GARY BEVERAGE, et al.,

Grievants,

v. **Docket No. 00-38-250**

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Gary Beverage, Linda Beverage, and Richard Thompson ("Grievants") initiated separate grievances on May 31, 2000, challenging their reductions in force and transfer at the conclusion of the 1999-2000 school year. The grievances were denied at level one, and level two hearings were held on June 21, 2000. These grievances were denied in written level two decisions dated July 25, 2000, and July 31, 2000. Level three consideration was bypassed, and Grievants appealed to level four in August of 2000. These grievances were consolidated by order dated September 6, 2000, and a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on November 17, 2000. Grievants were represented by counsel, William D. Turner, (See footnote 1) and Respondent was represented by counsel, Gregory W. Bailey. The parties postponed submission of briefs while a transcript of the level four hearing was prepared, and this matter became mature for consideration upon receipt of fact/law proposals on April 9, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed by the Pocahontas County Board of Education ("PCBOE") as regular classroom teachers at Pocahontas County High School ("PCHS").

2. Prior to the spring of 2000, Grievant Gary Beverage was employed full-time as an Electronics teacher and had 20 years of seniority. The purpose of his position was to teach "Cisco Systems," a computer networking program, instructing students regarding the installation and programming of this type of computer system. Grievant Beverage had 85 students enrolled in his

courses during the 1999-2000 school year, higher enrollment than some other vocational programs. Cisco Systems was the newest vocational program at PCHS during 1999-2000.

3. Grievant Thompson was employed as a full-time welding instructor in the spring of 2000 and had 24 years of seniority. He was PCBOE's only welding teacher.

4. Grievant Linda Beverage was employed half-time as an Intro to Majors instructor and half-time as a guidance counselor, prior to the conclusion of the 1999-2000 school year. Intro to Majors is part of the “Schools to Work” program mandated by the State Board of Education, which is directed toward preparing students for college and career choices. Ms. Beverage was the only teacher of Intro to Majors for PCBOE.

5. Due to declining enrollment during the 1999-2000 school year, causing a loss of state funding, along with a loss of some federal funding, Respondent found that it would be necessary to eliminate 17 professional positions in the spring of 2000. Superintendent James Phares became aware of the necessity of the cuts in the fall of 1999. After informing Board members that cuts in some programs would be necessary, Mr. Phares and the Board decided to conduct meetings with principals and teachers prior to determining where the reductions in force (“RIFs”) would be made, in order to have maximum inputfrom all persons who might be affected.

6. An initial list of proposed reductions was discussed by Mr. Phares with principals and teachers' representatives from each county school in December of 1999. The list contained proposed program areas to be cut, but did not identify specific individuals. Grievant Linda Beverage's counseling position was included on this list, but neither of the other two Grievants' programs were included.

7. This initial list also included proposals to reduce positions held by the wives of two Board members, Mrs. Vance and Mrs. Friel. Mrs. Vance is employed as a Gifted and Social Studies teacher and has 35 years of seniority with PCBOE. Mrs. Friel is employed at PCHS as a Language Arts teacher.

8. When the final reductions were made in March of 2000, Mrs. Vance was not affected, due to her numerous years of seniority. Mrs. Friel's foreign language teaching position was reduced to half-time at PCHS, and she now teaches half-time at one of the county's middle schools, dividing her day between the two schools.

9. By January of 2000, all Grievants had been informed (informally) by PCBOE administration

that their programs were being considered for possible reductions in force.

10. Grievants Gary and Linda Beverage attended PCBOE's meeting on January 24, 2000, and engaged in a lengthy discussion with the Board members about the possible reductions and how their programs might be affected.

11. Grievant Thompson attended PCBOE meetings on February 7, 2000, and March 13, 2000, and discussed with Board members the value of his welding program, explaining why he did not believe it should be reduced.

12. At several PCBOE meetings in February and March of 2000, the Board metin executive session to discuss areas where potential reductions could be made and how this would affect other positions through “bumping” and terminations. During these sessions, the Board made no decisions, and merely discussed possibilities and potential impacts. Also, the Board only discussed programs in general, and specific individuals were not mentioned by name.

13. After receiving written notice of their proposed RIFs, Grievants received formal RIF hearings before the Board in March of 2000, prior to any decisions being made regarding the proposed reductions.

14. On April 18, 2000, PCBOE approved Grievants' RIFs. Grievant Gary Beverage's position was reduced to a half-time Electronics teacher, and Grievant Thompson's position was reduced to a half-time Welding instructor. Grievant Linda Beverage's position was changed to half-time guidance counselor at PCHS and half-time guidance counselor at Green Bank Middle School. Responsibility for the Intro to Majors instruction was assigned to another teacher at PCHS.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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.

___With regard to reductions in force, W. Va. Code § 18A-4-7a provides:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employmentpursuant to the provisions of section two [18A-2-2], article two of this chapter: Provided, That all persons employed in a

> certification area to be reduced who are employed under a temporary permit shall be properly notified and released before a fully certified employee in such a position is subject to release: Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.

Grievants have made no contention that the provisions of W. Va. Code § 18A-4-7a were violated in the instant case. Rather, they contend that their RIFs were illegal in three respects: first, the Board "prejudged" their situations prior to notification and hearing, as required by the provisions of W. Va. Code § 18A-2-2; second, the Board violated W. Va. Code § 6-9A-4, et seq., ("the Sunshine Law") by discussing the RIFs in executive sessions, and finally, Grievants believe that the Board's decisions resulted from discrimination and favoritism.

The portion of W. Va. Code § 18A-2-2 pertinent to this issue provides:

> The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated . . . by a majority vote of the full membership of the board before the first of April of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board prior to the board's action thereon . . . .

It has been held by the West Virginia Supreme Court of Appeals that this statute was violated when a superintendent proposed elimination of the grievant's position and obtained the Board's "tentative approval" before notifying the grievant of the proposedtransfer. The Court stated as follows:

> The statute requires that a superintendent not submit an employee's name for proposed transfer . . ., or discuss such actions with the board, until after the superintendent has notified the employee directly and afforded him an opportunity to request a hearing before the board. Such a procedure is consistent with the concept that the board is to make a detached and independent evaluation of the employee's case.

Lavender v. McDowell County Bd. of Educ., 174 W. Va. 513, 327 S.E.2d 691 (1984).

In Warner v. Kanawha County Board of Education, Docket No. 99-20-166 (July 29, 1999), this Grievance Board applied the Supreme Court's reasoning in Lavender, supra, to determine that W.

Va. Code § 18A-2-2 had not been violated by a superintendent who submitted the grievant's name to the Board as a position he planned to recommend for elimination, prior to the employee being notified of the potential RIF. Because the superintendent never asked the Board to take any action on the proposal prior to the employee being notified, the grievant received the “detached and independent evaluation” of her case at a subsequent RIF hearing, which was not vitiated by the prior discussions between the Board and the superintendent.

The situation discussed in Warner, supra, is extremely similar to the situation which occurred in the instant case. There is no evidence that Superintendent Phares sought any advance “approval” of any of the proposed reductions. Moreover, all three Grievants were notified informally of their proposed RIFs well in advance of any decision being made by the Board, and they were allowed to argue their cases before PCBOE both before and after being formally notified. Accordingly, the undersigned finds that PCBOE's discussions of proposed RIFs during meetings held prior to late March 2000, did not constitute “prejudgment” of Grievant's cases, and no violation of W. Va. Code § 18A-2-2 has beenproven.

W. Va. Code § 6-9A-3 requires that all meetings of governmental agencies be open to the public. However, exceptions are made for “executive sessions,” which may be held under circumstances including “matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee . . . .” The statute further states that “[g]eneral personnel policy issues may not be discussed or considered in a closed meeting” and that all final actions taken by public agencies must occur in open meeting. Grievants contend that the Board's executive sessions did not fall within any of the statutory exceptions, because the statute only allows discussion in executive session of “individual specific employee[s], not programmatic or resource allocation.” Grievants also believe that PCBOE's sessions constituted general policy issue discussions, which are not covered within the exceptions to the open meetings requirement.

The matters which may be discussed in executive session include “matters arising from” the transfer of an employee, which is exactly what PCBOE did when it discussed the potential consequences of the proposed RIFs in executive session. As explained by several witnesses in this case, the Pocahontas County school system is so small, the discussion of “programs” necessarily constitutes discussion of individuals. Moreover, there is no language in the statute which mandates

that the “employee” whose transfer is being discussed must be mentioned by name. In fact, Superintendent Phares testified that, because most of the program areas in each school are only taught by one individual, early board meetings were difficult and contentious. Members of the public who attended these meetings began engaging in “mud-slinging” sessions against certain individuals whoseprograms had not been targeted, and, in addition, rumors--which were largely false-- began circulating around the county about who was being cut. Therefore, it was decided that, until the impact of all the reductions could be discussed and worked out, it would be best to discuss these matters in executive sessions.

Also, the undersigned does not agree that the discussion of the “domino effect” of potential reductions in force constitutes discussion of “general personnel policy.” The discussion of the possible impact of transferring certain individuals, and the effect on other employees and the school system in general, is permissible in executive session, pursuant to the provisions of W. Va. Code § 6-9A-4(b). No decisions were made by PCBOE during these sessions, and no violation of the open meetings law has been proven.

Finally, Grievants contend that, because Board members' wives were included in the list of initial proposed RIFs and were not ultimately affected, Grievants' transfers resulted from discrimination and favoritism. W. Va. Code § 29-6A-2(d) 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." W. Va. Code § 29-6A-2(h) defines favoritism as "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 under W. Va. Code §§29-6A-2(d) and (h), a grievant must demonstrate the following:

> (a) that he 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 him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v.

Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); 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 is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the 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. Dep't 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).

In that Grievants, Mrs. Vance and Mrs. Friel were all initially targeted for possible RIFs, they are similarly situated. However, Mrs. Friel's position was altered in exactly the same fashion as Grievant Linda Beverage's, so Grievants have not established a prima facie case of discrimination or favoritism with regard to Mrs. Friel. As to Mrs. Vance, although a prima facie case may have been established, PCBOE has proven legitimate reasons for why Mrs. Vance was ultimately unaffected by the RIFs, due to her 35 years of seniority. No matter what areas were targeted for RIFs, Mrs. Vance would likely remain unaffected during any reductions. Accordingly, Grievants' have failed to prove discrimination or favoritism.

In addition, the evidence is undisputed that no less senior employees in Grievants'certification areas were allowed to remain in their positions while Grievants were transferred or reduced. Grievants have made an effort in this case to argue the value of their programs and justifications for why their RIFs would be detrimental to the students and to the county. While this is understandable, and Grievants may well be correct in their assertions, they have failed to demonstrate that their RIFs violated any law or policy or constituted an abuse of Respondent's broad discretion in such matters. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, Grievants have the burden of proving their claims 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.

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. Under the facts and circumstances presented, Grievants were not denieda detached and independent evaluation of the merits of the Superintendent's proposal to transfer or reduce their positions through a reduction in force. See Lavender v. McDowell County Bd. of Educ., 174W. Va. 513, 327 S.E.2d 691 (1984); Warner v. Kanawha County Board of Education, Docket No. 99-20-166 (July 29, 1999).

4. W. Va. Code § 6-9A-3 requires that all meetings of governmental agencies be open to the public.

5. "Matters arising from the . . . transfer" of an employee may be discussed in executive session, and such meetings are not required to be open to the public. W. Va. Code § 6-9A-4(b). However, general personnel policy may not be discussed in such sessions, and all final decisions of agencies must be made in open meetings.

6. PCBOE did not violate the provisions of W. Va. Code §§ 6-9A-3 or 6-9A-4 by discussing the impact of potential reductions in force during executive sessions.

7. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§29-6A-2(d) and (h), a grievant must demonstrate the following:

(a) that he 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 him; and,

(c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 8. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the 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. Dep't 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).

9. With regard to Mrs. Vance, Grievants established a prima facie case of discrimination and favoritism. However, Respondent has provided legitimate, non- discriminatory reasons for its actions, which have not been proven to be pretextual.

10. Grievants' reductions in force were not the result of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Pocahontas 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. 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: April 23, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants were represented at level two by Gary Archer of WVEA.