ROSE DUBA

v. **Docket No. 93-23-455**

LOGAN COUNTY BOARD OF EDUCATION

D E C I S I O N

Ms. Rose Duba, Grievant, is employed by the Logan County Board of Education ("LCBOE") as an Education Evaluator. In the Spring of 1993 she filed this grievance stating the grievable event was:

> Violation of WV Code 18A-4-5 (Uniformity). Grievant performs like assignments to that of school phychologists (sic) who are paid for 220 days. Resolve by paying grievant for the 220 rate for 1992 school year to now and increase her contract to 220 days.

On May 25, 1993 this grievance was denied at Level II. On October 21, 1993 Dr. Henry Marockie, State Superintendent of Schools (See footnote 1), denied this grievance stating he agreed with the reasons given in the Level II decision: "[the grievant's] duties are substantially different from those of a school psychologist." The Grievant appealed to this Grievance Board on November 3, 1993, and after several continuances, a Level IV hearing was held on February 3, 1994. After submission of findings of fact andconclusions of law this case came mature for decision on March 25, 1994.

Grievant testified, "I do everything that the psychologists do . . . ." Level II Trans. at 6. She contends that her duties are "like" the school psychologist because both an Education Evaluator and a school psychologist must perform tests on potential students for special education programs and write reports stating their recommendations. Both reports are necessary before an Individual Education Plan ("IEP") can be developed for a specific student. Utilizing the information in the record from the Level II hearing (See footnote 2) and Level IV hearing, the following findings of fact are formulated.

Findings of Fact

1. Grievant has been employed by LCBOE as an Education Evaluator for three and a half

years. Prior to that time she worked as an educator for the LCBOE.

2. Education Evaluators conduct academic evaluations or achievement tests on referred students and write a report which is passed on to the school psychologist who incorporates this data in his report. Level II Trans. at 23.

3. School psychologists conduct psychological testing, usually IQ tests, on referred students and write reports including both their results and the Education Evaluator results.

4. A school psychologist is required to be certified by the West Virginia Department of Education. W. Va. Code §30-21-3.

5. To be certified as a school psychologist, an individual is required to have completed a Master's level program of study in an accredited program approved by the State. W. Va. Bd. of Educ. Policy 5202, Section 8B, 3(e) (126 CSR 136).

6. The position of Education Evaluator requires no special or separate certification. Any teacher who has a certification in special education and has completed the required course work may give these achievement tests and write the required report. A psychologist with proper course work may conduct the academic testing. Conversely an Education Evaluator is not certified to conduct the psychological or IQ testing.

7. Prior to utilizing Education Evaluators, and even occasionally now, teachers perform the academic/achievement evaluation of referred students.

8. School psychologists interpret a variety of behavioral disorders and write recommendations for teachers who work with these children. Level II Trans. at 20.

9. School psychologists consult with teachers, principals, and school counselors to give guidance on how to assist troubled students in classroom settings. Id.; Level IV hearing.

10. School psychologists occasionally do crisis intervention, individual counseling and suicide prevention in the schools. Level II Trans. at 20.

11. The current caseload of referrals for testing prevents school psychologists from frequently participating in individual or group counseling sessions within the school setting.

Discussion

W. Va. Code §18A-4-5a states in pertinent part:

> County boards of education in fixing the salaries of teachers shall use at least state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of a state minimums fixed by this article, such counties schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.

> Counties 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 for teachers of one-teacher schools, and they may provide additional compensation for any teacher assigned duties in addition to the teacher's regular instructional duties wherein such non-instructional duties are not part of the scheduled hours of the regular school day. Uniformity shall also apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county . . .

The first difficulty with Grievant's argument is that Code §18A-4-5b titled "Salary Supplement for Teachers" refers to uniformity in teacher salaries and duties and does not include other professional personnel such as a school psychologist. Accord, Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W. Va. 1991); See also, Weimer-Goodwin v. Bd. of Educ. of Upshur County, Syl. Pt. 1, 369 S.E.2d 726 (W. Va. 1988). Although Grievant's exact status is unclear from the record, her testimony reveals she has no certifications other than those of a teacher, and it will beassumed she is considered a "professional educator" or "classroom teacher" according to W. Va. Code §18A-1-1(c). School psychologists are considered as "other professional employees" pursuant to W. Va. Code §18A-1-1(d). See also, W. Va. Bd. of Educ., Policy 5202, Section 8B (1-4). Thus, it appears Grievant's argument must fail because this code section does not apply to psychologists.

But, assuming arguendo that Code §18A-4-5a could be construed to apply to education evaluators and school psychologists, the next question is whether the education evaluators and school psychologists are "performing like assignments and duties within the county," and whether these individuals are alike in "the classification of training, experience, responsibility and other requirements." Id. As previously stated, school psychologists are classified as other professional personnel, and education evaluators are classified as professional educators. To be a school psychologist a Master's degree and certification by the State Board are required. The Grievant is certified in the area of learning disability, and received her training for giving the achievement tests in

the diagnostic classes associated with that curriculum. Lower level Trans. at 8. As previously stated any special education teacher with the appropriate classes may perform these tests.

Additionally, Code §30-21-2(g) is helpful in outlining the functions which a school psychologist is qualified to perform.

> "School psychological services" means the activities the school psychologists may engage in to promote mentalhealth and to facilitate the education of school age children, which include, but are limited to, the following:
>
> (A) Consultation, which includes collaboration with individuals and groups of school personnel, parents, families and representatives of community agencies;
>
> (B) Psychological and psychoeducational assessment, which includes the gathering, interpreting and communicating of information derived from the assessment process which relates to learning and behavior;
>
> (C) Intervention, which includes individual and group counseling, behavioral intervention and crisis intervention;
>
> (D) Education, which includes parent training, school in-service and community education;
>
> (E) Facilitation, which includes assisting and developing useful communication between diverse groups of people separated by institutional, bureaucratic, educational or other barriers;

(F) Research, which includes designing, reporting and utilizing the results of research of a psychological nature;

(G) Program planning and evaluation, which includes program development, program implementation, program evaluation and problem-solving for organizational decision-making;

(H) Supervision, which includes the supervision of intern school psychologist, other school psychologist and personnel contracted to provide either psychological or psychoeducational assessment data;

Given the above outline of the school psychologist duties, it is clear they have greater responsibilities than those of an education evaluator. A school psychologist is capable of conducting both the psychological/intelligence quotient testing and the psychoeducational assessment. The school psychologist has the training and knowledge to intervene in crisis situations and to perform consultation with a variety of groups and individuals. He/she may also engage in parent training, school in-service, and community education.

Although the education evaluator and school psychologist are currently performing many similar duties due to the large caseload of referrals to the special education program, it is clear they are not alike in areas of classification of training, responsibilities, and requirements for certification. The school psychologist can perform many other duties that an education evaluator would not be qualified or trained to perform. Thus, there is no violation of the uniformity requirements of Code §18A-4-5b.

To the extent that Grievant relies on Workman, et al. v. Bd. of Educ. of the County of Logan, Civil Action No. 90-C-158 (Dec. 3, 1990) such reliance is misplaced. In that case the Logan County Circuit Court reversed a Grievance Board decision and found the petitioners, all supervisors/professional educators, had essentially the same job descriptions and performed "like assignments and duties" within the meaning of W. Va. Code §18A-4-5a. Since that case dealt with professional educators with the same job duties, it is not applicable to the instant situation dealing with a school psychologist and an education evaluator.

The following conclusions of law are made in addition to the above discussion.

Conclusion of Law

1. In a non-disciplinary case the Grievant has the burden of proving her case by a preponderance of the evidence. Tenny v. Barbour County Bd. of Educ., Docket No. 89-01-576 (May 30, 1990).

2. The Grievant has not met her burden and demonstrated by a preponderance of the evidence that the LCBOE violated the uniformity provisions of Code §18A-4-5b by failing to pay her at the same rate as a school psychologist.

3. "County boards of education have substantial discretion in matters relating to the hiring, assignments, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of County of Wyoming, Syl. Pt. 3, 351 S.E.2d 58 (W. Va. 1986).

4. The LCBOE's decision to pay the school psychologist and the education evaluator on different salary schedules is not arbitrary or capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 29, 1994

Footnote: 1 The Logan County Board of Education was placed under the control of the W. Va. State Board of Education pursuant to W. Va. Code §18-2E-5 on August 5, 1992.

Footnote: 2Both parties requested that the lower level record be utilized in this decision.