THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARCELLA CHARLES,
Grievant,

v. **DOCKET NO. 2016-1813-CONS**

MINGO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Two grievances were filed by Grievant, Marcella Charles, against her employer, the Mingo County Board of Education. The first was filed on August 26, 2015. The statement of grievance reads:

> WV § 6C-2-2 Discrimination, uniformity, favoritism compensation for like assignments and duties. Grievant recently became aware that the other county CTE instructor Mr. Hoffman has a longer contract term to complete less duties and responsibilities than the grievant.

The relief sought by Grievant in that grievance is, "[c]ontract term increased to 261 days. Backpay, interest and other related benefits."

A conference was held at level one on the first grievance on October 21, 2015, and a level one decision denying the grievance was issued November 9, 2015. Grievant appealed to level two on November 16, 2015, and a mediation session was held on February 17, 2016. Grievant appealed the first grievance to level three on April 28, 2016.

The second grievance was filed on May 5, 2016. The statement of grievance reads:

> On August 15, 2015 Ms. Charles filed a grievance regarding uniformity and discrimination for performing the same or greater duties for less employment days and pay as the other CTE administrator in the county. In a thinly veiled attempt to avoid losing that grievance they have now rearranged the

> organization structure and now all decisions by the grievant have to be approved by the other CTE administrator. Effectively the county has removed her duties as CTE administrator without notification. This move is a significant change in duties that should have been properly notified and the newly created positions should have been posted. She did not get a RIF notice but did receive a transfer notice on the last possible day. Her contract was to be Vice Principal/CTE administrator. WV § 18A-4-7a No RIF notice, job should be posted WV § 6C-2-2 Reprisal.[1]

The relief sought in the second grievance is, "[o]rganization structure, duties and responsibilities restored."

The parties advised the Grievance Board on June 15, 2016, that they had agreed to waive the second grievance to level three, and requested that the grievances be consolidated. The two grievances were consolidated by Order dated July 13, 2016, and a level three hearing was held on the consolidated matter before Chief Administrative Law Judge Billie Thacker Catlett on October 25, 2016, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on December 8, 2016, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law. This matter was subsequently reassigned to the undersigned Administrative Law Judge for administrative reasons.

[1] Grievant did not address the argument that she had been placed in a newly-created position which should have been posted either at the level three hearing or in her post-hearing written argument; rather, Grievant focused on the argument that the action taken constituted reprisal. Accordingly, the argument that Grievant had been placed in a newly created position is deemed abandoned and will not be addressed.

Synopsis

Grievant is an Assistant Principal at a high school with responsibility for the CTE program at that high school. She is employed under a 240-day contract, just like all the other Assistant Principals in high schools in Mingo County. She asserted that she was a CTE administrator, and should be employed under a 261-day contract like the county CTE Administrator. Grievant is not employed in the same classification as the county CTE Administrator, and has a different level of responsibility than he does. She has not been discriminated against or been the victim of favoritism with regard to the contract term, nor did she demonstrate that the statutory uniformity provision has been violated. Grievant also did not demonstrate that she was placed on transfer in retaliation for filing a grievance. The three Assistant Principals at Grievant's high school were assigned different areas of responsibility, and had a secondary title reflecting the assigned area, which was unique in Mingo County. Grievant was placed on transfer due to the reduction in force of one Assistant Principal position at her high school, as was the other remaining Assistant Principal at the school, so that the duties of the least senior Assistant Principal, as reflected in her secondary title, could be reassigned as the Principal deemed appropriate.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Mingo County Board of Education ("MBOE") for 28 years, and has been an Assistant Principal/Career and Technical

Education ("CTE") at Mingo Central High School ("MCHS") since 2011, with a 240-day employment contract.

2. Since its opening, MCHS has had a CTE program housed at the school for students at MCHS, and some students at Tug Valley High School who wish to pursue CTE courses not offered at Tug Valley High School. Tug Valley High School also houses a CTE program for its students, which has been the responsibility of Tug Valley High School Assistant Principal Marsha Maynard. Grievant's duties involving CTE have been solely related to the CTE program at MCHS, and have been her duties as an Assistant Principal. Grievant has never held the position of CTE Administrator.

3. Grievant is paid as an Assistant Principal.

4. All Assistant Principals employed in high schools in Mingo County are employed under 240-day contracts. High School Principals in Mingo County are employed under 261-day contracts.

5. When MCHS opened, the Assistant Principal positions were posted with a specialty duty area. Assistant Principal positions at all other schools in Mingo County are posted as "Assistant Principal," and the Principals at the schools are responsible for assigning duties as they deem appropriate.

6. Thomas Hoffman is employed by MBOE as the Vocational Administrator under a 261-day contract. He is not an Assistant Principal, nor has he been employed as such within the last several years. He is responsible for the adult education program in Mingo County and for the facility which provides adult education programs in Mingo County. Adult education programs in Mingo County are year-round programs.

7. CTE programs at MCHS and Tug Valley High School are for students at the two high schools, and do not operate year-round.

8. Mr. Hoffman is responsible for management of adult tuition for the adult education programs in Mingo County. There is no tuition for secondary students who participate in CTE programs.

9. Grievant is not responsible for the facility known as MCHS, nor has she ever been. The Principal of MCHS is responsible for the facility.

10. In the spring of 2016, MBOE eliminated three Assistant Principal positions effective the end of the 2015-2016 school year. One of those positions was at MCHS. The least senior of the three Assistant Principals at MCHS was responsible for Curriculum and Instruction, and that position had been posted as Assistant Principal/Curriculum and Instruction. That person was reduced in force ("RIF'd"), and the two remaining Assistant Principals at MCHS were placed on transfer in order to eliminate the specialty areas from their respective job titles, and to allow the Principal at MCHS to reassign the curriculum and instruction duties as she deemed appropriate.

11. Grievant was notified by Mingo County Superintendent Robert Bobbera, by letter dated February 29, 2016, that "due to financial constraints resulting in reductions of administrative positions and the need for realignment of administrative duties at Mingo Central High School, I am considering a recommendation to the Mingo County Board of Education that your current position of Assistant Principal (Career & Technical Education) be renamed Assistant Principal, with an accompanying change in duties, effective for the 2016-2017 school year." The letter referred to this as a "proposed transfer." Grievant received this letter via email on February 29, 2016.

12. Effective the beginning of the 2016-2017 school year, Grievant's job title became Assistant Principal.

13. The other remaining Assistant Principal at MCHS had been the Assistant Principal/Athletic Director. The duties of Athletic Director at MCHS are now considered an extra-curricular assignment, and the former Assistant Principal/Athletic Director is now titled Assistant Principal. He continues to be Athletic Director as he received the extracurricular assignment.

14. Grievant was advised during the transfer process that, effective the beginning of the 2016-2017 school year, Mr. Hoffman would be assigned responsibility for approving all decisions involving the MCHS CTE program. Grievant was also advised that she would be assigned duties related to curriculum and instruction, and some of her CTE duties would be moved to Mr. Hoffman.[2]

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public

[2] Grievant argued in her post-hearing written argument that inserting Mr. Hoffman into the "chain of command" has "lead to more work being dumped on the grievant" and created a "hostile work environment." This is the first time Grievant has made any reference to a hostile work environment. Respondent was not properly placed on notice that this was an issue which needed to be addressed, and accordingly, this issue will not be addressed in this decision. As to more work being dumped on Grievant, a third grievance was filed by Grievant in August 2016, which is not part of this consolidated matter, and which specifically challenges the alleged significant alteration in her duties, "mostly with additional duties." Whether more work has in fact been dumped on Grievant has no bearing on whether she was transferred in reprisal for filing a grievance, which is the issue here. That issue seems to be the subject of the third grievance. The undersigned would note, however, that testimony was offered by MBOE's Personnel Director that Grievant has been uncooperative in efforts to move some of her CTE responsibilities to Mr. Hoffman.

Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

Grievant has asserted that she is being discriminated against and that the statutory uniformity provisions have been violated, based on a comparison of her job to that of Mr. Hoffman. Grievant asserted that her job was clearly the same as Mr. Hoffman's. Respondent pointed out that Mr. Hoffman is responsible for the year-round adult education program, which is different from the CTE program offered for secondary students during the school year at MCHS, Mr. Hoffman is responsible for the entire facility housing the adult education program while Grievant has no responsibility for MCHS, and that Grievant is above all, an Assistant Principal, and that she has the same contract term as other high school Assistant Principals in Mingo County.

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 the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In

order to establish 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, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). "'[E]mployees who do not have the same classifications are not performing 'like assignments and duties' . . . and cannot show they are similarly situated for discrimination and favoritism purposes.['] *Flint v. Bd. of Educ.,* 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam)*, *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.,* Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.,* Docket No. 2013-2251-CONS (July 22, 2014)." *Crockett and May v. Wayne County Bd. of Educ.,* Docket No. 2014-1698-CONS (Feb. 19, 2015).

Grievant is not similarly situated to Mr. Hoffman. Although Grievant asserted that she is an administrator and her duties are the same as Mr. Hoffman's, but she does more work than he does, Grievant's perception is not correct. While she may well do more work than Mr. Hoffman, that is not of any relevance here. Grievant is an Assistant Principal, she has been assigned Assistant Principal duties, and she is employed under a 240-day contract just like all the other Assistant Principals employed at high schools in Mingo

County. Mr. Hoffman is not an Assistant Principal. He is the county CTE Administrator. He has responsibility for the adult education facility, just like a Principal has responsibility for the entire school, and he has responsibility for the adult education program, which is different from secondary CTE programs, and is a year-round program. Grievant is similarly situated to other Assistant Principals in Mingo County, and she is being treated the same, and has the same contract term, as those employees. For these same reasons, Grievant has not demonstrated a violation of the statutory uniformity provisions, found in WEST VIRGINIA CODE § 18A-4-5b. *Flint, supra.*[3]

Grievant also alleged that she was transferred in retaliation for filing a grievance, and the entire purpose of the transfer was to assure that she would not prevail in her first grievance. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

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[3] WEST VIRGINIA CODE § 18A-4-5b states, in pertinent part, as follows:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
>
> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county. . ..

(1) that he engaged in protected activity (i.e., filing a grievance);
(2) that he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *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). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-

01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

In order to accept Grievant's theory, the undersigned would have to find that MBOE not only changed Grievant's duties in an effort to prevail in the first grievance, but it also eliminated one Assistant Principal position at MCHS in its elaborate plan to thwart Grievant's efforts. It is clear that Grievant was transferred because MBOE needed to eliminate an Assistant Principal position, and the duties of that Assistant Principal had to be reassigned. Grievant did not demonstrate that her transfer was in any way connected to the filing of a grievance.

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 her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. In order to establish 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, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. "'[E]mployees who do not have the same classifications are not performing 'like assignments and duties' . . . and cannot show they are similarly situated for discrimination and favoritism purposes.['] *Flint v. Bd. of Educ.,* 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam)*, *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.,* Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.,* Docket No. 2013-2251-CONS (July 22, 2014)." *Crockett and May v. Wayne County Bd. of Educ.,* Docket No. 2014-1698-CONS (Feb. 19, 2015).

4. Grievant did not demonstrate that she is being treated differently from any other employee who is similarly situated to Grievant, or that she is otherwise entitled to a 261-day employment contract.

5. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);
(2) that he 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.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *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).

6. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

7. Grievant did not demonstrate that her transfer was in retaliation for filing a grievance.

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).

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BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: March 7, 2017