KRISTINA EARLEY,

Grievant,

v. **Docket No. 01-52-320**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Kristina Earley, employed by the Wetzel County Board of Education (WCBE) as a teacher, filed a level one grievance on April 19, 2001, in which she alleged violations of W. Va. Code §§ 18A-4-14, 18A-4-5, and 18-29-2, when she was deprived of a duty free lunch period. Grievant requested "reinstatement of all benefits and compensation." Consideration of the grievance was waived at level one due to the supervisor's lack of authority to grant the requested relief. Following denials at levels two and three, Grievant advanced the complaint to level four on August 9, 2001. Both parties, represented by Owens Brown of WVEA and Larry W. Blalock, Esq., of Jackson and Kelly, PLLC, respectively, agreed to submit the matter on the record. The matter became mature for decision on December 7, 2001, upon receipt of proposed findings of fact and conclusions of law filed by the parties.

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

Findings of Fact

___1. Grievant has been employed by WCBE since 1984, and has been assigned as a special education teacher at all times pertinent to this decision.

2. During the 1999-2000 school year, Grievant was assigned to teach specialeducation full-time at Valley High School (VHS).

3. In February 2000, Assistant Superintendent Paul E. Barcus, Jr., notified Grievant that one-half of a special education position at VHS would be eliminated at the end of the school year. Because Grievant held the least seniority of any special education teacher at VHS, it was her employment which would be affected.

4. Grievant was given the option of remaining at VHS, reducing her employment to half-time, or transferring into a full-time position at either Magnolia High School or Hundred High School.

5. Grievant proposed that she be allowed to remain at VHS and assume a half- time position at Magnolia High School (MHS), which would allow her to remain a full-time teacher.

6. Mr. Barcus consulted with the Special Education Director who determined that Grievant would be able to meet the curriculum requirements of both schools only if she would agree to travel during her lunch period.

7. On February 16, 2000, Grievant signed the following statement:

I, Kristina L. Earley, agree to a half-time transfer to Magnolia High School in a BD/MI/LD teaching position effective for the 2000-2001 school year. I also agree to give up my right to a duty-free lunch period and do not expect additional compensation for doing so. This agreement would remain in effect for as long as the combined position between Valley High School and Magnolia High School exists.

8. It is approximately eighteen miles between VHS and MHS.

9. Other teachers employed by WCBE who travel between schools have been scheduled both travel time and a duty-free lunch period. These teachers did not sign an agreement waiving their lunch period.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (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.

Grievant argues that WCBE has deprived her of a statutorily mandated duty-free lunch period, and has engaged in discrimination by providing the lunch period to other itinerant teachers. WCBE denies that it has treated Grievant differently or improperly denied her a lunch period because she voluntarily exchanged the duty-free lunch to remain at VHS, in compliance with W. Va. Code § 18A-4-14.

Teachers are guaranteed a duty-free lunch by the provisions of W. Va. Code § 18A-4-14, which state in pertinent part:

(1) Notwithstanding the provisions of section seven [§ 18A-2-7], article two of this chapter, every teacher who is employed for a period of time more than one-half the class periods of the regular school day and 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" as set forth in section eight-a [§ 18A-4-8a] of this article 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. Such recess shall be included in the number of hours worked, and no county shall increase the number of hours to be worked by an employee as a result of such employee being granted a recess under the provisions of this section.

However, the duty-free lunch period is not mandatory, and may be waived by mutual agreement. Section 18A-4-14 continues:(3) Nothing in this section shall be construed to prevent any teacher from exchanging his lunch recess or a planning period or any service personnel from exchanging his lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent of schools or his agent: Provided, That a teacher and the superintendent or his agent may not agree to terms which are different from those available to any other teacher granted rights under this section within the individual school or to terms which in any way discriminate among such teachers within the individual school,

In her proposed findings and conclusions, Grievant asserts that this provision was not intended to allow teachers to keep their jobs. That point is undoubtedly valid, but does not apply in this instance. Grievant was not given the option of relinquishing her lunch period to keep her employment. Her continued employment was never threatened, and the statute does not place any limitations on the reason for a waiver, so long as it is a benefit. Grievant also claims that she was coerced into signing the agreed waiver. Again, the facts do not support this contention. Accepting Grievant's own testimony, her assignment at two schools was made at her request, and could only be accommodated if she agreed to forego a duty-free lunch. Certainly, being allowed to remain at VHS was a benefit to Grievant, and there is not one scintilla of evidence that she was in any way coerced into agreeing to forego her duty-free lunch period.

Neither does the evidence support Grievant's claim of discrimination. Discrimination is defined by 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." An employee seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her 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).

Grievant has proven that other itinerant teachers are provided both travel time and a duty-free lunch period. However, Grievant is not similarly situated to other teachers who did not voluntarily agree to forego their lunch period, or could not fulfill the curricular needs of their school if they were scheduled a duty-free lunch. Therefore, Grievant has failed to establish a prima facie case of discrimination.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has theburden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (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. W. Va. Code § 18A-4-14 provides that every teacher employed for more than one-half the class periods of a school day be scheduled a thirty minute duty-free lunch period. This time may be exchanged, by mutual agreement of the parties, for compensation or other benefit.

3. Grievant voluntarily exchanged her duty-free lunch period in exchange for the benefit of remaining assigned to VHS for half of the school day.

4. Discrimination is defined by 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."

5. An employee seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

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

(b)that she has, to her detriment, been treated by her 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). 6. Grievant failed to establish a prima facie case of discrimination.

Accordingly, the grievance is **DENIED**.

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

Date: January 17, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE