KAREN K. VANCE,

Grievant,

v. **Docket No. 02-19-272**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Karen Vance, employed by the Jefferson County Board of Education (JCBE) as an Aide, filed a level one grievance on June 24, 2002, in which she alleged violations of W. Va. Code §§ 18A-4-15, 18A-2-7,18A-2-5 and 18A-4-8b, as well as the JCBE Vacation Policy when she was removed from a position vacated by an employee on a medical leave of absence. For relief, Grievant requests reinstatement to the position for the duration of the leave of absence. The record does not include a level one decision since the parties agreed to proceed at level two. The grievance was denied at level two, and following a hearing on August 12, 2002, JCBE elected to waive consideration. Appeal was made to level four on August 28, 2002. A hearing was conducted on October 4, 2002, at which time Grievant represented herself, and JCBE was represented by Associate Superintendent Beverly Hughes. The grievance became mature for decision at the conclusion of the hearing when both parties waived the opportunity to file proposed findings of fact and conclusions of law.

The following facts are derived from the record.

Findings of Fact

1. Grievant has been employed by JCBE since January 1993, and has been classified as a Special Education/Transportation/General Classroom Aide - Itinerant, since August 7, 2001. Grievant's contract in this position is for 200 days per year. 2. Due to the illness of a regular employee during the 2001-2002 school year, Grievant was assigned as a Transportation Aide and Switchboard Operator. This position had not been posted.

3. The employee regularly assigned to this position holds a 261 day employment contract.

4. Grievant's contract expired on June 11, 2002. Existing staff, including Zane Keesecker, an aide with a 261 day contract, was utilized to maintain the switchboard during the summer months. The attendance duties performed by Grievant were not required during that period.

5. JCBE conducted a level three hearing on this grievance on August 12, 2002.

6. Assistant Superintendent Gerry R. Sokol notified Grievant by letter dated August 13, 2002, that her assignment for the 2002-2003 school year would be as a Special Education Aide at Charles Town Middle School.

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 §4.21 (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'sLaw Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health and Human Resources, 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.

___Grievant alleges violations of numerous Code sections and the JCBE Vacation Policy. JCBE denies all of the alleged violations. Grievant's claims are as follows:

___JCBE violated W. Va. Code §18A-2-5 when she was refused a new contract for the 2001-2002 school year even though she was assigned a different location, title and pay rate. Respondent asserts that Grievant had a valid contract on file.

Section 18A-2-5 provides that "[b]efore entering upon their duties service personnel shall execute with the board a written contract . . . ." Grievant was employed under a continuing contract during the 2001-2002 school year, and no additional contract was required. (See footnote 1)

___Grievant alleges that she was not properly transferred in violation of W. Va. Code §18A-2-7. JCBE asserts that Grievant was notified in the 2000-2001 school year that she would be placed on the transfer list and was assigned as an Itinerant Aide in August 2001, with no protest.

W. Va. Code §18A-2-7 provides that "an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred." Grievant is classified as an Itinerant Aide, and as such may be reassigned as needed without further transfer actions by the board. Grievant next asserts that as the person with seniority

in the position, she should have retained the Switchboard Operator duties in conjunction with a summer assignment as a Transportation Aide, as is permitted by W. Va. Code §18A-4-8h. While it would have been statutorily permissible to realign Grievant's duties, JCBE was under no obligation to do so. (See footnote 2)

Grievant argues that she was entitled to hold the position until the regular employee returned under W. Va. Code § 18A-4-15. JCBE asserts that the section cited by Grievant applies to substitute personnel, and is not applicable to her. Further, JCBE argues that Grievant is not entitled to the "step up" provision addressed in that section since she was not employed in the same building or work station as the absent employee.

W. Va. Code §18A-4-15 provides, in pertinent part:

(a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

(1) To fill the temporary absence of another service employee;

(2) To fill the position of a regular service employee who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board. . .

(b) if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling theregular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence.

This section is not applicable because Grievant is not employed in the same building or working station as the regular employee, and is not classified as a Switchborar Operator.

___Grievant alleges a violation of the JCBE Vacation Policy when it denied her 18 days of paid leave. JCBE denies that Grievant was entitled to a paid vacation since she is employed for 200 days per year.

The JCBE Vacation Policy specifically provides paid leave for 261 day employees. As an

employee with a 200 day contract, Grievant was not eligible for paid vacation time.

At the level three hearing Grievant included a claim of favoritism, as evidenced by the assignment of Mr. Keesecker to the switchboard duties during the summer.

Favoritism is defined by 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." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000). In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence by showing:

(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 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 Grievant and/or the other employee(s) and were not agreed to by Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant is employed under a 200 day contract while Mr. Keesecker is employed 261 days per year. Therefore, they are not similarly situated, and no favoritism was shown.

___At level four, Grievant added a claim of reprisal when she was given an undesirable assignment to a special education classroom the day following her level three hearing. (See footnote 3) Reprisal is defined by W. Va. Code §18-29-2(p) as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1)that he/she engaged in protected activity, e.g., filing a grievance;

(2)that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3)that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4)that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Grievant has established that JCBE took what she perceived to be an adverse action immediately following the level three hearing. However, JCBE has presented a legitimate, non-retaliatory reason for the action, i.e. the beginning of the school year was imminent and it was necessary to place Grievant in a position.

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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. 2. Grievant failed to prove a violation of W. Va. Code §§ 18A-2-5, 18A-2-7, 18A-4-8h, 18A-4-15, or the JCBE Vacation Policy.

3. Grievant failed to prove that JCBE engaged in favoritism, as defined by W.Va. Code § 18-29-2(o), when it retained a 261 day aide.

4. Grievant established a prima facie case of reprisal by demonstrating that she was placed into a perceived undesirable assignment the day following a level three hearing in this matter.

5. JCBE offered a legitimate, non-retaliatory reason for the action, successfully rebutting the claim of reprisal.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson 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 31, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The contracts were not made a part of the record.

Footnote: 2

W. Va. Code § 18A-4-8h limits school service personnel employees to "one regular full-day position, nor more than two one-half day positions at the same time."

Footnote: 3

Respondent did not object to the addition of this issue to the grievance.