**LORENE HOGSETT and DIANA PIERCE,**

**Grievants,**

**v.**

**DOCKET NO. 01-50-056**

**WAYNE COUNTY BOARD OF EDUCATION,**

**Respondent.**

**D E C I S I O N**

Grievants, Lorene Hogsett and Diana Pierce, filed the following statement of grievance against their employer, the Wayne County Board of Education ("Board") on April 3, 2000:

> Violation of WV Code 18-29-2, section "m" discrimination with regard to grievant being required to pull and throw away large bags of food waste when this is not a job responsibility of cooks at other schools.
>
> Relief sought: Relief sought is to have practice cease and to be treated as other cooks in the schools.

Grievants' Principal, Evelyn Meade, responded to the grievance at level one on April 13, 2000; a level two hearing was held on June 6, 2000, and a decision denying the grievance was issued by James J. Ross, Director of Personnel, on July 27, 2000; the Board reviewed the grievance at level three, and voted to uphold the level two decision on February 8, 2001; Grievants' appealed to level four on February 22, 2001, and the parties agreed to submit the grievance based upon the record. This matter became mature for decision on March 15, 2001, the deadline for the parties' submission of proposed findingsof fact and conclusions of law. Grievants were represented at all times by Susan Hubbard, WVEA; the Board was represented at level two by Michael E. Ferguson and at level four by David Lycan, Esq.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. A -

Grievance documents.

Ex. B -

May 12, 2000 letters from James J. Ross to Diana Pierce and Lorene Hogsett.

Grievants' Exhibits

Ex. C -

Wayne County Schools Job Description, Custodian.

Board Exhibits

None.

Testimony

Grievants testified in their own behalf, and presented the testimony of Barbara Wilson and Marsha Blankenship. The Board presented the testimony of Wilts Salmons.

FINDINGS OF FACT

After a careful review of the record in its entirety, the undersigned finds the following facts have been proven by a preponderance of the evidence.

1. Grievants Hogsett and Pierce are employed by the Board as cooks at Lavalette Elementary School.

2. As part of their job assignments, Grievants are required to pull and throw away large bags of food waste in the cafeteria while and after students are being served lunch. 3. Some Wayne County school cooks are not required to pull and throw away food waste, while at least four (4) schools, including Lavalette, require the cooks to perform this duty.

4. In the schools that do not require the cooks to perform this job, the custodians have been assigned this duty.

5. School principals are responsible for the efficient operation of their schools, including the school lunch program, and the principals have the authority to make job assignments as long as they do not violate the requirements and guidelines of job classifications of employees. See W. Va. Code § 18A-2-9.

DISCUSSION

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 § 4.21 (2000); 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. Grievants complain they are being treated differently than other cooks in the county by being required to pull and throw away large bags of food waste taken from the cafeteria when other school cooks are not. Grievants contend the pulling of the food bags filled from students emptying their food trays is not the job responsibility of the cooks, and is, in fact, one of the duties listed on the job description for custodians. Grievants contend that in most other Wayne County schools except theirs, the custodians perform these duties while the cooks dispose of the food waste in the kitchen area. The Board contends that pulling and throwing away food waste from the cafeteria is a responsibility properly assigned to the cooks. In addition, the Board asserts that the principal of each school is responsible for the lunch program at that school, and that the principal had the authority to make assignments to employees so long as the duties did not require the employee to perform duties outside his or her classification.

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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

(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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievants 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. ofCommunity 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).

Grievants have failed to establish a prima facie case of discrimination. The cooks at Lavalette Elementary are required to pull and throw away the bags of food waste. In at least three (3) other schools, the cooks are required to perform this job duty. The fact that some principals have assigned this task to custodians does not establish Grievants are being discriminated against by the Board.

Grievants also claim that disposing of food waste is not part of their job responsibilities as cooks. They offered the job description of custodian to show that one of the duties of a custodian is “[d]aily removes all waste and trash from his area.” LII G. Ex. C. However, Barbara Wilson, Director of Food Services for the Board, testified that it is also a cook's duty to perform any task or any job associated with the food service operation, which includes disposing of food waste if the principal assigns the cooks that task. LII Tr., p. 9. In this case, the principal at Lavalette assigned that task to the cooks. Indeed, as Principal Meade indicated in her level one response to this grievance, and as Grievant Pierce acknowledged, it has been the practice at Lavalette for cooks to remove the cafeteria trash for approximately 30 years. LII Joint Ex. A; LII Tr., p. 29.

## CONCLUSIONS OF LAW

1. Grievants have the burden of proving their 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 § 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."

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

(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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

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

4. Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievants 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).

5. Grievants have failed to establish a prima facie case of discrimination, because the evidence shows that there are other cooks in the county who are also required to pull and throw away bags of food waste from the cafeteria. 6. The principal of every school has the responsibility to plan, deliver and evaluate the support services necessary to implement a thorough and efficient program at

their assigned school.

7. Grievants have failed to establish that this practice is a violation of any rule, regulation, policy or statute.

Accordingly, this grievance is **DENIED**.

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

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: April 5, 2001**