ELIZABETH LAWTON,

Grievant,

v. **Docket No. 00-15-275**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Elizabeth Lawton, employed by the Hancock County Board of Education (HCBOE) as a Cook III at the Central Kitchen, filed a level one grievance on May 16, 2000, in which she alleged favoritism and discrimination when she was not allowed to return to work on a “light duty” basis. She requested reinstatement of all personal leave used from April 17, 2000, though the end of the 1999-2000 school year, back pay, and interest. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced her appeal to level four on August 18, 2000. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on November 15, 2000, at which time Grievant was represented by John E. Roush, Esq. of WVSSPA, and HCBOE was represented by William T. Fahey, Esq. The matter became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on December 18, 2000. HCBOE elected not to file post- hearing submissions.

The facts of this matter are derived from the record in its entirety, including the level two transcript and exhibits, and the testimony and evidence admitted at level four.

Findings of Fact

1. Grievant has been employed by HCBOE for approximately nine years, and has been assigned as a Cook III at the Central Kitchen at all times pertinent to this grievance.

2. In August 1999, Grievant injured her shoulder while off the job.

3. On April 3, 2000, Grievant re-injured her right shoulder (rotator cuff) at work while catching/steadying a vegetable chopper.

4. On or about April 25, 2000, Grievant returned to work with a doctor's slip that indicated she could perform “light duty”. There were no specific weight restrictions placed on Grievant. HCBOE did not allow Grievant to return to work at that time.

5. On or about May 15, 2000, Grievant again returned to work with a doctor's slip which included the following limitations/remarks: “light duty if no light duty off work until 6/1/00.” Neither Grievant nor her doctor indicated what specific accommodations would be necessary to allow her to work.

6. Food Service Director Nancy Karavolos saw the doctor's slips, and on both occasions advised Grievant that she could not work with a “light duty” restriction.

7. Previously, accommodations have been made to other employees who could not perform all the responsibilities of their positions, allowing them to continue working. Specific examples are: (1) an employee who could not accurately complete the required paperwork which was rotated among the remaining employees at that school; (2) an employee with a detached retina was restricted in lifting for a period of three weeks, and the other employees assisted with those duties; (3) an employee with a burned hand was relieved of washing pans for one day; and, (4) an employee who returned from gall bladder surgery was assisted in stirring the coppers (large pans of food). 8. On or about August 14, 2000, Grievant was approved for total temporary disability benefits for the period of April 3, 2000, through June 1, 2000.

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 §4.21 (2000); 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. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

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 she 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 her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 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 under W. Va. Code § 18-29-2(m), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show 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).

Grievant has established a prima facie case by proving that co-workers who have been unable to fully complete all of the duties of their position were accommodated and allowed to work, while she was not. In response, HCBOE asserts that of the four examples offered by Grievant, she was the only one who had reported to work with a “light duty” restriction. Testimony offered by a variety of witnesses at levels two and four establish that of those individuals who had suffered a physical limitation, the cook with the burn was accommodated only one day, and the cook who had her gallbladder removed wasaccommodated only two days. The cook with the detached retina was accommodated for a longer period of time; however, all these individuals had a well defined limitation which apparently required only minimal accommodation from their coworkers.

By comparison, Grievant returned to work with a limitation that she be assigned to “light duty.” The doctor's statement did not define “light duty”; however, Grievant stated that she was not given

any weight restrictions, but was told to judge for herself what was appropriate, just “not to do any heavy lifting away from [her] body.” Grievant opined that she could have “done pans” if she was careful, conducted the morning counts, assisted with the coppers, assisted on the cook side, worked the salad bar, worked on inventory, and helped clean and scrub at the end of the day. Lisa Ann Pauley, Head Cook in the Central Kitchen, testified that there is no “light duty” assignment, and the most “light duty” available is working on the salad bar, where Grievant was working when she re-injured her shoulder.

At level four, Grievant expressed frustration that she was not given the opportunity to demonstrate the duties she was able to perform. While her desire to work is admirable, Grievant's opinion as to her capabilities appears optimistic. Certainly, scrubbing is not a “light duty” activity. Assisting others in their efforts might be helpful, but, as Grievant conceded, she would have to be careful when engaging in activities such as washing the pans. With no guidelines from her physician as to what work duties Grievant could actually complete, HCBOE's determination that she could not work was reasonable given the additional potential harm she could have suffered. Therefore, HCBOE has provided a nondiscriminatory, legitimate reason for the difference in treatment. Grievant does not allege that the reason was pretextual. 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 her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. 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 job responsibilities of the employees or agreed to in writing by the employees."

3. 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."

4. 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 she 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 her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 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).

5. Grievant established a prima facie case of discrimination/favoritism by proving that co-workers who have been injured and unable complete all of the duties of their position were accommodated and allowed to work, while she was not.

6. 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, the 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).

7. Respondent provided a legitimate, nondiscriminatory reason for the difference in treatment, i.e., that Grievant was the only employee who had attempted to work while under a “light duty” restriction.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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: January 30, 2001 _____

Sue Keller

Senior Administrative Law Judge