THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA LEGG-HENDRICKSON, et al.,
Grievants,

v. **Docket No. 08-10-009**

FAYETTE COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievants are currently employed by the Fayette County Board of Education ("FCBOE") as teachers and service personnel. Their Statement of Grievance reads:

> WV § 18A-4-10 Leave, 18A-4-5a uniformity of pay & 18-29-2 discrimination, retaliation. Passages to work blocked by picket lines. Employees felt intimidated by the presence of a picket line. Not all employees treated equitably in the matter. [1]

The Relief Sought is "Payment for March 14, 2007 when picket lines were present. Payment for the day due to non uniform application of the rules."

This grievance was filed on May 8, 2007, and denied at all lower levels. Grievants filed to Level IV on May 15, 2008.[2] Grievants were represented by Ben Barkey of the West Virginia Education Association ("WVEA"), and Erwin and Jamison Conrad, Esq., represented FCBOE. The parties agreed to submit this case on the record developed

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[1]In 2007, the Legislature, 2007 Acts ch. 207, 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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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 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. References in this decision are to the former statutes, which continue to control the proceedings in this case.

[2]This grievance was filed under the old grievance procedure.

below. This matter became mature for decision on August 11, 2008, when the parties submitted proposed Findings of Facts and Conclusions of Law. The grievance was assigned to the undersigned Administrative Law Judge on August 28, 2008, but a complete copy of the lower level record was not received by the undersigned until September 2008.

Synopsis

In their Statement of Grievance, Grievants assert they "felt intimidated" by the picket lines, and they did not cross them. Grievants also argued other teachers were treated differently and received sick leave when they were not ill.

Respondent avers Grievants were not threatened in any way, either physically or verbally, were not intimidated, and chose not to cross the picket lines. Additionally, Respondent asserts Grievants did not properly complete the necessary forms to meet the statutory and policy requirements to receive paid leave. Thus, they could not receive compensation. Respondent also asserts Grievants did not meet their burden of proof and demonstrate that other employees were treated differently. For the reasons discussed below, this grievance must be 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 are employed as teachers and service personnel by FCBOE.

2. On March 14, 2007, the West Virginia Education Association planned a work stoppage to protest what they viewed as poor compensation.

3. FCBOE was aware of the planned work stoppage, and Superintendent Chris Perkins received guidance from the State Department on Education ("SDOE") as to how to proceed. The SDOE referred Superintendent Perkins to *Prince v. Wayne County Board*

of Education, Docket No. 90-50-281 (January 28, 1990). SDOE's memo stated "[e]mployees who are prevented from working due to actual physical threats, intimidation and violence and who can provide substantiation of the same should be paid as though they had reported to work. However the mere presence of a picket line is not sufficient to excuse an employee from reporting to work." Exhs. 4 & 5.

4. Superintendent Perkins shared SDOE's information with all his principals verbally, in a meeting, in writing, and by email. Superintendent Perkins explained the above-stated standard would be followed in order to grant leave during the work stoppage. Superintendent Perkins referred administrators to W. VA. CODE § 18A-4-10, and he noted leave without cause days could not be used in connection with a concerted work stoppage or strike. Exhs. 1 & 7.

5. The SDOE memo also directed board of educations to inform staff members in advance and to be sure to follow county board policy and the "legal advice" contained in the document. Exh. 4.

6. The vast majority of Grievants are WVEA members and are employed at Rosedale Elementary. The principal at Rosedale Elementary is Ted Dixon.

7. Grievants drove to school on March 14, 2007, and when they saw a picket line, which was composed of only one or two people, they told Principal Dixon, who was standing outside, that they would not cross the picket line and would not be at work that day.

8. Upon their return to work, Grievants requested paid leave for March 14, 2007. On their leave request slips, Grievants did not identify the type of leave requested, and this information is required in order to grant paid leave. Exh. No. 7. After Grievants submitted the deficient leave request forms, FCBOE requested Grievants to complete these forms

and clarify what type of leave they were seeking and why. Grievants still did not check a section denoting what type of leave they were requesting.

9. Grievants completed these forms with the following statements (the following is a representative sample of these statements):

> "I did not feel comfortable crossing the picket line, therefore I went home."
> "There was a picket line and I did not want to cross it."
> "I chose not to cross the line and went home."
> "When I arrived a work on the morning of March 14, I was greeted by a picket line[.] I did not feel comfortable crossing it."
> "I was not comfortable crossing a picket line and chose not to do so."
> "I will not cross a picket line!"
> "I felt uncomfortable and chose not to cross the picket line."
> "I was not comfortable crossing the picket line. . . ."
> "I felt uncomfortable and followed West Virginia tradition of not crossing a picket line."
> "I did not feel I could cross a picket line."
> "[P]icket line was at the gate and being the daughter of a coal miner I choose not to cross."
> "There were picketers at the front gate of the school. I did not and will not cross a picket line."

10. The witnesses at the Level II hearing agreed that their written statements were correct.

11. Some FCBOE employees requested sick leave for March 14, 2007, but their requests were not granted unless they submitted a doctor's excuse. This procedure for requesting sick leave had been explained prior to the work stoppage. If an employee submitted a doctor's excuse, sick leave was granted.[3] Resp. Exh. 1.

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[3]Grievants asserted during the hearing and in their arguments that these employees were not ill. No evidence was submitted to support this assertion, and it will not be considered further. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998). As this was the basis for the allegations of discrimination and retaliation, these issues will not be addressed further.

12. Grievants Brett Floyd and James Ross are teachers at Collins Middle School. Their forms requesting leave were not submitted. They testified they were not intimidated by the picket line and did not expect to be paid, as they had been informed by their principal of the rules regarding attendance for March 14.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. *Id.* As there are several issues raised by this grievance, they will be addressed one at a time.

W. VA. CODE § 18A-4-10(3) discusses the use of "without cause days" and states:

> (3) Each employee is permitted to use three days of leave annually without regard to the cause for the absence. Personal leave without cause may not be used on consecutive work days unless authorized or approved by the employee's principal or immediate supervisor, as appropriate. The employee shall give notice of leave without cause to the principal or immediate supervisor at least twenty-four hours in advance, except that in the case of sudden and unexpected circumstances, notice shall be given as soon as reasonably practicable. The principal or immediate supervisor may deny use of the day if, at the time notice is given, either fifteen percent of the employees or three employees, whichever is greater, under the supervision of the principal or immediate supervisor, have previously given notice of their intention to use that day for leave. **Personal leave may not be used in connection with a concerted work stoppage or strike**. . . .

(Emphasis added).

As stated by the above-cited Code Section, "without cause days" may not be used in "connection with a concerted work stoppage," and must be requested in advance. Accordingly, the first issue to address is whether Grievants are allowed to use "without cause days" in this set of facts.

The standard set out by SDOE and utilized by FCBOE was "[e]mployees who are prevented from working due to actual physical threats, intimidation and violence and who can provide substantiation of the same should be paid as though they had reported to work. However, the mere presence of a picket line is not sufficient to excuse an employee from reporting to work." As noted in Finding of Fact 9, there was no indication from Grievants, in their request for paid leave, that they were intimidated in any way. The words used repeatedly in their statements are "not comfortable" and "chose." These statements cannot support a finding of "actual physical threats, intimidation and violence."

During their testimony, Grievants were clear that they were not threatened either verbally or physically by the picketers. Some Grievants did express some mild fear/concerns that there could be later reprisals if they crossed the picket line. These fears were based on stories from coal mine strikes that Grievants had heard from their fathers and other relatives. Several Grievants testified they were raised in southern West Virginia and were taught not to cross a picket line.

In regard to this testimony, the assessments stated in *Prince* appear to apply. The administrative law judge in *Prince* stated, "This is not a situation where crossing the picket lines would have produced any clear-cut detriment to Grievants, and there was not even credible fear thereof established." Additionally, he concluded, "In short, Grievants. . . chose not to cross picket lines. . . . While some Grievants expressed mild fear of some future reprisal had they crossed the lines, it was well established that none of them had any

serious intention of crossing under any circumstances out of sympathy for the teachers and because of the cultural, labor-favoring climate among the majority of Wayne Countians."

While Grievants had the option of making this choice, and chose not to cross this picket line, without the required intimidation, they cannot be paid for this decision. *Prince, supra*. *See Barksdale v. Harrison County Bd. of Educ.*, Docket No. 90-17-331(Nov. 28, 1990). *See also Dodd v. Kanawha County Bd. of Educ.*, Docket No. 20-87-196-1 (Nov. 13, 1987).

Two other issues should be noted. First, Grievants did not request their "without cause" leave within the required time frame stated in W. VA. CODE § 18A-4-10(3). *See Melbourne v. Mingo County Bd. of Educ.*, Docket No. 90-29-219 (Aug. 29, 1990). Second, Grievants assert they are entitled to paid leave, but did not identify the type of leave they wished to receive. As with all state entities, paper work must be completed to support the outlay of funds. It is unclear why Grievants did not complete the forms properly, but FCBOE is not required to guess what type of leave is sought. Thus, based on FCOBE's policy, Grievants cannot receive paid leave.

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, Grievants have the burden of proving their grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human*

Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

2. W. VA. CODE § 18A-4-10(3) requires an employee to give notice of a leave without cause request at least twenty-four hours in advance; gives the principal or immediate supervisor the authority to deny this leave under certain circumstances; and prevents the use of personal leave in connection with a concerted work stoppage.

3. The mere presence of a picket line is not sufficient to excuse an employee from reporting to work, but employees who are prevented from working due to actual physical threats, intimidation and violence, and who substantiate these assertions, can be paid as if they reported to work. *See Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990); *Barksdale v. Harrison County Bd. of Educ.*, Docket No. 90-17-331 (Nov. 28, 1990).

4. Grievants did not meet their burden of proof and establish they were the targets of any type of threat, intimidation, or violence such that would excuse them from attending work on March 14, 2007. *See Prince, supra; Barksdale, supra*.

5. Grievants have not met the requirements set out in W. VA. CODE § 18A-4-10(3) and FCBOE Policy to receive without cause leave days for March 14, 2007.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: February 2, 2009

Janis I. Reynolds
Administrative Law Judge