NANCY PAULEY, et al.,

Grievants,

v. **DOCKET NO. 02-22-116**

LINCOLN COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants Nancy Pauley, Brenda Adkins, Dannie Adkins, Trina Burns, Annetta Hatfield, Linzy Honaker, Iris Hager, Thomas McKay, David Owens, Darlene Neil, Trish Phillips and Marsha Weaver filed their grievance against Respondent, Lincoln County Board of Education (LCBE), at Level I on February 8, 2002, stating:

> The Lincoln County Board of Education violated WV Code 18-29-2(o) by adding additional days to the employment terms of selected employees and failing to reinstate employment days previously reduced from our employment contracts.

As relief, they ask that their "employment terms be increased in a manner similar to that of the favored employees and in accordance with the verbal agreements and assurances given by the LCBE."

The grievance was denied at Levels I and II, and Level III was waived. The parties agreed to submit the matter to Level IV for a decision based on the foregoing record, supplemented by their proposed findings of fact and conclusions of law. These briefs were filed by Gary E. Archer, WVEA representative on behalf of Grievants and by Gregory W.Bailey, Esq., of Bowles Rice McDavid Graff & Love, PLLC, Respondent's representative, on June 14, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievants are all service personnel employed by Respondent in various classifications, each with 240-day continuing employment contracts.

2. Prior to the 1997-98 school year, Grievants all had extended contracts providing them with 261 days of employment.

3. On March 26, 1996, in response to financial difficulties, Respondent uniformly reduced the extended contracts of all of its employees, including Grievants. Grievants' contracts were reduced from 261 days to 240 days. Mr. McKay joined a grievance filed by a group of other mechanics at the time of the reduction, which he believes was denied and not pursued further. The other Grievants did not file a grievance over this reduction. (See footnote 1)

4. Although Respondent made no such promise, Grievants believed that when the financial outlook improved, their contracts would be uniformly increased back to 261 days.

5. In July, 2000, a few days after William K. Grizzell assumed office as the Superintendent, the Director of Maintenance sent him a letter requesting that Donald R. Miller, a mechanic, have his employment term adjusted from 226 days to 240 days, tomake it uniform with the other mechanics. (See footnote 2) The Board acted favorably on this request, and increased Mr. Miller's term to 240 days, which was the same level it was before the uniform reductions.

6. In November, 2001, Tina Black and Amy Pritchard, executive secretaries, initiated separate grievances requesting that their contract be increased to 240 days to make them uniform with other executive secretaries. Mr. Grizzell granted the grievance and recommended the increase to the Board, which also approved the increase.

7. No personnel now employed by Respondent has a 261-day contract term.

DISCUSSION

This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievants allege favoritism as defined by W. Va. Code § 18-29-2(o), which is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

In order to establish a claim of favoritism, an employee must establish a *prima facie* case 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).

Grievants contend that the addition of days to the employment terms of Mr. Miller, Ms. Black and Ms. Pritchard was the result of favoritism, but Grievants failed to establish that they, or any of them, were similarly situated to these employees when those increases took effect. None of these employees' contracts were increased from 240 days to 261 days as Grievants request. Instead, respondent correctly identified that it was unfair to treat the other employees differently than Grievants, and that it had a duty to increase their days to match Grievants' employment terms. Further increasing Grievants' contracts in response to these increases would create another inequitable position.

Grievants also failed to establish that equalizing the employment terms of those employees was a detriment to them. Those employees were not favored over Grievants when the decision was made to increase their contracts.

Grievants also argue that Respondent promised to restore their 261-day contracts when the financial picture improved, and testimony at the Level II hearing indicates it has improved somewhat. However, no evidence was presented that this promise was anything more than uncertain rumor and wishful thinking, and in any event, restoring their prior contracts based on this improved condition was not a basis for the grievance as filed.

The following conclusions of law support this discussion:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which the grievant bears the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*,W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Favoritism as defined by W. Va. Code § 18-29-2(o) is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

3. In order to establish a claim of favoritism, an employee must establish a *prima facie* case 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. Grievants did not establish that they were similarly situated to other employees whose contract terms were increased, and did not establish that these increases were a detriment to them. Therefore, Grievants did not establish a *prima facie* favoritism claim. 5. Grievants presented no evidence of unfair treatment as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 11, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Mr. McKay produced no records of the prior grievance, and was unclear as to what exactly became of it. A grievance was also filed by some Grievants at this time over Respondent's vacation policy, but it was dismissed at Level I and was not pursued further.

Footnote: 2

One other mechanic works 226 days, but he specifically requested not to have his term increased.