JUDITH WILLIAMS, .

.

Grievant, .

.

v. . DOCKET NO. 93-22-386

.

LINCOLN COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Judith Williams (hereinafter "Grievant"), an employee of the Lincoln County Board of Education (hereinafter "LCBE"), alleging a violation of W. Va. Code §18-29-2(m) and (o), in regard to her transfer from Ferrellsburg Elementary School to Hamlin Elementary School. The instant grievance was initiated at Level I on April 30, 1993, and denied through Level III. On September 15, 1993, Grievant submitted a timely appeal to Level IV, electing to have the grievance decided on the record below. (See footnote 1)

As the pertinent facts in this grievance are not in controversy, the following Findings of Fact are derived from the somewhat sparse record below:

FINDINGS OF FACT

1. Grievant has been employed by LCBE as a teacher for four years. Level II Hearing Transcript at 6 [hereinafter references to the Level II and Level III hearing transcripts will be cited as "T II at " and "T III at ", respectively].

2. Grievant's position of Extension Teacher at Ferrellsburg Elementary was abolished by LCBE on April 27, 1993. T II at 6-7; Ex 1 at Level II.

3. As the result of Grievant's position being abolished by LCBE, she was transferred to Hamlin Elementary as an "unassigned" teacher. T II at 7; Ex 1 at Level II.

4. At the same time Grievant's position was abolished at Ferrellsburg Elementary, LCBE abolished 30 other positions, including three elementary teacher positions at Midway Elementary. Ex 1 at Level II.

5. Two of those elementary teachers, Janice Moore and Margaret Adkins, were allowed to remain at Midway as "unassigned" teachers. T II at 7; Ex 1 at Level II. A third Midway teacher whose position was abolished, Gloria Matthews, was transferred to the status of "County Teacher - Unassigned." Ex 1 at Level II.

6. Grievant had less seniority than other teachers from Big Ugly Elementary School who were transferred to Ferrellsburg when Big Ugly Elementary was closed. T III at 10.

7. Positions created at Ferrellsburg Elementary as a result of closing other schools were filled in accordance with a facultysenate vote conducted under the provisions of W. Va. Code §18A-4-8f (1993). T III at 9-10.

DISCUSSION

The education employees' grievance procedure (See footnote 2) **defines "grievance" to include:**

> **any claim by one or more affected employees ... alleging a violation, a misapplication, or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism.... W. Va. Code §18-29-2(a) (1993) (emphasis added).**

Grievant contends that her transfer to Hamlin Elementary by LCBE violated W. Va. Code §18-29-2(m) and (o). Subsection "m" defines "discrimination" to mean "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." Subsection "o" defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to prevail on claims of this nature, Grievant must prove the allegations in her case by a preponderance of the evidence. Moses v. Mercer County Bd. of Educ., Docket No. 93-27-001 (Apr. 8, 1993);

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant contends that a prima facie case of discrimination has been established under this Board's ruling in Steele v. Wayne County Board of Education. (See footnote 3) Steele requires a grievant to demonstrate the following in order to establish a prima facie case of discrimination under W. Va. Code §18-29-2(m):

> **(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,**
>
> **(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing. Steele, supra, at 15.**

In the instant case, the undersigned finds that Grievant has not established a prima facie case under the first two prongs of the Steele test. Although Grievant was transferred to another school after her position at Ferrellsburg Elementary was abolished, at least one teacher (Gloria Matthews) at Midway Elementary was similarly transferred after her teaching position was likewise abolished. Thus, LCBE treated other employees in a manner substantially identical to Grievant.

Moreover, the fact that Grievant and the two teachers whose treatment she seeks to compare taught at different schools with different staffing patterns frustrates Grievant's effort to show that these other employees were similarly situated in some pertinent way. Grievant did not show that the teachers whose positions at Midway Elementary were abolished received specialtreatment. Grievant merely established that she and these other teachers shared certain common circumstances in that their positions were abolished. These common circumstances do not rise to the level of similarity required to establish a prima facie case of discrimination under our holding in Steele.

Likewise, these facts do not support Grievant's contention that she was the victim of some

prohibited form of favoritism under §18-29-2(o). See Wyatt v. McDowell County Bd. of Educ., Docket No. 92-33-312 (Apr. 21, 1993); Bailey v. Kanawha County Bd. of Educ., Docket Nos. 89-20-217/218/219 (Sept. 20, 1989). There was no evidence to suggest that Grievant was somehow singled out for disparate treatment on any improper basis.

Even if Grievant were held to have established a prima facie case, LCBE's explanation at the Level III hearing that there were vacancies at Midway available for reassigning teachers whose positions had been abolished, while such vacancies did not exist at Ferrellsburg, provides a nondiscriminatory reason for its decision to transfer Grievant. T III at 10. Steele, supra, at 15. See Burdine v. Tex. Dept. of Community Affairs, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/ 296/311 (Jan. 28, 1990).

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance alleging discrimination and/or favoritism, Grievant has the burden of proving her allegations by a preponderance of the evidence. Wyatt v. McDowell County Bd. of Educ., Docket No. 92-33-312 (Apr. 21, 1993); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

2. Grievant failed to establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) in regard to her transfer to Hamlin Elementary when her position as Extension Teacher at Ferrellsburg Elementary was abolished. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant did not show by a preponderance of the evidence that her transfer from Ferrellsburg Elementary to Hamlin Elementary resulted from any form of favoritism prohibited under W. Va. Code §18-29-2(o). See Wyatt v. McDowell County Bd. of Educ., Docket No. 92-33-312 (Apr. 21, 1993); Bailey v. Kanawha County Bd. of Educ., Docket Nos. 89-20-217/218/219 (Sept. 20, 1989).

4. Assuming that Grievant did establish a prima facie case of discrimination or favoritism, Respondent LCBE articulated legitimate, nondiscriminatory reasons for its actions sufficient to refute such charges. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19,

1989). See Burdine v. Tex. Dept. of Community Affairs, 450 U.S. 248 (1981).

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board not any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: March 7, 1994

Footnote: 1*This case became mature for decision on November 4, 1993, following receipt of written submissions. As a result of employee turnover, this grievance was administratively transferred to the undersigned for decision on December 21, 1993.*

Footnote: 2*W. Va. Code §§18-29-1, et seq. (1993).*

Footnote: 3*Docket No. 89-50-260 (Oct. 19, 1989).*