BRYAN ROGERS,

Grievant,

v. Docket No. 96-18-104

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Bryan Rogers, filed this grievance alleging:

> Employee(s) with the same classification and (to my knowledge) the same department was permitted not to report to work on a "snow day" when I was required to work or to take a personal day. In all respects pertaining to the situation he performs like assignments and duties. This violates W. Va. Code 18-29-2 (favoritism & discrimination), W. Va Code 18A-4-5b and past county practice and policy. I seek compensation for this day in the form of crediting my personal day account by one day.

This grievance was denied at all lower levels, and Grievant 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. With Code C no employee is expected to report. Due to the emergency

situation and the Governors' request, JCBOE decided not to use any of its regular 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. Grievant did not report to work. Custodians and maintenance employees who were called to report, but did not do so, were required to take a sick or personal day, or a day without pay.

Grievant contends that a similarly situated employee, Mr. Tom Lawrence, was not required to follow this procedure, and JCBOE is guilty of favoritism and discrimination, and also violated W. Va. Code §18A-4-5b, the uniformity of pay section. JCBOE states Mr. Lawrence is not an employee of the Maintenance Department, and was not required to report to work on January 8, 1996.

Grievant appears to have two major contentions in his grievance that relate to his treatment compared to the treatment of Mr. Lawrence. First, he contends Mr. Lawrence is a member of thesame department as he, Maintenance. Second, Grievant states he has the same classification as Mr. Lawrence, and thus, he should not be treated differently. The facts, as presented by the testimony, do not support either of Grievant's contentions.

Grievant was hired into the Maintenance Department in 1991 with a multiclassification of Electrician/Electronics Technician II. His direct supervisor is, and always has been, Mr. Wayne Eagle, the Director of Maintenance. During much of his employment with JCBOE, Grievant has worked approximately two days each week in the Repair Shop repairing computers. Because of the increased work load, in 1992, the Repair Shop was made into a separate department. It is now called the Technology Department, with Mr. Larry Koeing as the director. When Grievant first started to work, he and Mr. Koeing were co-workers and received their orders from Mr. Eagle. After the creation of the Technology Department, Mr. Eagle continued to direct Grievant to report to the Technology Department for approximately two days a week. When Grievant is in the Technology Department he is expected to perform the work assigned him by Mr. Koeing. Infrequently, Mr. Eagle has found it necessary to "pull" Grievant from this duty and has the authority to reassign Grievant if he thinks it is necessary. If it is not an emergency, he would probably ask Mr. Keith Winter, the Assistant Superintendent of non-curricular affairs, for permission to assign Grievant.

In 1993, JCBOE posted a position for an Electronic Technician II, whose immediate supervisor would be the Director of Technology. Mr. Lawrence applied for and received this position. Since the date of his employment, Mr. Lawrence has been a member of the Technology Department, and Mr.

Koeing has been his direct supervisor. Mr. Koeing completes his evaluations, signs his time sheets, and directs his work.

Mr. Winter, Mr. Eagle, and Mr. Koeing all testified that Mr. Lawrence is and always has been in the Technology Department, not the Maintenance Department, and did not have to report to work on January 8, 1996. Grievant thought Mr. Lawrence was a member of the Maintenance Department, and Mr. Lawrence was somewhat unclear as to the relationship between the Technology Department and the Maintenance Department.

Grievant makes much of the fact that the Board's minutes incorrectly identified Mr. Lawrence as a member of the Maintenance Department when he was hired. Mr. Winter and Ms. Delores Ranson, Assistant Superintendent for Personnel, testified that the minutes were in error, and this error was repeated in subsequent years because the same computer disk was used when these probationary employees were rehired for the following years. The fact that the Board minutes report Mr. Lawrence as a Maintenance employee is not dispositive because, "board 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. Lawrence testified he came into work because Mr. Koeing had told him the only time he was not to report was when there was a Code C, and since January 8, 1996, was not a Code C he thought hewas expected to report. Mr. Winter testified he was surprised to see Mr. Lawrence, as he was not expected to report to work, but asked him to help as they were short-handed. (See footnote 2)

A review of the above-stated evidence indicates Grievant's first contention, that he and Mr. Lawrence are in the same department, must fail. Some of this same testimony also goes toward disproving Grievant's second claim of discrimination and favoritism. The testimony clearly reveals, that although Grievant works in the Technology Deaprtment two days a week, he is and always has been an employee of the Maintenance Department.

Grievant alleges discrimination and favoritism saying he was treated differently than a similarly situated employee. 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 Code Section cited by Grievant as violated by JCBOE is W. Va. Code §18A-4-5b which requires uniformity of pay for "all persons . . . performing like assignments and duties within the county."

It is clear Grievant does not have the evidence to support his case. To prove discrimination or favoritism a grievant must establish a prima facia 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).

Grievant has failed to establish a prima facie case. He was not similarly situated to Mr. Lawrence. He is not in the same department. Grievant is multiclassified as an Electrician/ Electronic Technician II, and Mr. Lawrence is classified as an Electronics Technician, II. Mr. Lawrence, as a member of the Technology Department, was not considered an essential employee, and was not called to work. It must be remembered that a county board may, in case of emergency, "provide alternate work schedules" for employees. W. Va. Code §18A-5-2. Further, "[d]ifferences in work sites can justify differences in the treatment of employees assigned to those sites despite that the employees are in the sameclassification." Rotenberry v. McDowell County Bd. of Educ., Docket No. 93-33-102 (Sept. 22, 1993).

The above-discussion will be supplemented by the following formal Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievant is employed in the Maintenance Department of the Jackson County Board of Education("JCBOE") as an Electrician II/ Electronics Technician II.

3. Mr. Tom Lawrence is employed in the Technology Department and is classified as an Electronics Technician II.

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 to work on January 8, 1996.

Conclusions of Law

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

2. "Differences in work sites can justify differences in the treatment of employees assigned to those sites despite that the employees are in the same classification." Rotenberry v. McDowell County Bd. of Educ., Docket No. 93-33-102 (Sept. 22, 1993). 3. Grievant failed to demonstrate any discrimination or favoritism.

4. Grievant failed to demonstrate a violation of any Code Section.

5. County boards of education may provide alternate work schedules in case 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 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 consolidated for hearing with Sullivan, et al. v. Jackson County Bd. of Educ., Docket No. 96-18-087 as some of the testimony was the same. Separate decisions were then issued.

Footnote: 2

Mr. Lawrence later received a "comp" day for this day he worked.