

PATRICIA FERGUSON,

Grievant,

v.

Docket No. 95-29-176

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Patricia Ferguson, alleges the Mingo County Board of Education ("MCBOE") has inequitably applied its personal leave policy and, as a result, has discriminated against her. This grievance was denied at Levels I and II and waived at Level III. The case was appealed to Level IV, and the parties agreed to submit this case on the lower level record. Because of the difficulty in obtaining the lower level record, this case did not become mature for decision until November 3, 1995, the date the Level II record was received. Grievant submitted proposed Findings of Fact and Conclusions of Law, and Respondent, apparently, elected to stand on the Level II decision.

The facts of this case are not in dispute and are set out below.

Findings of Fact

1. On December 6, 1994, Grievant, a teacher at Matewan High School ("MHS"), voluntarily took her daughter and one other student to Pikeville College for an orientation and information session.

2. Grievant was required to take a half day of personal leave for this event.

3. On December 6, 1994, the Dean of Students at MHS, Norville Estepp, took his son to the same orientation sessions and was required to take a full day of personal leave.

4. On March 16, 1995, at the request of Principal Thomas Hoffman, Mr. Estepp accompanied the MHS basketball to the State Tournament in Charleston. Mr. Estepp had a son on the basketball team.

5. During the course of the school year, Mr. Hoffman usually attends the football games, and Dean of Students Estepp attends the basketball games. This division of duties has been in place for

several years.

6. The team left on Wednesday, March 16, 1995, even though they were not scheduled to play until Thursday, March 17, 1995. Mr. Estepp did not ride the bus with the students, but met them for lunch on the road, sat with the team on Wednesday while they watched their upcoming opponent play, and stayed in the same motel with the players.

7. Mr. Estepp was not required to take personal leave during the Basketball Tournament.

8. In the past, the school has been required to pay for damage caused by the students while they were in attendance at the State Tournament. Additionally, school personnel have been required to bring a student back early because of inappropriate behavior.

9. The Secondary Schools Activities Commission ("SSAC") requested the schools to send a responsible administrator with the teams to the Tournament.

Discussion

Grievant argues she was discriminated against when she was required to take personal leave to accompany her daughter and another student to college orientation, while Mr. Estepp was not required to take personal leave when he accompanied his son to the State Tournament. To prove discrimination a grievant must first make a prima facie case which requires demonstrating:

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

(b) that [s]he has to her detriment, been treated by [her] employer in a manner the other employee(s) has/have not, in a significant particular;

and,

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

If a grievant can establish a prima facie case, a presumption of discrimination exists, which the

respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Here, Grievant has not established she was similarly situated to Mr. Estep. Both were treated equally when taking their children to a college orientation. Indeed, it appears Grievant was treated more favorably than Mr. Estep in that he was required to take a day of personal leave, rather than half a day. The fact that Grievant took another student in addition to her daughter is not compelling. The main reason Grievant attended the orientation was to take her daughter. Additionally, Grievant was not asked by her principal, Mr. Hoffman, to take these students. She took them of her own volition. Further, Grievant is the Library Media Specialist at MHS. Unlike Mr. Estep, she has no administrative functions.

Mr. Estep took the students to the Tournament at the request of his supervisor. His accompanying the team followed the pattern established throughout the prior school years. The fact his son was a member of the team does not change the nature of Mr. Estep's duties for the 1995 school year. It must also be noted that by sending Mr. Estep, MHS complied with the request of the SSAC.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A grievant must prove all of the allegations constituting her grievance by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. Grievant has failed to meet her burden of proof and establish a prima facie case of discrimination.

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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 29, 1996