JOHN MAINELLA, et al.,

Grievants,

v. **Docket No. 01-HE-072**

INTERIM GOVERNING BOARD/FAIRMONT STATE COLLEGE,

Respondent.

D E C I S I O N

Grievants, John Mainella, Donald Strand, and Robert Kisner, employed as Electrician, Lead Electrician, and Lead Carpenter, respectively, at Fairmont State College (FSC or Respondent), individually filed level one grievances on January 16, 2001, in which they alleged discrimination and favoritism occurred when they did not receive the same upgrade and salary increases awarded to Plumbers in January 2001. Grievants requested a five percent salary increase and back pay. The requested relief was not available at levels one or two, and appeals to level four were made on February 27 and 28, 2001. The three grievances were consolidated for hearing held on August 30, 2001. Grievants represented themselves, and Respondent was represented by counsel, Samuel R. Spatafore, Assistant Attorney General. The matter became mature for decision on November 1, 2001, the final date for submission of proposed findings of fact and conclusions of law.

The following facts derived from the record are undisputed, and may be set forth as findings of fact.

Findings of Fact

1. Grievants have been continuously employed by FSC since 1994 when the Mercer system of personnel classification was implemented by the Board of Directors. (See footnote 1)

2. Since 1994, Grievant Mainella has held the classification of Electrician, Grievant Strand has been classified as a Lead Electrician, and Grievant Kisner has been classified as a Lead Carpenter.

3. Pursuant to an earlier grievance, Creel v. Bd. of Trustees/W. Va. Univ., Docket No. 94-BOT-458 (Mar. 31, 1997) (See footnote 2), the Job Evaluation Committee (JEC) met in November 2000 at which time the Plasterer/Masons and Plumber classifications were upgraded, and those employees granted a salary increase. The Creel grievants were awarded back pay effective January 1, 1994, while all non-grieving Plumbers and Plasterer/Masons received the increase effective January 16,

2001. (See footnote 3)

4. Prior to the changes made in the Plumber classification, many of the skilled trades workers, including electricians and carpenters, had traditionally been assigned to the same pay grade. 5. The JEC was not ordered by the Grievance Board or the Circuit Court to upgrade Electricians, Carpenters, and other Trades Workers.

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 §4.21 (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. Dept. 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.

Grievants argue that the failure of the JEC to upgrade their classifications when it met in November 2000, resulted in discrimination and favoritism because they had historically been compensated in the same pay grade as Plumbers. Grievant Strand also asserts that Electricians are entitled to an upgrade because they must be licensed. Respondent denies it engaged in discrimination or favoritism since it simply complied with a Court Order. Respondent further notes that the Higher Education system is exempt fromstate law that requires Electricians be licensed, therefore, no credit is given for that certification under the Mercer system. (See footnote 4)

W. Va. Code §§ 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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."

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

Grievants alleging discrimination or favoritism must establish a prima facie case by demonstrating:

(a) that they are similarly situated in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s), and were not agreed to by the grievants in writing.

Ridinger v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele v. WayneCounty Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra.

Grievants have failed to establish a prima facie case of discrimination or favoritism because they are not similarly situated to other employees who received a salary increase. Although Grievants and Plumbers are both considered skilled trades, they remain separate classifications and are not similarly situated. Further, the data line was adjusted for Plumbers, reflecting their duties and responsibilities, which differ from Electricians and Carpenters. Even if Grievants had established a prima facie case of discrimination, Respondent has offered a legitimate, nondiscriminatory reason for its action, i.e., the pay grade for Plumbers was revised pursuant to an Order of the Kanawha County Circuit Court. 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, 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 §4.21 (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. W. Va. Code §§ 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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.___W. Va. Code §§ 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. Grievants alleging discrimination or favoritism must establish a prima facie case by demonstrating:

(a) that they are similarly situated in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s), and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra. 5. Grievants have failed to establish a prima facie case of discrimination or favoritism by proving that they were similarly situated to Plumbers, or that the difference in treatment was based on anything other than actual job responsibilities.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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: November 26, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

At the time the Mercer system was implemented in 1994 institutions of higher education in West Virginia were governed by the Board of Trustees (universities) and the Board of Directors (colleges). When this grievance was filed in January 2001, these institutions of higher education were governed by the West Virginia Higher Education Policy Commission ("HEPC") and the West Virginia Higher Education Interim Governing Board ("IGB"). W. Va. Code §§ 18B-1-2 (2000); 18B-1B-1 (2000); 18B-1C-2 (2000). On July 1, 2001, the IGB ceased to exist and was replaced by a Board of Governors at each institution. W. Va. Code §§ 18B-1-2; 18B-2A-1 (2001);18B-2A-4 (2001).

Footnote: 2

The Circuit Court of Kanawha County affirmed the Grievance Board's decision, and the West Virginia Supreme Court of Appeals refused to grant an appeal.

Footnote: 3

In Creel, the grievants prevailed in their claim for a higher paygrade, and Respondent was Ordered to adjust the paygrades of Plumber and Plumber, Lead, and awarded the named Grievants back pay from January 1, 1994.

Footnote: 4

Margaret Buttrick, Human Resources Administrator for the West Virginia Higher Education Policy Commission, testified at level four that while the HEPC does not require that Electricians be licensed, certain institutions may require it.