DONARETTA SEBOLT, et al.,

Grievants,

v.

DOCKET NO. 96-23-423

LOGAN COUNTY BOARD OF EDUCATION,

Respondent,

and

NORMA McCLOUD,

Intervenor.

D E C I S I O N

Grievants, Donaretta Sebolt, Dorothy Baisden, Rebecca Afzalirad, Rosemary Procopio (See footnote 1) and Sue Proklovich (See footnote 2) , filed a grievance against their employer, the Logan County Board of Education, in May 1996, alleging that "[t]he principal has been guilty of West Virginia Code [§§] 18-29-2 (m)(n)(o)(p)", and requesting "immediate cessation of hostilities." The grievance was advanced directly to level four on October 15, 1996, by agreement of the parties. Pursuant to W. Va. Code § 18-29-4(u), Norma McCloud madea motion to intervene on March 13,1997, which was granted. Following several continuances for good cause, as well as a mediation session before the Grievance Board, a level four hearing was held on December 10, 1997, January 14, 1998, and February 19, 1998. This matter became mature for decision on March 20, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 3)

SUMMARY OF EVIDENCE

Grievants' Exhibits

Ex. 1 -

March 22, 1996 letter from Norma E. McCloud to Dorothy Baisden.

Ex. 2 -

March 22, 1996 memorandum from Norma McCloud to Classroom Teachers.

Ex. 3 -

March 23, 1996 handwritten memorandum from Dorothy Baiden to Norma McCloud.

Ex. 4 -

January 24, 1997 memorandum from Norma McCloud to Staff.

Ex. 5 -

Handwritten note advertising “Judy's Pies & Cakes” for sale.

Ex. 6 -

February 27, 1997 memorandum from Ray D. Woolsey to John D. Myers.

Board's Exhibits

Ex. 1 -

February 13, 1998 memorandum from JoAnn Gore.

Intervenor's Exhibits

Ex. 1 -

April 3, 1992 letter from Norma McCloud to Mrs. D. Sebolt.

Ex. 2 -

April 1, 1996 letter from Norma McCloud to Mrs. Donaretta Sebolt.

Ex. 3 -

October 5, 1994 handwritten note from Norma McCloud to D. Sebolt.

Ex. 4 -

West Virginia Child Nutrition Program Summarized Report 2/28/96.

Ex. 5 -

West Virginia Child Nutrition Program Summarized Report 2/28/96.

Ex. 6 -

Copies of Checks.

Ex. 7 -

Weekly Food Service Record.

Ex. 8 -

Observation/Data Collection for December 18, 1995, 9:15 a.m.

Ex. 9 -

Packet of correspondence relating to School Lunch Program.

Testimony

Grievants testified in their own behalf and offered the testimony of Sue Proklovich, David Godby, and John Myers. The Board offered the testimony of Sheila Hager, Denise Akers, and Debbie Willis. Intervenor testified in her own behalf, and presented the testimony of Sharon Brogan, Alice Hundley, Martha Mullins, and Denise Phipps.

ISSUES

The issues to be decided are whether Grievants have proven by a preponderance of the evidence that the Board, through the actions of Ms. McCloud, has engaged in discrimination, harassment, favoritism, and/or reprisal against them.

BACKGROUND

This grievance arose out of various incidents over time which the Grievants allege constitute discrimination, harassment, favoritism, and reprisal against them on the part of their Principal, Norma McCloud. As a result of these ongoing incidents, the Grievants, as well as others, had a meeting in late February or early March 1996, wherein they listed their complaints in writing, and gave the list to the Faculty Senate Chair, Rosemary Procopio. Ms. Procopio informed Principal McCloud about the complaints, and submitted the list to Superintendent John Myers. Superintendent Myers told Ms. Procopio he would look into the matter and get back with the teachers. He did not, and they filed this grievance on May 20, 1996.

Following the filing of the grievance, several attempts were made by the Logan County administration, including Superintendent Myers and Assistant Superintendent Ray Woolsey, to resolve the conflict between the Grievants and Ms. McCloud. Meetings were held and advice was given, but to no avail. Ultimately, and with the agreement of the parties, this grievance was advanced directly to level four on October 15, 1996. Amediation session was conducted before this Grievance Board, and some of the issues complained of were resolved. However, some issues still remained, and this grievance proceeded to hearing at level four on December 10, 1997, January 14, 1998, and February 19, 1998. At the hearing, it was agreed that evidence would be limited to events which occurred prior to the filing date, May 20, 1996. In addition, one of the Grievants, Sue Proklovich, was dismissed, as she had transferred out of Logan Elementary School, and thus, her claims for relief were moot. However, she was permitted to testify as a witness for the Grievants, over the continuing objection of the Board.

Any specific relief relative to any of the alleged incidents is necessarily time-barred, but the testimony and exhibits regarding those events serve as evidence of the Grievants' claims of discrimination, favoritism, harassment, or reprisal, which are ongoing claims.

Each of the Grievants has individual complaints against Ms. McCloud and the Board which comprise the allegations made in the grievance statement. They will be addressed individually.

Dorothy Baisden

Grievant Dorothy Baisden raised issues of discrimination, favoritism, and reprisal with regard to problems with the “hot lunch program” at Logan Elementary. Specifically, Ms. Baisden alleged Ms. McCloud permitted a retired teacher, Tank Williams, to have free breakfasts at the school, and also permitted teacher Sheila Hager to have free lunches. Ms. Baisden testified she witnessed Mr.

Williams receive free breakfasts on a regular basis. There is no dispute that Mr. Williams often came to the school to visit in the early morning hours while he was taking a walk. Ms. Baisden alleges she saw Mr. Williams eating breakfast, but admitted she had no firsthand knowledge that he did not pay for thebreakfast. Ms. McCloud never saw Mr. Williams eating breakfast, but frequently saw him drinking coffee in the kitchen. When the complaint arose regarding free breakfasts, she told him, upon the direction of Superintendent Myers, to stop going to the kitchen. He did, and no further reports were made of Mr. Williams receiving free food.

Ms. Baisden also testified she witnessed teacher Sheila Hager taking a cellophane- wrapped salad from the lunch counter without paying for it. Ms. McCloud and Ms. Hager both testified that it was quite common for Ms. McCloud to give Ms. Hager part of her lunch, especially when they were both working long hours and through lunches on the Blue Ribbon Schools Project. On the particular day in question, Ms. McCloud testified she gave a salad off of her lunch tray to a student to take to Ms. Hager. Ms. Hager corroborated this testimony, stating a student brought her a salad one day and told her it was from Ms. McCloud.

Ms. Hager waited to eat the salad with her students when they went to the cafeteria for lunch. She had the salad with her when she went through the lunch counter with the children, and did get utensils from the lunch counter. She denies taking the salad from the lunch counter as Ms. Baisden related the story.

Ms. Baisden confronted Ms. McCloud in the faculty lounge and asked her why she was not allowed to have free food when other teachers were, specifically, Ms. Hager. Ms. McCloud told her that Ms. Hager was having financial troubles, and that she often gave her portions of her lunch tray. Ms. Baisden did not believe Ms. McCloud and reported the incidents involving Tank Williams and Sheila Hager to Harriet Deel with the State Department of Nutrition, and the U.S. Inspector General on or about April 5, 1996. Ms.Baisden also included this complaint on the list of concerns sent to Superintendent Myers through Ms. Procopio in March 1996.

Ms. Deel contacted Ms. McCloud and Superintendent Myers regarding the alleged “fraud” in the hot lunch program at Logan Elementary School. Ms. McCloud encouraged Ms. Deel and any other investigators to come to the school and review her records, because she wanted to be sure she was not doing anything wrong. Neither the State Department nor the U.S. Inspector General made any findings of fault with regard to Logan Elementary's hot lunch program. I Ex. 9.

___Sharon Brogan, Ms. McCloud's secretary, testified as to the method used to monitor breakfast and lunch to make sure that everyone has paid or will be charged for their meals. I. Exs 4, 5. As children and teachers come into the lunchroom, they give the attendant their lunch numbers, which get entered into a computer. Sometimes they buy their meals and sometimes they charge them. Sometimes the purchase gets posted on the next day. Both students and teachers are allowed to charge their meals. There is nothing on the lunch records which reflects Ms. Hager or Mr. Williams receiving free food, nor is there anything which shows that they did not receive free food on the days in question.

As a result of her reporting the alleged “fraud” regarding the hot lunch program, Ms. Baisden alleged that Ms. McCloud retaliated against her when she was asked to judge a social studies fair. Ms. Baisden had been a judge for the social studies fair in the past. When it came time to judge in 1996, she informed Ms. McCloud that she had been asked by contest officials to judge the fair. She received a letter on March 22, 1996, from Mrs. McCloud, stating that, as there had been complaints about the Title I program (Ms.Baisden was a Title I teacher), she wanted Ms. Baisden to give her justification in writing for attending the social studies fair. G. Ex. 1.

On the same day that Ms. McCloud wrote to Ms. Baisden, she wrote a memo to all classroom teachers informing them that the two fifth-grade teachers were going to the social studies fair, and asked other teachers to volunteer to supervise students in their classroom for that period of time. G. Ex. 2. The two fifth-grade teachers were the coordinators of the social studies fair.

Ms. Baisden responded in writing, explaining that while the social studies fair did not directly benefit her students, it would benefit the school as a whole because she would develop a familiarity with the contest. Ms. McCloud permitted Ms. Baisden to attend and judge the social studies fair.

Ms. Baisden believes the only reason she received the letter from Ms. McCloud asking for justification to go to the fair, was because of her reporting the problems with the hot lunch program to Superintendent Myers. (She reported the problems to the State Department on April 5,1996, after Ms. McCloud's March 22, 1996 memorandum to her regarding the social studies fair, so any retaliation could not have stemmed from that reporting).

Ms. Baisden alleged that Ms. McCloud then proceeded to harass her, by calling her into her office and “interrogating” her for the better part of a day over the hot lunch incident. Ms. McCloud admits calling Ms. Baisden into her office, but not to talk about the hot lunch program. Ms. McCloud testified

that after Superintendent Myers received the list of concerns from the Grievants, he told her to sit down with each one of them individually and talk to them about their concerns. It was merely coincidence that Ms. McCloud called Ms. Baisden into her office to talk about her concerns shortly after Ms. Baisden had reported the hot lunch program to the State and Federal officials. Ms. McCloud testified that, sometime during this meeting, Ms. Baisden admitted to Ms. McCloud that she called Harriet Deel at the State Department and reported the alleged “fraud” in the hot lunch program. Because the investigation was going on regarding that allegation, Ms. McCloud necessarily spent time talking to Ms. Baisden about that issue. Ms. McCloud also called in the other Grievants to discuss the concerns they reported to the Superintendent.

Rebecca Afzalirad

Ms. Afzalirad alleged Ms. McCloud discriminated against her and retaliated against her for an incident which occurred in November 1989. In November 1989, Ms. Afzalirad ordered a VCR for her classroom through a bonus program in which her students participated. She did not receive the VCR. She notified everyone to keep an eye out for it, and contacted the company she ordered it from. The company put a tracer on it and found it had been sent and signed for by Ms. McCloud.

Ms. Afzalirad asked McCloud about it and she denied the VCR was the property of Grievant, asked her for the serial number, and then said she would check into the matter. As it turned out, the VCR had been received in November and Ms. McCloud had placed it in a Title II teacher's classroom. Ms. McCloud testified she made an honest mistake; that she did not know the VCR was intended for Ms. Afzalirad, even though the packaging slip apparently had her name on it.

After this incident, Ms. Afzalirad testified the environment at school became hostile. She alleged she was not treated the same as the rest of the staff (those who did not joinin the grievance). Specifically, she alleged others did not get “written up” for things, while she did.

Ms. Afzalirad clarified that being “written up” referred to her observation forms. Ms. McCloud gave her constructive criticism on her observation forms, which she conceded she probably deserved. However, she feels other teachers were not receiving the same sorts of comments for their shortcomings, although she admitted she did not know what was on other teachers' evaluations or observations.

Although Ms. Afzalirad alleged Ms. McCloud retaliated against her for the VCR incident, she has never received an unsatisfactory evaluation. She does not have any direct knowledge whether any

other teachers have or have not been written up or reprimanded or given unsatisfactory evaluations.

Donaretta Sebolt

Although Ms. Sebolt had numerous complaints about Ms. McCloud, it appears her problems with Ms. McCloud began when five computers were ordered for the school. Two computers went to the 6th-grade classrooms. Two computers were given to the 5th-grade classrooms, and one computer was assigned to one 4th grade classroom. The teacher of that classroom, Denise Akers, had not yet begun teaching. Ms. McCloud testified that the reason Ms. Akers' classroom received the computer was because she had a gifted student in her class whose IEP required a computer. Ms. Sebolt did not recall Ms. McCloud explaining that to her at the time.

Ms. Sebolt taught the other 4th grade classroom, and was without a computer for over a year. In addition, she had a printer problem that was not corrected for three years,although various attempts were made to fix it. Eventually, it had to be sent away to be repaired.

Ms. Sebolt also related a problem involving Ruth Chafin, a teacher who was suffering from some personal problems. Ms. McCloud had evaluated Ms. Chafin and concluded she was not a satisfactory teacher. Ms. McCloud told Ms. Sebolt not to help Ms. Chafin, even though she was also a 4th grade teacher.

Ms. McCloud clarified that Ms. Sebolt had told Ms. McCloud that Ms. Chafin was having personal problems that she did not want to get involved with. Thus, Ms. McCloud did not impose any responsibility on Ms. Sebolt to assist Ms. Chafin during this period.

Ms. Sebolt related an incident regarding thefts at the school. One day she caught a teacher, Sheila Hager, taking money out of her purse. She had helped Ms. Hager with money in the past, and Ms. Hager admitted she took the money out of Ms. Sebolt's purse. She reported it to Ms. McCloud's secretary, as Ms. McCloud was not there at the time. Ms. McCloud was doing an observation of another teacher at that time. The secretary related the incident to Ms. McCloud, and she came to Ms. Sebolt's classroom immediately upon learning of the theft. Ms. Sebolt wanted Ms. McCloud to report the incident the Board office, and Ms. McCloud asked if she wanted Ms. Hager to lose her job. Ms. Sebolt complained that Ms. McCloud did not do anything about this incident. However, the evidence presented showed that Ms. McCloud did report the incident to the Board office, and a counselor was assigned to assist Ms. Hager with her problems. Further, Ms. McCloud told Ms. Sebolt to report the theft to the authorities if she felt that was necessary. Ms. McCloud also sent a memo telling staff

to be careful about locking up pocketbooks and such, although she did not specifically mention the theft from Ms. Sebolt.Ms. Sebolt testified that she had had money stolen before, but she did not report it to Ms. McCloud.

Ms. Sebolt complained of problems with her attending outside meetings, stating that no substitutes were provided for her by Ms. McCloud. Ms. McCloud told her she would have to find someone to cover her classroom while she was gone. Ms. Sebolt alleged that Ms. McCloud provided substitutes for other teachers, and that she was the only one who was hassled about substitutes. However, Ms. Sebolt did not identify any other teacher who allegedly received favorable treatment, or provide any specifics regarding this claim. Ms. McCloud testified that Logan County policy at that time mandated that schools could only use parent volunteers or teacher trainees as substitutes, because there was no money to pay for substitutes. Ms. Sebolt did get to go to the meetings, and her classes were covered.

Ms. Sebolt testified that she is not allowed to use a copier in Ms. McCloud's office which was bought with funds from the faculty senate, PTO, and general funds. She said other teachers used the copier, but she was not permitted to by Ms. McCloud. Other than her testimony to this fact, Ms. Sebolt presented no evidence that she was ever denied use of the copier in Ms. McCloud's office. Ms. McCloud clarified that anyone could use the copier, unless she had a meeting going on in her office. Ms. Sebolt did not testify whether she attempted to use the copier while Ms. McCloud was conducting a meeting.

Ms. Sebolt was unhappy at her former position at another elementary school and felt her Principal there “had some problems”, or “we had some problems”, similar to those she is experiencing with McCloud. Ms. Sebolt admitted her complaints against Ms.McCloud are similar to those she had with other Principal, except the other Principal “didn't lie”, referencing Ms. Sebolt's belief that Ms. McCloud lied to her about various things.

Ms. Sebolt complained that Ms. McCloud took a computer table away from her classroom. Ms. McCloud explained that the school “'lost” the Title I building, and she had to store equipment throughout the elementary school wherever she could. Ms. Sebolt had a Title I table stored in her classroom, and Ms. McCloud removed it when the Title I teachers received their computers. The table was clearly marked Title I. Ms. Sebolt confirmed she had an extra computer table in her classroom, anyway.

Ms. Sebolt complained that Ms. McCloud was angry with her because of an incident involving a student, A.W., who was experiencing some problems at school. First, Ms. McCloud had cautioned Ms. Sebolt about discussing A.W.'s problems with anyone besides his parents. I Ex. 1. Ms. Sebolt apparently had discussed A.W. with his grandfather. Second, A.W.'s parents had requested copies of all of A.W.'s tests, because he was held back. Ms. Sebolt refused to copy the material and referred Ms. McCloud to the Freedom of Information Act with regard to copying testing materials. Ms. Sebolt said that the parents could come in and look at the tests, but she would not provide copies to them.

Interestingly, the parents of A.W. also had problems which involved Ms. Afzalirad. A.W.'s mother was concerned that her son was not receiving speech therapy at Logan Elementary. She inquired of Ms. Afzalirad whether the speech therapist was coming to her classroom to help A.W. Sometimes the speech therapist did not make it to Ms. Afzalirad's class at the designated time, but she always made up the time with the student later. However, Ms. Afzalirad failed to inform A.W.'s mother of this, and simply informed her that the speech therapist was not coming to her class when scheduled. As a result, A.W.'smother kept a log of all the times Ms. Afzalirad reported the speech therapist had not come to help A.W., and filed a complaint with school officials.

In January 1996 the speech therapist, Debbie Willis, was called to the special education office because of A.W.'s mother's complaint. Ms. Willis testified the complaint that she was not helping A.W. was not true, and that she had documented the speech services. She had all her documentation and discussed the situation with Ms. McCloud. The parent had not complained to Ms. Willis at all, but went directly to the State Department of Education.

Once they investigated, it was discovered that the parent had asked Ms. Afzalirad to document when Ms. Willis had assisted the child. She showed them a little notebook where Ms. Afzalirad had initialed dates. Ms. Afzalirad had never mentioned the mother's complaint to Ms. Willis. Ms. Willis testified that often times, Ms. Afzalirad would not send her children for services and when Ms. Willis would reschedule them, Ms. Afzalirad would forget to send them. Ms. Afzalirad admitted initialing the parent's book, but alleged she did not know what she was initialing.

Ms. Sebolt complained that she had not gotten all materials and supplies she wanted. She did not present any evidence that any other teacher in the school received all the materials and supplies they wanted.

Ms. Sebolt complained that when she gets phone calls at school, McCloud stands close and

listens.

Grievants complain that “nothing was done”regarding the list of concerns they submitted to Superintendent Myers. The following witnesses attested to efforts made by the administration to resolve the conflict between Grievants and Ms. McCloud. David Godby, Director of Title I, was part of a team called into Logan Elementary at the direction of Assistant Superintendent Ray Woolsey to address the problems with the Title I program. The Title I problem arose when the Title I teachers complained they were being used as substitutes. Mr. Godby testified that he spoke with the teachers and Ms. McCloud about the substitute issue, and that problem was resolved.

He had also received complaints from parents about Title I aides not serving the students. He testified he receives concerns constantly from all schools, including Logan, about the Title I program. One parent was not happy that aides were assisting children at all, and she wanted only teachers to assist the children. Others complained that the aides did not assist the children correctly.

Teachers complained that aides were not in classrooms when they should be, and that they were being used in other job capacities. Mr. Godby testified that aides can be used in other job capacities, provided the duties they perform are not in excess of other similarly situated aides in the building. He said the Principal has the right to assign duties to Title I staff, whether they are Title duties or not, as long as they are equal to those assigned to other similarly-situated people. He did not find a situation at Logan where an aide was not available to assist children. He did notice scheduling problems where an aide was assigned to a classroom, but the children were not there because of choir or gym or something. He observed that it was possible the aide was then seen in the office doing something else during that time. Mr. Godby said complaints about Title I are commonplace, and he did not find anything unusual, discriminatory, or indicative of favoritism at Logan Elementary.___John Myers, former Superintendent of Logan County, until June 1997, testified that he met with teachers, a WVEA representative, and the Logan County Education Association President to discuss the teachers' concerns, including free breakfasts for Tank Williams, free salad for Sheila Hager, favoritism, vandalism, Title I aides, the social studies fair, and other miscellaneous concerns.

Shortly thereafter, he met with Ms. McCloud and discussed the items which had been presented to him. He testified that he and Ms. McCloud worked with the hot lunch people in relation to their concerns. He testified an investigator came into the school, and nothing was ever proven regarding the hot lunch allegations. He did discuss with Ms. McCloud that if Tank Williams was coming in for

breakfast, she needed to advise him to stop, which she did. There was no proof that he ever received free breakfasts, though.

He and Ms. McCloud worked with Mr. Godby in relation to the Title I concerns which are detailed above.

He met with the faculty on a faculty senate day and spent the better part the day discussing their problems. They told him they wanted to work it out themselves, but they were unsuccessful. He set up a mediation with the Grievance Board where some guidelines were set out, and some things were resolved, but it did not solve the entire problem. Mr. Woolsey worked closely with the faculty and the administration as a result of the mediation.

Mr. Myers testified that the climate at Logan Elementary was hostile; there was hardly anybody in the various groups at that school who cared for each other. He denied that he ever put Ms. McCloud on an improvement plan because of these concerns, mainlybecause he was not of the strong opinion that she was the total problem in that situation. He testified that everyone in the room was part of the problem.

Mr. Myers testified that WVEA representative, Bob Morgenstern, asked him to remove Ms. McCloud as Principal of Logan Elementary. He responded that, in his opinion, it was a multi-faceted problem, and that while she was part of the problem, it was not of the magnitude that she should be removed, anymore than removing the teachers would be appropriate. He also testified that neither he, nor anyone else in administration, asked Ms. McCloud to resign, transfer, or retire as a result of these problems, although it is readily apparent that this is the only way the problem will be resolved to Grievants' satisfaction.

With regard to the vandalism to cars in the parking lot, it was never resolved who did it, but the vandalism was reported immediately to the authorities.

Administratively, Mr. Myers testified he tried to do everything he could do professionally to assist the situation at Logan Elementary. He feels this is an “unresolvable grievance”; that neither side has worked real hard to solve their problems, and they are generally personality conflicts which are not going to be resolved. Mr. Myers reviewed the things Ms. McCloud did in an effort to solve the problems and felt they were administratively appropriate. She complied with everything he directed her to do as part of these ongoing meetings and mediation.

For example, there was a problem with student placement, where a first grade teacher felt she

had an unfair number of special education students. Ms. Sebolt also voiced concerns about student placement. He made Ms. McCloud re-schedule the placement in a way that would eliminate any hint of favoritism. She complied, but someteachers were still concerned, but he was satisfied with the result. Student placement problems are not unique to Logan Elementary.

Finally, Ms. McCloud attempted to explain several other allegations made against her with respect to this grievance. She testified she has never allowed Title I aides to go to the bank or shopping instead of being in the classroom. She said that, prior to her taking over the school, aides were allowed to leave school to go shopping. When she took over, she was very specific that no aide would leave the school for shopping. It was a very big issue at that time, that employees were signing out and taking longer than their 30 minute duty-free period.

Ms. McCloud testified she did not know if Title I aides decorated a Christmas tree in 1996. She did know that a tree was decorated by the PTO President at night and on weekends. Ms. McCloud does not approve of Christmas trees in school, but went along with it because the PTO wanted it, funded it, and decorated it, as they have for the last two years.

Ms. McCloud admitted that Title I aides wallpapered her office at night, and that they volunteered to do it.

Ms. McCloud testified that no solicitation is permitted on school property. However, Superintendent Myers clarified that non-profit organizations, such as churches, had the right to sell their products if it was not done on school time. There was an incident involving Sue Proklovich, where she had brought in some sweatshirts to sell for her church in 1995. Ms. McCloud told her she could bring them in, and she placed them in the faculty lounge. Someone spilled coffee on them, and when Ms. Proklovich told Ms. McCloudabout the spill, Ms. McCloud responded that, maybe she should not bring items into the school anymore.

Ms. Proklovich interpreted this to mean she was not allowed to sell items for her church at the school. Then she saw others advertising they were selling items for other churches. G. Ex. 5. Ms. McCloud testified she allowed this solicitation, as long as the individual did not deliver the items on school time or collect money on school time. She also checked with Superintendent Myers for approval. Ms. McCloud does not remember telling Sue Proklovich she could not advertise or solicit anything for her church at school. There also was an incident regarding tutoring on school property for profit. At first, Ms. McCloud did not pay attention to the teachers who tutored after

school, but at some time, she was ordered by the State Department of Education not to permit tutoring for profit at the school. She informed teachers they could not use the school to tutor for profit anymore. Upon questioning, Ms. McCloud testified she was not aware that Sheila Hager continued to tutor for profit. Ms. Hager later clarified that she did continue to tutor on a volunteer basis, but not for pay.

Other witnesses, including Ms. Proklovich, testified to the hostile atmosphere at Logan Elementary, not only between faculty and Ms. McCloud, but among members of the faculty. In fact, Ms. Proklovich testified she transferred out of Logan Elementary, because she was being “attacked' by other teachers. She said that Ms. McCloud did not appear to do anything about her complaints regarding the other teachers, because the attacks continued. Specifically, one teacher periodically made comments to her about her noisy key ring, and continued to do so even after Ms. Proklovich complained to Ms. McCloud.

DISCUSSION

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.” “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code § 18-29-2(o). In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, the grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996);

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). W. Va. Code § 18-29-2(p) defines "reprisal" as "the 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 by establishing:

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

(2) that he 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, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

Establishment of a prima facie case of retaliation shifts the burden of proof to the employer to show that the action was the result of legitimate, nonretaliatory reasons. SeeTex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra.

"Harassment" is defined as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 18-29-2(n).

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Ms. Baisden reported fraud in the hot lunch program at Logan Elementary to the State Department of Nutrition and the U.S. Inspector General, because she believed Tank Williams and Sheila Hager were receiving free food.

2. Ms. McCloud did not know that Tank Williams was receiving free food for breakfast, if he even was.

3. Ms. McCloud shared her lunch with Sheila Hager from time to time, and on one specific day, gave her a salad, which Ms. Hager took to the lunchroom with her children.

4.

Ms. Hager did not receive free lunch trays from the school.

5. Ms. Baisden had no firsthand knowledge that Tank Williams was receiving free breakfasts from the school, with or without Ms. McCloud's knowledge.

6. Ms. McCloud asked Dorothy Baisden for justification in writing why she should judge the social studies fair, which did not involve her students.

7. Ms. McCloud did not forbid Dorothy Baisden to judge the social studies fair in 1996, and in fact permitted her to go to the fair. 8. No wrongdoing was ever proven by the State Department of Nutrition or the U.S. Inspector General with regard to Logan Elementary's hot lunch program.

9. Ms. McCloud called Ms. Baisden into her office to discuss the list of complaints she had made to Superintendent Myers, which included the hot lunch program.

10. During this meeting, Ms. Baisden admitted reporting the alleged fraud in the hot lunch program to the State and the U.S. Inspector General.

11. Ms. McCloud called in other Grievants to discuss their concerns as well.

12. Ms. McCloud made a mistake when she appropriated the VCR ordered for Ms. Afzalirad's classroom in November 1996 and assigned it to a Title II classroom.

13. Ms. Afzalirad received constructive criticism on her observation forms from Ms. McCloud, but never received an unsatisfactory evaluation from Ms. McCloud.

14. Ms. Afzalirad has no knowledge of what comments or criticisms other teachers have received on their observations or evaluations.

15. Ms. Sebolt did not receive a new computer in her 4th grade classroom, while the other 4th

grade teacher did receive a new computer.

16. The other 4th grade teacher had a gifted student in her classroom whose IEP required a computer be available.

17. Ms. Sebolt had problems with her existing computer and printer for several years, despite repeated attempts to repair it.

18. Ms. Sebolt had a Title I table in her classroom which had been stored there after the school "lost" its Title I building. Ms. McCloud subsequently retrieved the Title I table to place in the Title I classroom. 19. Ms. Sebolt had another computer table in her classroom, as well as the Title I table.

20. Ms. Sebolt had some personal problems with another teacher and her family and told Ms. McCloud she did not want to be involved with their problems.

21. As a result, when that teacher was experiencing some problems at school, Ms. McCloud told Ms. Sebolt not to assist her.

22. Ms. Sebolt caught another teacher, Sheila Hager, taking money out of her purse and reported it to Ms. McCloud. Ms. McCloud was observing another teacher at the time, but she came to Ms. Sebolt's classroom as soon as she heard about the theft.

23. Ms. McCloud reported the theft to the Board office, and the teacher involved was offered counseling through the Board.

24. Ms. McCloud told Ms. Sebolt she could file criminal charges against the teacher.

25. Ms. McCloud sent a memorandum to the staff cautioning them about leaving their purses unattended and locking their desks.

26. One other time, Ms. McCloud sent around a list of some things that had been reported stolen, but did not report any thefts relating to Ms. Sebolt.

27. Ms. Sebolt did not ever tell Ms. McCloud of any other thefts except the one involving Ms. Hager.

28. Ms. Sebolt had problems getting volunteers or substitutes to cover her classroom when she attended out of school meetings. Ms. Sebolt never had to miss a meeting because she could not get a substitute or volunteer. 29. During the 1995-96 school year, the Logan County schools were not allowed to hire substitutes due to a severe financial shortage. Volunteers or teacher trainees had to be used to cover classrooms.

30. There is a copy machine in Ms. McCloud's office that was bought with funds from the faculty senate, the PTO, and the general funds.

31. This copier is for everyone's use, except when Ms. McCloud is having a meeting in her office.

32. Ms. McCloud requested Ms. Sebolt to turn over copies of a student's tests to his parents when he was held back a year. She refused, stating the tests were protected under the Freedom of Information Act.

33. The parents of that same student were also involved with Ms. Afzalirad in an incident regarding speech therapy services, which they alleged were not being given to their child. As it turned out, the child was receiving services, but Ms. Afzalirad did not inform the parents of that fact, nor did she speak to the speech therapist about the parents' complaints.

34. The Logan County administration, including Superintendent Myers, Assistant Superintendent Woolsey, and Title I Director David Godby intervened and did everything they thought possible to resolve the conflicts between Grievants and Ms. McCloud.

35. Neither Superintendent Myers nor anyone else in the Logan County administration ever recommended that Ms. McCloud step down as Principal of Logan Elementary, despite requests from Grievants that she do so.

36. Title I teachers were sometimes being used to serve as substitutes for other classrooms during the substitute shortage, but that problem has been resolved. 37. Title I aides are sometimes used in other job capacities, which is within the Principal's discretion, as long as those duties are not in excess of those of other similarly situated aides in the building.

38. None of the aides complained that they were being used inappropriately by Ms. McCloud.

39. Some Title I aides volunteered to wallpaper Ms. McCloud's office during the evening.

40. The PTO bought and decorated a Christmas tree placed in Logan Elementary.

41. Several cars, including Grievants', were vandalized in the school parking lot, but it was never determined who did it.

42. Ms. McCloud complied with Superintendent Myers' requests that she re- schedule her student placements in order to avoid any hint of favoritism, after Ms. Sebolt and some other teachers complained.

43. Ms. McCloud did not permit Title I aides to go to the bank or go shopping when they should

have been in the classrooms.

44. Ms. McCloud permits solicitation on school property from non-profit organizations. She never told Sue Proklovich that she could not solicit for her church at the school. She merely recommended that she not bring the items to school where they could be ruined, as her sweatshirts were.

45. Tutoring for profit is not permitted on school property, and Ms. McCloud ordered all teachers who were doing so to cease that activity.

46. Sheila Hager tutors on a volunteer basis after schools, but not for profit.

CONCLUSION

It is clear that Grievants do not like Ms. McCloud, and that Ms. McCloud quite possibly does not like Grievants. However, despite this mutual animosity, Grievants have not established that Ms. McCloud engaged in any unlawful activity against them in the form of discrimination, favoritism, retaliation, or harassment. The problems described above are the result of miscommunication, mutual dislike, distrust, and an inability to put aside differences in order to try to get along. It is quite clear that the only solution Grievants would find satisfactory is the dismissal of Ms. McCloud. Of course, this Grievance Board cannot afford that type of remedy, and Superintendent Myers explained that he was not of the opinion that the problems were entirely of Ms. McCloud's making. In addition, there was nothing she had done that would warrant dismissal from her position as Principal at Logan Elementary. I am afraid I must conclude, as did Superintendent Myers, that this is an unresolvable grievance. Even if I were to order the parties to “cease all hostilities”, there is no enforcement mechanism which could guarantee such a result. Grievants simply are not entitled to any relief in this matter, and certainly not the relief they desire.

CONCLUSIONS OF LAW

1. 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.”

2. “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential,

exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o).

3. In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

4. Once the grievant establishes a prima facie case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non- discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5. W. Va. Code § 18-29-2(p) defines "reprisal" as "the 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 by establishing:

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

(2)
that he 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, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

6. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

7. Establishment of a prima facie case of retaliation shifts the burden of proof to the employer to show the action was the result of legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra. 8. "Harassment" is defined as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 18-29-2(n).

9. Grievants have not shown that they are similarly situated to any other employee of Logan County who received favorable treatment, who was not discriminated against, or who was not retaliated against for acts similar in nature to those of the Grievants.

10. Grievants have not demonstrated that Ms. McCloud harassed them in any way as a result of any of their conduct or actions described above.

11. Ms. McCloud is not guilty of any conduct which would warrant her dismissal as Principal of Logan Elementary, even if this Grievance Board had such punitive power.

Accordingly, this grievance is **DENIED**.

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

MARY JO SWARTZ

Administrative Law Judge

Dated: June 17, 1998

Footnote: 1

Ms. Procopio withdrew from the grievance by letter dated March 3, 1998.

Footnote: 2

Ms. Proklovich transferred out of Logan Elementary subsequent to the grievance being filed. It was determined at level four that Ms. Proklovich's claims against the Board and Ms. McCloud were moot, as she was no longer in the same school as Ms. McCloud, and that she would be dismissed from the grievance. Ms. Proklovich objected to her dismissal, and testified as a witness for the Grievants.

Footnote: 3

Grievants were represented by Robert Morgenstern and Anita Mitter of the West Virginia Education Association, and Joan G. Hill, Esq., of Crandall, Pyles, Haviland & Turner. The Board was represented by Brian R. Abraham, Esq. Intervenor McCloud was represented initially by Timothy Conway, Esq., who withdrew as counsel on October 21, 1997. Thereafter, Ms. McCloud appeared pro se.