SHERRI ELLIOTT, et al.,

Grievants,

v. **Docket No. 98-42-304**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent,

and

CHERYLL HALVERSON and DONNA AUVIL,

Intervenors.

D E C I S I O N

Grievants, Sherri Elliott, Janice Bennett, Beverly Wine, Mary Higgins, Debra Lambert, Rosalie Martin, and Annetta Ogden, filed the following grievance against the Randolph County Board of Education ("RCBOE" or "Board"). (See footnote 1) They allege the Board's decision to reclassify Intervenor Donna Auvil and pay her a $50.00 a month supplement, and the decision to increase the increase the supplement paid to Intervenor Cheryll Halverson by $20.00 a month was incorrect and the result of favoritism. The relief sought is to pay Grievants a supplement, and to take away Intervenor Auvil's reclassification and both Intervenors' supplements.

This grievance was denied at all lower levels and was appealed to Level IV on August 20, 1998. A Level IV hearing was held by Administrative Law Judge Randy Miller on November 11, 1998. This case became mature for decision on January 5, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) This case wasreassigned to the undersigned Administrative Law Judge for administrative reasons on April 26, 1999.

Issues and Arguments

Grievants are employed in various service personnel classifications. Some of them are Cooks. They argue they work as hard as Intervenors, note the cooks asked for a supplement and did not receive one, and declare that to grant Intervenors an increase without giving them one is favoritism.

They maintain it was incorrect of Superintendent Glen Karlen to ignore the recommendations of the Reclassification Committee. Grievants also argue the work Intervenor Auvil performs is that of an Executive Secretary not of a Coordinator, and her duties should not result in reclassification. Grievants aver the position Intervenor Auvil was reclassified to should have been posted and failure to do so violated W. Va. Code § 18A-4-8b. They also claimed that if these supplements were given to take care of increased overtime created by the demands of the position, that the proper remedy is to pay the overtime. (See footnote 3) Grievants also argue the information about these personnel matters was intentionally kept from them; and thus, this grievance is timely filed. Initially, Respondent argues this grievance was not timely filed. Additionally, Respondent argues Superintendent Karlen's recommendation to reclassify Intervenor Auvil and to grant both supplements was based on the increase in Intervenors' duties and was appropriate. Respondent notes the recommendations of the Reclassification Committee are just that, recommendations, and that Superintendent Karlen can elect to follow the recommendations or not as he sees fit. (See footnote 4) Respondent also maintains none of the Grievants are similarly situated to the Intervenors; and thus, no favoritism could have occurred. Respondent further avers that no posting was required as there was no vacancy, only a reclassification. Additionally, Respondent contends there was no attempt to hide any information from Grievants, and the method of dealing with these personnel issues was the same as always. Respondent notes Superintendent Karlen sent the requested information immediately after it was requested, and the information was faxed to the newspaper the morning following the board meeting. Intervenors maintain they followed the proper channels to attain reclassification and supplements, and the personnel action was appropriate due to their additional duties and responsibilities.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Intervenor Auvil is employed in the central office of RCBOE. Until the Board's action on April 2, 1998, she was classified as an Executive Secretary.

2. At the April 2, 1998 Board meeting, RCBOE voted to approve Superintendent Karlen's recommendation to reclassify Intervenor Auvil as an Executive Secretary/Coordinator of Personnel, to include a $50.00 a month supplement. This recommendation was based on the additional duties

and responsibilities Intervenor Auvil had accepted after the position of Director of Personnel was eliminated.

3. Intervenor Halverson is and was classified as an Executive Secretary/Certification Officer. With the addition of new rules and regulations, she received additional duties and responsibilities in the Certification area. At the April 2, 1998 Board meeting, RCBOE voted to approve Superintendent Karlen's recommendation to grant Intervenor Halverson an additional $20.00 a month supplement due to the increase in her Certification Officer duties.

4. Grievants Martin, Lambert, and Ogden are employed as Cooks.

5. Grievant Higgins is employed as a Secretary III/Accountant.

6. Grievant Bennett is employed as a Paraprofessional/Aide/Autism Mentor.

7. Grievant Wine is employed as a Secretary. (See footnote 5)

8. RCBOE has a Reclassification Committee which is composed of various Board employees. They serve as a review committee on issues of reclassification andsupplement pay. Their role is one of recommending, and they have no authority to require the Board or Superintendent Karlen to accept their recommendations.

9. All the cooks had requested RCBOE either to reclassify them after a certain number of years or grant them a supplement. The Reclassification Committee recommended cooks should be reclassified after they had served a certain number of years, and the service personnel organizations were to develop a proclamation to present to the Board.

10. The Reclassification Committee reviewed the requests from Intervenor Auvil and Intervenor Halverson and, on a 2-2 vote, recommended these requests should not be granted. They believed the additional duties and responsibilities assigned to Intervenor Auvil were covered under her Executive Secretary Job Description.

11. Superintendent Karlen reviewed the report of the Reclassification Committee, and then discussed the situation with Intervenor Auvil, who gave him additional information about her additional duties and responsibilities. He further reviewed the increase in Intervenor Halverson's certification duties. He decided that both Intervenors' additional duties and responsibilities merited the action he recommended to the Board.

12. Sometime earlier, unclear from the record, the position of Director of Personnel was eliminated. Superintendent Karlen assumed some of the duties of that position. Intervenor Auvil

assumed the rest of the duties of the position. Many of the duties formerly performed by the prior Director of Personnel, Dr. Shannon Bennett, are performed by Intervenor Auvil. These additional duties and responsibilities include: arranging for interviews and interview committees for employment interviews; answeringquestions on personnel matters, including interpretation of applicable Code Sections; appearing and testifying at grievance hearings; researching references; redesigning application forms to match Code Sections, evaluations, and interview procedure; placing recruiting information in appropriate places, such as newspapers and WVEIS; helping with and supervising orientation of new workers; working with the Sick Leave Bank; collating application information; and scheduling testing for competency tests. (See footnote 6) These additional duties and responsibilities were not ones performed by Intervenor Auvil before the elimination of the Director of Personnel position, and they were previously performed by the Director of Personnel.

13. Superintendent Karlen's recommendation was placed on the Board's agenda as a personnel matter, not as a personnel change. Personnel matters are not routinely disseminated; personnel changes are. This difference is because personnel matters are usually private or personal, and personnel changes are not. Copies of all personnel matters can be obtained by asking for them. Copies of personnel changes are passed out at the Board meeting, and sent to the schools the next day.

14. No one asked for a copy of the personnel matters after the April 2, 1998 Board meeting. A copy of this action was faxed to the newspaper the next day as the reporter had left before the meeting was over. 15. When Grievant Bennett asked for a copy of this personnel matter, sometime in May 1998, she was immediately sent a copy.

16. Within fifteen days of receiving this information Grievants filed this grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.

The multiple issues raised by the parties will be discussed separately.

1. Timeliness

The first issue to resolve is one of timeliness. RCBOE contends this grievance is barred from consideration because it was not initiated in a timely manner. In order to proceed to the merits in this grievance, it must first be determined if the instant grievance was properly submitted under the timelines established by W. Va. Code §18-29-4.

Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June17, 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code §18-29-4(a)(1) provides, in pertinent part:

> 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 . . ., 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.

See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992).

Respondent argues that because the action was taken in April 1998, and Grievants did not file until May 1998 the grievance is untimely. In Spahr, supra, the West Virginia Supreme Court of Appeals held that, until an employee knows of the relevant facts giving rise to his grievance, the time limitations contained in W. Va. Code § 18-29-4(a)(1) are tolled. Holloway v. County Bd. of Educ., Docket No. 97-35-291 (Mar. 20, 1998). Additionally, "Spahr and Duryutta [sic][v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40, 181 W. Va. 203 (1989)], teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable

procedural obstacles and traps." Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997), n. 11. A review of the above-cited law and the evidence of record, clearly indicates this grievance is timely filed. Grievants filed within fifteen days of when they learned of the reclassification and additional supplements.

2. Whether the information was intentionally concealed from Grievants?

The evidence indicates the information on personnel matters was handled in exactly the same manner as other personnel matters had been handled in the past. One could question whether this issue was a personnel matter or a personnel change, but that decision is left to the discretion of Superintendent Karlen. It is clear he put the matter before the Reclassification Committee, and then put the matter before the Board through memorandum and noted the same on the agenda. What the exact nature of the personnel matters to be discussed was is not indicated on the agenda, but if a person wanted to know all they had to do was ask. Additionally, when Grievant Bennett asked for the information, it was immediately forthcoming. No evidence indicated this information was concealed from Grievants.

3. Whether Intervenor Auvil was inappropriately reclassified based on her additional duties and responsibilities

Grievants have failed to demonstrate they have standing to contest RCBOE's personnel actions regarding Intervenors. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996).

In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to

pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied its statute in reclassifying or granting a supplement to an employee, where a grievant is not personally harmed, there is no cognizable grievance. See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dept. of Trans., Docket No. 92-DOH-053 (Apr. 24, 1992).

Because Grievants were not "adversely affected" by the employment decision, they do not have standing to challenge the reclassification of Intervenor Auvil and the granting of supplements to Intervenors. Phillips v. Div. of Corrections, Docket No. 96-CORR-112 (June19, 1996). See Hopkins v. Fayette County Bd. of Educ., Docket No. 95-10-486 (Mar. 15, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 5, 1994); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994).

4. Whether RCBOE was required to post the position of Coordinator of Personnel

W. Va. Code §18A-4-8b states:

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days.

No violation of W. Va. Code §18A-4-8b is found in RCBOE's failure to post this position when it was reclassified. No new position was created, no position was vacant, and thus, there was no duty to post. Dempsey/Stratton v. Mingo County Bd. of Educ., Docket Nos. 94-29-1068/1069 (Aug. 30, 1995). See Raines v. Lincoln County Bd. of Educ., Docket No. 96-22-013 (June 28, 1996); Butcher v. Logan County Bd. of Educ., Docket No. 95-23-015 (July 27, 1995); Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995). Grievant assumed additional these duties over a period of time. There was no intentional plan here to add duties so Intervenor Auvil could later be reclassified. Thus, no violation of W. Va. Code § 18A-4-8b has occurred, but a violation of W. Va. Code § 18A-4-8 could have occurred if RCBOE failed to reclassify an employee who is working out of classification.

5. Favoritism

Grievants also allege RCBOE's failure to grant them a supplement when it granted Intervenor Auvil and Intervenor Halverson supplements is favoritism. W. Va. Code §18- 29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee." To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

> (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 other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, and the respondent can rebut such presumption by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants have failed to establish a prima facie case. They have not shown they are similarly situated to the employees to whom they compare themselves. Intervenor Auvil and Intervenor Halverson received a supplement because of a significant increase in their duties over the past several years. Although Grievants work hard in their various positions, the issue is whether they are similarly situated to Intervenors. Grievants did not demonstrate there has been any increase in their duties and responsibilities as has occurred with Intervenors. Accordingly, Grievants have failed to make a prima facie case.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of

proving their 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. Grievants filed this grievance in a timely manner after they obtained knowledge about the Board's actions. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. Grievants failed to demonstrate RCBOE engaged in any attempts to hide the actions taken by the Board at the April 2, 1998 meeting.

4. Boards of education are required to classify service personnel according to the duties they perform. W. Va. Code §§ 18A-2-5 and 18A-4-8.

5. Because Grievants were not "adversely affected" by the employment decision, they do not have standing to challenge the reclassification of Intervenor Auvil and the granting of supplements to Intervenors. Phillips v. Div. of Corrections, Docket No. 96- CORR-112 (June19, 1996). See Hopkins v. Fayette County Bd. of Educ., Docket No. 95- 10-486 (Mar. 15, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 5, 1994); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). 6. Intervenor Auvil was properly reclassified pursuant to W. Va. Code §18A-4-8, as she was performing multiple, additional duties and responsibilities that were previously assigned to the Director of Personnel, Dr. Shannon Bennett. See generally, Cox v. Hampshire County Bd. of Educ., 177, W. Va. 576, 355 S. E.2d 365 (1987).

7. RCBOE did not violate W. Va. Code §18A-4-8b when it did not post a position which was reclassified and never vacant. Dempsey/Stratton v. Mingo County Bd. of Educ., Docket Nos. 94-29-1068/1069 (Aug. 30, 1995). See Raines v. Lincoln County Bd. of Educ., Docket No. 96-22-013 (June 28, 1996); Butcher v. Logan County Bd. of Educ., Docket No. 95-23-015 (July 27, 1995). Accord, Snodgrass v. Kanawha County Bd. of Educ., Docket No. 93-20-296 (Dec. 30, 1993); Hall v. Mingo County Bd. of Educ., Docket No. 92-29-499 (Feb. 2, 1993).

8. Grievants failed to meet their burden of proof and establish a prima facie case of favoritism. Grievants did not establish they were similarly situated to Intervenors.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Randolph County. Any 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 26, 1999

Footnote: 1

Grievant Mary Hayes asked to withdraw her grievance at Level IV. See Order dated November 17, 1998.

Footnote: 2

Grievants were represented by Attorney John Roush from the West Virginia School Service Personnel Association, Respondent was represented by Attorney Basil Legg, and Intervenors were represented by Mary Linn from the West Virginia Education Association.

Footnote: 3

This issue was not discussed in any detail. Intervenors did indicate they stayed late at times to complete their work. The issue of overtime is one for Intervenors to pursue, if they wish, and is not an issue that affects Grievants, and it cannot be grieved by them. See discussion at Section 3 of this Decision.

Footnote: 4

One of the Grievants is a member of the Reclassification Committee. She noted in her submissions that she understood the Reclassification Committee did not possess any power, but was a recommending unit only. As the parties agree on this issue, it will not be discussed further.

Footnote: 5

It appears that Grievant Wine is a school Secretary, but her exact classification was not clear from the record.

Footnote: 6

The majority of these competency test duties have been assigned to the Vocational School at the request of the Reclassification Committee. It was unclear from the record if any duties in this area remain.