JESSIE LEE MILLER

v. DOCKET NO. 97-22-083

LINCOLN COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Jessie Lee Miller filed this grievance against the Lincoln County Board of Education ("LBOE") on or about December 2, 1996. Grievant alleged LBOE violated W. Va. Code § 18A-2-13 by not employing enough cooks at West Hamlin Elementary School ("West Hamlin"). She also alleged discrimination and favoritism based upon her belief that other schools have more cooks per meal served than West Hamlin. She requested as relief that LBOE hire one additional cook at West Hamlin, at least half-time. (See footnote 1)

The following findings of facts are made from the record developed at the Level II hearing.

Findings of Fact

1. Grievant has been employed full-time by LBOE for three years as the Head Cook at West Hamlin. LBOE employs one other cook full-time at West Hamlin.

2. During the 1996-97 School Year, 201 students were enrolled at West Hamlin. Between 80 and 100 persons were served breakfast each day at West Hamlin, and between 185 and 208 persons were served lunch each day.

3. 172 students were enrolled at Ranger Elementary during the 1996-97 School Year. Two full-time and one part-time cooks were employed by LBOE at Ranger Elementary.

4. Grievant's supervisor has recommended that another cook be employed at West Hamlin.

5. LBOE was in a deficit situation, and determined it did not have enough money to hire another cook for West Hamlin for the 1996-97 School Year.

Discussion

The first issue which will be addressed is whether LBOE violated W. Va. Code § 18A-2-13. That

Code Section provides staffing level guidelines for cooks. However, as Grievant admits, the statute specifically states that these guidelines are "optional guidelines that county boards may use when scheduling full-day and half-day cooks." If LBOE were following these guidelines, West Hamlin would have three or three and a half cooks, because it serves between 245 and 291 meals perday. (See footnote 2) Relevant to this case, the guidelines suggest 2 cooks be employed to serve from 136 through 180 meals; 2.5 for 181 through 225 meals; 3 for 226 through 270; and 3.5 for 271 through 315 meals.

The mere fact that the guidelines are not mandatory indicates that they are not always applicable to a situation, and county boards are left to exercise their broad discretion in determining the proper staffing level. Grievant does not allege that a lack of sufficient personnel is causing meals to be prepared improperly. She made a vague reference to not cleaning sometimes, but the undersigned cannot conclude from her testimony that students are being placed at risk. Her main complaint was that she did not have time to rest, and became very tired. However, she did not allege a violation of state or federal labor laws, nor did she provide testimony from which the undersigned could address such an issue.

"A board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997). Grievant has not proven LBOE improperly exercised its discretion. Because the cook staffing guidelines are not mandatory, LBOE has not violated the statute.

The second issue is whether LBOE has discriminated against Grievant, or shown favoritism, by employing two and a half cooks at Ranger Elementary. W. Va. Code § 18-29-2(m) defines discrimination as:

> 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.

Paragraph (o) defines favoritism as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

A grievant alleging discrimination or favoritism must establish a prima facie case by

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 the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant has not demonstrated that she was similarly situated to another employee who was treated differently. Although Ranger Elementary has fewer students than West Hamlin, no evidence was presented regarding the number of meals served at Ranger. The undersigned cannot assume from the evidence presented that the ratio of meals served per student enrollment is the same at Ranger as it is at West Hamlin. Rather, with 172 students, Ranger could serve 301 student mealsper day. (See footnote 3) This would mean Ranger Elementary cooks would be serving more meals than those at West Hamlin. Further, if Ranger were serving 301 meals per day, the statutory guidelines suggest that three and a half cooks be scheduled. Thus, according to the guidelines, Ranger would be short one cook, just as West Hamlin is short one cook on those days less than 271 meals are served. No evidence was presented on how often more than 271 meals are served.

Even if Grievant proved a prima facie case of discrimination or favoritism, LBOE presented a legitimate, non-discriminatory reason for its failure to employ an additional cook at West Hamlin: lack of funds. "The preeminent restraint upon a local body is that it should not spend money `[i]n excess of the funds available for current expenses.' W. Va. Code §11-8-26." Hinzman, et al., v. Randolph County Bd. of Educ., Docket No. 96-42-358 (Apr. 23, 1997).

LBOE did not set out to make sure Grievant had to work harder than any other employee; it simply did not have the money to employ an additional cook. Conclusion of Law Number Three from the Level II Decision states:

> Grievant makes a persuasive moral argument that the situation at her school could use another half time cook; however, for the remainder of this school year, there are no funds for such relief and the matter will be readdressed with next year's budget at which time every consideration will be given to grievant's situation.

Based upon the evidence presented, LBOE could not offer Grievant any more than this.

Conclusions of Law

1. The burden of proof is on Grievant in this matter to prove all the allegations of her grievance by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992).

2. W. Va. Code § 18A-2-13, which provides guidelines for cook staffing levels in public schools, is optional. The Lincoln County Board of Education is not required to staff its schools with the number of cooks per meals served suggested in this statute.

3. Grievant failed to prove the Lincoln County Board of Education should have followed the optional cook staffing guidelines set forth in W. Va. Code § 18A-2-13.

4. A grievant asserting discrimination or favoritism must present a prima facie case. The first step is to demonstrate the grievant is similarly situated to another employee, which Grievant has demonstrated. The second step is to demonstrate the grievant has been treated by her employer to her detriment, in a manner that the other employee has not, in a significant particular. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant failed to demonstrate that she was treated differently from another employee. Grievant did not present a prima facie case of discrimination or favoritism.

5. Grievant failed to prove the Lincoln County Board of Education violated any law, statute, rule or regulation in staffing cooks at West Hamlin Elementary School.

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: July 23, 1997

Footnote: 1

Grievant's supervisor had no authority to grant relief at Level I. A Level II hearing was held on December 16, 1996, and the grievance was denied at Level II on February 4, 1997. Level III was waived by Grievant, who appealed to Level IV on February 11, 1997. The parties agreed to submit this matter for decision on the lower level record. This matter was reassigned to the undersigned in June 1997 for administrative reasons, and became mature for decision on June 16, 1997, the deadline for submission of written argument. Respondent declined to submit written argument.

Footnote: 2

Breakfast is counted as three fourths of a meal, and lunch is counted as a whole meal. W. Va. Code § 18A-2-13.

Footnote: 3

West Hamlin at times served 208 lunches, while the enrollment was only 201. The parties did not explain the reason for this, but obviously, if this occurred at West Hamlin, it could also occur at Ranger, which would increase the number of meals served to over 301.