AUDREY KOONTZ, et al.,

Grievants,

v. **DOCKET NO. 98-DOE-310**

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) are classified employees of the West Virginia Department of Education (DOE) at Cedar Lakes Conference Center. They claim entitlement to a $2,400 salary increase, which was granted to other DOE employees, effective January 1, 1998. They seek the $2,400 increase, retroactive with interest. This grievance was filed at level one on March 31, 1998, and denied on April 2, 1998. That decision was appealed to level two on April 7, 1998. A level two hearing was held on July 7, 1998, followed by a decision denying the grievance dated July 21, 1998. Level three consideration was waived, and Grievants appealed to level four on August 11, 1998. Grievants moved to remand the grievance to level three, which motion was denied by Administrative Law Judge Brenda Gould on December 1, 1998. The parties agreed to submit this matter for decision on the record developed below, supplemented by written arguments submitted on January 19,1999. (See footnote 2) In order to expedite the decision, this grievance was transferred to the undersigned administrative law judge on January 27, 1999. (See footnote 3)

After a thorough review of the evidence of record, including the level two transcript and its accompanying exhibits, the following findings of fact are made.

Findings of Fact

1. Grievants are classified employees of DOE and are assigned to the Cedar Lakes Conference Center (Cedar Lakes). Their classifications are various, including cooks, food service positions, auto mechanics, maintenance workers, and others.

2. Cedar Lakes was created by the legislature in 1949 as a conference center for the Future Farmers and Future Homemakers of America.

3. Cedar Lakes provides no educational services to students of West Virginia schools; it provides lodging, meals, and meeting facilities in a hotel-type format.

4. More than 80 percent of Cedar Lakes' yearly customers are not affiliated with the school system in any fashion, including church groups, clubs, and other associations.

5. Most of the classified positions at Cedar Lakes do not exist in the Charleston office of the DOE. Those that do exist in Charleston have vastly different job duties from Cedar Lakes' employees. Employees at Cedar Lakes with the same classification titles are engaged in providing lodging-related services, while the Charleston employees provide education-related support services to the state's county boards of education. 6. Cedar Lakes' employees are paid entirely from funds generated by Cedar Lakes' services in conjunction with a small amount of funds provided by the legislature.

7. The only funding provided by DOE to Cedar Lakes is for the salaries of employees in the “curriculum technology resource center,” which prints curriculum materials that DOE distributes to teachers and administrators throughout the state.

8. Effective January 1, 1998, DOE granted a $2,400 salary increase to all classified employees who provide educational support services to the state's schools. This included employees of the Charleston office and the two Cedar Lakes employees who are employed in the technology resource center.

9. In addition to Grievants, other DOE employees who do not provide support services to the school system did not receive the $2,400 raise.

Discussion

In a non-disciplinary matter, Grievants must prove the allegations of their complaint by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. Grievants contend that DOE's failure to grant them the $2,400 raise constituted discrimination and favoritism. DOE argues that the salary increase was granted to employees who

provide educational support services, so it was based upon job duties and was, consequently, appropriate. It also contends that Grievants have failed to assert this claim in a timely fashion, which will be addressed first.

W. Va. Code § 18-29-4(a)(1) provides:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Respondent contends that, based upon the level two testimony, at least some of the grievants in this case (See footnote 4) knew about the $2,400 raise some time in January of 1998, but did not file a grievance until March, well beyond the fifteen-day statutory time limit. In turn, Grievants argue that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), the pay disparity was a continuing violation, so their filing was not untimely.

This Grievance Board has consistently recognized that, in accordance with Martin, supra, salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996). However, that is of no moment here, because DOE has failed to assert its untimeliness defense “at or before the level two hearing,” as required by W. Va. Code § 18-29-3(a). The lower level record contains no assertion by DOE, either in its opening or closing statements at level two or in any document prior thereto, that this grievance was untimely. Therefore, Respondent is barred from raising this defense. See Haddox, supra; see generally Payne v. Mason County Bd. of Educ., Docket No. 96-026-047 (Nov. 27, 1996); Trickett v. PrestonCounty Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

As stated above, Grievants claim they have been the victims of discrimination and favoritism. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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." Similarly, W. Va. Code § 18-29-2(o) defines "favoritism" to mean "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.

Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); 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. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251(1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

The overwhelming evidence of record establishes that, not only are Grievants not similarly situated to those employees who received a salary increase, but that the raise was based entirely upon the job duties of those who received it. Only employees who are directly involved in providing support services of an educational nature to the state's 55 county school systems were given the increase. In addition to the Charleston classified staff, this also included the employees at Cedar Lakes' technology center, who are also clearly providing education-related services by printing curriculum materials for teachers and administrators. It is quite obvious that the remainder of the Cedar Lakes employees are employed for the sole purpose of providing conference and lodging facilities, and their job duties are totally unrelated to the school systems or to educational services. In addition, Cedar Lakes is completely financially independent from DOE, paying its employees, with the

exception of the technology center employees, from its own revenues. This lends further support to DOE's contention that the purpose and function of Grievant's job duties are completely different from those of the employees in DOE's main office in Charleston. Grievants have not established a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o).

Grievants also allege that, on two prior occasions involving similar circumstances to the instant grievance, DOE ultimately granted Cedar Lakes employees the same salary increases provided to other employees, after grievances were initiated. No information was available regarding the first grievance, so it cannot be addressed. As to the second, which was filed in 1988, documents reveal that, although the grievance was denied byDOE, Cedar Lakes employees did ultimately receive raises. This was because of a misunderstanding regarding the source of funds for the raises. The grievants mistakenly believed funds had been appropriated specifically for such raises, but the governor had only authorized raises if each agency's existing funds allowed. Accordingly, upon discovery that Cedar Lakes did have funds available in its own revenue accounts for granting such increases, they were authorized. DOE did not contribute in any fashion to the funding for these raises. Accordingly, DOE does not have an “established practice” of granting raises to all DOE employees, as alleged by Grievants.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, Grievants must prove the allegations of their complaint by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. An employer must raise a timeliness defense at or before the level two hearing, or it is precluded from asserting such a defense. W. Va. Code § 18-29-3(a); See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); See generally Payne v. Mason County Bd. of Educ., Docket No. 96-026-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

3. Discrimination is defined in W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees."

4. Favoritism is defined in W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

5. 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.

Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); 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. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievants have failed to establish a prima facie case of discrimination or favoritism in regard to DOE's granting of a $2,400 raise to certain DOE employees.

7. DOE had legitimate, job-related reasons for treating employees differently with regard to the raise at issue in this grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or theCircuit Court of Jackson 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.

Date: February 8, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The numerous named grievants, in addition to Ms. Koontz, are: William Casto, Betty Brown, Eleanor Jewell, Deanna King, Kathy Young, Gene Chancey, Christine Hedricks, Judy Casto, Jeannette Casto, Diane Fletcher, Rosemary Curry, Debra J. Parsons, Sharon Ratliff, Larry Fields, Jim Kammerer, Roger White, Jerry Jarrell, Thomas Waybright, Paul Collins, Tim Lowry, Bryan Easter, Oleta Atkinson, Karen Pitts, Sketter Lowry, Carolyn Ray, Carolyn Mahood, Gary Walters, Bobby E. Miller, Kelly Boswell, Margaret Boggess, Pamela G. Roush, Patricia Walker, Roy L. Asbury and Mark Kiser.

Footnote: 2

Grievants were represented by Perry Bryant of the West Virginia Education Association, and DOE was represented by counsel, Katherine L. Dooley.

Footnote: 3

Grievances submitted for decision on the lower level record are often reassigned to the administrative law judge with the least active docket, so that a decision can be issued as quickly as possible.

Footnote: 4

Only four of the named grievants participated and testified at the level two proceedings.