THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARY NELSON, et al.,

Grievants,

v.

Docket No. 08-03-003

BOONE COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) are employed by Respondent as teachers at Brookview Elementary School. They filed this grievance on January 12, 2007, alleging:

ALL [sic] employees of the Boone County Board of Education were NOT [sic] given equal opportunities to exchange previous days worked for the scheduled work day (12-22-06).

Professional employees, instructional aides, and office staff were not given the SAME [sic] opportunities or the length of time to work off December 22, 2006, as other employees.

For relief Grievants seek:

Compensation of one (1) day pay as other School Service Personnel received.

We would like a policy developed to ensure that all employees be treated fairly and be given equal opportunities as stated in the Boone County Schools Calendar under “Equal Opportunity Employer.”

This grievance was denied at Levels 1 and 2. A Level 3 hearing was held onSeptember 27, 2007. Grievants were represented by William McGinley, Esq., of West Virginia Education Association, and Respondent was represented by Timothy R. Conaway, Esq. The grievance was denied at Level 3 on December 11, 2007. Grievants appealed the decision to Level 4 and agreed to submit the case for decision based on the lower level record. This case became mature for decision on July 21, 2008, upon the parties' submissions of Findings of Fact and Conclusions of Law.

Synopsis

Grievants assert they were discriminated against when they were not given the same opportunity as other employees to leave two hours early on December 22, 2006, a previously designated educational support and enhancement (hereinafter referred to as an ISE) day.

Respondent avers that it provided all employees with an opportunity to leave two hours early on that date, so long as the principal-led professional development scheduled for that time was held at an alternate time prior to December 22nd. The only requirement was that the Assistant Superintendent be notified of the alternative date, time and agenda. This grievance is denied. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1.

Grievants were employed by Respondent as teachers during the 2006-2007 school year and were assigned to Brookview Elementary School.

2.

December 22, 2006, was the last employment day in the 2006-2007 school calendar before Christmas break. It had previously been designated as an ISE day.

3.

Pursuant to W.Va. Code §18-5-45, boards of education are required to schedule ISEdays in the months of October, December, February, April, and June.

4.

ISE days have three components required by W.Va. Code §18-5-45. It must encompass two hours of instructional activities for students (See footnote 2) ; two hours of professional activities for teachers, during which faculty senate shall meet; and all remaining time is to be used for other professional activities for teachers to improve student instruction. Teachers are required to attend ISE days, as they are a necessary part of their duties.

5.

ISE days are a scheduled work day for all service personnel and are used for training or other tasks related to their job classification.

6.

On Friday, December 15, 2006, Assistant Superintendent John Hudson sent an e-mail to all principals of Boone County Schools allowing employees to be released two hours early on December 22, 2006, so long as the principal-led professional development was scheduled between December 18th-21st. The e-mail required the principal to submit the alternate date, time, and activity/agenda to Mr. Hudson by Monday, December 18, 2006.

7.

On Friday, December 15, 2006, Grievants met and discussed the option of scheduling the two hours of professional development at a different time. They were unable to come to a consensus as to an alternative time.

8.

Grievants requested Respondent consider a school dance that was previously scheduled for the evening of December 18th be considered as professional development. Respondent denied that request, as it did not comport with theprofessional development requirement set forth in the West Virginia Code.

9.

Grievants met again on Monday, December 18, 2006, in an attempt to agree on an alternate day for the professional development. Once again, they were unable to agree on a time.

10.

On December 22, 2006, Mr. Hudson sent a clarifying memo to all principals stating that teachers who had extra continuing education hours were not permitted to substitute those hours for the six hours statutorily required on ISE day.

11.

Pursuant to W.Va. Code §18A-5-4a, boards of education may require support personnel to attend training. Such attendance may be substituted for some employment so that support personnel do not lose pay.

13.

Respondent allowed cooks and custodians to take advantage of leaving early on December 22, 2006.

14.

The cooks had been required to attend training sessions after work hours on October 10, 2006, and November 8, 2006. The time spent in this training was allowed to be used as compensatory time for December 22nd, as no students were at school on that date and the cooks were not needed to perform their ordinary functions.

15.

The custodians had been required to attend training given at a state-wide meeting in Charleston on July 20, 2006. The time spent in this training was allowed to be used as compensatory time for December 22nd, as no students were at school on that date and the custodians were not needed to perform their ordinary functions.

Discussion

In a non-disciplinary matter, it is incumbent upon the grievants seeking relief, pursuantto W.Va. Code §§18-29-1 *et seq*. to prove all allegations of the grievance by a preponderance of the evidence. *Holly v. Logan Co. Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). In other words, the grievants have the burden of proving that each element of their claim is more likely to have occurred than not. *Petry v. Kanawha Co. Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997); Black's Law Dictionary (6th Ed. 1991). (See footnote 3) Grievants have failed to present sufficient evidence that they are entitled to the requested relief.

Discrimination is statutorily defined 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(m). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

a) that he or she has been treated differently from one or more similarly-situated employee(s);

b) that the different treatment is not related to the actual job responsibilities of the employees;

c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd.of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). Favoritism as defined by W.Va. Code §18-29-2(o) “means unfair treatment of an

employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

In this case, Grievants are asserting discrimination and favoritism by not being provided with the opportunity to substitute the professional development scheduled for December 22, 2006. Grievants also assert they were discriminated against when they were not allowed to substitute additional continuing education hours for the hours required on the ISE day. Grievants were given the same notice and opportunity to schedule an alternative time for the principal-led professional development as every other school in the county. Unfortunately, they were not able to agree among themselves on an alternative date and time with which to fulfill this requirement.

Second, Grievants argue that it is discrimination and favoritism for cooks and custodians to be allowed to substitute continuing training/education for an ISE day when those who had extra continuing education hours were not. Aside from the fact that no testimony was produced to indicate Grievants had more than the required continuing education hours, ISE days are required for teachers and were designed with teachers and students in mind. Support personnel are not required on ISE days for their regular duties, instead it is a day for them to receive training or to perform additional work within their classification. Either way, clearly Grievants are not similarly situated as cooks and custodians. The difference in treatment clearly is as a result of the job responsibilities. The undersigned, therefore, makes the following Conclusions of Law.

Conclusions of Law

1.

> In a non-disciplinary matter, it is incumbent upon the grievants seeking relief, pursuant to W.Va. Code §§18-29-1 *et seq*. to prove all allegations of the grievance by a preponderance of the evidence. *Holly v. Logan Co. Bd. of Educ*., Docket No. 96- 23-174 (Apr. 30, 1997). In other words, the grievants have the burden of proving that each element of their claim is more likely to have occurred than not. *Petry v. Kanawha Co. Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997); Black's Law Dictionary (6th Ed. 1991).

2.

> Discrimination is statutorily defined 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(m).

3.

> In order to establish either a discrimination or favoritism claim asserted under the

grievance statutes, an employee must prove:

a) that he or she has been treated differently from one or more similarly-situated employee(s);

b) that the different treatment is not related to the actual job responsibilities of the employees;

c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

4.

Favoritism as defined by W.Va. Code §18-29-2(o) "means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

5.

Grievants failed to prove Respondent discriminated against them. WHEREFORE, based upon the foregoing, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. (See footnote 3). Neither the West Virginia Public 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:

November 14, 2008

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Patty Jarussi, Robin Chafin, Dana Warner, Debra Ashby, Kathy Kinder, Betty Dickson, Renee Duncan, Lois Kirk, Susan Mayhorn, Lora Price, Kesley Kimle, M. Meeker, Vicky Chafin, Pamela Multett, Mauer Dellard, Mary Logsdon, Devona Faye, Rose Jarrell, Jeff Davis, Logan Halstead, Sue Jurnbull-Graley, Kathleen Burke, Beverly Cook, Julia Warner, Mark Kennedy, Sharon M. Cook, Barbara Ulbrich, Nada Baldwin, Rhonda Brown, Era Hall, Sherry Kerns, Debbie Welch, Pamela Roberts, Susan Kimbler, Kimberly Retton, Cheryl Ingraham, Denise Kennedy, Valerie Mullins, Janet Tulley, Ronna Lorrison, Morris Price, Kathy Ison, Anna Keffer, Rebecca Protan, Stephanie Harper, Cozetta Miller, Nina Farmer- Hill, Lisa Nichols, Julie McClure, Regina Hoff, Leticia Lovejoy.

Footnote: 2

Teachers are to be available to assist students for tutoring, meetings, or other instructional activities.

Footnote: 3

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.