JAMES BENNETT, et al.,

Grievants,

v. DOCKET NO. 95-10-256

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, James Bennett, Michael Holstein, Bill Hewitt, Gary Hornsby, Roger Hanner and Leon Shrewsbury, filed this grievance on April 25, 1995, in which they "allege discrimination (West Virginia Code § 18-29-2) in that they were required to work on "snow" days and on the OSE days on which the "snow" days were rescheduled. Although other school service employees were required to work on the OSE days, they were not required to work the "snow" days. Grievants seek as relief, an extra vacation day or other compensation for the day in question, April 14, 1995." Grievance Form (emphasis in original). Following adverse decisions at the lower levels, Grievants appealed to level four on June 21, 1995. The parties agreed to submit the grievance on the record developed below, consisting of the Level II hearing transcript and exhibits, and the Level II decision. This case became mature for decision onAugust 24, 1995, following receipt of the parties' proposed findings of fact and conclusions of law.

The facts of this grievance are not in dispute and are set forth below in the following findings of fact.

Findings of Fact

1. All of the grievants are 261-day employees assigned to the bus garage for the Fayette County Board of Education ("Board").

2. The original school calendar for school year 1994-95 had April 14, 1995, Good Friday, scheduled as an Outside School Environment (OSE) Day.

3. Fayette County schools were closed on the "snow days" of January 30, February 6, 7, 8 and 9, and March 3 and 9, 1995.

4. In accordance with W. Va. Code § 18-5-15, in order to keep the number of instructional days from dropping below 178 days, the school calendar was amended by memorandum dated February 17, 1995. The amendment declared that April 14, 1995 be designated as the make-up day for February 7, 1995, a "snow" day. Joint Exhibit 3.

5. Grievants were aware of this schedule change on or about February 17, 1995.

6. April 14, 1995, was then designated as a faculty senate day, which by statute constitutes a full instructional day. W. Va. Code § 18-5A-5.

7. Grievants, as well as all other Central Office employees and school custodians, were required to work on the February 7"snow" day, while other employees (teachers, secretaries, clerks, aides and bus drivers) were not required to work.

8. When the April 14, 1995 OSE day was cancelled and designated a make-up day for the February 7 "snow" day, Grievants, as well as other employees who had been required to work on February 7, were required to work on April 14, the rescheduled faculty senate day.

Discussion

Grievants claim that they have been discriminated against because they were required to work on April 14, 1995, while other employees were not.

Respondent denies that Grievants have been discriminated against, relying upon a State Superintendent's Opinion on this issue dated March 21, 1988. Respondent also challenges the grievance as untimely.

The question asked of the State Superintendent at that time is directly on point to the instant grievance:

> 1. Can the superintendent require central office personnel to work March 28 (originally scheduled as an outside-the-school environment day) and extend their calendar when they already have worked the "snow day" and, yet, school personnel did not?

The State Superintendent answered:

> Yes. W. Va. Code 18A-5-2 authorizes the county board of education to provide

> "appropriate alternative work schedules" for professional and service personnel on a "snow day" hence, work can properly be assigned to central office employees on a "snow day." An outside-the-school environment day must be cancelled when necessary to keep the number of instructional days from not dropping below 178 per § 18-5-15. If central office employees are needed for work on a cancelled "OS" day, then they can be required to work even though theyalready have worked on the "snow day." This is not actually a calendar extension.

Interpretations by the State Superintendent of Schools of statutes affecting education personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994).

The State Superintendent was also asked whether this practice resulted in discrimination against central office employees because they were penalized for school personnel having a day off due to snow. The State Superintendent responded, "Yes, although I do not think it is discrimination contrary to law. In this regard, please refer to Cimino v. Bd. of Ed., 158 W. Va. 267, 210 S.E.2d 485 (1974), enclosed."

"Discrimination" means 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 § 18-29-3(m). In order to establish a case of discrimination, Grievants are required to establish by a preponderance of the evidence

> (a) that they are similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded them; and,
>
> (c) that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Once Grievants establish a prima facie case of discrimination, the Board can then offer a legitimate reason to substantiate itsactions; thereafter, Grievants must show that the offered reasons are pretextual.

Grievants have failed to make a prima facie case of discrimination, because they have failed to

prove that they were treated differently than other employees within their particular classification, i.e., other employees in the bus garage. Grievants represent all of the employees in the bus garage, and they were all required to work on April 14, 1995. The fact that employees in other classifications, i.e., teachers, secretaries, clerks, aides and bus drivers, were not required to work on April 14, 1995, does not assist Grievants in meeting their burden of proof. See Cimino v. Bd. of Educ. of Marion County, 158 W. Va. 267, 210 S.E.2d 485 (1974).

Based upon a thorough review of the record, case law and applicable statutes, the undersigned finds that the State Superintendent's opinion is not clearly wrong, except to the extent he opines the practice is "discriminatory." Rather, it is more correct to say that some employees are treated differently, but such treatment does not give rise to discrimination.

Respondent also alleges that the grievance is untimely, as Grievants were aware on February 17, 1995, the date of the memorandum amending the school calendar, that April 14, 1995 would be a make-up day for one of the snow days. The grievance was filed on April 25, 1995. While it is true that Grievants could have filed a grievance following the issuance of the memorandum, it is entirely possible that more schedule changes would be forthcoming,and that the make-up day could be changed again. Thus, once it became clear that Grievants would absolutely have to work on April 14, 1995, that became an event which could trigger the period for filing the grievance. Therefore, the undersigned finds that the grievance was filed in a timely fashion pursuant to W. Va. Code §§ 18-29-2, et seq.

Conclusions of Law

1. W. Va. Code § 18-5A-5 states ". . . each Faculty Senate shall be provided by its local Board of Education at least a two hour per month block of non-instructional time within the school day: provided, that any such designated day shall constitute a fall instructional day."

2. Any school or schools may be closed on account of the prevalence of contagious disease, conditions of weather, or any other calamitous cause over which the Board has no control. Under any or all of the above provisions, the time lost by the closing of schools is counted as days of employment and as meeting a part of the requirements of the minimum term of 180 days of instruction. On such day or days, county boards of education may provide appropriate alternative work schedules for professional and service personnel affected by the closing of any school or

schools under any and/or all of the above provisions. W. Va. Code §18A-5-5.

3. Interpretations by the State Superintendent of Schools of statutes affecting education personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994).

4. The State Superintendent's determination that Central Office employees who are needed for work on canceled out-of-school environment days can be required to work even though they have already worked a "snow day" is not clearly erroneous, and applies equally to the bus garage employees in this grievance.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 31, 1995