CAROLYN MAHONE and SUSAN THOMPSON,

v. Docket No. 93-29-159

MINGO COUNTY BOARD OF EDUCATION,

KAREN BROWNING AND JANICE MILLER

DECISION

Carolyn Mahone, a teacher of hearing impaired students, and Susan Thompson, a teacher of visually impaired students, are employed by the Mingo County Board of Education (Board) at the Mingo County Vocational Center. They filed a grievance at Level I October 20, 1992, alleging,

> After ongoing (m) discrimination and (o) favoritism, some county specialists receive incentive pay, $2,000.00 not certified and $3,000.00 certified, preferential scheduling and extended days. As hearing and vision specialists we have not received incentive pay, or extended days and have worked as Behavior Disorder teachers for the past two years in addition to our hearing and vision positions. We would like to be compensated for the past two years incentive pay, extended days, and continue to receive the incentive pay with the option of extended days.

The grievants' supervisor was without authority to address the matter. At Level II, the parties became involved in procedural disputes and no evidence was presented at hearings held October 29and 30, 1992. Upon appeal to Level III, the Board waived participation in the matter.

An appeal to Level IV was made December 23, 1992, where an order was issued January 19, 1993, remanding the case to Level II for a full evidentiary hearing. A hearing was held April 23, 1993 in which Karen Browning, the Board's Director of Special Education, and Janice Miller, the Board's Assistant Director of Special Education, were allowed to intervene pursuant to W.Va. Code §18-29-3(u). (See footnote 1) The grievance was denied by Evaluator W.C. Totten and the Board again waived participation. The grievants refiled at Level IV on May 10, 1993, and the parties subsequently agreed to submit the case for decision on the record developed at the lower levels and proposed findings of fact and conclusions of law. Thegrievants and intervenors submitted such proposals by August 25, 1993. The Board declined to do so. (See footnote 2)

For reasons which are not clear from the transcript, the Level II hearing was almost entirely

focused on matters which were not the subject of the grievance. As a result, few findings can be made on the allegations set forth above. The evidence pertaining to the charge of "preferential scheduling" is so scant as to preclude any analysis whatsoever of that allegation. Similarly, to the extent that the mention of the grievants' instruction of Behavior Disorder students can be construed as an allegation of violation of policy, practice or statute, there is insufficient evidence to make factual conclusions on that charge. The record will support only the following findings on the issue of the referenced "incentive pay."

1) While the grievants have, at times, been referred to as specialists, their primary function throughout their employment with the Board has been instruction of students with hearing and visual impairments.

2) The Board has been provided federal funds to be used at its discretion to attract and retain persons qualified to provide speech and language therapy to students.

3) The Board has used the funds to provide employees designated as speech therapists compensation for days worked beyondthe normal 200-day instruction year. This compensation has been referred to as "incentive pay."

4) The Board's job description for speech and hearing therapists reflects that the goal of such positions is "To help reduce or eliminate speech and hearing impediments that interfere with the individual student's ability to derive full benefit from the district's educational program." The remainder of the description reflects that the incumbent functions as a resource to those providing instruction and does not provide curriculum-oriented instruction.

5) The grievants do not work beyond the 200-day school term and are therefore not provided incentive pay. During the 1991-92 term they made requests to work additional days but were refused by Superintendent of Schools Everett Conn.

ARGUMENT

The grievants assert that they and the speech and hearing therapists perform "like assignments and duties" and the Board is mandated by W.Va. Code §18A-4-5a to provide them additional days on their contracts and supplemental pay. They contend that the failure to provide them this benefit also constitutes favoritism and discrimination as those terms are defined in W.Va. Code §18-29-2. The Board's position, as gleaned from its Level II findings, is that the grievants and therapists do not perform similar duties and the uniformity provisions of Code §18A-4-5a are therefore not applicable.

The Board further maintains that the dissimilarity in duties precludes a finding that it engaged in favoritism ordiscrimination. The intervenors essentially agree with the Board's position.

CONCLUSIONS

After a thorough review of the parties' positions, the applicable statutes and the foregoing findings of fact, the undersigned makes the following conclusions of law.

1) A county board of education "may fix higher salaries for teachers placed in special instructional assignments, for those assigned to or employed for duties other than regular instructional duties ... and [they] may provide additional compensation for any teacher assigned duties in addition to his regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day. Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county." W.Va. Code §18A-4-5a.

2) "Teacher shall mean teacher, supervisor, principal, superintendent, public school librarian; registered professional nurse, licensed by the West Virginia board of examiners for registered professional nurses and employed by a county board of education, who has a baccalaureate degree; or any other person regularly employed for instructional purposes in a public school in this state;" While therapists, as defined by the Board's job description, do not provide curriculum-oriented instruction to students, their ultimate goal is to facilitate the education of physically impaired students. Thus, they are "employed forinstructional purposes" within the meaning of Code §18-1-1 and are "teachers" for the purposes of Code §18A-4-5a.

3) In order to prevail on a claim of a violation of the uniformity in pay provisions of Code §18A-4-5a, a grievant must show that he and other employees perform "substantially similar" duties. Weimer-Godwin v. Bd. of Ed. of Upshur County, 369 S.E.2d 726, 730 (W.Va. 1988).

4) That the grievants and therapists are all "teachers" for the purposes of W.Va. Code §18A-4-5a is not dispositive of their claim of a violation of the uniformity in pay provisions therein.

5) Inasmuch as the record establishes that the grievants provide "hands-on" instruction to physically impaired students and the therapists perform duties calculated to mitigate those impairments, the grievants have failed to demonstrate that they and the therapists perform substantially similar duties.

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

7) In order to prevail on a charge of favoritism or discrimination a grievant must demonstrate, among other things, that he and one or more other employees are similarly situated. Stewart v. Wyoming County Bd. of Ed., Docket No. 92-55-299 (April21, 1993). Since the grievants and therapists perform different duties and have different goals, they are not similarly situated. Thus, the grievants have failed to demonstrate that the Board engaged in favoritism or discrimination in awarding the therapists additional days and supplemental pay.

8) The grievants have otherwise failed to show that the Board has violated any policy, regulation or statute.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mingo County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: February 7, 1994

Footnote: 1"Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties."

The intervention was unnecessary. Ms. Browning and Ms. Miller supervise the grievants and in those roles have made decisions which displeased the grievants. It appears that the supervisors' request to intervene was prompted by their belief that they might in some way be held personally liable for monetary damages should the grievants prevail. The record does not support that Ms. Browning or Ms. Miller committed any act for which they might be legally assessed such

damages. Indeed, the record does not establish that they were guilty of any wrongdoing whatsoever. Since the joinder was within the Level II evaluator's statutory authority and inasmuch as the grievants fail on the merits of the case, there is no need to address whether the supervisors should remain parties to the action.

Footnote: 2The case, originally assigned to Administrative Law Judge Sunya Anderson, was transferred, for administrative reasons, to the undersigned's docket on September 30, 1993.