THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BONITA REDD,
Grievant,

v. **Docket No. 2009-0451-McDED**

McDOWELL COUNTY BOARD OF EDUCATION
and WEST VIRGINIA DEPARTMENT
OF EDUCATION,
Respondent.

DECISION

Grievant Bonita Redd filed a grievance against her employer, McDowell County Board of Education, on August 26, 2008. The statement of grievance reads, "Florisha McGuire being hired as Associate Principal of Mount View. Violations: Public Employee law §6C-1-3, Title VII, Title IX, 18A-4-7a, State and Federal statutes, violation of section procedure, §1607.3, McDowell County Policy 8-001, favoritism, reprisal, and discrimination."[1]

For relief Grievant seeks, "Position of Associate Principal, triple back pay."

Grievant initially requested to proceed directly to level three, as she claimed she had been demoted. By letter dated September 8, 2008, Suzette Cook, Superintendent, objected to proceeding directly to level three, contending there was no demotion, and requested Grievant determine whether she preferred a conference or a hearing at level one. On September 12, 2008, Grievant responded in writing once again insisting that she be allowed to proceed to level three. Superintendent Cook responded by letter dated September 26, 2008, objecting to waiving levels one and two and scheduled a level one hearing on October 8, 2008. Grievant alleged default on September 29, 2008, because Superintendent Cook would not agree to waive levels one and two of the grievance procedure. Grievant again

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[1]While the statement of grievance indicates Grievant asserts she should have been hired for the Associate Principal, there was no evidence presented concerning this issue. Therefore, it is deemed abandoned.

asserted default by letter dated October 2, 2008. Upon receipt of these two letters, Superintendent Cook sent Grievant a letter on October 6, 2008, reiterating that Grievant did not fall under the exceptions in West Virginia Code §6C-2-3(4) that allowed waiving the lower levels of the grievance procedure.

On November 25, 2008, Chief Administrative Law Judge Ronald Reece issued an Order Ruling on Grievant's Request For a Hearing on Default Claim. In that Order, Grievant's default request was denied for failure to state a claim upon which default could be granted under W. Va. Code §6C-2-3. The case was then dismissed from the level three docket and remanded to level one.[2]

A level one hearing was held on October 8, 2008. On October 22, 2008, the grievance was denied at level one. Level two mediation was held on March 10, 2009.

A level three hearing was held on August 11, 2009, at the Grievance Board's Beckley office. At some point prior to the level three hearing, the West Virginia Department of Education was joined as a necessary party, as it had intervened in the operation of the McDowell County school system. Grievant appeared pro se. McDowell County Board of Education was represented by Kathryn Reed Bayless, Esq., and the West Virginia Department of Education was represented by Heather L. Deskins, Esq. This case became mature on September 15, 2009, upon receipt of the parties' findings of fact and conclusions of law.

Findings of Fact

1. Grievant is currently employed as Assistant Principal at Mount View High School in McDowell County, West Virginia.

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[2]At level three Grievant once again requested default. Since this issue has been decided previously, this will not be addressed.

2. For the 2007-2008 school year, Mount View had a principal and three assistant principals.

3. When an assistant principal resigned, Superintendent Cook, in consultation with the State Department, decided to leave the assistant principal position vacant and create an Associate Principal position. The purpose was to provide greater support to the principal.

4. The position of Associate Principal was posted, and Grievant, along with two others, applied.

5. All three applicants were interviewed, and their qualifications were assessed pursuant to the first set of criteria set forth in W. VA. CODE §18A-4-7a.

6. Florisha McGuire ranked the highest and was the successful candidate.

7. Grievant ranked third.

8. Grievant's title has not changed.

9. Grievant's pay has not changed.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant have not met her burden. *Id.*

Grievant has continually asserted she was demoted when Respondents filled the Associate Principal position. She asserts that while her title and salary have remained consistent, her duties have been lessened. It has been recognized by this Grievance Board

that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989); *Dudley v. Bureau of Senior Services*, Docket No. 01-BSS-092 (July 16, 2001).

Grievant asserts her duties changed when Ms. McGuire took the position of Associate Principal. At the level one hearing, Grievant was pressed to explain specifically what duties were different. The following exchange occurred:

Respondent's Attorney	Q:	But in terms of – and I understand what you're saying. If we can focus on the duties, themselves, are you doing something this year in terms of a duty that you did not do last year?
Grievant	A:	We [Grievant and Ms. McGuire] both basically have the same duties, both me and Mrs. McGuire, but her status is higher than mine.

Level One Transcript, page 17.

Grievant has not demonstrated a change in duties. Therefore, she has not met her burden.

Grievant also asserts she has been a victim of discrimination and favoritism. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W.VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. *See* W. VA. CODE § 6C-2-2(h). 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant presented no evidence to satisfy her burden with respect to these claims.[3]

Lastly, Grievant asserts reprisal. To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in protected activity (i.e., filing a grievance);
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> (2) that she was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (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 also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

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[3]Grievant's allegations that Respondents violated Title VII and Title IX are encompassed as discrimination claims, even though they would be judged by a different standard. Since Grievant did not present any evidence of discrimination, these allegations will not be addressed further.

Grievant presented no evidence on reprisal.

Grievant is upset about the Associate Principal position. She is convinced that hiring Ms. McGuire for that position caused her to be demoted. Throughout the proceedings, Grievant has referred to her position as that of Assistant Principal/Lead Administrator. However, she testified that her contract was only for Assistant Principal. The undersigned was not provided with evidence concerning the reason Grievant believed she was Lead Administrator or the specific duties to which she believes were taken from her when Ms. McGuire was hired.

In the absence of evidence, this grievance must be DENIED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. A "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989); *Dudley v. Bureau of Senior Services*, Docket No. 01-BSS-092 (July 16, 2001).

3. Grievant did not prove she had been demoted.

4. 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; and,
>
> (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 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant did not prove her claims of discrimination or favoritism.

6. To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in protected activity (i.e., filing a grievance);
>
> (2) that 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 also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. Grievant did not prove she was a victim of retaliation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

DATE: February 17, 2010

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Wendy A. Elswick
Administrative Law Judge