JOANNE DROWN,

Grievant,

v. Docket No. 96-06-323

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, JoAnne Drown, grieves her reduction-in-force and transfer from the Vocational-Technical ("VoTech") Center. She alleges the Cabell County Board of Education ("CCBOE") violated W. Va. Code §§ 18A-4-8b and 18-29-2(a), (m), and (o) when it changed her 261-day secretarial position to a 220-day position. At Level I, Grievant sought reinstatement to her prior position with a 261-day contract. At Level II Grievant changed her relief and stated the VoTech Center was a "horrible place to work", and she no longer wanted to be placed in her "old" position. She requested as relief that all secretaries that were to have their 261-day contracts reduced but did not, would have their contracts reduced to 220 days.

This grievance was denied at Levels I and II and waived at Level III. After appeal to Level IV, a hearing was held on September 10, 1996. Grievant again changed her request for relief, and this change was allowed by the undersigned. She now requests reinstatement to her former 261-day position at the VoTech Center. This case became mature for decision on November 5, 1996, the deadline for the parties' proposed findings of fact and conclusions of law. Although somewhat confusing, the material facts of this case are not in dispute and will be set out below.

Findings of Fact

1. Grievant is employed by CCBOE as a secretary. During the 1995-1996 school year she was employed for 261 days, or a twelve month contract, as an evening secretary at the VoTech Center. She is currently employed at West Middle School as a secretary with a 220-day employment term.

2. During the Spring of 1996, CCBOE was required to downsize staff because its staffing levels

were above the state funding level. CCBOE decided to decrease the contract terms of nine of its 261-day secretaries. CCBOE also decided the VoTech Center must eliminate two of its secretarial positions.

3. On February 26, 1996, Grievant received notice her position at the VoTech Center was being eliminated, she did not have enough seniority to remain in a 261-day position, and she would be placed on the preferred recall list.

4. On March 28, 1996, CCBOE voted to reduce the number of days in Grievant's contract and to transfer her to a 220-day position in another location.

5. Of the nine, 261-day secretaries reduced-in-contract, Grievant was the least senior.

6. Prior to the start of the school year, multiple changes occurred and seven of the more senior, former 261-day secretaries had again been placed in 261-day positions. Two of these positions were for the 1996-1997 school year only.

7. Mr. David Groves, Director/Principal at the VoTech Center, was very concerned about the decrease in the number of secretaries at his school. He questioned whether the Centercould function properly without sufficient people to answer the constant phone calls. In response to his concerns, CCBOE was able to utilize "soft" or grant monies to place a secretary at the VoTech Center during the 1996-1997 school year only, to help during the transition period.

8. The position referred to in Finding of Fact 7 was posted as one year only, and a former 261-day secretary, Ms. Virginia Berkeley, with more seniority than Grievant, received the position. Grievant did not apply for this position.

9. One of the five remaining secretaries at the VoTech Center decided to retire during the Summer of 1996. CCBOE utilized this opening to rework the position and posted a position for a 235-day, evening secretary. (This employment term was the same as the evening assistant principal's.) Ms. Judy Slash Byrd, one of the two secretaries eliminated from the VoTech Center applied for and received this position. Ms. Byrd is more senior than Grievant. Grievant did not apply for this position because Ms. Byrd informed Grievant she was applying for the position and would get it because she had more seniority. The duties of this position are very similar to the ones Grievant performed in her prior position.

Issues

Grievant alleges CCBOE is guilty of discrimination, favoritism, and misapplication of statutes, regulations, and policies. (See footnote 1) She argues her position is still at the VoTech Center; thus, she should still retain that position, but with a 261-day contract. CCBOE states that all statutes, policies, rules, and regulations were followed, Grievant's contract terms were properly reduced based on seniority, and Grievant does not have standing to grieve over the placement of Ms. Berkeley and Ms. Byrd at the VoTech Center, as she did not apply for these positions.

Discussion

Grievant alleges discrimination and favoritism saying she was 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 preferential, exceptional or advantageous treatment of another or other employees."

To prove discrimination 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260

(Oct. 19, 1989).

To prove 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 the other employee(s) has/have been given an advantage or treated with preference in a significant manner not similarly afforded him;

and,

(c) that such difference in treatment has created a substantial inequity for him[,] and that there is no known or apparent justification for this difference.

Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1991).

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, the grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, supra.

Grievant has failed to establish a prima facie case of either discrimination or favoritism. She was not similarly situated to the other 261-day secretaries as they all had more seniority than she. Additionally, she did not demonstrate that any employee was treated in a more favorable way than she was. The evidence does demonstrate CCBOE's decisions were based on the seniority of the employees at issue.

When a county school board seeks to reduce the contract terms of a service employee, the board must comply with the procedures set out in W. Va. Code § 18A-2-6. Syl. Pt. 2, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399 (1994), citing Bd. of Educ. of Fayette v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982). CCBOE followed these procedures. Grievant received proper and timely notice of her reduction-in-contract and transfer and had a RIF/transfer hearing. A board of education has the discretion to determine the number of jobs, and the employment terms of those positions. Lucion at 402. This reduction in employment terms must take into account the seniority of the employees to be reduced. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 425, 446 S.E.2d 510 (1994). CCBOE was required to reduce contract terms on the basis of the seniority of the employees to be affected. Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994). Thus, it was proper that employees with the most seniority would be allowed to retain, or

would be hired, to fill the 261 and 235-day positions before Grievant, as she was the affected employee with the least seniority.

Further, the evidence shows the more senior employees were either retained in their prior positions because of need, or were placed in positions for which they applied, based on seniority. The fact that a position similar to Grievant's, with a reduced contract term, still remains does not matter. It is not the same position as it does not have the same contract terms. Grievant's position was properly eliminated due to lack of need and her contract terms were reduced based on her lack of seniority. Berry, supra; Newhouse, supra.

Of further note, it is clear Grievant does not have standing to contest the filling of either of the VoTech Center positions as she did not apply for them. See Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). See also Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Akers v. Raleigh County Bd. of Educ., Docket No. 94-41-1076 (Apr. 27, 1990).

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

Conclusions of Law

1. In a non-disciplinary grievance, a grievant has the burden of proving her case by a preponderance of the evidence. Sanders v. Brooke County Bd. of Educ., Docket No. 93-05-173 (Aug. 27, 1993).

2. 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."

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

4. When a county school board seeks to reduce the contract terms of a service employee, the board must comply with the procedures set out in W. Va. Code § 18A-2-6. Syl. Pt. 2, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399 (1994), citing Bd. of Educ. of Fayette v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982).

5. A board of education has the discretion to determine the number of jobs and the employment terms of those positions. Lucion at 402.

6. A reduction in employment terms must take into account the seniority of the employees to be reduced. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 425, 446 S.E.2d 510 (1994). A county board of education is required to reduce contract terms on the basis of the seniority of the employees to be affected. Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994).

7. Grievant has not met her burden of proof and demonstrated CCBOE engaged in any discrimination or favoritism, or shown CCBOE failed to followed the required statutory procedures when it reduced her contract terms and transferred her to a 220-day position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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: February 28, 1997

Footnote: 1

This issue was not explained in any detail. It is assumed Grievant is arguing that the statutes covering RIF's and transfers were not properly followed.