MARCELLA CHARLES, ET AL.,

Grievants,

v. DOCKET NO. 94-29-046

MINGO COUNTY BOARD OF EDUCATION ,

Respondent.

D E C I S I O N

This grievance has been submitted for decision on the record developed at the level two hearing held on January 12, 1994. The case involves whether Grievants are entitled to restoration of one day of personal leave. There is little dispute as to the salient facts, which are set forth below largely as proposed by the parties. (See footnote 1)

Findings of Fact

1. Grievants, Marcella Charles, Eva Kinder and Etta McCoy, are teachers employed by the Mingo County Board of Education at Matewan Elementary School.

2. Grievants filed a grievance alleging the Mingo County Board of Education applied Mingo County School Board Policy 110.00 in a discriminatory manner. This policy provides, in pertinent part, that "[w]hen County high schools participate in state play-offs, [football-basketball] the staff/students from that school area may be excused to attend."

3. The Superintendent of Schools for Mingo County, Everett Conn, initially declined to close the school on Friday, December 3, 1993, to permit the staff and students of Matewan Elementary school to attend a football playoff game in Charleston on December 4. The Superintendent subsequently changed his mind and late in the morning of December 3 notified school administrators that school would be closed at mid-day.

4. Grievants were absent from work on December 3, each having used a personal leave day pursuant to W. Va. Code § 18A-4-10, for the purpose of attending the state football playoffs.

5. On or about January 14, 1994, Mr. Conn instructed payroll to restore one half of a personal leave day to each Grievant.

Discussion

At the level two hearing, Grievants alleged discrimination andfavoritism contending that other schools in the county had been dismissed for the entire day in the past to attend playoff games. As relief, Grievants sought restoration of one full personal leave day to their payroll record.

In his level two decision, the evaluator stated that the grievance had been granted in part because the county superintendent had already ordered restoration of a half day of personal leave to all those who had requested a personal leave day on Friday, December 3, 1993. In their level four proposed findings and conclusions submitted on March 29, 1994, Grievants asserted that the restoration of a half day of personal leave had not yet been made. In reply, Respondent attached to its proposals an affidavit and a payroll record showing that a change had been made in order that Grievants would be charged with only one half day of personal leave, consistent with the finding of the level two evaluator.

Having obtained partial relief below, Grievants at level four requested restoration of the other half day of personal leave, asserting that they would not have taken personal leave if they had known the county superintendent was going to dismiss school early. Grievants also contend that they have established favoritism within the meaning of W. Va. Code § 18-29-2(o). See Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331 (W. Va. 1993).

The evidence of discrimination and favoritism introduced at level two was extremely limited and rather confusing. At most the testimony of Grievant Charles establishes that another county school was closed at mid-day on Friday prior to a Saturday playoff game (Tr. 6). This evidence certainly does not establish that the county board of education engaged in discrimination or favoritism toward Matewan area schools, such that Grievants would be entitled to an entire day off without using any personal leave. Furthermore, although it was unfortunate that Grievants did not receive timely notice that the school would be open for only half a day, that fact does not create any legal entitlement to restoration of the remaining half day of personal leave.

The county board of education, at least in this instance, appears to have been responsive to Grievants complaints. Although the record contains no details, the county board of education apparently commenced a process to review, clarify and modify Policy 110.00, in addition to restoring a half day of personal leave.

Conclusions of Law

1. In order to prevail in this nondisciplinary case, Grievants must prove by a preponderance of the evidence that the county board of education engaged in favoritism or discrimination. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

2. Grievants have failed to carry their burden of proving by a preponderance of the evidence that the county board of education engaged in favoritism or discrimination in the application of Policy 110.00, such that they would be entitled to restoration of more than half a day of personal leave.

Accordingly, this grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mingo 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 nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advisethis office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

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RONALD WRIGHT

Administrative Law Judge

Date: June 30, 1994

Footnote: 1 This case was reassigned for administrative reasons to the undersigned from the docket of another administrative law judge. The evidentiary record consists of an eleven page level two transcript. It is noted that the original statement of grievance is not of record and an exhibit referred to in the level two transcript was not submitted with the transcript to this office.