FRANCIS GIBSON and

LISA BAILEY,

Grievants,

v. **Docket No. 03-33-225**

McDOWELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievants, Francis Gibson and Lisa Bailey (collectively "Grievants"), were employed as teachers at Iaeger High School by the respondent, the McDowell County Board of Education ("BOE"), when, on January 17, 2003, they failed to report for work due to inclement weather. Each was charged a day of annual leave for January 17, 2003. Teachers who missed work due to inclement weather on a subsequent day, February 18, 2003, were not required to take annual leave.

On March 12, 2003, Grievants filed a cursory statement of grievance that did little to inform the reader of the substance of their complaints. Specifically, the statement of grievance contained nothing more than "[b]oth former (current) and newly developed (disputed) county policy & WV § 18-29-2."

Based on the record developed at Level II, it appears that Grievants are asserting 1) that an inclement weather policy was not properly adopted by BOE; and 2) that Grievants were subjected to favoritism or discrimination when they lost a day of personal leave for their respective absences on January 17, 2003, whereas BOE employees who did not report to work on February 18, 2003, were not required to use a day of personalleave. The relief sought by Grievants is the "[r]eturn of personal day taken on January 17, 2003" and an "[o]rder directing county administration as to the proper implementation of their policies."

On March 24, 2003, Grievants' principal denied their grievance at Level I on the grounds that he was without authority to grant the relief requested. Grievants waived the time requirements and a

Level II hearing was held on May 22, 2003. Thereafter, on July 2, 2003, the grievance was denied as untimely, although the Level II decision appears to deny the grievance on the merits, as well. Level III was waived. Upon appeal to Level IV, additional documents were submitted to supplement the underlying record and the parties agreed that the Level IV decision could be rendered on the supplemented record. This grievance matured for decision on April 12, 2004, after both parties had submitted their proposed findings of fact and conclusions of law.

Grievants are represented by Ben Barkey, WVEA Region VII UniServ Consultant. BOE is represented by attorney Kathryn Reed Bayless.

DISCUSSION

Inclement Weather Policy

The McDowell County school system was operating under intervention by the West Virginia Board of Education ("State Board") when the events giving rise to this grievance took place. At the outset of the intervention period there were no prescribed procedures for making policy changes in the McDowell County school system. According to an affidavit from Dr. David Stewart, State Superintendent of Schools, the State Board did not implement procedures for written approval of policy changes in intervention counties untilafter the McDowell County weather policy was amended.

Grievants refer to a "new" inclement weather policy that went into effect August 12, 2002. The documents submitted into evidence by Grievants at Level II reflect that an amendment to a pre-existing inclement weather policy took effect on August 12, 2002. The policy, which had been adopted January 24, 1983, had been amended a number of times throughout the intervening years. Basically, the only changes wrought by the August 12 amendment were removal of 1) definitions for various types of closure codes, 2) a reference to school breakfasts, and 3) a list identifying certain bus runs as "mountain runs."

Grievants argue that the "new" inclement weather policy, meaning the post-August 12, 2002-amendment version, was not properly adopted. This argument fails because the State Board did not implement a policy for approving policy changes in intervention counties until after the amendment to McDowell County's inclement weather policy took effect.

Further, the question of whether the August 12, 2002, amendment was properly adopted is of no moment in the resolution of this grievance. The ability to close or delay schools, based on bad weather and road conditions, was vested in the Superintendent under either version of the policy.

Classes were canceled for students on January 17, 2003, but the staff were to report to work on a late schedule. Even with the delay, neither Grievant felt that it would be safe to travel and, as a consequence, neither reported for work on January 17, 2003. Grievants filled out the appropriate paperwork to charge January 17 as a personal leave day. According to the testimony adduced from Grievants at Level II, this was consistent with prior practice. They were aware at the time they made the decision that their failureto venture out on the bad roads on January 17 would cost each a day of personal leave. (See footnote 1) On February 18, 2003, bad weather once again caused classes to be canceled for students. Initially, teachers and staff were advised to report to their respective work sites on a late schedule. Throughout the morning of February 18, Dr. Mark A. Manchin, Superintendent of McDowell County Schools ("Dr. Manchin"), continued to receive reports of worsening weather and worsening travel conditions. He consulted the Department of Highways and the National Weather Service regarding the deteriorating conditions. In addition, a number of employees called Dr. Manchin to advise him of the hazardous travel conditions they had encountered. Safety concerns led Dr. Manchin to advise such employees that they did not have to report to school.

Given that he did not become aware of the grave change in weather until it was too late to cancel school altogether on February 18, 2003, Dr. Manchin decided that employees who were unable to report for work on that day would not be required to take a personal leave day. Grievants were among those who reported to Iaeger High School on February 18. They claim that it is unfair that they had to relinquish a day of personal leave when they could not get to work because of bad weather on January 17, while those who did not come to work on February 18 did not lose a day of leave.

Favoritism/Discrimination

Although not clearly articulated in their statement of grievance, Grievants appear to be claiming that they were the victims of favoritism or discrimination because, under circumstances that Grievants perceive to be similar, they were required to take a day ofleave for January 17, while their colleagues who did not report on February 18, 2003, were not. The difference in the way the absences were treated related to the fact that Dr. Manchin was not aware of the treacherous travel conditions that resulted from a bad turn in the weather until it was too late to reach all of the employees. A comparison between absences on January 17 and absences on February 18 does not support an argument that Grievants were the victims of favoritism or discrimination, both of which deal with

inappropriate differences in the way employees are treated with respect to one another.

On the other hand, a comparison of how various employees were treated on February 18, 2003, yields a different result. Under either version of the inclement weather policy, Dr. Manchin was required to make a decision by 6:00 a.m. regarding whether schools would be delayed or closed that day. It appears that Dr. Manchin met this deadline when he made the initial decision that employees should report on a delayed schedule on February 18 and that this decision was disseminated to employees through the usual means. Between 8:30 and 9:00 a.m., Dr. Manchin altered this decision based on his concerns over the intervening weather developments.

The ability to amend a decision in the interests of safety should not be impeded, so Dr. Manchin's decision that employees need not report to their respective work sites is accepted as reasonable. The problem arose when Dr. Manchin was only able to communicate this change to a limited number of employees. Dr. Manchin's inability to reach all employees to advise them that they did not need to report to work could have been excused by the fact that the changes in travel conditions did not occur until after the two-hour delay had already been announced. However, the sticking point is that, after the fact, Dr. Manchin excused the absences of those who failed to go to work on February 18. In the ordinary course of events, all employees are subject to the same delay or closure decision. When schools are open or when all employees are properly apprised of a delay, employees are then able to decide whether to risk travel to get to work or relinquish personal leave time in order to remain at home. *Yevuta, et al. v. Wetzel County Bd. of Educ.*, Docket No. 94-52-191 (Oct. 12, 1994).

In this case, when Dr. Manchin finally decided that the weather was too bad to require employees to report to work, that decision was only communicated to a limited number of employees. Having told certain employees that they did not need to report to work, Dr. Manchin determined that it would be unfair to charge those employees a day of personal leave. While well-intentioned, this decision had the effect of affording certain employees a benefit that was not afforded to others.

Grievants, who complied with the original, official announcement and struggled to reach their work sites, find themselves in the position of having provided a day of service while their absentee colleagues did not and for which the absentees were not charged a day of leave. It is true that Grievants were paid their regular salary for providing that day of work. Nonetheless, the February 18 absentees were, in effect, given an additional day of personal leave while Grievants were not. Such

action on the part of Dr. Manchin establishes a *prima facie* case of discrimination.

All employees were subject to the two-hour delay on the morning of February 18, 2004, and all were faced with the treacherous travel conditions brought about by the late developing ice storm. By telling certain employees that they did not have to have to come to work and then granting them an additional leave day, Dr. Manchin created a disparity in treatment that was not related to actual work responsibilities. This difference intreatment was not agreed to in writing by Grievants. Accordingly, Grievants demonstrated that, under the unique facts of this case, they were subjected to discriminatory treatment.

It falls to BOE to rebut the *prima facie* showing of discrimination by establishing that there was a legitimate, nondiscriminatory reason for the differences in treatment. The fact that the weather changed unexpectedly does not relieve BOE of the obligation to treat employees the same. Nor can BOE rely upon the fact that Dr. Manchin was not aware of the change in the weather until after the time set by the inclement weather policy for making the decision to close schools. The changes in the weather and the timing of such changes may excuse Dr. Manchin's actions in announcing a two-hour delay and then deciding that the schools should be closed due to deteriorating weather and travel conditions. However, the weather changes do not offer a rational basis for affording an extra leave day to only those employees who were able to speak with Dr. Manchin on February 18, 2003, or who were simply unable to reach their work sites.

Grievants and others worked because the communication mechanism for closures was ineffective on this occasion. Through no fault of their own, Grievants have been denied a benefit that was extended to the absentees. There is no basis for this distinction under these facts. Therefore, Grievants prevail on a claim of discrimination.

Timeliness

In arguing that this grievance is untimely, BOE attempts to measure the fifteen-day period for filing a grievance from Grievants' submission of their personal leave paperwork, which took place within a day or two of January 17, 2003. Grievants respond that, initially, they were unaware that employees who missed work on February 18, 2003, were not required to take a personal leave day. They did not become cognizant of this fact until late February or early March 2003, when they were first informed about it by teachers from a different school. Grievants correctly assert that they filed their grievance within the requisite time period after becoming aware of the disparity in treatment with

respect to employee absences on January 17 and February 18. Therefore, this grievance is timely.

This is not a disciplinary grievance. Accordingly, Grievants bear the burden to prove their case by a preponderance of the evidence. They have done so.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievants are employed by BOE as teachers at Iaeger High School in McDowell County.

2 2. The McDowell County school system, at all times material to this grievance, was operating under intervention by the State Board.

3 3. An amendment to McDowell County's inclement weather policy took effect on August 12, 2002.

4 4. At the time the inclement weather policy was amended, there were noprocedures in place for obtaining approval from the State Board for policy changes in counties operating under the State Board's intervention.

5 5. Subsequently, the State Board designed and implemented procedures to obtain written State Board approval of policies for any county school system in which the State Board had intervened.

6 6. Both versions of the inclement weather policy expressly stated that “[t]he decision to close or delay schools will be made prior to 6:00 a.m. on the morning that schools are to be closed or delayed. When possible, the decision will be made on the evening before schools are to be closed or delayed and announced prior to 11:00 p.m.”

7 7. Due to bad weather, Dr. Manchin canceled school for students but ordered employees to report to work on a delayed schedule on January 17, 2003.

8 8. Independently of one another, Grievants called the school on January 17 and, citing the bad weather, reported that they would not be coming to work that day.

9 9. After returning to work, Grievants filled out the appropriate paperwork so that their respective absences on January 17, 2003, would be treated as personal leave and they would each be paid for that day.

10 10. This was consistent with prior practice regarding an absence of this sort.

11 11. On February 18, 2003, bad weather again caused Dr. Manchin to cancel school for the students and place school employees on a 2-hour delay.

12 12. Between 8:30 a.m. and 9:00 a.m. on the morning of February 18, Dr. Manchin became aware that weather conditions were deteriorating and that travel was becoming increasingly treacherous due to ice. Upon consulting with the Department of Highways and the National Weather Service, he ascertained that “it was a freakish-typestorm that was causing the roads to be extremely dangerous.”

13 13. Dr. Manchin also received a number of telephone calls from employees about the icy conditions. He advised them that they did not have to report to work.

14 14. Due to the fact that the treacherous developments in the weather on February 18 did not occur until late in the morning, Dr. Manchin was unable to exercise his discretion to close schools entirely in time to prevent some employees from attempting to reach their work sites.

15 15. Once he became aware of how dangerous the roads were becoming, Dr. Manchin and his staff attempted, with little success, to contact all of the school principals to advise them that employees were not required to report on February 18, 2003.

16 16. Dr. Manchin decided that, given the peculiar circumstances, it would be unfair to require employees who were unable to reach their work sites to take a personal leave day for February 18. Instead, absences on that day were treated as excused.

17 17. Grievants were among those employees who were able to report to school on February 18.

18 18. At least two teachers at Iaeger High School did not report for work on February 18.

19 19. Grievants were not aware that employees who were unable to come to work on February 18, 2003, were not required to take personal leave until they were so informed by some teachers from another school.

20 20. The conversation with the other teachers, during which Grievants first became aware of the discrepancy in the way the two days were being treated in terms of leave, took place around the first of March 2003.

21 21. This grievance was filed on March 12, 2003.

CONCLUSIONS OF LAW

Based upon the foregoing and a review of the pertinent law, the undersigned hereby concludes as

follows:

Timeliness

1 1. BOE raises the affirmative defense that this grievance was not timely. Such defense must be established “by a preponderance of the evidence.” *Pryor, et al., v. W. Va. Dep't of Transp./Div.of Highways*, Docket No. 97-DOH-341 (Oct. 29, 1997).

2 2. Pursuant to West Virginia Code section 18-29-4(a)(1), a conference with a supervisor to discuss the grievance must be scheduled “within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant[.]"

3 3. An analogous provision of West Virginia Code section 29-6A-4(a) has been described as “a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Syl., *Barthelemy v W. Va. Div. of Corrections, Pruntytown Correctional Center*, 207 W. Va. 601, 602, 535 S.E.2d 200, 201 (2000).

4 4. The timeliness of this grievance is ascertained by measuring from Grievants' discovery on or about March 1, 2003, that employees who failed to report for work on February 18, 2003, were not required to take a day of personal leave.

5 5. BOE has failed to establish that this grievance, which was filed on March 12,2003, was not timely.

Burden of Proof

6 1. This is a non-disciplinary grievance in which Grievants bear the burden of proof. 156 C.S.R. 1 § 4.21 (2000); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23- 174 (Apr. 30, 1997).

7 2. Grievants' allegations must be proven by a preponderance of the evidence. 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The Inclement Weather Policy

8 3. The question of whether the amendment was properly approved is irrelevant to the disposition of this grievance.

9 4. To the extent that Grievants seek relief relative to BOE's application or implementation of

the inclement weather policy, Grievants have failed to establish any grounds for the granting of such relief.

Favoritism/Discrimination Relating to January 17

10 5. West Virginia Code section 18-29-3(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

11 6. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreedto in writing by the employees." W. Va. Code § 18-29-2(m).

12 7. To establish a *prima facie* case of discrimination or favoritism under West

Virginia Code sections18-29-2(m) or (o), a 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.

Bd. of Educ. of County of Wood v. Airhart, 212 W.Va. 175, 569 S.E.2d 422, 169 Ed. Law Rep. 744 (2002) (citing *Flint v. Bd. of Educ. of County of Harrison*, 207 W.Va. 251, 256, 531 S.E.2d 76, 81 (1999)(*per curiam*)).

13 8. The difference in BOE's response to bad weather on two different days does not implicate favoritism or discrimination, which address inappropriate differences in the treatment of employees.

Favoritism/Discrimination Relating to February 18

14 9. The difference in treatment that resulted when the February 18 absentees received a gratuitous day of personal leave, while Grievants did not, constitutes discrimination, as defined in West Virginia Code section 18-29-2(m), in that the differences in treatment are not "related to the actual job responsibilities" and have not been "agreed to in writing by the employees."

15 10. Under the *Airhart* test, discussed above, Grievants have established a *prima facie* case of discrimination because they are similarly situated to the employees who failed to report to work on February 18, 2003, in that they were all faced with inclement weather,bad roads, and were all subject to the administration's initial directive to report to work by 10:00 a.m.. The additional day of leave for

employees who did not report to work on February 18 constitutes an advantage not afforded Grievants and results in substantial inequity.

16 11. BOE has failed to rebut this *prima facie* showing of discrimination.

17 12. Grievants are entitled to personal leave to compensate them for the time they worked on February 18, 2003, when BOE failed to cancel schools in a timely manner and then excused the absences of those employees who did not report for work on that day.

CONCLUSION

Grievants' request for reinstatement of the personal leave they used for their absences on January 17, 2003, is denied. However, Grievants are entitled to a day of leave to redress the problems of February 18, 2003. It should be noted that this decision is limited to the peculiar facts of this grievance as it relates to the events of February 18, 2003, and Dr. Manchin's subsequent actions relating to that date.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. The respondent, McDowell County Board of Education, is **ORDERED** to award each of the grievants, Francis Gibson and Lisa Bailey, one additional day of personal leave to be used at their discretion in the same manner as any other accumulated personal leave time.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of McDowell 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 partyto such appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 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.

Date: July 23, 2004 _____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

This is not intended to suggest that any employee should ignore safety concerns in an effort to preserve their

accumulated leave time.