BETTY GRAHAM, et al.,

Grievants,

v. **Docket No. 00-30-052**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Betty Graham, Deborah Summers, and Jo Anne Fisher, employed by the Monongalia County Board of Education (MCBOE) as Cooks, filed a level one grievance on November 4, 1999, in which they alleged violations of W. Va. Code §§18A-4-14 and 18-29- 2(m) as a result of a reduction in personnel which has deprived them of their duty-free lunch period. Grievants request monetary reimbursement, plus interest, for the lost lunch periods, and the posting of an additional half-time Cook at their school. The grievance was denied at level one by Brookhaven Elementary School (BES) Principal Ed Collins, who lacked authority to add personnel to his staff. Following an evidentiary hearing at level two, the grievance was again denied, based upon a finding that staffing at BES was adequate. The grievance was advanced to level four on February 3, 2000, and an evidentiary hearing was conducted on April 11, 2000. Grievants were represented by John E. Roush, Esq. of WVSSPA, and MCBOE was represented by Harry M. Rubenstein, Esq. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before May 31, 2000.

The essential facts of this matter are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievants are employed by MCBOE as regular, full-time Cooks, and areassigned to Brookhaven Elementary School. In addition to Grievants, a half-time Cook is also assigned to the school.

2. Grievant Graham is the Cafeteria Manager and works from 6:00 a.m. to 2:00 p.m. Grievant Fisher works from 6:15 a.m. to 1:15 p.m., and Grievant Summers works from 6:45 a.m. to 1:45 p.m. The half-time Cook works from 10:00 a.m. to 1:30 p.m.

3. As Cafeteria Manager, it is Grievant Graham's responsibility to organize the operation of the

kitchen, including the schedules of the Cooks.

4. Prior to the 1998-1999 school year, four full-time and one half-time Cooks were assigned to BES. Effective the 1998-1999 school year, the sixth grade was relocated to another school, and due to the reduced student enrollment, the kitchen staff was reduced by one full-time position.

5. In general, MCBOE determines staffing based upon the average daily participation in the month of October of the previous year. One Cook is assigned for each 100 lunches and 50 breakfasts served. Because breakfasts are counted as only three- fourths of a meal, this calculation results in the assignment of one Cook per 138 weighted meals.

6. An average of 426.5 weighted meals (breakfast and lunch) are served at BES on a daily basis, equaling 121.9 meals per Cook. Other elementary schools in Monongalia County have lower Cook/meal ratios.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their 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. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievants argue that with the reduced staff, there is simply not enough time for them to complete all their duties and to take a thirty minute, duty-free lunch. They assert that they are subject to discrimination in that cooks in other schools are receiving different treatment, i.e., they have a higher Cook/meal ratio than other schools, and that the difference in treatment is to their detriment, and without their agreement.

MCBOE asserts that Grievants have failed to meet their burden of proof because they have not demonstrated that it has denied them the right to a duty-free lunch, or that they are treated differently than Cooks assigned to other schools. Specifically, MCBOE notes that it has not set a schedule for Grievants that denies them a lunch period. To the contrary, it notes that scheduling is the responsibility of Grievant Graham, who has not scheduled a lunch period for herself or the other

Grievants. Addressing the discrimination claim, MCBOE denies that it has treated Grievants differently from other Cooks, and notes that the assignment of one Cook for every 138 weighted meals at BES is well within its formula since only 122 meals per Cook are served at that school. Although Grievants serve more meals per Cook than other schools, MCBOE notes that they are serve the same, or fewer meals, than Cooks in four other schools in the county.

There is no dispute that Grievants are entitled to a duty-free lunch under W. Va.Code §18A-4-14, which provides that "every service personnel whose employment is for a period of more than three and one-half hours per day and whose pay is at least the amount indicated in the 'state minimum pay scale' . . . shall be provided a daily lunch recess of not less than thirty consecutive minutes, and such employee shall not be assigned any responsibilities during this recess." Grievants simply argue that unlike other schools, they do no have adequate staff to allow them to schedule lunch breaks. Grievants each described their responsibilities, and the time required to perform them, establishing that a thirty minute break is not feasible. They suggest that one possible measure to free up time would be to discontinue offering the salad bar as a meal option, since it was quite time consuming to prepare the ingredients, plus it required one person's undivided attention while serving.

Laura Savio, MCBOE's Coordinator of Child Nutritional Program, testified that elimination of the salad bar was discouraged as it provides a second entree option, and keeps the number of meals served at a higher level. She opined that the loss of the salad bar would not be of any assistance to Grievants because the anticipated reduction in the number of meals served would simply result in yet a further reduction in kitchen staff at BES. This concern was supported by the testimony of Grievants that on days when a preferred entree, such as pizza was served, the salad bar was not offered because significantly fewer students choose it. Thus, students choose the salad bar when less favorable entrees, such as fish sticks are offered. If the salad bar was discontinued the students might elect to pack their lunch.

Grievants have established that they do not have a duty-free lunch period; however, they have not established that they are subject to discrimination. Employees seeking toestablish unlawful discrimination must first establish a prima facie case under W. Va. Code §18-29-2(m) by demonstrating the following:

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

(b)that they have, to their detriment, been treated by their 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory 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).

Grievants have established a prima facie case of discrimination by showing that other schools serving many fewer meals, have a proportionately larger staff. MCBOE explains that the exceptions to its general rule of one Cook per 138 meals occur when there would otherwise be only one Cook assigned to a school to do all the work, or in other situations, a Cook may transport and serve meals at another location. MCBOE has provided a reasonable, non-discriminatory reason for its action, and Grievants do not claim the response was pretextual. Although Grievants did not prove discrimination, they have established a violation of W. Va. Code §18A-4-14, in that they do not enjoy a duty-free lunch. MCBOE places the blame for this situation on Grievant Graham, however, the responsibility ultimately lies with the employer. While Grievant Graham has the authority to schedule the staff, the testimony of all Grievants indicates she has simply been unable to arrange their workload to accommodate lunch breaks. Ms. Savio stated that this was first mentioned to her in October 1999, but that she interpreted the inquiry to be related to staffing. She suggested that Grievants test different approaches to see what works.

MCBOE has clearly been put on notice of this problem at least since the grievance was filed in November 1999, and the undersigned fails to understand why no action has been taken to assist Grievants. Being told they had the authority to arrange their schedules obviously was no help when Grievants clearly are not aware of options available to them. MCBOE has allowed Grievants to continue throughout the 1999-2000 school year without a lunch period in violation of W. Va. Code §18A-1-14. Therefore, Grievants are entitled to compensation for the lost lunch periods, with interest,

from fifteen days prior to the date they filed their grievance through the end of the 1999-2000 school year. Grievants may not collect compensation for the earlier time when they had not placed MCBOE on notice of the situation. Further, MCBOE is strongly urged to provide Grievants assistance with their scheduling, to insure that lunch breaks are provided in the future. Grievants' request for additional staff is denied because the staff level at BES is within MCBOE's general formula, which is reasonable, and not arbitrary and capricious.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their 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. Employees seeking to establish unlawful discrimination must first establish a prima facie case under W. Va. Code §18-29-2(m) by demonstrating the following:
(a)that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)that they have, to their detriment, been treated by their 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory 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). 4. Grievants established a prima facie case of discrimination; however, MCBOE offered a reasonable, nondiscriminatory reason for the practice, and Grievants did not challenge the reason as pretextual.

5. W. Va. Code §18A-4-14, which provides that "every service personnel whose employment is for a period of more than three and one-half hours per day and whose pay is at least the amount indicated in the 'state minimum pay scale' . . . shall be provided a daily lunch recess of not less than thirty consecutive minutes, and such employee shall not be assigned any responsibilities during this recess."

6. While MCBOE did not act in any way to deny Grievants a duty-free lunch, no action was taken to assist Grievants and to insure that the benefit was instated.

Accordingly, the grievance is **GRANTED** to the extent that Grievants are awarded compensation, with interest, for the lost lunch periods. The grievance is **DENIED**, regarding the request for additional staff.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 andState Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 29, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE