THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL CHANDLER, et al.,
Grievants,

v. **DOCKET NO. 2015-1018-CONS**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, twelve employees of the Kanawha County Board of Education,[1] filed a grievance against their employer on March 9, 2015. The statement of grievance reads:

> Grievants are employed in the maintenance department with 261-day employment terms. Grievants allege that they were treated differently and to their detriment in comparison to other 261-day employees on March 5, 201[5]. On March 5, 201[5] Grievants were required to report to work or take a personal, vacation or dock day, whereas other 261-day employees were excused for work without loss of pay or use of a personal, vacation or dock day. Grievants allege a violation of W. Va. Code §6C-2-2 (discrimination/favoritism) and §18A-4-5b (uniformity).

As relief Grievants seek "payment for March 5, 2015 without loss of a personal or vacation day."

A conference was held at level one on March 17, 2015, and a decision denying the grievance was issued on April 2, 2015. Grievants appealed to level two on April 10, 2015, and a mediation session was held on June 23, 2015. Grievants appealed to level three on July 7, 2015. A level three hearing was held before Chief Administrative Law Judge Billie

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[1] The Grievants are Michael Chandler, Richard Spencer, Mark Humphreys, John A. Rectenwald, Nathan Looney, Anthony Kidd, Terry Riddle, David Pauley, Darren Wines, Robert Stowers, Jonathan Booker, and Paul "Butch" Townsend.

Thacker Catlett on October 28, 2015, at the Grievance Board's Charleston, West Virginia, office. Most of the Grievants were represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, with those not represented by Mr. Roush appearing *pro se*, and Respondent was represented by James W. Withrow, Esquire. This matter became mature for decision on December 4, 2015, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, and was subsequently transferred to the undersigned Administrative Law Judge for administrative reasons on February 8, 2016.

Synopsis

Grievants are employed by Respondent in the Maintenance Department. On March 5, 2015, a winter storm hit Kanawha County toppling trees and power lines in some areas, causing flooding, and leaving roads snow-covered. Although Kanawha County schools were closed for the day, employees of the Maintenance Department, including Grievants, were required to report to work. Most of the Grievants were unable to report to work due to road conditions, flooding, or downed trees and power lines. Those Grievants who did not report to work were required to take a personal or vacation day. Those school service personnel who were not required to report to work, including secretaries employed in the Maintenance Department, were not required to use personal leave time even though they did not report to work. Grievants did not produce evidence that any similarly situated employee was treated differently than any of the Grievants with regard to the requirement to report to work on this date or take leave time. Grievants did not prove their claims of discrimination, favoritism, or a violation of the uniformity provision.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievants are employed by the Kanawha County Board of Education ("KBOE") in various classifications in the Maintenance Department at the Crede facility as full-time, 261-day employees.

2. On March 5, 2015, a storm hit Kanawha County, resulting in the closing of schools in the county for the day. "Maintenance Workers" were required to report to work. School-based Custodians employed under a 261-day contract were required to report to work two hours later than normally required. Grievants were required to report to work. No other KBOE employees were required to report to work. Those school service personnel employed under a 261-day contract who were not required to report to work were paid for the day, and were not required to take a personal leave day. For those employed under a 200-day contract who were considered "school-based," March 5, 2015, was not considered a work day, and they were required to make up the day later in the school year. Secretaries employed in the Maintenance Department were not required to report to work.

3. Any employee of the Maintenance Department who was required to report to work on March 5, 2015, but did not do so was paid, but he or she was required to take personal leave for the day. Grievants knew they were required to report to work, but many of the Grievants were unable to report to work due to downed trees and power lines, snow-covered roads, or flooding. The record reflects that Grievants Michael Chandler, Truck Driver, Richard Spencer, Crew Leader, John Rectenwald, Mechanic, and Nathaniel

Looney, Heavy Equipment Operator, were unable to report to work on March 5, 2015. Grievant Mark Humphreys, Locksmith, did report to work on March 5, 2015. The record does not reflect whether the remaining Grievants reported to work.

4. Many of the Grievants are part of KBOE's snow-removal crew. The record does not reflect that any employee on the snow-removal crew was not required to report to work on March 5, 2015.

5. Personnel who are required to report to work when school is closed for weather-related reasons do not receive any additional compensation for reporting to work.

6. The record does not reflect that any employee was confused about whether he or she was required to report to work on March 5, 2015.

7. On February 17, 2015, schools were closed in Kanawha County due to adverse weather conditions. KBOE sent out a notice to employees regarding who was to report to work that day. Many employees who were required to report to work did not do so because they were confused by the notice. Many, if not all of the Grievants were required to report to work that day, and did so. KBOE decided that employees who were required to report to work on February 17, 2015, but did not do so would not be required to take a personal or vacation day due to the confusing notice. That situation was the subject of another grievance which was granted in *Spencer, et al., v. Kanawha County Board of Education,* Docket No. 2015-1004-CONS (January 14, 2016). The grievants in that grievance who had reported to work on February 17, 2015, were awarded one additional day of personal leave.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants argued they were discriminated against and that Respondent showed favoritism toward other 261-day employees because Grievants were required to report to work or take a personal or vacation day, while other 261-day employees who were not required to report to work did not have to take a personal or vacation day. Grievants argued in this regard that, "[a]ll employees, regardless of classification, share the common and basic responsibility of reporting to work at their appointed work site and time on regularly scheduled work days," and that "Respondent introduced no evidence that the difference in treatment was a result of the job responsibilities of Grievants." As will be outlined below, the initial burden is on Grievants to demonstrate that they are similarly situated to other employees who are treated differently. This, Grievants did not do.

Grievants also repeatedly pointed out that on February 17, 2015, some KBOE employees who were required to report to work but did not do so were not required to take

a personal or vacation day. That situation, however, was the subject of another grievance which has already been decided and has no bearing on the issues raised here. The Administrative Law Judge in that grievance found that the reason for the difference in treatment that day was that "there was confusion about who was to report to work." *Spencer, et al., v. Kanawha County Bd. of Educ.,* Docket No. 2015-1004-CONS (Jan. 14, 2016). Because of the confusing notice to employees, KBOE decided that in that one instance, those who were supposed to report to work but did not do so would not be charged a personal or vacation day. There is no evidence of any confusion on March 5, 2015, about who was to report to work, or that anyone who was required to report to work and did not do so was not required to take a personal or vacation day. The *Spencer, et al.,* grievance was granted, and the grievants, five of whom are also Grievants herein, were awarded one additional day of personal leave.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

"'[E]mployees who do not have the same classifications are not performing 'like assignments and duties' for uniformity purposes and cannot show they are similarly situated for discrimination and favoritism purposes.['] *Flint v. Bd. of Educ.,* 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam)*, *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.,* Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.,* Docket No. 2013-2251-CONS (July 22, 2014)." *Crockett and May v. Wayne County Bd. of Educ.,* Docket No. 2014-1698-CONS (Feb. 19, 2015). The fact that all 261-day employees are required to report to work as scheduled does not make all 261-day employees similarly situated, as Grievants argue.

As one might imagine, this very same issue has previously been addressed by the Grievance Board. In *Sullivan, et al., v. Jackson County Board. of Education,* Docket No. 96-18-087 (August 30, 1996), the Grievance Board found no favoritism or discrimination in requiring certain employees to report to work on a snow day while others were not required to report to work, based on the differences in job duties of the employees. The Administrative Law Judge in *Sullivan, et al.,* stated, "[t]he three employees at issue were all employed in departments or areas other than [Grievants']. They were not considered

'essential employees', and, as such, were not called out to work. It must be remembered that a county board may, in cases of emergency, "provide alternate work schedules" for employees which may or may not comport with the previously designated work codes. W. VA. CODE §18A-5-2."

Grievants did not compare themselves to any particular employee who was treated differently than them. If they are attempting to compare themselves to the secretaries in the Maintenance Department, the secretaries are not similarly situated to Grievants because they are not in the same classification, nor would their duties bear any resemblance to those of a Truck Driver, Heavy Equipment Operator, Locksmith, Mechanic, or Crew Leader, the only classifications identified as belonging to any of the Grievants. Accordingly, the record does not reflect that any similarly situated employee was treated differently than Grievants. Grievants did not demonstrate that they were discriminated against or that favoritism was shown toward other similarly situated employees.

Grievants also argue that the uniformity provisions of W. VA. CODE § 18A-4-5b have been violated. That CODE SECTION states, in pertinent part, "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 . . .." The uniformity provision requires county boards of education "to provide uniform benefits and compensation only to similarly situated employees, meaning those who have 'like classifications, ranks, assignments, duties and actual working days.' *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.,* Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.,* Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions

must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. *Lockett v. Fayette County Bd. of Educ.,* Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.,* Docket No. 97-22-105 (Sept. 24, 1997)." *Crockett and May, supra*. "The requirement in uniformity that the compared employees be 'performing like assignments and duties' is essentially the same requirement as in discrimination and favoritism, in which the grievant and compared employee must be 'similarly situated.'" *Id.*

As Grievants did not place any evidence into the record that any KBOE employee in any of the same classifications as Grievants, or performing assignments and duties similar to those performed by Grievants, was treated differently than Grievants, they did not demonstrate a violation of the uniformity provision.

The following Conclusions of Law support the Decision reached.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

3. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. The uniformity provision requires county boards of education "to provide uniform benefits and compensation only to similarly situated employees, meaning those who have 'like classifications, ranks, assignments, duties and actual working days.' *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.,* Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.,* Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees

to whom they are attempting to compare themselves. *Lockett v. Fayette County Bd. of Educ.,* Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.,* Docket No. 97-22-105 (Sept. 24, 1997)." *Crockett and May v. Wayne County Bd. of Educ.,* Docket No. 2014-1698-CONS (Feb. 19, 2015).

5. "The requirement in uniformity that the compared employees be 'performing like assignments and duties' is essentially the same requirement as in discrimination and favoritism, in which the grievant and compared employee must be 'similarly situated.' '[E]mployees who do not have the same classifications are not performing 'like assignments and duties' for uniformity purposes and cannot show they are similarly situated for discrimination and favoritism purposes.['] *Flint v. Bd. of Educ.,* 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam)*, *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.,* Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.,* Docket No. 2013-2251-CONS (July 22, 2014)." *Crockett and May, supra.*

6. Grievants did not demonstrate that any employee who was similarly situated to any of them was treated differently from any Grievant with regard to the requirement that they report to work on March 5, 2015, or take a personal or vacation day.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: February 23, 2016