BRENDA WEST,

Grievant,

v. Docket No. 97-40-524

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Brenda West, employed by the Putnam County Board of Education (PCBE) as a teacher, filed a grievance dated September 22, 1997, in which she alleged violations of W. Va. Code §18-29-2 (m) and (o) when the Board refused her request for a leave of absence. The record does not reflect that complaint was reviewed at level one, and no decision was included in the record. The greivance was denied following an evidentiary hearing at level two, and Grievant elected to by-pass consideration at level three, pursuant to W. Va. Code §18-29-4(c). The grievance was advanced to level four on November 25, 1997, at which time both parties agreed that a decision could be based upon the lower-level record. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law on or before January 20, 1998.

The facts of this matter are not in dispute and are set forth as follows.

Findings of Fact

1. Grievant has been employed by the PC BE as a teacher for more than twenty (20) years.

2. In 1995, Grievant requested, and was granted, a one-year leave of absence to accept a position with the West Virginia Department of Education.

3. Grievant retained her position with the Department of Education, and she received a second leave of absence from PCBE for the 1996-97 school year.

4. PCBE refused to grant Grievant a third, consecutive leave of absence for the 1997-98school year.

5. PCBE has granted Judy Hale, another classroom teacher, four consecutive one-year leaves of absence, most recently for the 1996-97 school year.

6. PCBE has granted Pam Abston, employed as a classroom teacher, two consecutive leaves of absence for the 1994-95 and 1995-96 school years. Ms. Abston prevailed in a grievance when PCBE refused to grant her request for a third leave of absence. (See footnote 1)

7. Consecutive, one-year leaves of absence require PCBE to waive its standing policy on leaves of absence for professional personnel.

8. Beginning the 1996-97 school year, PCBE has denied all requests for leaves of absence which do not fall within the circumstances outlined in PCBE Policy 3.3., including those of Judy Hale and Pam Abston.

9. On August 4, 1997, PCBE adopted a resolution to deny all future requests for leaves of absence not specifically provided for by policy.

Grievant argues that PCBE's denial of her request for a leave of absence for the 1997-98 school year is discriminatory, and results in favoritism, because other, similarly-situated employees have been granted consecutive leaves of absence. PCBE argues that it has changed its practice of suspending Policy 3.3 to grant leaves of absence in part because employees such as Grievant have taken what they perceive to be better jobs with the State Education Department, and wish to be afforded a safety net, by being granted leaves of absence while they enjoy such employment. If for any reason such job does not work out or funding for the job is cut, a leave of absence will insure they have a place to return. PCBE asserts that to permit an individual to work at another job on a long-term basis, while retainingthe ability to return to its employment on a preferred basis, is not the intended purpose of a 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 generally addresses leaves of absence, but only specifically cites leaves "for the purpose of pregnancy, childbirth or adoptive or infant bonding . . . ." Decisions on whether to grant a leave of absence requested by an employee for reasons other than those addressed by statute is ordinarily a matter within the sound discretion of the board of education. Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); See Pockl v. Ohio County Bd. of Educ.. 185 W. Va. 256, 406 S.E.2d 687 (1991). PCBE's policy provides specific limitations on leaves of absence granted for medical, maternity, and military conscription reasons. The policy states that "[a]ll other leaves shall be limited to the school year in which the leave began. Extensions may only be approved in extraordinary circumstances."

Of course, PCBE is prohibited by W. Va. Code §§18A-29-2 (m) and (o) from engaging in discrimination or favoritism by granting discretionary leaves of absence to some employees, but not 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." Code §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, 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 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 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).

Applying this analysis to the facts of the present case, Grievant has established that she is similarly situated to one or more individuals who are employed by PCBE as classroom teachers; however, she has failed to prove that any other employee has been given advantage or treated with preference in a significant manner not afforded to her, during the specific period of time in question. Although PCBE approved a third leave of absence for Ms. Hale, it did not permit her a leave of absence for the 1997-98 school year. Ms. Abston was awarded a third leave of absence based upon a Grievance Board decision finding that PCBE had engaged in discrimination when it denied her request for the school year 1996-97, while granting Ms. Hale's for the same period of time; however,she was not granted a leave of absence for the 1997-98 school year . Grievant has not shown that PCBE waived Policy 3.3 to grant any employee a leave of absence for the 1997-98 school year.

In addition to the foregoing discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. 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.

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 responsibilities 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 such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to in writing.

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, 178 W. Va. 53, 365 S.E.2d 251 (1986).

6. Grievant failed to establish a prima facie case of discrimination relating to her request for a second consecutive leave of absence, because she failed to show that PCBE had suspended its Policy 3.3, and granted at least one other employee an extended leave of absence for the 1997-98 school year.

Accordingly, the grievance is DENIED.

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.

Date: March 20, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

1 Although PCBE advises that the Abston case has been appealed to the Circuit Court of Putnam County, the

Grievance Board has not been notified to prepare and transmit the record to that Court.