconduct on the part of the driver.

6. Grievant Joanna Costello is an aide assigned to a special education bus. Prior to last October, she was allowed to board the bus at the first children's stop, which is closer to her home.

7. Ms. Costello filed a grievance in November of 2003, alleging various acts of discrimination, harassment, and retaliation, including the requirement that transportation aides began and end their days at the bus garage. That grievance was denied at level four. See Costello v. Monongalia County

Bd. of Educ., Docket No. 04-30-130 (Aug. 31, 2004).

8. Grievants Vera Jones and Joe Wolfe are bus operators who transport regular students. Cameras were installed on their buses without their prior consent, when the buses were being repaired for other reasons.

9. Grievants Jeanne Strader and Charlene McMillen are bus operators who transport special needs children. Pursuant to the new policy, they must park their busesat the transportation garage, whereas they previously were allowed to park closer to their homes.

10. Grievants Jackie Mattern and Lisa McMillen are transportation aides who must begin and end their day at the transportation garage. They would like to be allowed to board their buses at locations closer to their homes.

11. Illa Hess, a regular bus operator employed by Respondent, has been granted permission to park her bus on property which is used by MCBOE's maintenance department. Ms. Hess' husband is a supervisor in that department, and Respondent has determined that there is adequate security for the bus at that location.

12. When transportation aides or drivers call off work, they are allowed to leave a recorded message with any special instructions, which is given to the substitute who takes their assignment. However, this has failed to avoid some communication “glitches” in the past, and special education runs have consequently been delayed.

13. A conference room at the bus garage has been divided, so that one end can serve as a lounge area for the bus operators to use between their runs. It has tables, chairs, a microwave, a refrigerator, coffee makers, and snack and drink machines.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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.

While some Grievants appear to have more complaints than others, it appears that their chief concerns are the placement of cameras on some buses, but not others, and the transportation

director's alteration of previous practice insofar as special education drivers and aides must begin and end their workdays at the bus garage. With regard to these issues, Grievants assert discrimination, favoritism, harassment, and reprisal have occurred, entitling them to relief.

Discrimination is defined by W. Va. 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." W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism, a grievant must establish 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 establish a prima facie case of discrimination/favoritism, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason to substantiate its actions. Thereafter, 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. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 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).

With regard to the parking requirements for special education buses, Grievants have failed to establish a prima facie case of discrimination or favoritism, because they are not similarly situated to

regular bus drivers. Respondent has articulated several legitimate issues which differentiate special education buses and personnel from regular buses. Regular buses only have a driver who must report to work and tend to the business of getting children to school safely. Conversely, special education buses have both a driver and aide who must coordinate their activities to get themselves and the buses, with any special equipment needed, on the road in a timely fashion. When either employee calls off work, scheduling problems can result, which is of special concern with the children served by these buses. In addition, there are fewer special education buses available to use as replacements when problems arise. Although some Grievants claimed that other transportation aides are allowed to meet their buses at locations along the bus route, they provided no specific details regarding these aides. Moreover, Respondent countered that, if those situations have occurred, it was without MCBOE's permission and against the transportation department's policy. Accordingly, Grievants have not established discrimination or favoritism with regard to the parking requirement. Insofar as cameras are concerned, Grievants who have cameras on their buses have established a prima facie case of discrimination and favoritism, because they are similarly situated to all other bus drivers who do not have cameras on their buses. However, Respondent has explained why some buses have cameras and others do not, which is merely a funding issue at this point in time. So long as Respondent does, in fact, eventually complete its goal of putting cameras on all buses, it is not discriminatory to have cameras only on some buses.

In addition, this Grievance Board has previously held that the placement of surveillance cameras on school buses is a legitimate means for employers to monitor an employee's job performance. See Gross v. Kanawha County Bd. of Educ., Docket No. 02- 20-090 (Aug. 30, 2002). In the instant case, none of Grievants have made any allegations that video footage has been used against them in any fashion, and Respondent contends that the cameras will be a useful tool in protecting both children and bus operators. Grievants have failed to prove that the cameras should be removed from their buses. As to the concern of some Grievants that the videotape continues for too long--20 minutes--after the ignition is turned off, the undersigned can find no statutory or other violation in this practice.

Grievants have also argued that the change in parking requirement has resulted in a transfer, which they were not notified of as required by statute. It was determined in Moore v. Mercer County Bd. of Educ., Docket No. 01-27-558 (Feb. 20, 2002) that a minimal change in assignment does not constitute a violation of W.Va. Code § 18A-2-7(a), which states in part: "[A]n employee shall be

notified in writing by the superintendent on or before the first Monday in April if he [or she] is being considered for transfer or to betransferred." When an employee continues with the same daily schedule, the same working hours, and the same job location as in previous years, he or she has not been transferred. The alteration of where Grievants park their vehicles at the beginning of the work day has not changed their assignments or positions. Such a minimal change in no way falls within the meaning of "transfer" as used in W. Va. Code § 18A-2-7(a), and does not trigger the notification requirement of that section. See Tolliver v. Mingo County Bd. of Educ., Docket No. 95-29-475 (May 31, 1996); McClain v. Hancock County Bd. of Educ., Docket No. 96-15-114 (June 27, 1996).

Grievants have also argued harassment and reprisal. W. Va. Code § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997).” Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). Reprisal is defined by W. Va. Code §18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes out a

prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Although it is somewhat difficult for the undersigned to ascertain exactly which Grievants are making these allegations and with reference to what specific incidents, it appears that there is a general feeling among the transportation employees that they are not treated with respect by their superiors, specifically, Duane Prickett, Transportation Supervisor. However, when questioned regarding specific allegations, chiefly those made by Grievant Charlene McMillen, Mr. Prickett did not recall having “words” with her, nor did he recall intentionally assigning her “old” buses for extracurricular trips. Moreover, Mr. Prickett testified that he does not make the decisions regarding where buses are parked, which are handled by Mr. Schuetzner. Testimony revealed that some transportation employees feel that the alteration in parking policy was made because the supervisors dislike them personally. The evidence simply does not support this allegation, because several legitimate reasons for the policy have been established. Although some Grievants are unquestionably inconvenienced by having to drive farther to reach the bus garage, the undersigned cannot find that this decision was made to harass or mistreat them. One Grievant even complained that a lounge is not provided for employees who must wait at the bus garage between runs, which was completely refuted by Respondent's evidence regarding the lounge area provided at the garage. Grievants have failed to prove harassment by a preponderance of the evidence, nor have they demonstrated that any MCBOE official has engaged in reprisal against any of them who may have been involved in prior grievances.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

___1. In a non-disciplinary matter, Grievants have the burden of proving their claims 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. In order to establish a prima facie case of discrimination or favoritism as defined in W. Va. Code §18-29-2(m) and (o), a grievant must establish 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).

3. A minimal change in an employee's job assignment does not result in a transfer for which notice must be provided pursuant to W. Va. Code § 18A-2-7(a). Moore v. Mercer County Bd. of Educ., Docket No. 01-27-558 (Feb. 20, 2002). The requirement that special education bus drivers and transportation aides begin and end their workdays at the bus garage was not a transfer.

4. The placement of video cameras on school buses is a legitimate method for a board of education to monitor the activities which occur on those buses. See Gross v. Kanawha County Bd. of Educ., Docket No. 02-20-090 (Aug. 30, 2002).

5. W. Va. Code § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Grievants have failed to prove that they have been subjected to harassment by their supervisors.

6. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the

protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994).

7. Grievants have failed to prove by a preponderance of the evidence that they have been subjected to reprisal.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 27, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants are Vera Jones, Charlene McMillen, Connie Tharp, Jeanne Strader, Jacob Tennant, Shirley Pitcher, Billie Barnett, Joe Shultz, Mary Ann Rogers, Cheryl Williams, Jacqueline Mattern, Bernard Sharpnack, Daryl White, Lisa McMillen, Joseph Wolfe, Michael Smith, Harry Snyder, and Joanna Costello.