NADINE STOVER,

Grievant,

v. **DOCKET NO. 02-41-179**

RALEIGH COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Nadine Stover filed her grievance on or about April 1, 2002, alleging that her schedule had been changed without her consent, that she had been the victim of harassment, favoritism and discrimination, and that she had been placed on the transfer list without due process. As relief, she seeks "(a) an end to harassment, favoritism and discrimination; (b) reinstatement to her original daily schedule; and (c) removal [from] the transfer list." (See footnote 1)

Her grievance was denied at Levels I and II, and Level III was bypassed. A Level IV hearing was held on August 13, 2002, at the Grievance Board's Beckley office. WVSSPA Attorney John E. Roush, Esq. represented Grievant, and Erwin Conrad, Esq. represented Respondent. The parties agreed to submit the proposed findings of fact andconclusions of law by September 11, 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. Grievant is one of two regularly-employed custodians at Stanaford Elementary School in Raleigh County. She has been employed as a custodian at Stanaford for about 17 years. Her supervisor is the principal of Stanaford Elementary, Dreama Bell.

2. Grievant's work schedule for the 2001-2002 school year was from 1:00 p.m. to 9:00 p.m. For the 2002-2003 school year, her schedule was changed to 2:00 pm. to 10:00 p.m. Grievant did not

consent to the change in schedule.

3. Because Grievant did not consent to the schedule change, she was placed on the transfer list. She was notified of the transfer by letter dated Monday, April 1, 2002, from Superintendent Charlotte Hutchens, Ed. D., and by the same letter informed of her rights under W. Va. Code § 18A-2-7 to a hearing, and of the April 8, 2002, hearing date should she request to be heard.

4. The post office attempted delivery of the letter on April 2, 2002, but Grievant did not accept delivery of the notice until April 4, 2002. She requested and was given a hearing on the transfer.

5. Grievant and Steve McGhee, the other custodian at Stanaford Elementary, have divided duties. He works the day shift and she works the afternoon shift. Grievant maintains the rooms and areas that Mr. McGhee does not, and *vice versa*. At the beginning of the 2001-2002 school year, Grievant was satisfied with the division of labor and felt it was fair. 6. On or about February 19, 2002, Ms. Bell notified Grievant that she had reassigned some of the areas. Ms. Bell informed Grievant she was not to clean the autism room or the 4th grade classroom of Mr. Webb, and that the locks on the autism room had been changed and she was not to go into that area. In addition, several other rooms were reassigned. Although Grievant believed she had more work added to her assignment than she had removed, she agreed to the change and did not file a grievance regarding the change.

7. On or about February 22, 2002, the assignments were again slightly altered, with Grievant picking up the kindergarten room and two of Mr. McGhee's classrooms and Mr. McGhee taking responsibility for a lounge and 5th grade classrooms that Grievant had previously maintained. Again, Grievant agreed to the new assignments on a trial basis and did not file a grievance over the change.

8. In March 2002, Ms. Bell asked all teachers to have their classes do everything they could to lighten the workload on the custodians, by wiping down desks, erasing the boards, picking up trash, etc. All of the teachers submitted a list of the things they and their students would do to help out.

9. Grievant complained to her vice principal that one of the teachers had not been doing the things on her list. Grievant believes this teacher and Ms. Bell are very close friends. Shortly thereafter, Ms. Bell again revised the work assignments, adding two classrooms to Grievant's schedule and about the same time informed Grievant for the first time of the proposed change in starting and ending times for the next school year. Level II Joint Exhibit No. 6.

10. Grievant feels a number of minor slights are indicative of harassment and favoritism. She is

not permitted to have a key to the walk-in freezer even though it is herduty to check its temperature. (See footnote 2) She has been told not to sit in the office during her break even though she incorrectly believes Mr. McGhee “has the run of the office.” She often does not get a copy of the school newsletter, and she did not receive an official ballot (See footnote 3) to vote for the school service personnel of the year award.

11. Ms. Bell places one copy of the school newsletter, which mainly covers academic issues, in the mailbox shared by the two custodians, and one copy in the mailbox shared by the three cooks. None of the aides receive the newsletter.

12. Ms. Bell allows Grievant to take her 30-minute lunch break at the end of her shift, in effect permitting her to leave 30-minutes early, so Grievant can go to her second job. Grievant is also permitted to flex her starting and ending times when needed for personal reasons, and to take time off during the day for personal reasons when she requests to do so.

13. Mr. McGhee takes a fifteen-minute lunch break, and he takes two other fifteen-minute breaks during his workday. Grievant is allowed one fifteen-minute break, and 30 minutes for lunch. Because Mr. McGhee works for the lunch program and gives up part of his lunch time for that, he gets a free meal, as do other employees who work for the lunch program in the same manner.

14. Ms. Bell changed the locks on the autism room because the teachers complained of after-hours vandalism to the room, such as Styrofoam packing peanuts or birdseed all over the floor, tomato seeds all over the desks, money missing from the filing cabinets, and soured milk hidden behind a cabinet. Neither Grievant nor Mr. McGhee havea key to this area, and Ms. Bell unlocks it in the morning so Mr. McGhee can clean it while other people are present. The disturbances to the room stopped after Ms. Bell took this measure.

15. Ms. Bell did not take the freezer key away from Grievant, as that was done years ago when there had been problems. Only the head cook has a key now, and no key is required to check the temperature gauge on the outside of the freezer.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's 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.

Grievant's initial contention is that her work schedule was improperly changed, and the transfer provisions of W. Va. Code § 18A-2-7 were not followed. That section requires that the employee "be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred." Respondent's letter to Grievant was dated and mailed April 1, 2002, a Monday. Grievant did not actually receive the notice until Thursday, April 4.

Respondent argues that the Grievance Board's decision in Harper v Mingo County Bd. of Educ., Docket No. 00-29-310 (Nov. 27, 2000), Level II Joint Exhibit No. 2, established a "mail-box rule" for the first Monday in April deadline for transfer notifications contained in W. Va. Code § 18A-2-7. Such a rule would deem the required notice given when mailed. Grievant argues that no such rule has been established, and that Harper is distinguishable from the case *sub judice* because in that case the notice was actually dated and mailed prior to the deadline, but not delivered until after the deadline. However, the first Conclusion of Law in that case is plain and unambiguous and based on past authority:

> MCBOE provided Grievant timely notification of the proposed transfer, pursuant to W. Va. Code §18A-2-7, when it placed the certified letter in the mail. Notice is timely made when it is effectively transmitted to the grievant, not the date it is received. Snyder v. Marion County Bd. of Educ., Docket No. 00-24-263D (Oct. 23, 2000); Wensell v. W. Va. Regional Jail & Correctional Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998).

Harper, *supra.* That holding supports the proposition that the notice is timely if placed in the mail on or before the date by which notice is required to be made. Accordingly, Respondent's notice of transfer to Grievant was timely made when it was mailed on the first Monday in April. Grievant was subsequently afforded all the due process to which she was entitled, and was afforded a hearing on the transfer before it was finalized. Her transfer was valid.

Grievant claims that Respondent's repeated alteration of her daily duties violated W. Va. Code § 18A-4-8a(7), which states, "No service personnel may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee." Grievant argues that this section makes a distinction between "daily work schedule" and "daily work hours," and that even if Grievant's starting and ending times weren't modified during the school year, her work schedule was, repeatedly.

"Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, which limits changes in a school service employees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis [citations omitted]." Napier v. Mingo Co. Bd. of Educ., Docket No. 00-29-086 (July 13, 2000). "Notwithstandingthe language in W. Va. Code § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of her contract, some of which cannot reasonably be effected until shortly after school starts. [Citations omitted.]" Napier, *supra*.

The changes in Grievant's work assignments were not schedule changes as contemplated by the language of W. Va. Code 18A-4-8a(7). At best, they were simply rearrangements of her established schedule. Her duties remained the essentially the same, and she had very nearly the same amount of the same work to accomplish in the same amount of time. The distinction Grievant urges between the terms "work schedule" and "work hours," even if correct, is inapposite here since neither were changed.

Grievant also alleges a pattern of harassment, discrimination and favoritism. Favoritism is defined by W. Va. Code § 18-29-2(o) as "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), and "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.'" Hogsett, v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

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

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

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

Grievant, who compares her treatment to that of the other custodian, meets criteria (a), but fails to prove she has been treated significantly differently. Both custodians have had their duty assignments rearranged multiple times. Both custodians are prohibited from entering the autism classroom unless their principal unlocks it for them, and neither has a key to the room. Both benefit from the directive that the teachers and their students do what they can to lighten the load on the custodians. Mr. McGhee is not permitted to spend his break time in the office, but is permitted to come into the office when he needs to, just as Grievant is. Most service personnel at the school do not receive the "What's Happening" newsletter unless it contains something relevant to them, as it is for mostly academic and instructional issues. While Mr. McGhee indicated he does take two fifteen- minute breaks while Grievant is permitted only one, Ms. Bell credibly testified she was unaware that he did so, and that he should only take one break. Regardless, both are allowed 45 minutes total break time. Grievant did not establish a *prima facie* discrimination or favoritism claim.

"Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 18-29-2(n). Harassment is basically a series of actions taken by a person's supervisor for no reason other than the vexation of the employee. *See*, Coster v. Div. of Corrections, Docket No. 98-CORR-109R (Nov. 30, 1998). Harassment has been found in cases in which a supervisor has constantly criticized an employee's workand created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See* Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997); Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (1999). The common elements of these definitions are a repetition of the supervisor's actions and a lack of reason for them. Koontz v. Marshall County Bd. of Educ. Docket No. 01-25-431 (Oct. 17, 2001).

Grievant does not explicitly identify any specific actions by her supervisor as being "harassment," but instead she claims she has been generally demeaned and humiliated by her treatment. She claims there was no reason to exclude her from the autism room, or to deny her a key to the walk in freezer. These actions do not seem to indicate a lack of trust in Grievant in particular, as everyone else who does not need access is excluded as well. Both Grievant and Mr. McGhee are excluded from the autism room because the teachers in that area complained that their rooms had been

vandalized after hours on several occasions. However, Ms. Bell did nothing to single out Grievant as a particularly distrustful employee, and Grievant provided no evidence that Ms. Bell was being purposely vexatious. In fact, Ms. Bell seemed fairly accommodating to Grievant, allowing her to use flex-time when needed and to schedule her lunch break at the end of the day so she can leave early. There were no allegations of constant criticism. Ms. Bell was simply trying to effectively administer the operations of her school, and that certainly is not contrary to her expected professional demeanor. Grievant's allegations in this regard are too ephemeral to sustain her burden of proof on the issue.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievant bears the burden of proof. Grievant's allegations must be supported by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

2. West Virginia Code § 18A-2-7 requires that the employee “be notified in writing by the superintendent on or before the first Monday in April of he is being considered for transfer or to be transferred.”

3. Harper v. Mingo County Board of Education, Docket No. 00-29-310 (Nov. 27, 2000), established a “mail-box rule” for the first Monday in April deadline for transfer notifications contained in W. Va. Code § 18A-2-7.

4. Grievant's transfer notification was timely sent, and she was afforded full due process before her transfer was finalized.

5. “Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, which limits changes in a school service employees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis. Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996). *See* Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992).” Napier v. Mingo Co. Bd. of Educ., Docket No. 00-29-086 (July 13, 2000).

6. “Notwithstanding the language in W. Va. Code § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of her contract, some of

which cannot reasonably be effected until shortly after school starts. Sipple, *supra*. *See* Conner, *supra*; [Froats v. Hancock CountyBd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989)]. Accord, Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1100 (Aug. 2, 1995)." Napier, *supra*.

7. In this particular case, Grievant's daily work schedule was not changed.

8. Favoritism is defined by W. Va. Code § 18-29-2(o) as "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), and "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.'" Hogsett v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

9. In order to establish a claim of discrimination or favoritism, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, Grievant must show:

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

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

10. Grievant failed to establish a *prima facie* case of discrimination or favoritism.

11. "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 18-29-2(n). Harassment is basically a series of actions taken by a person's supervisor for no reason other than the vexation of theemployee. *See*, Coster v. Div. of Corrections, Docket No. 98-CORR-109R (Nov. 30, 1998). Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See* Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997); Pauley v. Lincoln County Bd. of Educ.,

Docket No. 98-22-495 (1999). The common elements of these definitions are a repetition of the supervisor's actions and a lack of reason for them. Koontz v. Marshall County Bd. of Educ. Docket No. 01-25-431 (Oct. 17, 2001).

12. Grievant was not harassed by her supervisor.

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 Raleigh 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: September 19, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The original Grievance Form as filed at Level I was not filed at Level IV and was not submitted by either party as part of the record. According to the Level II decision, Grievant also requested that her supervisor be disciplined. This issue was not raised at Level IV and is deemed abandoned.

Footnote: 2

The thermometer that Grievant is required to check is mounted on the outside of the freezer.

Footnote: 3

When she complained to Ms. Bell, she was permitted to submit her nomination on a separate piece of paper.