

DENNY SULLIVAN, ET AL.,

Grievants,

v. Docket No. 96-18-087

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Denny Sullivan, John Sayre, William Goodson, Bryan Rogers, and James Hamilton, filed this grievance alleging:

Employee(s) within the same department was/were permitted to stay home on a "snow" day, when other employees within the maintenance department were required to work or take personal, sick, or vacation day. In all respects pertaining to this situation, said employee(s) perform like assignments & duties. This violates W. Va. Code(18- 29-2 favoritism & discrimination) and W. Va Code(18A-4- 5b[])] and past county practice and policy. We seek compensation for this day and clear policy for similar future circumstances.

This grievance was denied at all lower levels, and Grievants appealed to Level IV. A hearing was held on May 8, 1996 ([See footnote 1](#)) , and the case became mature for decision on June 7, 1996, the deadline for the parties' proposed findings of facts and conclusions of law.

Background

On January 8, 1996, West Virginia experienced such a heavy snowfall that Governor Gaston Caperton declared a state of emergency and requested that employers ask only essential personnel to report to work. The Jackson County Board of Education("JCBOE") has three Codes it uses to notify its personnel to report when schools are delayed or closed. In Code A, schools are closed, but county office, maintenance, custodial, and mechanical personnel are to report, as well as principals and assistant principals. Due to the emergency situation and the Governors' request, JCBOE

decided not to use any of its codes, and to request only the individuals involved in snow removal, the custodians and the maintenance employees, to report. All other employees were to remain at home. Some of the Grievants were able to report to work and some were not. The employees who were unable to report were required to take a sick or personal day, or a day without pay.

Grievants contend that three maintenance employees were not required to follow this procedure, and thus JCBOE is guilty of favoritism and discrimination, and violated W. Va. Code §18A-4-5b, the uniformity of pay section. JCBOE states that the three employees at issue are not in the Maintenance Department, and were not required to report to work on January 8, 1996.

The three individuals that Grievants state are in the maintenance department and were not required to report to work are: Sandy Pence, Charles Wise, and Tom Lawrence. Grievants state Ms. Pence is the Maintenance Department secretary, and, as such, should have been required to report and help with snow removal. Mr. Keith Winter is the Assistant Superintendent in charge of non-instructional services. His areas of responsibilities include transportation, maintenance, technology, and food and health services. He testified Ms. Pence is his secretary, his direct supervisee, and is considered part of the county office staff. Since one of his supervisory areas is maintenance, Ms. Pence does, at times, work on Maintenance issues at his direction. This does not make her an employee of the Maintenance Department.

Mr. Charles Wise is multi-classified as an AV Technician/Clerk II/ Truck Driver. He is a direct supervisee of Mr. Winter, and is considered an employee of the county office. He is not, and never has been, a member of the Maintenance Department. Because he was placed on JCBOE's Service Personnel Staff Development Council in a seat designated for a representative of Maintenance, Grievants incorrectly assumed Mr. Wise was a member of their department. At Level IV, Mr. Skip Hackworth, former Assistant Superintendent for JCBOE, stated that after several unsuccessful attempts to get maintenance employees to nominate an employee from their department, he appointed Mr. Wise, with his consent, to fill the position. Clearly, Mr. Wise is a county office employee and not an employee of the Maintenance Department.

The third employee in question is Mr. Tom Lawrence, an Electronics Technician II employed in the Technology Department under the direct supervision of Mr. Larry Koenig, the supervisor of that department. Some confusion among Grievants about Mr. Lawrence's status was caused by the fact that when Mr. Lawrence was originally hired, he was listed in the Board minutes as an employee of

the Maintenance Department. In subsequent years, this error was repeated because the same computer disk, listing probationary employees and their departments, was reused each year when these employees were rehired.

The testimony of record makes it clear that Mr. Lawrence is an employee of the Technology Department. First, Mr. Lawrence's name in the phone book is listed in the Technology Department. Second, Mr. Koenig is Mr. Lawrence's direct supervisor, not Mr. Wayne Eagle, the Supervisor of the Maintenance Department. This fact is borne out by the fact that Mr. Koenig completes Mr. Lawrence's evaluations, approves his leave slips, and assigns his work. Third, the job description identifies that the supervisor of an Electronic Technician II is the Director of the Technology Department.

Grievants make much of the fact that Mr. Lawrence is listed in Board minutes as a Maintenance employee. "[B]oard minutes, like every other written record, are subject to error." Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996). Mr. Eagle, Supervisor of Maintenance, Mr. Winter, Assistant Superintendent in charge of non-instructional duties, and Mr. Hackworth, former Assistant Superintendent in charge of non-instructional duties, all testified Mr. Lawrence is, and always has been, a member of the Technology Department, not the Maintenance Department.

Issues and Discussion

Grievants allege discrimination and favoritism saying they were treated differently than similarly situated employees. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee." The last violation cited by Grievants is W. Va. Code §18A-4-5b which requires uniformity of pay for "all persons . . . performing like assignments and duties within the county." [\(See footnote 2\)](#)

It is clear Grievants cannot prove their case. To prove discrimination or favoritism a grievant must establish a prima facie case which consists of demonstrating:

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

(b) that he has, to his detriment, been treated by his 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 job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants have failed to establish a prima facie case. They were not similarly situated to the employees who were allowed to stay home on January 8, 1996. The three employees at issue were all employed in departments or areas other than theirs. They were not considered "essential employees", and, as such, were not called out to work. It must be remembered that a county board may, in cases of emergency, "provide alternate work schedules" for employees which may or may not comport with the previously designated work codes. W. Va. Code §18A-5-2. JCBOE provided alternate work schedules, and this act was in compliance with W. Va. Code §18A-5-2, and the Governor's directive.

Additionally, Grievants have failed to demonstrate JCBOE violated Code §18A-4-5b, the uniformity of pay provision. Since Ms. Pence, Mr. Wise and Mr. Lawrence do not perform "like assignments and duties", this provision does not allow for comparison of these individuals to Grievants. The above-discussion will be supplemented by the following formal Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievants are employed in the maintenance department of the Jackson County Board of Education("JCBOE").
2. Ms. Sandy Pence and Mr. Charles Wise are employed in JCBOE's county office.
3. Mr. Tom Lawrence is employed in the Technology Department.
4. On January 8, 1996, pursuant to a state of emergency declared by the Governor, JCBOE called only maintenance and custodial employees to work, as they were considered essential to

maintain the premises and to remove snow.

5. Employees in the departments referred to in Finding of Fact 4 were required to take some form of leave time if they were unable to report on January 8, 1996.

Conclusions of Law

1. Grievants in a non-disciplinary action have the burden of proving their case by a preponderance of the evidence. Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. Grievants failed to demonstrate that JCBOE engaged in any discrimination or favoritism, as Grievants were not similarly situated to the other employees who did not have to report.

3. Grievants failed to prove JCBOE violated W. Va. Code §18A-4-5b. 4. A county board of education may establish "alternate work schedules" for employees during a time of emergency. W. Va. Code §18A-5-2.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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: August 30, 1996

[Footnote: 1](#)

This case was heard together with Rogers v. Jackson County Bd. of Educ., Docket No. 96-18-104, because some of the testimony was similar. The cases were separated for decision.

[Footnote: 2](#)

Grievants also appear to argue that JCBOE cannot establish a separate Technology Department, with a separate supervisor, because W. Va. Code §18A-1-1(e) does not list technology as a designated area, and there is no listing for a Supervisor of Technology in W. Va. Code §18A-4-8. This argument is without merit as the areas listed in Code §18A-1-1 are not considered all inclusive. Additionally, while Code §18A-4-8 does not list a Supervisor of Technology, it also does not identify a supervisor for each of the other areas identified in Code §18A-1-1(e). Further, Code §18A-4-8 does provide for the position of director or coordinator for individuals "assigned to direct a department or division."