NANCY BOWEN,

Grievant,

v. Docket No. 99-20-039B

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Nancy Bowen, (See footnote 1) filed two separate grievances against the Kanawha County Board of Education ("KCBOE"). As these grievances concerned different issues, they were separated for decisional purposes. Grievant alleged it was unfair and an act of favoritism that multi-classified employees received seniority in all the categories within their classification. Her grievance states:

> **I[,] Nancy Bowen[,] work as a bus operator and work in the summers as a clerk at Capitol High School, I receive no seniority for the clerk position. Mechanics - bus operators drive only 10 days a year and receive a total of one year as a bus operator and one year as a mechanic. Bus operators - clerk work only one half day as a bus operator and one half day as a clerk[.] They receive one year seniority as a bus operator and one year seniority as a clerk[.] This is favoritism of the Kan. Co. Bd. of Education.**

The relief sought was for multi-classified employees to receive seniority pro rata to the time they work within each classification during the year. This grievance was denied at all lower levels. The grievance was appealed to Level IV on January 22, 1999, and the parties agreed to cancel the scheduled hearing, and submit the case on the record developed below. This case became mature for decision on March 23, 1999, after receiptof the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant argues multi-classified employees should not receive a full year of seniority for each of the classifications within their multiple classification. For example, mechanics, who

are multi-classified as mechanics/bus operators, receive a full year of regular credit in each of those classifications, when the mechanic usually works only ten days or less in the bus operator classification. Grievant wants this practice, which she views as favoritism, stopped, and she wants the amount of seniority received in each classification to be pro-rated. Thus, individuals classified as mechanics/bus operators would receive only a fraction of a year's seniority as a bus operator, or credit for the actual days worked in the classification.

Although somewhat unclear, it also appears Grievant finds this practice particularly unfair because the days she works in another classification during the summer are not counted toward regular seniority during the school year. Although it was not clearly pled, Grievant also seems to argue she should receive regular seniority for her summer employment.

Respondent argues W. Va. Code § 18A-4-8g mandates that multi-classified employees receive this seniority, and that it is only complying with the requirements of this statute. Further, Respondent avers that pursuant to W. Va. Code § 18-5-39, summer work seniority and regular seniority are to be considered separately. Respondent also notedthat while W. Va. Code § 18-5-39 offers many rights and privileges to summer employees, the rights offered in W. Va. Code § 18A-4-8b are not included.

The facts in this case as revealed by the lower level records are somewhat sparse. However, 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. Grievant has been employed as a bus operator with the Kanawha County Board of Education ("KCBOE") for eighteen years.

2. Grievant has worked in the summer as a clerk at Capitol High School since 1994.

3. Grievant does not receive any regular seniority for her summer employment as a clerk.

4. Many of KCBOE's bus operators are multi-classified. Frequently, they are either classified as bus operators/clerks or mechanics/bus operators.

5. Bus operators also classified as clerks usually work one half of a day as a clerk and one half of the day as a bus operator.

6. Mechanics also classified as bus operators usually work approximately ten days or less as a bus operator.

7. KCBOE has instituted these multi-classifications in order to make better use of the employees' time.

8. These multi-classified employees receive regular seniority for both of the positions in which they are employed.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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's argument that multi-classified employees ' seniority must be calculated on a pro-rata basis must fail. W. Va. Code § 18A-4-8g is the controlling statute and states:

> **School service personnel who hold multi-classification titles shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his or her multi-classification title.**

Clearly, this Code Section directs a county board of education to grant multi-classified employees seniority for the entire year in all classifications within their multi-classification. To do otherwise would be unfair to the multi-classified employee and would most likely present a record-keeping nightmare for the employer.

Grievant has also alleged that the manner in which Respondent grants regular multi-classified employees seniority is a form of favoritism of regular employees over summer employees. She argues if these employees are allowed to receive regular seniority for "part-time" work, she should receive regular seniority for her summer work. 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 whichconsists 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, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case. She is not similarly situated to the employees to whom she compares herself. The multi-classified employees in her comparison are regular school year employees, and as such their seniority is controlled by W. Va. Code §§ 18A-4-8b & 18A-4-8g. The employment of summer employees and their "seniority" is covered under a different statute, W. Va. Code § 18-5-39. W. Va. Code § 18-5-39 states:

> **The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to all rights, privileges and benefits provided in sections five-b [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14], eight, eight-a, ten and fourteen, article four, chapter eighteen-a of this code . . . .**

It is clear from this Code Section that the rights and privileges concerning seniority which are afforded regular employees are not extended to summer employees. The seniority of summer and regular employees is not considered to be the same and can not be co- mingled.

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, Grievant has the burden of proving 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 § 18A-4-8g controls the granting of seniority of multi-classified employees and mandates these employees "shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his or her multi-classification title."

3. KCBOE did not violate any statute, rule regulation, or policy by granting multi-classified employees seniority in each classification, for each year they work.

4. 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."

5. To prove favoritism a grievant must establish a prima facie case whichconsists 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).

6. Grievant has failed to demonstrate a prima facie case of favoritism as she is not similarly situated to the employees to which she compares herself.

7. The seniority granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be co-mingled. W. Va. Code §§ 18-5-39; 18A-4-8b; & 18A-4-8g.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha 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 norany 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 31,1999

Footnote: 1

At times in correspondence from Grievant's representative, Ms. Bowen was referred to as Ms. Brown.

Footnote: 2

Grievant was represented by Representative Steve Angel from the West Virginia Federation of Teachers, and Respondent was represented by KCBOE's General Counsel James Withrow.