STEPHEN PRIESTLEY, et al.,

Grievants,

v v.

Docket No. 02-22-096

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Stephen Priestley, Chris Baker, Sheila Burns, Louis Watts, Ollie Hunting, and Forest Cummings, are employed by the Lincoln County Board of Education ("LCBOE" or "Board"). They filed the following grievance sometime in February of 2002:

> STATEMENT OF GRIEVANCE: The Lincoln County Lateral Transfer Policy is arbitrary, discriminatory, and shows favoritism to positions or locations.
>
> RELIEF SOUGHT: The Lateral Transfer Policy needs to be fair and show no favoritism toward any positions or locations who (sic) have less seniority, qualifications, etc.

It appears there was no filing at Level I. A Level II hearing was held on February 12, 2002, and a Level II decision denying the grievance was issued on March 28, 2002. Level III was bypassed, and Grievants appealed to Level IV on April 5, 2002. A Level IV hearing was held on June 4, 2002. The deadline for the parties' proposed findings of fact and conclusions of law was July 2, 2002, but this deadline was extended until July 9, 2002, at which time this grievance became mature for decision. (See footnote 1)

Issues and Arguments

Grievants argue the newly adopted Lateral Transfer Policy is violates the spirit and intent of W. Va. Code § 18A-4-7a, and the policy discriminates against some employeesand shows favoritism to

others. Respondent asserts the Lateral Transfer Policy was properly adopted, is less restrictive than the former policy, and does not violate W. Va. Code § 18A-4-7a. Respondent also notes the more restrictive policy would go back into effect if this policy is struck down. Further, LCBOE reports this policy has not yet been applied to any employee, and Grievants cannot demonstrate they have been harmed by it. Accordingly, any opinion on this issue would be advisory.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants, with the exception of Mr. Hunting, are employed as principals. Mr. Hunting is the Attendance Director.

2. LCBOE first adopted a Lateral Transfer Policy in 1993. This policy was amended in 1998.

3. On December 6, 2001, a new amended Lateral Transfer Policy was adopted. There is no contention that this policy was adopted incorrectly.

4. The recently amended Lateral Transfer Policy grants greater bumping rights to Grievants than they had under the old policy.

5. The Lateral Transfer Policy has not been applied to any employee of LCBOE.

6. Other counties have Lateral Transfer Policies that differ from LCBOE's. Some of the policies were submitted into evidence at Level II, and are more generous in the bumping options offered by LCBOE's policy.

Discussion

___As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 party bearing the burden has not met its burden. Id.

Grievants have not been transferred under this policy, and it is undisputed that no action has been taken by the board against Grievants or any other LCBOE employee. Grievants are asking for a ruling on whether LCBOE's amended Lateral Transfer Policy, will violate W. Va. Code § 18A-4-7a when it is applied. This argument involves a hypothetical situation and requests this Grievance Board for an advisory opinion, contrary to our established policy and precedent. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules § 4.22. Keys v. Div. of Envtl. Protection, Docket No. 97-DEP-176 (Sept. 4, 1997). See, e.g., Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); Friend v. Nicholas County Bd. of Educ., Docket No. 35-88-053-4 (Apr. 28, 1988).

Grievants are also asking this Grievance Board to decide whether the policy is discriminatory or shows favoritism when there is no event to scrutinize. Again this wouldinvolve an advisory opinion, and these issues cannot be addressed. See Prickett v. Monogalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000); Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 party bearing the burden has not met its burden. Id.

2. Grievants are seeking a ruling on whether LCBOE's policy violates W. Va. Code § 18A-4-7a and/or is discriminatory or demonstrates favoritism.

3. Grievants have not been transferred or exercised bumping rights under this policy, and it is

undisputed that no adverse action has been taken by LCBOE against them.This grievance is substantially hypothetical and speculative in nature, calling for an advisory opinion from this Grievance Board.

4. The Grievance Board does not render advisory opinions. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules § 4.22. See Prickett v. Monogalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000); Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Keys v. Div. of Envtl. Protection, Docket No. 97-DEP-176 (Sept. 4, 1997); Dooley v. Dep't of Transp., Docket No. 94-DOH- 255 (Nov. 30, 1994); Bryant v. Fayette County Bd. of Educ., Docket No. 91-13-198 (Mar. 13, 1992); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991); Lewis v. Greenbrier County Bd. of Educ., Docket No. 91-13-198 (June 12, 1991).

Accordingly, this grievance is **DENIED**.

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

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 5, 2002

Footnote: 1

Grievants were represented by Gary Archer from the West Virginia Education Association, and the Board was represented by Attorney James Gabehart.