CATHY PETRIE,

Grievant,

v. **Docket No. 01-26-596**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Cathy Petrie, filed this grievance against her employer, the Mason County Board of Education ("MCBOE") on August 15, 2001. The Statement of Grievance alleges:

> **Violations of WV Code 18A-4-16(4) with regard to Grievant being required to sign continuing contract of employment integrating an extracurricular assignment with her regular employment position. Discrimination/favoritism with employees with separate contracts 18-29-2(m) and (o).** (See footnote 1)
>
> **Relief Sought: Relief sought is the separation of the two positions with two separate contracts of employment.**

This grievance was denied at Levels I and II, and Level III was bypassed. Grievant appealed to Level IV on December 4, 2001, and a hearing was held on March 29, 2002. This case became mature for decision on April 22, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

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 is currently employed by MCBOE as a music teacher. She has been employed by MCBOE for thirteen years.

2. Prior to the 2001 - 2002 school year, elementary music teachers were not compensated for after school practices and performances, and they had only one contract.

(See footnote 3)

3. During the 2000 - 2001 school year, several music teachers attempted to resign from the performance-related portion of their contracts. These resignations were not accepted.

4. In February 2001, Superintendent Larry Parsons met with the music teachers to discuss the situation. At this same time, the music teachers requested additional compensation for their performance-related work. At the time of this meeting, MCBOE elementary music teachers had one contract, did not receive supplemental pay, and were paid from the same salary schedule as all other teachers.

5. As a result of this meeting, Superintendent Parsons decided all future music and band teacher contracts would combine the music instruction and performance aspects in one contract. These new, "blended" contracts for all music and band instructors, would be phased in as positions were posted, and new teachers were hired or teachers were transferred. He also recommended to MCBOE that these teachers be paid supplements to compensate them for these performance-related duties. 6. As of the 2001 - 2002 school year, music teachers, for the first time, were given a supplement for their performance-related work. Teachers who were not transferred received two contracts. One contract for the teaching aspects of their work with students, and another contract for the performance-related aspects. A teacher would receive the supplement whether he or she had a combined/blended contract or two separate contracts.

7. No music teachers are allowed to resign the performance portions of their contract and retain the teaching portion only.

8. Because of lack of need and a reconfiguration of the music program, Grievant was properly placed on a transfer list for the 2001 - 2002 school year.

9. As a result of this transfer, Grievant was placed at two elementary schools, and because Grievant teaches music at two elementary schools, she receives an additional $1000.00.

10. Grievant was given one of the new, "blended" contracts that combined instructional and performance-related duties.

11. Grievant did not want to sign this contract and said so with a statement attached expressing her disagreement. Grievant disagreed with the number of performances required

by the contract.

12. After Grievant signed her contract, she and her representative met with Superintendent Parsons and negotiated a decrease in the overall number of performances Grievant was required to present.

13. Grievant teaches general music to grades K - 6 at both schools. She also has a choir at both schools. The choirs meet during the instructional day 14. As of the date of the Level IV hearing, Grievant had spent 37 ½ hours outside of the instructional day on performance-related duties.

15. It is in the best interest of the students to have the teacher who conducted the practices of the performance material to lead the students in the performance. Test. Grievant, Lee, (See footnote 4) Cowan, Casto, Parsons, Level IV Hearing.

16. Pursuant to Policy 2520, State Department of Education Instructional Goals and Objectives ("IGO's") required music to be offered as an elective course to sixth graders, and the IGO's required performances as an activity of this elective's course work. Resp. Ex. No. 1, at Level IV; Test. Lee, Level IV Hearing.

17. Choral music electives must be offered by the sixth grade, and "should present two or three performances or open rehearsals for their peers, parents, and community." Policy 2520.

18. Whether performances are a required part of the K - 4 music program is up to each individual county. Test. Lee, Level IV Hearing.

19. MCBOE requires its music teachers to present performances for all music students.

Issues and Arguments

The issue here is a legal one. Are the performance-related activities co-curricular or extracurricular? In other words, are the performance-related endeavors an essential portion of the learning experience for students involved in music class and choir? If they are, Grievant's contract is lawful. If the activities are extracurricular; however, then theacceptance of the music teacher positions cannot be conditioned upon the acceptance of the performance-related activities. Additionally, if the activities are extracurricular, these positions must be posted and awarded separately per W. Va. Code § 18-4-16. (See footnote 5)

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); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." 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, the party bearing the burden has not met its burden. Id.

The first order of business is to examine the definitions of co-curricular and extracurricular, and review the IGO's the students are required to complete in their music classes. The State Department of Education defines co-curricular activities as "activities that are closely related to identifiable academic programs and/or areas of study that serve to compliment academic curricula." An extracurricular activity is one "that is not part of therequired instructional day or curricular offerings, but is under the supervision of the school." (See footnote 6) 126 C.S.R. 42 at §§ 5.14 & 5.23, Policy 2510. W. Va. Code §18A-4-16 defines extracurricular as "activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. . . ." (See footnote 7) (Emphasis added.)

W. Va. Code § 18A-4-16 also requires "[t]he assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval," and "[a]n employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board."

The introductory section of the Choral Music IGO's, Grade Six, indicates "[s]tudents at this level will learn to read and use the written language of music to interpret and perform choral scores." Resp. Ex. No. 4, at Level II. The IGO's for General Music do not specify performing in front of others for grades K - 5, but do indicate students will sing alone and with others and perform on instruments. At Grade Four in General Music,students are to sing in groups and respond to the cues of a conductor. At Grade Five in General Music, students are to sing and demonstrate a variety of abilities while vocalizing in ensembles. At Grade Six in General Music, students are to "sing accurately and with good breath control in class performance of songs."

This Grievance Board has followed the West Virginia Supreme Court of Appeals' directive in Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990), which held a regular contract of employment cannot be conditioned upon the acceptance of an extracurricular contract. Kaplan v. Cabell County Bd. of Educ., Docket No. 89-06-445 (1990). See Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980). In Cruciotti, the board of education required the physical education teacher hired for a vacant teaching position, also to agree to function as an athletic trainer. The Court found this to be an "improper joinder" of positions. The holding was based on the finding that "most" of the duties took place after regularly scheduled school hours. Additionally, athletic trainers were listed as a separate position on the salary schedule with coaches.

However, on the issue at hand, music teaching and performing, this Grievance Board has conflicting cases. Brown v. Upshur County Bd. of Educ., Docket No. 96-49-388 (Jan. 31, 1997); Hamrick v. Tyler County Bd. of Educ., Docket No. 93-48-185 (Dec. 30, 1993). Both these cases were rendered before the development and adoption of the State Department of Education IGO's requiring specific learning activities for grade levels and courses. (See footnote 8) **In Hamrick, the administrative law judge found the grievant failed to show the position of band director was extracurricular because, "[a]lthough ordinarily an extracurricular assignment and a regular-employment position may not be posted and filled as one job, the facts of this case clearly show that the band directors' duties in TCBE's schools are curricular, rather than extracurricular, in nature. Accordingly, Grievant failed to establish that the band duties must be separated from other instructional duties and posted separately under Code §18A-4-16."**

The administrative law judge also found, "[t]he facts of the instant case are distinguishable from those in Cruciotti (citation omitted). The school teacher in that case objected to the 'improper joinder' of physical education teacher and athletic trainer position in a posting. The Court found that inasmuch as 'most' of the trainer's duties occurred during after school hours, such duties are 'clearly extracurricular.'" Hamrick, supra.

In Brown, the administrative law judge did not cite or speak to the ruling in Hamrick, but found the Cruciotti analysis applied, and the position of band director required the performance-related duties should be posted as extracurricular. There was no discussion of the connection between the grievant's band teaching duties and performance-related duties.

The undersigned Administrative Law Judge resolves this conflict in the Grievance Board's case law by finding the rationale in Hamrick to be persuasive, especially given Policy 2510 and Policy 2520, and the definitions contained in 126 C.S.R. 42 §§ 514 & 5.23. It is clear the performance-related duties are co-curricular and flow from the class work during school time. Additionally, these performance-related duties do not occur on aregularly scheduled basis. Accordingly, Brown is overruled in so far as it conflicts with the holding in Hamrick and this decision.

Grievant also argued she had been discriminated against and other teachers had been treated more favorably because these other teachers had separate contacts, and she did not. 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." 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."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 18-29-2(m) & (o), must demonstrate the following:

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

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 or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. 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, 178W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not established a prima facie case of discrimination and/or favoritism. While Grievant has one "blended" contract, and other teachers who were not transferred have two, this does not indicate or demonstrate either discrimination or favoritism. This cannot be called "a significant particular." Grievant's contract has the same terms as the other teachers, with the exceptions of the modifications she negotiated. Grievant receives the same compensation as other elementary music teachers. Grievant is not allowed to cease the performance-related portions of her contract, and the other teachers may not cease this portion of their contract either. While Grievant's contract takes a different form, this is a difference without any effect. Accordingly, Grievant has not met her burden of proof and established discrimination and/or favoritism.

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 his 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep'tof Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. Co-curricular activities are "activities that are closely related to identifiable academic programs and/or areas of study that serve to compliment academic curricula." An extracurricular activity is one "that is not part of the required instructional day or curricular offerings, but is under the supervision of the school." State Department of Education definitions at Legislative Rules, 126 C.S.R. 42 at §§ 5.14 & 5.23, Policy 2510; Test. Lee, Level IV Hearing.

3. The performance-related duties of music and band teachers are co-curricular, and as such do not require a separate posting or a separate extracurricular contact.

4. 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."

5. 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."

6. To establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 18-29-2(m) & (o), must demonstrate the following:

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

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

7. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

8. Grievant has not established a prima facie case of discrimination and/or favoritism. Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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 GrievanceBoard. 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 31, 2002.

Footnote: 1

In the original grievance, an A was incorrectly placed after the 18.

Footnote: 2

Grievant was represented Susan Hubbard from the West Virginia Education Association, and Respondent was represented by Attorney Howard Seufer from Bowles Rice McDavid Graff & Love.

Footnote: 3

Band Directors do receive an increased number of days, over 2000, for the practices they conducted prior to the beginning of school, and it also appears high school band and choir director had separate additional contracts.

Footnote: 4

Julia Lee works in the State Department of Education Offices of Instructional Services, and she is the Fine Arts Coordinator. She assists teachers in Music, Dance, and Theater to meet the required IGO's.

Footnote: 5

Apparently, this separate posting has not been done in the past, and the music teacher or band director who received the teaching position was expected to fulfill the performance activity duties. It appears there is some concern among teachers that they might not receive their current positions if these positions were posted separately as extracurricular.

Footnote: 6

The definition continues and states "[i]t may be used for athletics, non-instructional assemblies, social programs, entertainment and other similar activities. Extracurricular activities may not be scheduled during the instructional day."

Footnote: 7

It is noted that Grievant's after school activities do not occur on a regular basis, and there are times in the school year when there are extra practices and performances, and other times when there are not.

Footnote: 8

It is noted that the IGO's, or Content Standards and Objectives in Policy 2520, are to become effective/mandatory in March 2003. Many school are currently following these IGO's.