GARY SALL, et al.,

Grievants,

v. **DOCKET NO. 03-54-099**

WOOD COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) filed several separate grievances (See footnote 2) challenging Respondent's Policy 4151.7, which permits employees other than 261-day employees to be compensated by a bonus for unused sick leave. Grievants allege discrimination and reprisal and that the Policy violates uniformity of pay requirements. Grievants request as relief to be able to participate in the sick leave bonus, payment of any such bonuses to which Grievants would be entitled and interest on any sums of money awarded.

After the grievances were denied at the lower levels, a level four hearing was held June 3, 2003, at the Grievance Board's Charleston Office. Grievants were represented by West Virginia School Service Personnel Association Attorney John E. Roush, Esq. and Respondent was represented by its counsel, Dean Furner, Esq. of Spillman, Thomas &Battle, PLLC. The parties agreed to submit their proposed findings of fact and conclusions of law by July 3, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievants are all service personnel employed by Respondent in various classifications and multiclassifications, with 261-day contracts.

2. Some Grievants were also grievants in another grievance, Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000). (See footnote 3) In Airhart, the grievants were found to

be 240-day employees performing like assignments and duties as 261-day employees, and therefore entitled to like benefits, specifically 261-day contracts and vacation days.

3. Some Grievants were already 261-day employees at the time of the Airhart grievance, and so did not participate in that case.

4. At a meeting of the Wood County Board of Education (WCBOE) on July 9, 2002, the Wood County Education Association presented a proposal for use of unused sick days. The policy was discussed at subsequent meetings.

5. At a Board meeting on October 8, 2002, WCBOE Policy 4151.7 - Bonus for Unused Sick Leave was approved by a vote of 3-2.

6. Policy 4151.7 states:

> The Wood County Board of Education recognizes the importance of our staff and the need to have each of them on their job daily. As an incentive to encourage good work attendance, the following plan has been developed.
>
> 1. The plan shall:
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> A. Compensate each eligible employee a maximum of $50 per day for up to 15 personal leave days earned during the current school year.
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> B. The employee's incentive compensation shall be reduced by $50 per day for each day of personal leave expended ($25 per day for half-time employees). Days taken without pay or days suspended will for the purposes of this policy, be counted as days expended toward eligibility for participation.
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> C. The compensation will be awarded at the conclusion of the current school term and may not be accumulated year to year.

D.

In the event of an emergency and state aid would be cut or local taxes would not be received, then this plan would be reduced by as much as the budget reduction would total. In no case would the line accounts be reduced below legal limits.

E.

This plan will be reviewed annually by the Board of Education concerning approval for the next school year. The plan is approved on a one-year basis and factors such as state statute, state equity concerns and availability of resources will have to be considered.

2.

To be eligible, an employee (200 or more contracted days) must have available a minimum of fifteen (15) unused personal leave days at the beginning of the school year for this incentive compensation to be paid. Employees who work 261 days are not eligible because paid vacation is available.

7. Grievants, by virtue of their 261-day employment status, are expressly ineligible for the bonus.

8. Grievants are usually able to use their vacation days when they are sick, thus preserving their sick days, which may be accumulated and applied toward benefits upon retirement.

DISCUSSION

This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievants argue that it is discriminatory and violative of statutory uniformity of benefits requirements for WCBOE to make them ineligible for the unused sick leave bonus, while other service employees are eligible. Grievants also contend the exclusion may be retaliation for their win in the Airhart grievance. Respondent's position is that Policy 4151.7 is expressly permitted under the statute, and was enacted pursuant to a request to an employee organization rather than as retaliation for any activity by the 261-day employees.

By authority of W. Va. Code § 18A-4-10a, "County boards of education are authorized to pay to

their employees or to defined groups thereof, for the purpose of reducing absenteeism, a bonus at the end of an employment term for each unused day of personal leave accumulated by the employee during that employment term."

Respondent claims that 261-day employees were excluded from the plan because they receive vacation days. Testimony from most of the witnesses reveals why this was an economical and practical idea; employees with vacation days generally may use their vacation days when they are sick, thus saving their sick days without reducing theirabsenteeism. Although technically vacation days must only be used with advance notice to the employer, in practice employees are usually permitted to call in sick and request the day be charged to their vacation. Nevertheless, Grievants claim the plan is discriminatory.

"W. Va. Code § 18-29-2(m) defines 'discrimination' 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.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). In order to establish a claim of discrimination, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, Grievants must show:

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

Grievants have not established a *prima facie* discrimination claim, as they have not established that they are similarly situated, in a pertinent way, to the employees who receive the attendance incentive. Grievants are not similarly classified, do not have the same employment term, and in fact enjoy vacation benefits denied the other employees. The only similarity is that both groups of

employees are service personnel, and that similarity is not enough to sustain the claim.

Nor does the policy violate any statute requiring uniformity of pay and benefits, for the same reasons. West Virginia Code § 18A-4-5b provides that "uniformity shall apply toall salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]" This provision has been interpreted to mean that boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Harmon v. Fayette County Bd. of Educ., Docket No. 03-10-035 (May 6, 2003); Airhart *supra*; Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995). Grievants do not perform like assignments and duties as the other employees, have different classifications and ranks, and a different number of working days. Respondent is not, therefore, required to provide them with the same benefits as the non-261-day employees.

Grievants also argue that Respondent's enactment of the attendance bonus policy is, or may be, retaliation or reprisal for the Airhart grievance, in which some Grievants participated. 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;
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> (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.

Vance v Jefferson County Bd. of Educ., Docket No. 02-19-272 (Oct. 31, 2002); Conner v. Barbour

County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). Grievants have not sustained this charge either. Even for those Grievants who did engage in the protected activity of filing the Airhart grievance, none could provide a causal connection between the activity and the new policy. As shown by the fact that Grievants were not denied a benefit to which they were entitled, either to resolve a discriminatory practice or to provide uniformity of benefits, Grievants were not adversely affected by the new policy.

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. Vance, *supra*; Conner, *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). Even though Grievants did not establish a *prima facie* reprisal claim, Respondent nonetheless offered a legitimate reason for its action. Respondent credibly proved that the policy was initiated by a group of employees and not the board, with no connection to the Airhart grievance, that it was expressly authorized by statute, and that it had the legitimate purpose of seeking to improve attendance of a group of employees.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that acontested 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.

2. "W. Va. Code § 18-29-2(m) defines 'discrimination' 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.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

3. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the

Grievants must show:

> (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).

4. Once Grievants establish a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievants 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. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hogsett, *supra.*

5. Grievants did not establish a *prima facie* discrimination claim. 6. Respondent nevertheless demonstrated a legitimate, non-discriminatory reason for the perceived discrimination.

7. West Virginia Code § 18A-4-5b provides that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]" This provision has been interpreted to mean that boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Harmon v. Fayette County Bd. of Educ., Docket No. 03-10-035 (May 6, 2003); Airhart v. Wood County Bd. of Educ., 569 S.E.2d 422 (W. Va. 2002); Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95- 15-217 (Sept. 29, 1995).

8. Grievants do not perform like assignments and duties as the employees who receive the attendance incentive.

9. 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.

Vance v Jefferson County Bd. of Educ., Docket No. 02-19-272 (Oct. 31, 2002); 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).

10. Grievants did not sustain a *prima facie* reprisal claim.

11. 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. Vance, *supra*; Conner, *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).

10. Respondent offered sufficient evidence of a legitimate, nonretaliatory reason for its action to rebut a reprisal claim, even though none was proven.

11. "County boards of education are authorized to pay to their employees *or to defined groups thereof*, for the purpose of reducing absenteeism, a bonus at the end of an employment term for each unused day of personal leave accumulated by the employee during that employment term." W. Va.

Code § 18A-4-10a (emphasis added).

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County. Any such appeal must be filed within thirty (30) days ofreceipt 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 11, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Gary Sall, Beth Baker, Judith Barnette, David Conley, Connie Dellinger, Tony George, Robert McPherson, Robert Mellinger, Rose Mellinger, Karen Powell, Barbara Swisher and Pamela Wharton.

Footnote: 2

Several other grievants participated in the consolidated grievance hearing held at level two, but only those named above appealed to level four.

Footnote: 3

Affirmed in Bd. of Educ. of the County of Wood v. Airhart, 212 W. Va. 175; 569 S.E.2d 422 (2002).