VERA BROOKS, GAIL HACKNEY,

and NANCY SULLIVAN,

Grievants,

v. **Docket No. 03-33-226**

McDOWELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievants, Vera Brooks, Gail Hackney, and Nancy Sullivan (collectively "Grievants") were employed by the respondent, the McDowell County Board of Education ("BOE"), as teachers at Iaeger Elementary School when an ice storm wreaked havoc on the school schedule on February 18, 2003. Grievants claim entitlement to a day of personal leave because they reported to work on February 18, 2003, while BOE excused the absences of employees who did not come to work that day.

Grievants filed a cursory written grievance on March 12, 2003, wherein they stated enigmatically "[b]oth former (current) and newly developed (disputed) county policy WV § 18-29-2." The requested relief was "[p]ersonal leave day without cause for 02-03 to car[r]y through 03-04" and "[o]rder directing county administration as to the proper implementation of their policies." Grievants' principal, having determined that the grievance exceeded his authority, issued a Level I denial on March 20, 2003. A Level II hearing was conducted on May 22, 2003. After being denied at Level II, their grievance was waived at Level III and appealed to Level IV where Grievants were represented by Ben Barkey, WVEA Region VII UniServ Consultant, and BOE was represented by attorney Kathryn Reed Bayless. Upon appeal to Level IV, additional documents were submitted to supplement the underlying record and the parties agreed to submit this grievance on the supplemented record. The parties submitted proposed findings of fact and conclusions of law on or before April 12, 2004. During Level IV review it was discovered that the original Level II decision, which was not paginated,

had some pages mixed in from a Level II decision issued in a different grievance, which was styled *Gibson v. McDowell County Board of Education*, Docket No. 03-33-225 (July 23, 2004).

During a telephonic hearing on July 16, 2004, this mix-up was called to the attention of the parties. The grievance was placed in abeyance until the correct pages for the Level II decision could be submitted. Thereafter, on August 2, 2004, the West Virginia Education and State Employees Grievance Board received a properly compiled Level II decision, at which point this grievance was mature for decision. (See footnote 1)

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievants are employed by BOE as teachers at Iaeger Elementary School in McDowell County.

2 2. The McDowell County school system, at all times material to this grievance, was operating under intervention by the West Virginia Board of Education ("State Board").

3 3. An amendment to McDowell County's inclement weather policy took effect on August 12, 2002.

4 4. The policy changes were approved by the State Board but it is unclear how the approval was communicated.

5 5. Subsequently, the State Board designed and implemented formal procedures to obtain written State Board approval of policies for any county school system in which the State Board had intervened.

6 6. On February 18, 2003, bad weather caused Dr. Mark A. Manchin, Superintendent of McDowell County Schools ("Dr. Manchin"), to cancel school for the students and place school employees on a two-hour delay.

7 7. Dr. Manchin received a number of telephone calls from employees about the icy conditions. He advised them not to report to work if conditions were too hazardous.

8 8. By the time Dr. Manchin became aware of how badly the travel conditions had deteriorated it was too late to reach all employees to cancel school altogether.

9 9. Grievants were among those employees who were able to report to school on February

18.

10 10. Employees who did not report to work on February 18 were not required to take personal leave in order to be paid for that day.

11 11. Grievants did not become aware that absentees were not required to take personal leave for February 18 until they attended a faculty senate meeting that took place some time after February 18 but before they filed their grievance.

12 12. Grievant Sullivan stated that faculty senate meetings usually take place the third Friday of the month.

13 13. If the faculty senate meeting in question actually did take place on the third Friday, it would have taken place on February 21, 2003.

14 14. Grievants' written grievance was filed on March 12, 2003.

DISCUSSION

This grievance is based on Grievants' perception that they were not treated fairly with respect to the events of February 18, 2003. Although they originally focused their complaints on the adoption and implementation of the inclement weather policy in McDowell County, the real thrust of their grievance is that the employees who reported to work on February 18, despite grueling travel conditions, were not treated as favorably as the employees who did not make the effort to reach their respective work sites.

Seen in this light, this grievance is based on allegations of favoritism or discrimination, as defined in West Virginia Code section 18-29-2. Grievants bear the burden of proving a claim of favoritism/discrimination by a preponderance of the evidence. If Grievants make a *prima facie* showing on this issue, the burden then shifts to BOE to rebut the *prima facie* case by proving, by a preponderance, that there was a legitimate, nondiscriminatory reason for the differences in treatment. As discussed more fully below, BOE is unable to meet this burden to rebut Grievants' *prima facie* case of favoritism/discrimination.

The facts giving rise to this grievance had their genesis in unpredictable winter weather that created a difficult situation on February 18, 2003. Employees were initially informed that school would be closed for students but employees were to report on a two-hour delay. However, the weather continued to deteriorate throughout the morning and travel became increasingly treacherous.

By the time Dr. Manchin was aware that the late-developing storm had created this dangerous

situation, it was too late to make an effective cancellation announcement through the telephone chain or through the broadcast media. The administration attempted, with little success, to contact principals to cancel schools altogether. Employees who contacted Dr. Manchin's office were told that they did not have to report for work. Subsequently, Dr. Manchin decided that, based on the unusual circumstances, it would be unfair to require employees who were absent on February 18, 2003, to relinquish a day of personal leave in order to be paid for that day.

Grievants were among those employees who complied with Dr. Manchin's initial directive to report to work on a delayed schedule on February 18. Grievants claim entitlement to a day of leave on the grounds that they reported for work on February 18, 2003, while their absentee colleagues were afforded an excused absence. This, in effect, gave employees who were absent on February 18 an extra leave day that Grievants did not receive.

Grievants also challenge whether the amended inclement weather policy in effect on February 18, 2003, had been properly adopted in McDowell County. However, Grievants never clearly articulated their arguments regarding the role of the inclement weather policy as it relates to this grievance. As discussed more fully below, there does not appear to be any real connection.

Timeliness

BOE claims that this grievance is untimely. In general, a grievance must be filed within fifteen days of the triggering event. However, West Virginia Code section 18-29- 4(a)(1) contains a discovery exception to the fifteen-day requirement. The time for filing thus runs from the date of the faculty senate meeting during which Grievants learned that absent employees had not been charged a day of leave for February 18, 2003.

Untimely filing is an affirmative defense for which BOE bears the burden of proof by a preponderance of the evidence. There is no definitive evidence regarding the date of the faculty senate meeting in question. Although Grievant Sullivan volunteered the information that such meetings usually took place on the third Friday of the month, which would have been February 21, 2003, this does not mean that normal practices prevailed in February 2003. Her statement regarding a normal or usual practice does not rise to the level of a preponderance of the evidence sufficient to foreclose Grievants from proceeding in this matter. Therefore, BOE failed to prove that this grievance was not timely.

Inclement Weather Policy

At all times pertinent to this grievance, the McDowell County school system was operating under intervention by the State Board. At the outset of the intervention period there were no prescribed procedures for making policy changes in the McDowell County school system. This omission was remedied by the State Board but not until after the amendment to the McDowell County inclement weather policy took effect on August 12, 2002. According to Dr. Manchin, the amendment to the pre-existing policy had been sent "to Charleston" and "Charleston approved it." Clearly, the reference to Charleston means the State Board. Grievants' argument that the "new" inclement weather policy, meaning the post- August 12 amendment version, was not properly adopted must fail in light of Dr. Manchin's testimony on this point. The procedures subsequently adopted by the State Board obviously do not assist Grievants in this argument because, as noted, such procedures were not in place at the time the amendment was approved.

In any event, the question of whether the amendment was properly adopted is of no moment in the resolution of this grievance. The ability to close or delay schools based on bad weather and road conditions was vested in the superintendent under either version of the policy. Neither version addressed how absences would be treated where the decision to close schools could not be made in time to prevent some employees from leaving their homes to report for work. (See footnote 2)

Favoritism/Discrimination

As noted above, Grievants were not particularly clear about the theory upon which they based their claim of entitlement to a day of personal leave. Perhaps the best statement of Grievants' theory came from counsel for BOE, who stated that Grievants' complaint with respect to February 18 was that "[w]e came to school. . . . We worked. We found out later that two people who did not make it to school that day at Iaeger [Elementary School] were paid, and were not required to take a leave day." Level II Transcript at 20. Thus it appears that Grievants are arguing favoritism or discrimination. The grievants in the aforementioned *Gibson* grievance prevailed upon a claim offavoritism/discrimination arising out of the same events. The grievants in *Gibson* were teachers at Iaeger High School who also reported for work on February 18, 2003.

BOE correctly asserts that "[i]t is within the discretion of the superintendent to determine when employees will report on days of inclement weather." Respondent's Proposed Findings of Fact and Conclusions of Law at 4, ¶ 3. However, BOE misses the mark with the argument that "there has been no showing that the applicable policy or any statute or regulation was violated." Respondent's

Proposed Findings of Fact and Conclusions of Law at 4, ¶ 3.

Under either version of the inclement weather policy, Dr. Manchin was required to make a decision by 6:00 a.m. regarding whether schools would be delayed or closed that day. It appears that Dr. Manchin met this deadline when he made the initial decision that employees should report on a delayed schedule on February 18. This decision was disseminated to employees through the usual means. Later in the morning, between 8:30 and 9:00, Dr. Manchin altered this decision based on his concerns over the intervening weather developments. In this respect, Dr. Manchin did not meet the policy-imposed deadline. (See footnote 3)

Unfortunately, Dr. Manchin was only able to communicate this change to a limited number of employees. His inability to reach all employees to advise them that they did not have to report to work was understandable in light of the fact that the change in travel conditions did not occur until late in the morning after the delay had already beenannounced. The real problem arose when Dr. Manchin decided to excuse the absences of those employees who failed to report to work on February 18.

All employees were subject to the two-hour delay on the morning of February 18, 2003, and all were faced with the treacherous travel conditions brought about by the late developing ice storm. However, Grievants, who complied with the original, official announcement and struggled to reach their work sites, (See footnote 4) find themselves in the position of having provided a day of service while their absentee colleagues did not and for which the absentees were not charged a day of leave. It is true that Grievants were paid their regular salary for providing that day of work. Nonetheless, the February 18 absentees were, in effect, given an additional day of personal leave while Grievants were not.

It was the decision on the part of Dr. Manchin to forgive absences on February 18, 2003, that created a disparity in treatment that was not related to actual work responsibilities. This difference in treatment was not agreed to in writing by Grievants. Accordingly, Grievants demonstrated that, under the unique facts of this case, they were subjected to discriminatory treatment, as defined in West Virginia Code section 18-29- 2(m).

It falls to BOE to rebut the *prima facie* showing of discrimination by establishing that there was a legitimate, nondiscriminatory reason for the differences in treatment. The fact that the weather changed unexpectedly does not relieve BOE of the obligation to treat employees the same. Nor can

BOE rely upon the fact that Dr. Manchin was not aware of the change in the weather until after the time set by the inclement weather policy formaking the decision to close schools. The changes in the weather and the timing of such changes may excuse Dr. Manchin's actions in announcing a two-hour delay and then deciding that the schools should be closed due to deteriorating weather and travel conditions. However, the weather changes do not offer a rational basis for affording an extra leave day to only those employees who were able to speak with Dr. Manchin on February 18, 2003, or who were simply unable to reach their work sites.

Grievants and others worked because the communication mechanism for closures was ineffective on this occasion. Through no fault of their own, Grievants have been denied a benefit that was extended to the absentees. There is no basis for this distinction under these facts. Therefore, Grievants prevail on a claim of discrimination.

This is not a disciplinary grievance. Accordingly, Grievants bear the burden to prove their case by a preponderance of the evidence. They have done so and this grievance will be granted.

Based upon the foregoing and a review of the applicable law, the undersigned concludes as follows:

CONCLUSIONS OF LAW

1 1. This is a non-disciplinary grievance in which Grievants bear the burden of proof. 156 C.S.R. 1 § 4.21 (2000); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23- 174 (Apr. 30, 1997).

2 2. Grievants' allegations must be proven by a preponderance of the evidence. 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 truethan not." *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR- 486 (May 17, 1993).

3 3. Timeliness is an affirmative defense that must be established by BOE “by a preponderance of the evidence.” *Pryor v. West Virginia Dep't of Transp./Div. of Highways*, Docket No. 97-DOH-341 (Oct. 29, 1997).

4 4. Under the discovery rule, as set forth in West Virginia Code section 18-29- 4(a)(1), the grievance had to be filed within fifteen days of Grievants becoming aware that employees who were absent on February 18 would not be required to take a personal leave day in order to be paid.

5 5. Grievants made this discovery at the first faculty senate meeting to convene after February 18, 2003.

6 6. In light of the fact that BOE failed to establish, with certainty, the date of the faculty senate meeting, BOE failed to meet the burden of proving by a preponderance of the evidence that this grievance was untimely.

7 7. A preponderance of the evidence established that the State Board did approve the policy amendment, although the approval may have been less formal than under subsequently implemented practices.

8 8. Under either version of the policy, Dr. Manchin had the discretion to close or delay schools based on inclement weather.

9 9. In any event, the approval of the amendment to the inclement weather policy is irrelevant to the question of whether Dr. Manchin's decision to treat absent employees more favorably than Grievants by excusing absences on February 18, 2003, was improper.

10 10. To establish a *prima facie* case of discrimination or favoritism under West

Virginia Code sections18-29-2(m) or (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.

Bd. of Educ. of County of Wood v. Airhart, 212 W.Va. 175, 569 S.E.2d 422, 169 Ed. Law Rep. 744 (2002) (citing *Flint v. Bd. of Educ. of County of Harrison*, 207 W.Va. 251, 256, 531 S.E.2d 76, 81 (1999)(*per curiam*)).

11 11. The difference in treatment that resulted when the February 18 absentees received a gratuitous day of personal leave, while Grievants did not, constitutes discrimination, as defined in West Virginia Code section 18-29-2(m), in that the differences in treatment are not “related to the actual job responsibilities” and have not been “agreed to in writing by the employees.”

12 12. Under the *Airhart* test, discussed above, Grievants have established a *prima facie* case of discrimination because they are similarly situated to the employees who failed to report to work on February 18, 2003, in that they were all faced with inclement weather, bad roads, and were all subject to the administration's initial directive to report to work by 10:00 a.m.. The additional day of leave for employees who did not report to work on February 18 constitutes an advantage not afforded Grievants and results in substantial inequity.

13 13. BOE has failed to rebut this *prima facie* showing of discrimination.

14 14. Grievants are entitled to personal leave to compensate them for the time they worked on February 18, 2003, when BOE failed to cancel schools in a timely manner and then excused the absences of those employees who did not report for work on that day.

CONCLUSION

Grievants are entitled to prevail. However, iIt should be noted that this decision is limited to the peculiar facts of this grievance as the decision to forgive absences for a limited number of employees on February 18, 2003.

Accordingly, this grievance is **GRANTED.** The respondent, McDowell County Board of Education, is **ORDERED** to award each of the grievants, Vera Brooks, Gail Hackney and Nancy Sullivan, one additional day of personal leave to be used at their discretion in the same manner as any other accumulated personal leave time.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 West Virginia Code section 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: September 7, 2004 _____

Jacquelyn I. Custer

Administrative Law Judge

Footnote: 1

The Level II decision received on August 2, 2004, blends facts from the aforementioned Gibson grievance with the events relating to Grievants. Specifically, the Level II decision discusses events that took place on January 17, 2003, that pertain to Gibson but have no relationship to this case.

Footnote: 2

This is not to suggest that school officials were dilatory or failed to respond in an appropriate manner to the evolving weather conditions on February 18.

Footnote: 3

This is not to suggest that Dr. Manchin should not have amended his closure decision in the interests of safety.

Footnote: 4

Grievant Brooks walked two miles to get to work because the roads were too icy for her to drive.