THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

REBECCA BUTCHER,

Grievant,

v. **Docket No. 06-50-059**

WAYNE COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Rebecca Butcher, is the county-wide School-to-Work Supervisor. She filed a grievance on June 27, 2005, alleging "discrimination and favoritism with regard to employment term, job title, and compensation for travel expenses afforded to others in like assignments." For relief she seeks to be "granted a 261-day employment term, title from Supervisor to Director (See footnote 1) and compensation for travel from work site and central office." Grievant waived Level I, was denied at Level II, and bypassed Level III. A Level IV hearing was held at the Grievance Board's Charleston Office on May 1, 2006. This case became mature on June 1, 2006, upon the parties' submissions of proposed findings of fact and conclusions of law.

Issues, Arguments, and Agreements

Grievant argues her title should be elevated to that of Director because of her various responsibilities. She argues others with like duties have had their titles changedto Director. She also asserts her contract term should be 261 days instead of the 240-day contract she currently holds. Grievant also wishes to be compensated for travel from 2004 to the present.

Respondent has agreed to provide Grievant with a 261-day contract. However, Grievant wants it

retroactive to January 2005, but Respondent asserts it should only be retroactive to June 2005. Respondent also agreed to reimburse Grievant for any reasonable mileage claimed from 2004 to the present. At the conclusion of the Level IV hearing the parties agreed Grievant would submit her claims and documentation for mileage. Any contested mileage would then be ruled on by the undersigned. However, from Respondent's proposed findings/conclusions, it appears Grievant did not submit any mileage paperwork.

Respondent also asserts Grievant's duties do not merit a change in her title from Supervisor to Director. Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a county-wide Supervisor of the School-to-Work program, and has been in that position since 1998.

2. Grievant is a central office employee and is assigned to the Spring Valley High School Vocational & Technical Center ("Center"). The Principal at Spring Valley High School is responsible for the teachers and students at the Center.

3. At the Center, Grievant is responsible for occasionally covering classes, dealing with minor disciplinary problems, sending serious disciplinary problems to the Principal of Spring Valley High School, taking students to the Health Center at SpringValley High School as needed, reporting maintenance problems, ordering custodian's supplies, relaying teachers' purchase requests, answering phones, and completing the payroll sheet for the Center's employees.

4. Grievant travels between the Center and Wayne County Board of Education office as part of her job responsibilities. Grievant uses her own car for travel.

5. Grievant holds a 240-day contract while others with county-wide administrative responsibilities hold 261-day contracts.

6. The original 1998 posting for Grievant's position contained ten main duties. Level II, Joint Exhibit No. 2. As of the 2005-2006 school year, Grievant no longer: (1) coordinates the research and writing of grant proposals; (2) attends or participates in the Family Resource Network Board of Directors' meetings; (3) attends or participates in West Virginia Joint Apprenticeship & Training Advisory Counsel (WVJATAC) meetings; or (4) attends or participates in Wayne County Community Service Organization Advisory Committee meetings. Grievant also no longer coordinates the Work

Based Advisory Council because it has evolved into the Wayne County Schools Steering Committee which is comprised of 30 members. Grievant is now the recording secretary for that Committee.

7. Grievant is supervised by Dennis Bradley (See footnote 2), the county's Secondary Schools and Technical Education Director.

8. The School-to-Work program is currently operated by county funds, and is now part of programs such as High Schools to Work program, the Tech Prep program, the EDGE program, and Career Technical Education program. All of these programs areunder the direction of Mr. Bradley. Grievant assists Mr. Bradley with these programs.

9. Grievant is not the only Supervisor in the county who has not been promoted to Director.

10. Mr. Bradley and Vicki Smith, Director of Purchasing and English, were both Supervisors and were ultimately promoted. Upon promotion to Director, both of these individuals not only had the same duties they first acquired as Supervisors, but their county-wide job duties and responsibilities increased dramatically.

11. Prior to her promotion, Ms. Smith filed a grievance seeking a title change because of vast job responsibilities.

12. Respondent agreed to promote Ms. Smith, and she was promoted in January, 2005.

13. Ms. Smith was under the impression that Grievant would also receive a promotion and discussed this with Grievant. (See footnote 3)

14. Grievant began to inquire about that possibility, but was told the Superintendent wanted to hold off on any promotion.

Discussion

This grievance does not challenge a disciplinary action, so 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient thata 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

I. Credibility

One issue that must be addressed is credibility since Grievant asserts her job duties are equal to

that of a Director within the county. Grievant testified to her job responsibilities and compared her duties to those of Mr. Bradley.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93- HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*, Docket No. 96- 29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence ornonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 4) See *Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

"[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." *Chin v. Dep't of Treasury*, 44 M.S.P.R. 201 (1990). The undersigned finds Grievant's perception of her situation to be a bit skewed, thus calling her credibility into question.

Grievant consistently testified that she helped Mr. Bradley in a number of duties, and at one point even referred to herself as a "Dennis Bradley wanna be." However, when asked on cross-examination about helping Mr. Bradley, Grievant testified that Mr. Bradley was the Director, and he liked for her to remember he was the Director and she was a Supervisor. Therefore, when she said she helped him, really they both carried equal weight as far as making decisions. Grievant then conceded Mr. Bradley was ultimately responsible for decisions and the results of the decisions.

Also, Grievant made a several comments belittling Mr. Bradley. For instance, she testified on

direct that Adult Basic Education was not originally part of Mr. Bradley's duties, but was later added because Mr. Bradley did not have enough to do. Contrary to that statement, she later testified that Mr. Bradley probably had duties additional to the ones about which he testified. She also asserted that evaluating a person's duties based onwhat they write down and are accountable for cannot be done.

Grievant testified there is a reason why Respondent would want her to remain a Supervisor. She believes that when Mr. Bradley retires, Respondent will place someone else in the position and use her to do all the work. She testified that, "It all boils down to Rebecca Butcher. I'm not entitled to mileage or this and that, but some other people are." Grievant appeared to feel wronged by Respondent.

Conversely, Mr. Bradley's testimony was in no way demeaning to Grievant. He testified that they worked together to accomplish a job for the county. He did explain there was some confusion over paying mileage to Grievant, but he had no objection to her receiving payment for mileage incurred as part of her job. Respondent, through the Superintendent, also offered to rectify both Grievant's mileage and contract term. Clearly, Respondent desired to correct any injustice that had occurred.

Because Grievant made inconsistent statements, her credibility is called into question. Grievant attempted to elevate her job responsibilities while belittling those duties of others. The undersigned believes these inconsistencies in her testimony are due largely to Grievant's inability to perceive events in an unbiased manner. Clearly, Grievant feels as if she has not been adequately recognized for her skills and abilities, and she is frustrated. Understandably, this frustration has caused her perception of Respondent's motives to be skewed.

II. Discrimination/Favoritism

Grievant asserted she was treated differently from other employees as a result of discrimination/favoritism. “[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from otheremployees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment.” *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

“Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional

or advantageous treatment of another or other employees." *W. Va. Code* § 18-29-2(o).

Grievant has failed to show Respondent has engaged in discrimination or favoritism by not promoting her to Director. *W. Va. Code* § 18A-1-1, with regard to definitions, states the following:

(3) 'Supervisor' means a professional educator who, whether by this or other appropriate title, is responsible for working primarily in the field with professional and other personnel in instructional and other school improvement; and

(4) 'Central office administrator' means a superintendent, associate superintendent, assistant superintendent and other professional educators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the countywide school system.

From all the evidence presented, Grievant's job duties clearly meet the definition of Supervisor.

Grievant has met her burden with respect to mileage payment and her contract. Respondent should reimburse Grievant for any and all reasonable mileage that resulted from her employment, so long as Grievant provides the appropriate documentation. Through Mr. Bradley's testimony it appeared as if the reason she had not been paidmileage was because Mr. Bradley believed he could not authorize mileage unless he had a specific fund from which to pay it. However, as Grievant's supervisor, Mr. Bradley can authorize mileage to be paid from the county-wide fund.

Respondent, in an attempt to resolve this issue at the lowest level, offered to pay Grievant mileage upon receipt of appropriate documentation. As of the filing of the findings/conclusions, Grievant apparently still had not submitted any receipts. Grievant should submit any/all claims for mileage to Respondent within 10 days of receipt of this Decision, with or without Mr. Bradley's signature of approval. Respondent is then directed to pay mileage it deems appropriate.

Grievant has also met her burden on the issue of her contract. However, once again Respondent attempted to correct the error by providing Grievant with a 261-day contract retroactive to June 2005, when new contracts for the 2005-2006 school year were issued. Grievant did not accept this because she wanted the 261-day contract retroactive to January 2005, when Ms. Smith was promoted to Director and provided with a 261-day contract. Grievant was not involved in Ms. Smith's grievance, and though there appears to be some misunderstanding, the resolution of Ms. Smith's grievance has no bearing on Grievant's case. Grievant is not similarly situated to Ms. Smith. Ms. Smith testified in

great detail that she had not only retained all of her duties and responsibilities of her Supervisor's position throughout the years, but she also had been assigned many other duties. Grievant, however, had a reduction in duties due to the change in the School-to-Work program. Therefore, Grievant should be awarded a 261-day contract retroactive to June 2005.

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

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so 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. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*, Docket No. 96-29-154 (Sept. 30, 1996).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

4. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." *Chin v. Dep't of Treasury*, 44 M.S.P.R. 201 (1990).

5. "[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

6. "Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 18-29-2(o).

7. *W. Va. Code* § 18A-1-1, with regard to definitions, states the following:

(3) 'Supervisor' means a professional educator who, whether by this or other appropriate title, is responsible for working primarily in the field with professional and other personnel in instructional and other school improvement; and

(4) 'Central office administrator' means a superintendent, associate superintendent, assistant superintendent and other professionaleducators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the countywide school system.

8. Grievant has met her burden of proof concerning mileage and her contract term.

9. Grievant has failed to meet her burden of proof concerning a change in her title from Supervisor to Director.

Accordingly, the grievance is **GRANTED**, in part. Grievant is to be placed on a 261-day contract, retroactive from June 2005. Grievant is to be compensated for any and all reasonable mileage that resulted from her employment, so long as Grievant provides the appropriate documentation within 10 days of receipt of this Decision. All other portions of this grievance are denied.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any such appeal must be filed within thirty 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.

DATE: July 10, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Grievant wants to be named Director of Technical Education. It should be noted that Dennis Bradley is Director of Secondary Education and Technical Education. Mr. Bradley is her supervisor.

Footnote: 2 *Mr. Bradley is retiring on June 30, 2006.*

Footnote: 3 *Grievant originally believed she was a party to Ms. Smith's grievance, and only after discussing the issue with her representative did she realize she was not involved in that grievance.*

Footnote: 4 *The list of factors to use when assessing credibility was originally obtained from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).*