DANIEL BAKER, et al.,

Grievants,

v. **Docket No. 02-HEPC-068**

HIGHER EDUCATION POLICY COMMISSION/

FAIRMONT STATE TECHNICAL AND COMMUNITY COLLEGE,

Respondent.

D E C I S I O N

Grievants, Daniel Baker, Richard Pagan, Robert Yokley, Brad Gilbert, and Elliot Stricklin, are employed by Fairmont State Technical and Community College (FSC or Respondent) as instructors of Aviation Mechanics at the National Aerospace Education Center. On January 29, 2002, Grievants filed a level one grievance alleging that they are subject to discrimination, because they are required to work more hours than other faculty before they are eligible for overload compensation. For relief, Grievants request that they be eligible for overload compensation at the same level as the previous nine years, and receive back pay for work beyond 19 contact hours performed during the Spring 2002 semester.

The grievance was waived at levels one and two, and denied at level three. The matter was advanced to level four on March 18, 2002, and a hearing was conducted on May 3, 2002, at the Grievance Board's Westover office. Grievants represented themselves and FSC was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision upon receipt of post-hearing submissions on or before June 4, 2002.

Findings of Fact

1. Grievants are employed by FSC as faculty in the Aviation Maintenance Technician (AMT) program at the National Aerospace Education Center (NAEC), which ispart of the Community and Technical College system created by W. Va. Code §§ 18B-3C- 1, et seq.

2. The AMT program is strictly regulated by the Federal Aviation Administration (FAA). The curriculum for the program consists of 1,981 hours of instruction, which includes both theory and lab classes in four categories: General, Airframe, Powerplant, and Airframe and Powerplant combined.

3. FAA regulations require six to eight hours of instruction time for each three hours of course

credits. This discrepancy results in an incompatibility between the AMT program and other academic units in which contact hours typically are the same as credit hours.

4. Since 1997, NAEC faculty have been assigned a base teaching load of nine credit hours and/or nineteen contact hours. Other faculty were assigned a twelve hour teaching load during that period. Work beyond this level was considered overload for which the employees received additional compensation.

5. Effective Spring 2002, Grievants' workload was adjusted to twenty-two contact hours and fifteen credit hours. The workload of other faculty was increased from twelve to fifteen credit hours.

6. Grievants' contact hours for Spring 2002 varied from twenty-two to thirty hours per week. They were additionally responsible for student advising, maintaining published office hours, class preparation, student makeup time, completion of progress reports and grading, maintaining detailed attendance reports and other records required by the FAA, maintaining the laboratory, including acquisition of supplies and materials,professional development, program recruitment, public speaking on behalf of the college and the NAEC, and working with local employers.

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 Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Grievants assert that the increase in their contact hours is discriminatory because they must work more hours than other faculty before they are eligible for overload compensation. Employees seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) by demonstrating the following:

(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).

Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, the grievants 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, 179 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).

Respondent does not dispute that Grievants must work more hours than other faculty before they are eligible for overload compensation, or that the difference is related to their actual job responsibilities. Therefore, Grievants have established a prima facie case of discrimination.

In response, Respondent asserts that the increase in the number of contact hours required of Grievants from nineteen to twenty-two was legitimate and nondiscriminatory, because the minimum credit hours of all faculty was raised from twelve to fifteen. Respondent further argues that it has the right to set policies and determine faculty workload pursuant to W. Va. Code § 18B-3C-12(b)(3) which states in part:

Policies shall be formally established to ensure the separation of academic and faculty personnel policies of the community and technical college from those of the sponsoring institution. These policies include, but are not limited to, appointment, promotion, workload and, if appropriate, tenure.

Finally, Respondent opines that Grievants' workload is comparable to faculty at West Virginia Northern Community College and Southern West Virginia Community and Technical College.

Grievants do not contest the fact that Respondent has the right to set work loads, but assert that the stated reasons for the increase in their contact hours was pretextual since other faculty members are given the same, or nearly the same, contact hours as credit hours. They opine that their current schedules have been extended to avoid the employment of an additional faculty member, and to subsidize the college.

Certainly, Respondent has the right to determine faculty workload, but it must do so in a manner

which is not discriminatory. Respondent's comparison of Grievants' workload with that of faculty at other community colleges is of little value since the documentation presented does not reflect whether a program similar to the AMT is offered at those schools. Further, while the workload of all faculty members was increased, Grievants were already completing more hours than other faculty before receiving overload compensation, and they must continue to do so under the revised quota.

The existence of this inequity is apparently acknowledged by Respondent as evidenced by the testimony of Blair Montgomery, Provost for the Community and Technical College. Provost Montgomery stated that the solution to this situation might be to increase the number of credit hours assigned to the NAEC courses. This would more accurately reflect the hours Grievants work, and should result in a more equitable point when overload compensation is required. (See footnote 1) Until such time as this, or another, plan is implemented, Grievants are being treated in a discriminatory manner for which Respondent did not provide any legitimate, non-discriminatory reason.

In addition to the foregoing it is appropriate to make the following formal 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 Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. Employees seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) by demonstrating the following:

(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).

3. Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions.

Thereafter, the grievants may show that the offered reasons arepretextual. 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, 179 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).

4. Grievants have established a prima facie case of discrimination by proving they are required to work more contact hours than other faculty before they are eligible for overload compensation, and that the difference in treatment is unrelated to their actual job responsibilities.

5. Respondent failed to establish a legitimate, nondiscriminatory reason for requiring Grievants to work more hours than other faculty before they are eligible for overload compensation.

Accordingly, the grievance is **GRANTED**, and Respondent is Ordered to reinstate the nineteen contact hour requirement for overload compensation, and to appropriately compensate Grievants for overload work completed in excess of nineteen hours for the Spring 2002 semester.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of itsAdministrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code §29-5A-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: June 27, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The Provost noted that any such change would need to be processed through the Curriculum Committee, and must be initiated by the Department.