JAMES KEATLEY, II

Grievant,

v. Docket No. 95-29-257

MINGO COUNTY BOARD OF EDUCATION

Respondent.

D E C I S I O N

James Keatley filed this grievance alleging that the Mingo County Board of Education (hereinafter "BOE"), unlawfully transferred him to a different school in violation of W. Va. Code § 18A-4-7a, W. Va. Code § 18-29-2 and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, et seq. As relief, Grievant requested to be placed "in a position that will accommodate his disability."

The grievance was denied at Level One. After a hearing the grievance was denied at Level Two, and on June 21, 1995, Grievant appealed directly to Level Four, as permitted by W. Va. Code § 18-29-4(c). A Level Four hearing was conducted at the Board's Charleston office on July 27, and the parties agreed that proposed findings of fact and conclusions of law would be filed by August 18. Neither party filed proposals and this case became mature for decision on that date.

Before addressing the issues properly raised in this case, it is necessary to rule on a Motion to Stay or Dismiss filed by the BOE on August 25; Grievant has made no response to the motion. The basis for the motion is that Grievant filed a verified complaint with the West Virginia Human Rights Commission (HRC) on August 1. The BOE requested the HRC to stay its proceeding on the theory that Grievant cannot proceed in that forum until he has exhausted his administrative remedy with this Board. The BOE requests that this Board stay a decision in this case, until after the HRC rules on its motion, asserting that Grievant's forum shopping is prejudicial and alluding to the possibility of the agencies issuing conflicting decisions. The BOE's motion clearly lacks legal merit and does not warrant any discussion.

Findings of Fact

After a review of all matters of record, the following undisputed facts have been gleaned from the record.

1. During the spring of the 1994-95 school year, the BOE was compelled by severe budgetary problems to implement a reduction in force (RIF) to eliminate literally dozens of professional positions for the next school year. At the same time, the BOE was also converting its junior high schools to middle schools for the 1995-96 school year, a change that also required the transfer of numerous personnel.

2. Grievant was employed as an eighth grade science teacher at Matewan Junior High School (Matewan) during the 1993-94 school year. He is certified in Biological Science 7-12 and SocialStudies 4-8.

3. Grievant received notice in the spring of 1995 that he was being considered for transfer for the next school year. Grievant was afforded a transfer hearing on March 20, 1995, and the BOE, apparently on that date, approved the county superintendent's transfer recommendation, all in accordance with the procedural requirements of W. Va. § 18A-2-7.

3. At the time of the transfer hearing, Grievant was unaware that he had a medical condition that might interfere with his teaching abilities.

4. On March 22, 1995, after the transfer decision, Grievant was seen by Dr. David L. Weinsweig, who performed a Magnetic Resonance Image (MRI).

5. On April 7, 1995, Grievant was again seen by Dr. Weinsweig, and was informed of the results of the MRI. Dr. Weinsweig's medical report dated April 7, states, in pertinent part, as follows:

> He seems to be having increasing trouble with numbness. His coordination is a bit off, and he tells me that he has trouble with his depth field vision.
>
> His MRI of the brain shows multiple signal abnormalities which is consistent with multiple sclerosis. I suspect that this gentleman has multiple sclerosis.
>
> I am going to send him to Dr. McComas in the near future. ... I told him he really should not drive, and I gave him a note to be off work until he sees Dr. McComas to further evaluate the problem.

6. Grievant was also examined by Dr. Carl F. McComas, a neurologist, who stated in a April 26, 1995 report:

> Grievant "has a neurological disorder in which excessiveheat can be deleterious to his state of health.
>
> For that reason, it is recommended that he be allowed, if possible, to work in an air conditioned room. In addition, he has difficulty climbing steps and a work environment in which steps can be avoided would also be preferable."

7. The two medical reports referred to in the immediately preceding findings of fact constitute the only medical evidence introduced in this case. (See footnote 1) A copy of Dr. McComas' letter was delivered to the BOE's counsel by Grievant's mother in early May.

8. Grievant was permitted to testify, over a hearsay objection, that Dr. McComas told him on April 18 that the MRI had revealed preliminary indications of Multiple Sclerosis (hereinafter "MS"), that his symptoms were consistent with that condition, and that his physical activities should be limited and he should not work in hot working conditions.

9. Grievant testified at Level Two that he has numbness on the right side, specifically the right hand and foot, has experienced shortness of breath and some problems with his eyesight.

10. Sometime around the middle of May, Grievant was assigned to Kermit (now Middle School) effective the beginning of the 1995-1996 school year.

11. It is not clear on what date Grievant initiated the grievance process, but the grievance form states that it was deniedat Level One on May 25, 1995. Grievant filed the grievance in an attempt to remain at Matewan (now a middle school) or Matewan High School, the only one-story school buildings he was aware of in the county.

12. Kermit, unlike Matewan, is a multi-story school building. Some of the classrooms are not air conditioned.

13. Grievant or his mother told Mr. John Fullen, the Assistant Superintendent for Personnel, that Grievant had MS after he was examined by Dr. Weinsweig.

14. Grievant worked outdoors in the Governor's Summer Youth Program during the summer of 1995, and he has an extracurricular contract to coach football.

15. A teacher certified multi-subject, 1-8, can teach the classes Grievant is certified to teach and other classes.

Discussion

In addition to the foregoing findings of fact, additional facts will be set forth below in the discussion of the issues presented.

Grievant advanced three claims in his statement of grievance. (See footnote 2) At the Level Four hearing, however, Grievant abandoned the claim that the BOE violated W. Va. Code § 18A-4-7a in transferring him to Kermit. The BOE, nonetheless, presented testimony and documentaryevidence showing how the RIF was implemented and explaining the process followed in transferring Grievant from Matewan to Kermit. See R. Exh. 2.

Grievant's ADA claim will be addressed first. The thrust of this claim is that the BOE did not reasonably accommodate his medical condition by permitting him to remain a teacher at Matewan. Instead the BOE exposed him to working conditions which could be harmful to his health by transferring him to a multi-level school building, with classrooms that are not air conditioned. This claim cannot be sustained.

Although some uncertainty perhaps remains concerning the precise scope of this agency's jurisdiction under the broad language of W. Va. Code § 18-29-2(a), which defines what may be grieved, it now seems clear that the Grievance Board does not have jurisdiction to adjudicate an ADA claim. This determination is based upon the holding in Syllabus Point 1 of the West Virginia Supreme Court of Appeals in Vest v. Bd. of Educ. of County of Nicholas, 453 S.E.2d 781 (W. Va. 1995), a case involving sex discrimination:

> The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W.Va. Code, § 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment' as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.

The Court, in explaining its decision, emphasized the followingpoint at 784:

> Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W.Va. Code, 18-29-2. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act.

The reasoning in Vest would logically extend to federal civil rights statutes and to an ADA claim. The Human Rights Act prohibits employment discrimination against handicapped persons. W. Va. Code § 5-11-9. The definition of "handicap" under the Human Rights Act appears to mirror that of the ADA. (See footnote 3) Administrative notice is taken that the Human Rights Commission cooperates with the federal Equal Employment Opportunity Commission in enforcing and achieving the goals of these two laws. Grievant's ADA claim is therefore denied on jurisdictional grounds.

Furthermore, the undersigned also agrees with Respondent's contention that Grievant's ADA claim is largely, and perhaps completely, premature, even if the Grievance Board did have subject matter jurisdiction over ADA claims. When the Level Four hearing was held in July, the current school year had not yet begun. Hence, Grievant did not know in what room or floor in the school building he would be teaching, did not know whether his classroom would be air conditioned, did not know to what extent, if any, he would need any accommodation, and did not know whether a requestfor reasonable accommodation would be honored.

Grievant's final claim, that the BOE discriminated against him in violation of W. Va. Code § 18-29-2(m), is an issue clearly within the Grievance Board's jurisdiction, and one that has been addressed in numerous cases. Discrimination is broadly defined in subsection 2(m) as "any differences in the treatment of employees unless such differences are related to the actual responsibilities of the employees or agreed to in writing by the employees."

The Grievance Board has generally analyzed discrimination claims using a prima facie case approach, much like that used by the Courts and administrative agencies in deciding Title VII and Human Rights Act cases. To establish a prima facie case of discrimination, a grievant must establish the following:

(a) he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant matter; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to in writing.

See e.g., Salmons et al. v. W. Va. Dept. of Transportation/Div. of Highways, Docket No. 94-DOH-555

(Mar. 20, 1995).

Where a grievant can establish a prima facie case of discrimination, an employer can avoid a finding of discrimination by showing that the differences were related to the duties of theposition. Salmons; Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant attempted to prove he had been a victim of discrimination based primarily upon the following facts testified to by Superintendent Everett Conn and Assistant Superintendent Fullen. An English teacher at Matewan, Ms. Donna Hurley, who had been placed on transfer for the coming school year, had a documented medical condition that Mr. Conn and Mr. Fullen had known about for sometime. This teacher has limited eyesight and cannot see well enough to drive from dusk to dawn. The BOE intended to transfer Ms. Hurley to another school located about fourteen miles from her home for the next school year. The transfer would have required her to leave home before dawn to get to work on time and would have made it impossible for her to drive herself to work in the morning.

After Ms. Hurley had been placed on transfer, a vacancy occurred in a teaching position at Matewan (evidently closer to her residence), and the position was posted. Ms. Hurley applied for the position and was appropriately certified to fill it. The BOE accommodated Ms. Hurley's disability by selecting her for this position over a more senior, qualified teacher. (See footnote 4)

Having carefully considered allegations and evidence presented, the undersigned concludes Grievant has not proven that the BOE discriminated against him in violation of subsection 2(m). First, it should be made clear that Grievant does not contend the BOE treated him differently because of any bias, illicit motive or prejudice against persons with MS. (See footnote 5) Rather, Grievant's theory is that the BOE discriminated against him by not accommodating his medical condition, like it did Ms. Hurley, so that he could remain a teacher at Matewan.

The testimony was that Grievant bid on a vacant teaching position at Matewan after his assignment to Kermit, but he was not selected because he did not possess the certification required in the posting. Sensing this would be a legitimate, non-discriminatory reason for his non-selection, Grievant questioned Superintendent Conn about the certification that was required for the position. Superintendent Conn acknowledged that the position could have been posted with a certification that Grievant held to accommodate his condition, but he expressed the opinion that it would not have been in the best interests of the students. Henoted further that the principal at Matewan definitely

wanted a teacher certified multi-subject, 1-8, for the position.

The Grievance Board has frequently denied discrimination claims, as it did in Salmons, supra, because the grievant failed to show he was similarly situated to another employee(s). Here, Grievant has not proven he is similarly situated to Ms. Hurley in terms of the accommodation sought. In addition, the BOE presented a legitimate, non-discriminatory, educational reason for not selecting Grievant to fill the Matewan vacancy. The evidence does not demonstrate this educational decision was arbitrary or capricious.

Conclusions of Law

Based upon all matters of record, the undersigned reaches the following conclusions of law:

1. Under the provisions of the grievance procedure for education employees, W. Va. Code §§ 18-29-1, et seq., the Grievance Board has no subject matter jurisdiction to adjudicate claims based on the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, et seq.

2. Grievant's claim that his transfer to Kermit Middle School would be substantially detrimental to his health and violative of W. Va. Code § 18-29-2(a), is premature.

3. Grievant did not establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), because he did not show he was similarly situated to another teacher to which he attempted to compare himself.

4. Even if Grievant did establish a prima facie case of discrimination under subsection 2(m) of the grievance procedure, the BOE had a legitimate, non-discriminatory, job-related, educational reason for not selecting him for a vacant teaching position at Matewan.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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 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.

RONALD WRIGHT

Administrative Law Judge

DATED: September 25 , 1995

Footnote: 1 These reports were admitted over a hearsay objection, subject to the right of the BOE to cross-examine the physicians. The BOE did not seek to keep the record open to obtain the testimony of these physicians.

Footnote: 2 At the Level Four hearing, Grievant for the first time raised the question of whether his assignment to Kermit constitutes "a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of ... employees." W. Va. Code § 18-29-2(a). This claim, having been raised for the first time at Level Four and prior to the beginning of the school year, is considered premature.

Footnote: 3 It is assumed, without deciding, for purposes of deciding this case, that Grievant has a handicap within the meaning of the ADA and the Human Rights Act.

Footnote: 4 This classroom teaching position was presumably filled under what is frequently described as the "second set of factors" contained in W. Va. Code § 18-4-7a (1993). Where one or more tenured teachers apply for a vacant classroom teaching position, a county board of education must fill the vacancy under the second set of factors. This statute provides a largely objective standard for filling classroom teaching positions. Sisk v. Mercer Bd. of Educ., Docket No. 95-27-113 (Sept. 25, 1995); See Basler v. Putnam County Bd. of Educ., Docket No. 93-40-215 (Apr. 27, 1994). Noopinion is expressed whether the BOE's accommodation of Ms. Hurley was proper.

Footnote: 5 An employee is, of course, not required to allege or prove discriminatory intent in order to establish discrimination within the meaning of W. Va. Code §§ 18-29-2(m) or 29-6A-2(d). As explained in Vest at 784-85, however, an employee who has persuasive evidence that racial or sexual bias entered into an employment decision may want to introduce this evidence to prove "discrimination" or to rebut an employer's job-related explanation for its decision.