ALICE NEWSOME, et al.,

Grievants,

v. **DOCKET NO. 03-29-110**

MINGO COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Alice Newsome, Susan Hatfield, Linda Chandler and Carol Kirk (Grievants) filed this grievance against Mingo County Board of Education, (Respondent) on March 19, 2003, stating: "Respondents have violated *West Virginia Code* § 18-29-2(m)(o) by requiring similarly situated employees to arrive and depart work at different times." Grievants stated the relief sought as: "That grievants be permitted to arrive and depart work on the same schedule as the classroom teachers."

Having been denied at all lower levels, the parties agreed to submit the matter for decision at level four based on the record developed below. Grievants were represented by West Virginia Education Association UniServ Consultant Gary Archer, and Respondent was represented by Harry M. Rubenstein, Esq. of Kay Casto & Chaney, PLLC. This matter became mature for decision on May 30, 2003, the deadline filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants are all service personnel employed by Respondent as Aides at Riverside Elementary School.

2. Since 1998, when the State Board of Education took over Mingo County Schools, all service

personnel, including Grievants, have been required to work eight hours per day.

3. Grievants are required to arrive for work at 7:00 a.m. and leave at 3:00 p.m.

4. Classroom Teachers are required to arrive at 7:20 a.m. and usually leave by about 2:30 p.m.

5. Students start arriving at 7:20 a.m. and are usually gone by 2:15 p.m.

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. "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.

West Virginia Code § 18-29-2(a) allows recovery for "any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board." Grievants' claim it is a discriminatory practice for Respondent to apply its unwritten policy that requires them to work different hours than classroom teachers, or that classroom teachers are favored by their less rigid work schedules. Respondent argues it is not discriminatory becauseGrievants are not similarly situated to classroom teachers, and all personnel who are similarly situated are treated uniformly.

"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). 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 *prima facie* case of discrimination or favoritism under W. Va. Code §§ 18-29- 2(m) and (o), a grievant must establish the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees;

> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and
>
> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Flint v. Bd. of Educ. of the County of Harrison 207 W. Va. 251, 531 S.E.2d 76 (1999). *See* Martin, v. Randolph County Bd. of Educ. 195 W. Va. 297, 465 S.E.2d 399 (1995). In Flint, the Supreme Court of Appeals of West Virginia found that employees in different employment classifications can not be similarly situated. Here, Grievants are not only in different classifications than Classroom Teachers, they are in an entirely different *category* of employment, being service as opposed to professional personnel. Since all service personnel are treated the same, there can be no discrimination on that point, andeven if some service personnel were treated differently, as long as all personnel in the same classification were treated the same, discrimination would be difficult, if not impossible, to prove. Grievants have therefore failed to establish a *prima facie* discrimination claim.

The following conclusions of law support this decision:

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 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.

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. 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).

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 establish the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees;
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> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and
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> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Flint v. Bd. of Educ. of the County of Harrison 207 W. Va. 251, 531 S.E.2d 76 (1999). *See* Martin, v. Randolph County Bd. of Educ. 195 W. Va. 297, 465 S.E.2d 399 (1995).

5. Once Grievants establish a *prima facie* case of discrimination or favoritism, 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.*

6. Grievants are not similarly situated to Classroom Teachers, and have failed to articulate a *prima facie* claim of discrimination.

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 Mingo County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: June 6, 2003 _____

M. Paul Marteney

Administrative Law Judge