SANDRA F. MICK,

Grievant,

v. **Docket No. 99-21-220**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sandra F. Mick, employed by the Lewis County Board of Education (LCBE) as a Clerk II, filed a level one grievance on March 18, 1999, in which she alleged, "[d]id not know I could request my vacation to be reinstated & also 250 day employment. W. Va. School law 18-29-2 Page 283 favoritism - Discrimination! February 1999 an employee in this office was granted 250 day employment & reinstated vacation. She had voluntary [sic] bid a lesser position about (5) yrs ago. I'm asking for the same consideration." For relief, Grievant requested, "[r]einstate vacation days that were taken away. Employment extended (10) days = 250."

Grievant's immediate supervisor lacked authority to grant the requested relief. The grievance was denied following an evidentiary hearing at level two, and by LCBE following a hearing conducted at level three. The matter was appealed to level four on June 3, 1999. A hearing was conducted on August 17, 1999, at which time Grievant appeared pro se, and Respondent was represented by Harry M. Rubenstein, Esq., and Kelly Kimble, Esq. The grievance became mature for decision on September 17, 1999, the due date for submission of proposed findings of fact and conclusions of law.

The following findings of fact are made based upon evidence made a part of the lower-level record.

Findings of Fact

1. Grievant was first employed by LCBE in 1978 as a half-time Custodian II. She held this position until August 1989.

2. In Spring 1988, Grievant was verbally notified that she would no longer be receiving paid vacation days. She did not file a grievance regarding the loss of vacation.

3. In August 1989, Grievant bid on and received two half-time positions of Clerk II at the central

office. The positions were merged into one full-time position with a 240 day employment term, and 21 days of unpaid vacation. Grievant has held this position continuously until the present time.

4. In August 1994, Ann Burkhammer bid on and was awarded a 240 day Secretary III position in the special education department.

5. In 1999, Ms. Burkhammer prevailed in a grievance, and was allowed to realign her position resulting in an upgrade of her employment contract to 250 days, effective 1998-99.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance 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.

Grievant asserts that LCBE has engaged in discrimination and favoritism by denying her the opportunity granted to Ms. Burkhammer to realign her position and regaina 250 day employment term and paid vacation. LCBE argues that the grievance is untimely filed because the grievable event occurred in Spring 1988 when Grievant was advised that she would no longer receive paid vacation.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995);

Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Grievant's own testimony establishes that she was aware in Spring 1988 that shewould no longer receive paid vacation time. It is undisputed that she did not file a grievance to contest that decision. Generally, any attempt to recoup her vacation time would now be time-barred because W. Va. Code §18-29-4(a)(1) requires that the grievant, or her representative, schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought “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 . . . .”

However, this grievance presents a different issue in that it is not the retraction of her paid vacation which she grieves, but rather, LCBE's recent decision to allow a similarly situated employee the opportunity to regain the benefit. LCBE did not assert that Ms. Burkhammer's claim was time barred, even though approximately 5 years had passed since she had accepted the Secretary III position. The reason given for granting her request was that she “had not been given the same opportunities to realign her position in the Central Office, as had been given to other Central Office secretaries.” (LCBE Proposed Finding of Fact #10) The record does not include an explanation of what it means to “realign” one's position; however, Grievant indicated that realignment was available to personnel in other classifications as well as to secretaries. LCBE did not state that realignment was limited to any classification(s).

An employee seeking to establish that her non-selection was motivated by unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her 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 establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory 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. Dept. 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).

Grievant has established that another service employee who had lost an extended employment term when she transferred into a position a number of years ago has been recently allowed to realign her position and regain the lost benefit, and that Grievant has been deprived of the same opportunity. LCBE offers no legitimate, non-discriminatory reason for the difference in treatment. Therefore, Grievant has established discrimination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance 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. 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.”

3. Grievant has established a prima facie case of discrimination.

4. LCBE has failed to establish a legitimate, non-discriminatory reason for its decision to allow one employee to realign her position, but deny Grievant the same opportunity.

Accordingly, the grievance is **GRANTED**, and LCBE Ordered to allow Grievant the opportunity to realign her position, and to instate all the rights and benefits she would have been entitled to receive under her revised employment contract,effective ten days prior to the date the level one grievance was filed.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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. 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: October 28, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE