PAM ABSTON,

Grievant,

v. **Docket No. 97-40-057**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This is a grievance by Pam Abston (Grievant) submitted pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that her employer, Respondent Putnam County Board of Education (PCBE), violated W. Va. Code §§ 18-29-2(m) and (o) when it refused to grant her a leave of absence. This grievance was initiated on November 8, 1996. The parties waived Level I, and a Level II hearing was conducted on December 4, 1996. The grievance was denied at Level II by the Superintendent's designee, Jack Coyner, on January 16, 1997. Grievant waived Level III in accordance with W. Va. Code § 18-29-4(c), and appealed to Level IV on January 30, 1997. Following a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on April 28, 1997. As agreed at the conclusion of that hearing, this matterbecame mature for decision on May 15, 1997, upon receipt of the parties' proposed findings of fact and conclusions of law.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Level II.

FINDINGS OF FACT

1. Grievant is employed by Respondent Putnam County Board of Education (PCBE) as a classroom teacher.

2. Grievant has been employed by PCBE for ten years. On November 1, 1994, PCBE granted

Grievant a requested leave of absence for one year to take a position with the West Virginia Department of Education.

3. In November 1995, Grievant received a second leave of absence for the same purpose.

4. PCBE refused to grant a third leave of absence to Grievant in November 1996.

5. Judy Hale is employed by PCBE as a classroom teacher. PCBE has granted Ms. Hale four consecutive one-year leaves of absence, the most recent having been approved in August 1996.

6. Brenda West, another PCBE professional employee, has received two consecutive leaves of absence, the most recent in 1996.

7. Any leave of absence beyond one year requires PCBE to waive its standing policy on leaves of absence for professional personnel. 8. On one or more occasions prior to denial of Grievant's request for a third leave of absence, PCBE refused to waive its policy for other professional employees.

9. PCBE did not state a reason for denying Grievant's request for an additional leave of absence.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-2-2a makes the following provision for leaves of absence:

> (a) Any teacher who is returning from an approved leave of absence that extended for a period of one year or less shall be reemployed by the county board with the right to be restored to the same assignment of position or duties held prior to the approved leave of absence. Such teacher shall retain all seniority, rights and privileges which had accrued at the time of the approved leave of absence, and shall have all rights and privileges generally accorded teachers at the time of the reemployment.
>
> (b) An employee shall notify the county board at least ten working days prior to beginning such a leave of absence. The county board shall approve such leave of absence for any teacher or service personnel who requests an extended leave of absence without pay for any period of time not exceeding one year for the purpose of pregnancy, childbirth or adoptive or infant bonding. An employee shall not be required

to use accumulated annual leave or sick leave prior to taking an extended leave of absence.

(c) Such employee who returns from an approved leave of absence for the purpose of pregnancy, childbirth or adoptive or infant bonding which lasted for a period of one year or less than one year shall be reemployed with the right to be restored to the same assignment of position or duties and benefits held prior to the approved leave of absence. Such employee shallretain all rights and privileges generally accorded employees at the time of the reemployment.

The purpose for Grievant's requested leave of absence is not one of the purposes specified in § 18A-2-2a(b), above. Thus, the decision on whether or not to grant a leave of absence requested by an employee in circumstances not specifically described in W. Va. Code § 18A-2-2a(b) is ordinarily a matter within the sound discretion of the board of education. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Grievant does not disagree that PCBE has broad discretion in granting leaves of absence for reasons other than those specified in § 18A-2-2a(b). However, the school board is prohibited by W. Va. Code §§ 18-29-2(m) and (o) from engaging in discrimination or favoritism by granting discretionary leaves of absence to some employees but not to others, absent some legitimate reason. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Similarly, § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that

there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Applying this prima facie analysis to the facts presented here, Grievant has demonstrated that she is similarly situated to one or more other employees who are employed by PCBE as classroom teachers, and that she has been treated differently to her detriment, in that she has been denied an additional leave of absence for one year as was previously approved for Judy Hale. Further, Grievant has demonstrated that there is no significant difference in the actual job responsibilities of their positions which would warrant such disparate treatment. Indeed, the record indicates that Grievant and Ms. Hale were teaching in the same areas of certification prior to their leaves of absence. Grievant established a prima facie case of discrimination under W. Va. Code § 18-29-2(m). See, e.g., Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995) ; Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). PCBE did not present any job-related reason for its disparate treatment of Ms. Hale and Grievant. PCBE's counsel noted that Grievant's request for a leave of absence was denied after Ms. Hale's most recent request was granted, but the only other waiver application submitted since Ms. Hale's was likewise denied, inferring that PCBE has elected to change its policy on granting waivers. However, no such policy pronouncement was introduced in the record. Thus, the record indicates that two similarly situated employees requested exceptional treatment, that Ms. Hale's request was granted, and Grievant's substantially similar request was denied without explanation.

The contention that PCBE changed its policy prior to the time it addressed Grievant's request is based on speculation, without support from the preponderant evidence of record. The established

facts indicate that PCBE exercised its broad discretion disparately, without articulating a legitimate job-related basis. In these circumstances, Grievant met her burden of establishing that PCBE's action is contrary to W. Va. Code §§ 18-29-2(m) and (o). See Ball, supra. Accordingly, Grievant must be accorded equal treatment in the form of a third extension of her previously approved leave of absence, for the 1996-97 school year. See W. Va. Code § 18-29-5(b); Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992).

In addition to the foregoing discussion, the following conclusions of law are appropri ate in this matter:

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. LoganCounty Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Discrimination is defined in W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibili ties of the employees or agreed to in writing by the employees."

3. Favoritism is defined in W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Once Grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

6. Grievant established a prima facie case of discrimination in regard to PCBE's refusal to grant her an additional one-year leave of absence as was granted to at least one other similarly situated professional employee. PCBE failed to establish a legitimate, job- related reason for denying her requested leave of absence. Instead, a preponderance of the evidence of record established that Grievant's disparate treatment was the result of impermissible favoritism and discrimination. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store, supra); Conner, supra; Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Accordingly, the grievance is **GRANTED.** Respondent Putnam County Board of Education is hereby **ORDERED** to place Grievant on approved leave of absence for the 1996-97 school year. No other relief was requested and no other relief is provided.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 28, 1997