HAROLD F. FLINT, JR., et al.,

Grievants,

v. **DOCKET NO. 97-17-348**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Harold F. Flint, Jr., Raymond A. Anderson, Bernard Talbott, Kenneth Wagner, Charles Clutter, George Baker, Michael Baker, Danny Dennison and David L. Shaw, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1, et seq. Grievants allege that Respondent Harrison County Board of Education ("HCBOE") has illegally and improperly employed them under 240-day contracts, while employing other, similarly situated employees under 261-day contracts. Grievants Flint, Anderson, George Baker, Michael Baker, Dennison and Shaw seek as relief to be awarded the difference between pay and benefits for 261-day contracts versus 240-day contracts as of the dates they were hired. Grievants Wagner and Clutter seek such pay to be awarded as of the date upon which each assumed his duties as a School Bus Supervisor. Grievant Talbott passed away prior to the rendering of the level two decision, and his estate seeks the difference between pay under a 240-day contract and a 261-day contract from his date of hiring until his retirement.

This grievance was initiated as a circuit court proceeding on October 31, 1995, but the court ordered that the matter be processed as a grievance, remanding it to level two by order dated June 19, 1997. A level two hearing was conducted on August 5, 1997, followed by a written decision denying the grievance on August 26, 1997. Consideration at level three was waived, and thegrievants appealed to level four on August 28, 1997. The parties agreed to submit this matter for a decision based upon the record developed below. This grievance became mature for decision upon submission of the parties' written proposals, received by November 7, 1997.

The following findings of fact are appropriate, based upon the credible evidence introduced at level two.

Findings of Fact

1. All of the named grievants, except for the deceased Mr. Talbott, are presently employed by HCBOE with 240-day employment terms.

2. Grievants are required to work 240 days per year, 20 days per month, during a twelve month period. They receive no paid vacation days, and they are expected to take off 21 unpaid days throughout the year.

3. Employees of HCBOE who have 261-day contracts also work 240 days per year, but receive 21 paid vacation days.

4. Grievants Flint and Anderson are employed as Mechanics. Mr. Flint was hired on July 1, 1981, and Mr. Anderson was hired on July 2, 1984.

5. Grievants George Baker and Michael Baker were both hired by HCBOE on October 19, 1981, in the multi-classification of Carpenter II/General Maintenance/Mason.

6. Grievant Dennison has been employed by HCBOE since October 13, 1981, as a Carpenter I/General Maintenance/Mason.

7. Grievant Shaw has been employed as a Carpenter II/General Maintenance/Mason since August 1, 1984.

8. Grievant Wagner was promoted to a 240-day employment term as a BusOperator/School Bus Supervisor in 1990.

9. Grievant Clutter was promoted to a 240-day employment term as a Bus Operator/School Bus Supervisor in approximately 1984 or 1985.

10. Deceased Grievant Talbott was employed by HCBOE as a Buyer/Clerk II/Inventory Supervisor from August 25, 1981, until his retirement in the summer of 1996.

11. Grievants George Baker, Michael Baker, Dennison, Shaw, Wagner, Clutter and Talbott have compared themselves to other service personnel who hold 261-day contracts. However, none of the employees to whom Grievants have compared themselves are employed in the same classifications as Grievants.

12. Grievants Flint and Anderson perform the same duties, work the same schedule, and hold the same classification as Gordon Dawson and Junior Richards, who hold 261-day employment contracts with 21 days of paid vacation.

13. In the early 1980's, HCBOE began hiring employees only under contracts for terms of 240 days or less, discontinuing its use of 261-day employment contracts. This action was undertaken as a cost-reducing measure. Since that time, the only employees who have been hired under 261-day contracts are Central Office administrative personnel.

Discussion

In a non-disciplinary matter, the grievant has the burden of proving each element of his claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). Grievants allege that they have been subject to discrimination and favoritism and also allege that Respondent's actions have violated the “uniformity statute,” W. Va. Code §18A-4-5b. As will be discussed below, the undersigned findsthat only Grievants Flint and Anderson have proven their cases.

The exact issue presented in this grievance has been addressed previously by this Grievance Board. Grievants have cited Judge Keller's decision in Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990) (reversed on other grounds, Harrison County Bd. of Educ. v. Allman, Circuit Court of Harrison County, Civil Action No. 90-P-86-2, April 15, 1992), in support of their position, wherein it was held that a secretary in the central office, employed for 240 days, had to be provided the same employment term as the other secretaries in that office, who were still employed under 261-day contracts. The decision in Allman was based upon a violation of the provisions of W. Va. Code §18A-4-5b, which states that “uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.” Accordingly, boards of education must provide uniform vacation benefits to similarly situated service employees, meaning those who have “like classifications, ranks, assignments, duties and actual working days.” Concl. of Law No. 2, Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

Only Grievants Flint and Anderson have compared themselves to similarly situated employees. The other grievants, who are all multi-classified, have attempted to compare themselves to other service personnel holding 261-day contracts, but who do not hold the same multi- classifications. Even in Stanley, supra, members of the same department (maintenance) who sometimes performed similar tasks were held not to deserve the same contract terms, simply because they held different

classifications.

The same reasoning applies to Grievants' claims of discrimination and favoritism. W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unlesssuch differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” Similarly, “favoritism” is defined in Code § 18-29-2(o) and refers to “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 under W. Va. Code §§18-29-2(m) and (o), a grievant must demonstrate the following:

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

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). The grievants in this case who have compared themselves to other service employees in different classifications cannot establish a prima facie case under this standard, because they are not “similarly situated” to such employees.

However, Grievants Flint and Anderson have established discrimination, favoritism, and uniformity violations. The undisputed evidence is that the other mechanics who have 261-day contract terms, Gordon Dawson and Junior Richards, perform the same duties, hold the same classification, and work the same number of days as Grievants. Respondent admits that the only difference between these two individuals and Grievants Flint and Anderson is that Mr. Dawson and Mr. Richards were hired prior to the time when HCBOE discontinued its practice of offering 261-day contracts. Clearly, this violates the principles set forth in Allman, supra. Similarly situated employees who work the same amount of days must be provided uniform vacation benefits underW. Va. Code §18A-4-5b. Robb, supra.

Respondent has asserted that the doctrine of laches precludes Grievants from receiving back pay in this case, because of their significant delay in bringing their claims. Both Grievants Flint and Anderson testified that they knew of the differences in their contract terms dating back to when they were hired in 1981 and 1984, respectively. Therefore, there is no question that they could have filed their grievances many years ago and did not. They provided no explanation for their delay.

"Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987)." COL No. 3, Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994). Laches clearly applies in this case, because HCBOE would be prejudiced by having to pay numerous years of back pay to Grievants. However, W. Va. Code §18-29-4(v), enacted in 1992, provides that "[t]he doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice." It has been held by this Grievance Board that the failure to provide uniform vacation benefits for similarly situated employees is a continuing practice. Allman, supra.

Accordingly, HCBOE must create the requisite uniformity in contract terms for Grievants Anderson and Flint and the two other mechanics discussed for the one-year period prior to the filing of this grievance by compensating Grievants for the difference in pay between the 240-day contracts they held and 261-day contracts.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. W. Va. Code §18A-4-5b states that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county."

3. Boards of education must provide uniform vacation benefits to similarly situated service employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Concl. of Law No. 2, Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217

(Sept. 29, 1995).

4. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§18-29-2(m) and (o), a grievant must demonstrate the following:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievants George Baker, Michael Baker, Dennison, Shaw, Wagner, Clutter and Talbott have not proven by a preponderance of the evidence that they are similarly situated to other employees who hold 261-day contracts, so they have not established a prima facie case ofdiscrimination or favoritism, nor that W. Va. Code §18A-4-5b was violated by Respondent with regard to their employment.

6. Grievants Anderson and Flint have proven by a preponderance of the evidence that they are similarly situated to employees who hold 261-day contracts and are entitled to the same vacation benefits as those employees.

7. “Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987).” Concl. of Law No. 3, Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994).

8. W. Va. Code §18-29-4(v) provides that “[t]he doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice.”

Accordingly, the grievances of Grievants George Baker, Michael Baker, Dennison, Shaw, Wagner, Clutter and Talbott are **DENIED**. As to Grievants Flint and Anderson, this grievance is **GRANTED**, and Respondent is ordered to compensate these grievants for the difference between 240-day contracts and 261-day contracts for the one-year period prior to filing of this grievance.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison 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 EmployeesGrievance 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.

DATE: January 22, 1998 _____ **V.**

DENISE MANNING

Administrative Law Judge