VIRGINIA METZ,

Grievant,

v. **DOCKET NO. 97-54-463**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievant Virginia Metz against Respondent Wood County Board of Education, alleging Respondent had treated another employee, Connie Harmon, in a different manner than it treated Grievant, in violation of W. Va. Code § 18A-29-2(m), (n), (o), and (p), when Grievant was not allowed to work through her lunch half hour on April 29, 1997, to make up time she missed work on April 28, 1997. Grievant requested as relief equal treatment, cessation of favoritism, harassment, and retaliation, crediting of her personal leave with one-half hour, and attorney fees and costs. (See footnote 1) The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Wood County Board of Education ("WBOE") as a regular employee in the classification Secretary/Accountant/Foreman, assigned to the maintenance department. Her daily work schedule is 7:30 a.m. to 3:30 p.m., with a one-half hour paid lunch. She also earns personal leave, which she may use during the year.

2. With the approval of the Maintenance Director, Rex Prescher, or his assistant, Garry Cooper, the office staff in the maintenance department may work flexible hours or work through their half-hour lunch to make up time they must be absent during their regular work hours, rather than taking personal leave, as long as any time taken off work is made up during the same work week.

3. On April 28, 1997, Grievant reported to work three hours past her normal starting time, at

10:30 a.m. (See footnote 2) Grievant orally told Connie Harmon, the substitute secretary, that she wanted to work through lunch on April 28 and 29, 1997, to make up one hour of this time, and the other two hours should be taken from her personal leave. Ms. Harmon did not accurately relay this message to anyone. 4. Grievant did not ask her supervisor for permission to work through two lunches to make up one hour of this time, and in fact, never talked to him about this matter. Grievant had enough personal leave accumulated to take two and a half hours of personal leave on April 28, 1997.

5. Karen DuVall, the regular secretary, who is in charge of keeping track of employee time for payroll, told Mr. Prescher that Grievant had asked to take two hours of personal leave, and work through lunch to make up the time. (See footnote 3) She asked him how she was to account for the other half hour. Mr. Prescher was not aware of Grievant's absence until Ms. DuVall brought this issue to his attention.

6. Ms. DuVall also asked Grievant how they were going to take care of the other half hour. Grievant was not responsive to her, and never told her she wanted to work through two lunches, not one, to make up the time.

7. On April 28, 1997, Mr. Prescher sent Grievant a memorandum, which stated, in pertinent part:

> It has been brought to my attention you came to work today (4/28) at 10:30 a.m. and wish to take bank time (See footnote 4) for that time, which is fine. You also stated you would like to apply your 1/2 hour lunch to that time, which is also fine. Please correct the attached bank time sheet to reflect 2-1/2 hours.

8. Grievant read this memorandum as denying her request to work through her lunch on April 29, 1997. 9. Mr. Prescher did not deny Grievant's request to work through lunch on April 29, 1997, as no such request was ever made to him.

10. On May 9, 1997, Grievant sent Mr. Prescher a written memorandum responding to his April 28, 1997, memorandum, in which she stated:

> Per your memo to me on April 28, what I said to Connie was I would like to use 2 hrs. of bank time and use lunch for the rest of it.

. . .

> I understand from Connie that you are allowing her to accumulate lunch time to cover all the time she has taken off.

This was the first response Grievant made to what she perceived as Mr. Prescher's denial of her request to work through lunch on April 29.

11. As a substitute employee, Ms. Harmon does not earn personal leave, and is not paid for any time she must be absent from work.

12. Mr. Prescher has allowed Ms. Harmon to work through her lunch in order to be absent from work at other times without losing any pay.

Discussion

Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant alleged she had been treated unfairly by her supervisor, because he refused to allow her to work two half-hour lunches to make up for an hour of the time she was late for work. Regardless of whether Mr. Prescher let other employees make up time in this fashion, essential to meeting her burden of proof in this grievance is evidence that Mr. Prescher, in fact, refused Grievant's request. The evidence presented at Levels II and IV, as set forth in the above Findings of Fact, demonstratesvery clearly that no such request was ever made to Mr. Prescher for him to deny. Grievant simply misunderstood what had occurred, in large part due to her own failure to follow proper procedure. That is, Grievant should have asked Mr. Prescher directly, in writing and orally, for permission to work through lunch on both April 28 and April 29, 1997, and use two hours of personal leave, to make up the three hours she was late on April 28, 1997. Grievant has only herself to blame that things did not work out as she desired. Once she decided to simply leave an oral message with the substitute secretary, it was Grievant's responsibility to make sure the message she left was understood and accurately relayed to the appropriate people.

Even if Grievant had demonstrated Mr. Prescher had refused her request, she failed to prove discrimination, favoritism, harassment, or reprisal.

W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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.

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.

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.

Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); 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". Steele, supra.

Grievant is not similarly situated to Ms. Harmon. Ms. Harmon is a substitute employee who does not earn personal leave as Grievant does. Any time she misses work she is off the payroll.

W. Va. Code § 18-29-2(n) defines harassment as:

> repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

One instance does not qualify as "repeated or continual."

W. Va. Code § 18-29-2(p) defines reprisal as:

> the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

Grievant presented no evidence (See footnote 5) of any other grievances in which she had participated. Accordingly, she did not demonstrate a basis to support her claim of reprisal.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. Grievant failed to prove Mr. Prescher denied her request to work through her half- hour lunch on April 29, 1997, to make up for arriving late for work on April 28, 1997.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 6, 1998

Footnote: 1

This grievance was filed on or about July 1, 1997. The initial grievance also alleged a violation of "ERISA," and requested disciplinary action against her supervisor and the personnel director, and a regularly set duty free lunch time for all secretaries. This additional claim was not made at Level IV, and this other relief was not requested at Level IV, and are deemed abandoned. The grievance was denied at Level I on July 15, 1997. Grievant appealed to Level II, where the grievance was denied on October 17, 1997, following a hearing held on October 1, 1997. Grievant waived Level III, appealing the Level II Decision to Level IV on October 23, 1997. A Level IV hearing was held on February 18, 1998. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by Dean A. Furner, Esquire. This case became mature for decision on March 20,1998, upon receipt of the last of the parties' written arguments.

Footnote: 2

Grievant's husband was in the hospital, and she had spent most of the night there.

Footnote: 3

It is unknown how Ms. DuVall knew Grievant wanted to work through one lunch to make up part of the time.

Footnote: 4

"Bank time" is personal leave which has been set aside by the employee, "banked," to be used in increments of less than four hours.

Footnote: 5

Grievant's counsel stated Grievant had filed a lawsuit and other grievances against Mr. Prescher. This obviously cannot be accepted as evidence.