CHARLES CROOKSHANKS,

Grievant,

v.

DOCKET NO. 02-54-289

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Charles Crookshanks, instituted this grievance against his employer, the Wood County Board of Education ("Board"), on July 15, 2002:

> The Grievant is employed under a 240-day contract at Parkersburg South High School as an Assistant Principal. He performs identical or substantially similar work as Assistant Principals at Parkersburg High School and Parkersburg South High School who have 261-day contracts. Grievant seeks an addition of twenty-one days to his contract to create uniformity and similar treatment with the 261-day contract employees and to permit the Appellant to receive the benefits conferred upon 261-day employees. There is no known or non-arbitrary reason for this difference in treatment.
>
> The Chief Administrator violated the Grievant's rights by setting the Level Two hearing on a date when Grievant was supposed to attend a mandatory continuing education seminar out of town and then requiring Grievant to make up the seminar on another date. The Chief Administrator's actions constitute a reprisal against the Grievant for filing the original grievance.
>
> The Chief Administrator violated the Grievant's rights when he designated George Summers, a former employee of the Wood County Board of Education, as hearing examiner at Level Two. The Chief Administrator did not utilize Mr. Bob Harris, a current employee whose regular duties include the holding of Level Two hearings. The Chief Administrator then proceeded to serve as the Board of Education's key witness against the Grievant.

The grievance was denied at level ones and two, and appealed to level four on September 12,

2002. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on November 7, 2002, and this matter became mature for decision on December 7, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Joseph P. Albright, Jr., Bradley & Albright, and the Board was represented by Dean A. Furner, Spilman, Thomas & Battle.

SUMMARY OF EVIDENCE

LII General Exhibits

Ex. 1 -

Crookshanks Statement of Grievance and Level One Grievance Decision, dated August 8, 2002, by Tom Eschbacher.

Ex. 2 -

Allenbaugh Statement of Grievance and Level One Grievance Decision, dated August 8, 2002, by Tom Eschbacher. (See footnote 1)

Ex. 3 -

Crookshanks appeal to level two.

Ex. 4 -

Allenbaugh appeal to level two.

Ex. 5 -

August 13, 2002 letter from Daniel D. Curry to George Summers.

Ex. 6 -

August 13, 2002 letter from Daniel D. Curry to George Summers.

Ex. 7 -

August 15, 2002 memorandum from Daniel Curry to Joyce Allenbaugh and Charles Crookshanks.

LII Grievants' Exhibits

Ex. 1 -

Board of Education of County of Wood v. Airhart, et al., No. 30103 (Apr. 5, 2002).

Ex. 2 -

Grievance Procedural Levels.

Ex. 3 -

Wood County Schools Standard Operating Procedure, Grievances.

Ex. 4 -

Notes prepared by Grievants.

Ex. 5 -

Allenbaugh Statement of Grievance, dated July 25, 2002.

Ex. 6 -

Parkersburg South High School 2002-2003 Administrative Assignments.

Ex. 7 -

Parkersburg High School Administrative Assignments 2002-2003.

Ex. 8 -

Wood County Schools Average Daily Attendance 2001-2002 10th Month.

Ex. 9 -

May 10, 2002 memorandum from George B. Summers.

Level Two Board Exhibits

None.

Level Four Grievant's Exhibits

Ex. 1 -

Assistant Principal Contract of Employment of Charles Crookshanks, dated August 3, 2000.

Ex. 2 -

Wood County Schools Job Description, Assistant Principal.

Level Four Board Exhibits

Ex. 1 -

Proposed Principal Contract Change Through Attrition.

Ex. 2 -

Wood County Technical Center Block Enrollment 2002-03.

Testimony

Grievant presented the testimony of Daniel Curry, Thomas Eschbacher, and Bill Niday. The Board presented the testimony of Joyce Allenbaugh and Daniel Curry.

The material facts in this matter are not in dispute, and are set forth in the following findings of fact.

FINDINGS OF FACT

1. Grievant is currently employed by the Board as an Assistant Principal at Parkersburg South High School under a 240-day contract.
2. Marie Held and Ed Goe are employed as Assistant Principals at Parkersburg High School under 261-day contracts.
3. As a result of being employed under 261-day contracts, Ms. Held and Mr. Goe receive greater annual pay and benefits than Grievant does.
4. The job description for all assistant principals in Wood County is identical except for the term of employment.
5. All assistant principals in Wood County, regardless of whether they work at the elementary, junior high or high school level, perform many of the same basic dutiessuch as scheduling, attendance, discipline, supervision, evaluation, ordering of supplies, etc. LII G. Ex. 2.
6. A breakdown of job assignments among assistant principals at Parkersburg High School and

Parkersburg South High School evidences that they are performing substantially similar duties, and, if so ordered by the Principal, were subject at all times to assuming other duties currently performed by their counterparts.

7. Grievant, who holds a 240-day contract, performs the same or substantially similar duties and responsibilities as Ms. Held and Mr. Goe, who have 261-day contracts.

8. Beginning in 1996, Wood County began the process of reducing the contract terms of its principals and assistant principals through attrition. LIV Board Ex. 1.

9. Ms. Held and Mr. Goe have had their 261-day contracts since before 1996.
10. Grievant received his Assistant Principal contract in August 2000.

11. At level two, Superintendent Curry learned on a Wednesday that Grievant and Joyce Allenbaugh agreed to consolidate their grievances for hearing, but were not willing to waive the time line for setting the level two hearing. Superintendent Curry knew the regular grievance evaluator was not available on the next Monday, and that he had asked not to do that particular hearing. He set the hearing for that Friday, and, because he felt he needed to testify at the hearing, contacted George Summers, a retired Board employee, to conduct the level two hearing.

12. Grievant informed Superintendent Curry he had to attend a state department of education training session that Friday, but still would not agree to waive the time line for the level two hearing. 13. Being forced between the proverbial “rock and a hard place,” Superintendent Curry left the level two hearing set for that Friday, so as not to end up in default.

14. Superintendent Curry told Grievant he was being selfish and arrogant in not waiving the time line, and in filing the grievance right at the beginning of the school term, when it was very disruptive.

DISCUSSION

Grievant has the burden of proving each element of his 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.

This grievance arises from a policy adopted by the Board in 1996 to systematically reduce the

contract terms of its Principals and Assistant Principals through attrition. (See footnote 2) Since Grievant was hired as Assistant Principal in 2000, he was offered a 240-day employment contract, while incumbent administrators retained 261-day contracts. The difference between a 240-day contract and a 261-day contract is that under the latter, an employee receives 21 paid vacation days.

Grievant alleges the Board has violated the uniformity provisions of W. Va. Code § 18A-4-5b (1990), as well as the discrimination provisions of W. Va. Code § 18-29-2(m). W. Va. Code § 18A-4-5b provides that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]" Similarly, W. Va. Code § 18- 29-2 prohibits discrimination with respect to any employee of a board of education. In particular, W. Va. Code §§18-29-2(a) allows recovery for "any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board." 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 prima facie case of discrimination under W. Va. Code § 18-29- 2(m), Grievant must establish the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees;
>
> (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.

See Martin v. Randolph County Bd. of Educ.,195 W.Va. 297, 465 S.E.2d 399; Flint v. Bd. of Educ. of County of Harrison, 207 W. Va. 251, 531 S.E.2d 76 (1999).

Moreover, Grievant alleges the West Virginia Supreme Court of Appeals in the recently decided case of Board of Education of the County of Wood v. Airhart, ___ W. Va. ___, 569 S.E.2d 422 (2002), has determined the Board's practice violates the above Code provisions. In Airhart, Wood County service employees grieved the fact that similarly- situated employees had different contract terms. Finding that the employees in Airhart performed substantially similar duties, the Court held

that

> [W]here county board of education employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of work days to a level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits.

Id.

In arriving at that holding, the Court discussed a prior uniformity case, Flint v. Board of Education of County of Harrison, 207 W. Va. 251, 531 S.E.2d 76 (1999). In that case, in the early 1980s, the Harrison County Board began to reduce the number of professional and service employees holding 261-day employment contracts in an effort to reduce personnel costs which were not subsidized by State aid. Rather than laying-off employees or reducing their benefits, the Board either eliminated or posted 261-day positions as they became vacant with shorter employment terms of 240 days, and in some cases, 220 or 200 days. The Court, held that,

> while it is clear that the BOE had the authority in the early 1980s to replace vacant 261-day positions with 240-day contracts, it could not disregard the uniformity requirement of W.Va. Code §§ 18A-4-5b

The Court has declined to approve county boards' desire to reduce contracts through attrition, based on the clear and unambiguous language of Code § 18A-4-5b, and as the Board in this case has presented no evidence which would dictate a different holding, the Court's decisions in Flint and Airhart will be applied here.

Grievant also claims he is the victim of reprisal, due to Superintendent Curry's scheduling of the level two hearing on a day he was supposed to attend a conference, and for calling him selfish and arrogant. W. Va. Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in thegrievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT- 088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

This charge requires little discussion. Superintendent Curry had five days to schedule the level two hearing, pursuant to W. Va. Code § 18-29-4(b). Superintendent Curry knew neither the regular designated grievance evaluator, nor the Board's attorney, would be available for at least one day of the five day period, and requested that Grievant agree to waive the five-day requirement. Grievant refused to do so, but now claims that the Superintendent's choice to schedule the hearing within five days to avoid default is somehow evidence of “reprisal.” This is a specious argument. In this instance, the scheduling of the level two hearing on a day when Grievant was to attend a conference must be attributed, at least in part, to Grievant's refusal to waive the time lines, and demanding a hearing be scheduled on a day when no grievance evaluator was available. Grievant seeks as relief full back pay and benefits retroactive to the beginning of the 2002-2003 school year as though he was employed under a 261-day contract. The Board seeks to limit the relief requested because the grievance was not filed within fifteen days following the event giving rise to the grievance, i.e., Grievant's acceptance of his 240-day contract of employment, which the Board also contends constituted a waiver on Grievant's part. (See footnote 3)

Grievant filed this grievance on July 15, 2002, after receipt of his first paycheck for the 2002-2003 fiscal year. Grievant was aware of the Airhart decision, which had been issued in April 2002, and believed the Board was in error in continuing his 240-day contract for the 2002-2003 school year

based on that decision. As the fiscal year began on July 1, 2002, Grievant's institution of the grievance on July 15, 2002, occurred within fifteen working days of the beginning of his contract for that year, and Grievant is entitled to the relief requested. Moreover, the Board was also aware of Airhart, yet decided to maintain Grievant's 240-day contract despite that decision.

The above findings are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of his 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-4-5b provides that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]"

3. 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 prima facie case of discrimination under W. Va. Code § 18-29- 2(m), Grievant must establish the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(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.

See Martin v. Randolph County Bd. of Educ.,195 W.Va. 297, 465 S.E.2d 399; Flint v. Board of Educ. of County of Harrison, 207 W. Va. 251, 531 S.E.2d 76 (1999).

4. While county boards of education have the authority to replace vacant 261- day positions with 240-day contracts, they cannot disregard the uniformity requirement of W. Va. Code §§ 18A-4-

5b. Flint v. Board of Educ. of County of Harrison, 207 W. Va. 251, 531 S.E.2d 76 (1999).

5. Where county board of education employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of work days to level at or near the 240-dayemployees, principles of uniformity demand that the similarly situated employees receive similar benefits. Board of Education of the County of Wood v. Airhart, ___ W. Va. ___, 569 S.E.2d 422 (2002).

6. Grievant has proven by a preponderance of the evidence that he performs the same or substantially similar duties to Assistant Principals who are employed under 261-day contracts of employment, and that the Board has violated the uniformity and discrimination provisions set forth in W. Va. Code §§ 18A-4-5b and 18-29-2(m).

7. W. Va. Code § 18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT- 088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

9. Grievant has failed to establish a case of reprisal.

Accordingly, this grievance is **GRANTED**, and the Board is hereby **ORDERED** to change Grievant's contract of employment as Assistant Principal to 261-days, and to compensate Grievant in the form of all back pay and benefits to which he is entitled, as if he had been employed as a 261-day contract employee since the beginning of the 2002- 2003 school year.

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

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: December 31, 2002

Footnote: 1

Joyce Allenbaugh filed a similar grievance which was consolidated with Mr. Crookshanks' grievance for hearing at level two. Ms. Allenbaugh did not pursue her grievance past the level two decision.

Footnote: 2

The Board presented testimony and evidence demonstrating the difference in size between Parkersburg High and Parkersburg South, both in terms of enrollment and physical structure, to support the difference in contract terms. However, it was clear through Superintendent Curry's testimony at level four that his sole motivation in awarding newer employees lesser contract terms was to decrease all contract terms through attrition.

Footnote: 3

The Court in Airhart, supra, dismissed the waiver issue out of hand, declining to establish a principle that acceptance of a position serves as a waiver of one's statutory rights to uniformity with fellow employees. Id.