THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

EUGENE CLINTON ADKINS,
Grievant,

v. **Docket No. 2011-0967-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

_____Grievant, Eugene Clinton Adkins, filed this grievance on January 7, 2011, asserting that another employee, who had less seniority than he, had been called out to perform overtime assignments on December 31, 2010, and January 1, 2011. Grievant seeks compensation for lost wages at the legal holiday rate of pay with interest. The grievance was denied at level one following a conference. A level two mediation session was conducted on May 9, 2011. Grievant perfected his appeal to level three on May 18, 2011. A level three hearing was conducted before Administrative Law Judge Carrie H. LeFevre on September 8, 2011. Grievant appeared in person and by his counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, James W. Withrow, Kanawha County Board of Education. The case was reassigned on December 14, 2011, for administrative reasons. The case became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 11, 2011.

Synopsis

Grievant contends that he should have been given two extra duty assignments awarded to another employee with less seniority. Concerning one assignment, the record established that Grievant was not qualified to do the work and, therefore, was not similarly situated to the employee called out to perform the extra duty assignment. The same was not the case for the other extra duty assignment. Grievant and the other employee were similarly situated, the difference in treatment was unrelated to the job assignment, which Grievant was qualified to perform, and was not agreed to in writing. Therefore, Grievant was able to prove discrimination.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant is employed by the Respondent in the maintenance department. He is classified as a mason; however, he works in a number of other areas to meet the needs of the school system.

2. During the last week of December 2010, Grievant advised his supervisor, William Hughart, of his availability and desire to perform any overtime assignments occurring over the holiday weekend.

3. On December 31, 2010 and January 1, 2011, Respondent called out Anthony Kidd to perform extra work assignments. On the 31st Mr. Kidd worked on a roof leak. On the 1st he worked on duct work in the kitchen at an elementary school.

4. Grievant was available to work both December 31, 2010 and January 1, 2011. Grievant was seemingly qualified to do the roof work, having performed such work

with Mr. Kidd on numerous occasions and having had some experience in this area while he served the Respondent as a substitute. Grievant acknowledged that he had limited experience with duct work. He also admitted that he is not qualified to perform sheet metal work.

5. Grievant is superior in seniority to Mr. Kidd. They are both classified as masons.

6. None of Respondent's regularly employed roofer/sheet metal mechanics wanted to accept the extra duty assignment. Respondent does not employ any substitute roofer/sheet metal mechanics. The record of this grievance does not establish which service employee of Respondent was next in line for an extra duty assignment, only that Grievant and Mr. Kidd were available.

7. Respondent did not call Grievant and offer him the assignments on either day.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380

(Mar. 18, 1997). In other words, "[t]he 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).

Grievant contends that it constituted discrimination and/or favoritism for Mr. Kidd to be given the assignments in question, when Grievant is the more senior of the two. For purposes of the grievance procedure, discrimination is defined 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." 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);
>
> (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); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Concerning extra duty assignments, such as in the instant case, WEST VIRGINIA CODE § 18A-4-8b(f) requires that such assignments be offered to employees in the applicable classification pursuant to a seniority-based rotation.[1] *White v. Monongalia County Bd. of Educ.*, Docket No. 2008-0586-CONS (Dec. 16, 2008).

Addressing the call out assignment on January 1, 2011, the record established that the work involved installing duct work at an elementary school. Grievant conceded that he did not have the skill and experience to perform the job. This establishes that he was not similarly situated to Mr. Kidd and his assertion of discrimination and/or favoritism fails. That is not the case in regard to the December 31, 2011 assignment. Respondent argues the Grievant was not called out to work on an emergency roofing repair job because the supervisor did not believe that he had the skill to perform the job. Respondent argues that no favoritism or discriminatory motive existed due to the nature of the work.

Unfortunately for Respondent, motivation is not a factor to be considered when determining whether or not discrimination has occurred under the grievance statutes. Grievant and Mr. Kidd have the same classification. The record of this grievance does not establish which service employee of Respondent was next in line for an extra duty assignment, only that Grievant and Mr. Kidd were available. Grievant is the more senior of the two. As the more senior of the two, Grievant was entitled to be called and offered the overtime assignment on December 31, 2010.

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[1]W. VA. CODE § 18A-4-8b(f) states, in pertinent part, that a "service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments."

The undersigned concludes that Grievant and Mr. Kidd were similarly situated, in that they both held the same classification and both had roofing experience at the time the assignment was given to the less senior employee. Awarding the assignment to Mr. Kidd was not in any way related to his or Grievant's job duties, in that they both had the necessary experience and both were available on the day in question. Therefore, Grievant has proven discrimination in this case as it relates to the assignment on December 31, 2010.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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3. Grievant has proven by a preponderance of the evidence that he did not receive the December 31, 2010, assignment as a result of discrimination and/or favoritism.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to award Grievant all applicable back pay and benefits, with interest at the statutory rate, for the extra duty assignment that occurred on December 31, 2010.[2]

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 (eff. July 7, 2008).

Date: December 29, 2011

Ronald L. Reece
Administrative Law Judge

[2]The record established that Mr. Kidd was able to perform the roof repair by claiming 6.75 hours overtime pay on December 31, 2010.