OLLIE HUNTING,

Grievant,

v.

DOCKET NO. 97-22-103

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ollie Hunting, is currently employed by the Lincoln County Board of Education ("Board") as the Director of Attendance. He filed the following grievance on July 22, 1996:

> Violation of 18-29-2 - Directors days and pay are not uniform. (See footnote 1)
>
> Relief sought: 1. uniformity and equity with days and pay, $7.00 position pay, any & all benefits entitled to as a director, future benefits & days stay consistent and equal. (See footnote 2)

A level two hearing was held on August 6, 1996, and a decision rendered by Superintendent Dallas Kelley on February 4, 1997. (See footnote 3) Superintendent Kelley found that Grievant had proven his case by a preponderance of the evidence, but concluded he had no authority to grant the relief requested by Grievant. Grievant appealed to level four February 25, 1997, and a hearing was held on June 18, 1997, at which time this case became mature for decision.

Contrary to the Superintendent's belief, as a grievance evaluator under W. Va. Code § 18-29-1, et seq., the grievance procedure for education employees, he does have the authority to grant the relief requested by Grievant. See generally W. Va. Code § 18-29- 4(b). If the board disagrees with the Superintendent's decision, it can appeal to level four pursuant to W. Va. Code § 18-29-3(t). Triggs v. Berkeley County Bd. of Educ., 425 S.E.2d 111 (W. Va. 1992).

The parties originally agreed to submit this case on the record, but later requested a level four hearing for the limited purpose of submitting agreed stipulations. Based on the sparse level two transcript and decision, I find, by a preponderance of the evidence, the following facts.

FINDINGS OF FACT

1. The Board has created a class of employees called directors.

2. Grievant became the Director of Attendance for the Board on or about June 17, 1996. He was employed on a 210 day contract for the 1996-97 school year, and at the time the grievance was filed, was being paid a daily supplement of $5.50 per day. 3. The directors of other departments, including Maintenance, Special Education, Transportation, Vocational Education, and Food Service, are working under 240 day contracts and being paid a supplement of $7.00 per day.

STIPULATIONS

In addition to the above findings of fact, the following stipulations, derived from the level two decision, were agreed to by the parties.

1. (Conclusion of Law #1) Grievant proved that he was receiving the wrong rate of supplemental pay - position pay from $5.50 to $7.00. Granted. (See footnote 4)

2. (Conclusion of Law #2) Grievant proved the classification of directors is not uniform under W. Va. Code § 18A-4-5a.

3. (Conclusion of Law #3) Grievant proved discrimination in regard to days worked and benefits according to code.

4. (Fact #7) Grievant's days cut to 210 days constituted inconsistency, non- uniformity and statutory discrimination.

5. (Fact #1) Grievant's testimony was deemed credible and was unrefuted upon the record.

CONCLUSIONS OF LAW

1. It is incumbent upon the Grievant to prove his case by a preponderance of the evidence.

2. “County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. . .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.

3. "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. W. Va. Code § 18-29-2(m).

4. "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).

5. In order to establish a claim of discrimination or favoritism, Grievant must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, he must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1991); Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 6. Once Grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Steele, et al., supra.

7. Grievant has proven by a preponderance that he was not employed in a uniform manner in comparison with the other directors during the 1996-97 school year. (See footnote 5)

8. The board did not establish any legitimate, non-discriminatory reason for the differences in treatment of Grievant.

Accordingly, this grievance is **GRANTED**, and the Board is hereby **ORDERED** to compensate the Grievant for the difference between his 210 day contract and a 240 day contract for the 1996-97 school year.

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

MARY JO SWARTZ

Administrative Law Judge

Dated: September 18, 1997

Footnote: 1

The grievance was amended at level two to include violations of W. Va. Code §§ 18-29-2(m) and (o), and 18-4-5a.

Footnote: 2

Grievant filed another grievance on July 22, 1996, regarding 15 days he worked as Hamlin High Assistant Principal, which inadvertently was not placed on this Grievance Board's docket. However, at the level four hearing on the instant grievant, Grievant's representative indicated that the second grievance was no longer at issue. Thus, this decision will only address the grievance stated above.

Footnote: 3

The reason for the delay in issuing a level two decision is unknown.

Footnote: 4

Prior to the issuance of the level two decision, the Board adjusted Grievant's daily supplement to $7.00, and that claim is no longer an issue in this grievance.

Footnote: 5

W. Va. Code § 18-8-3 (1997), authorizing the employment of county directors of attendance, indicates this position "shall be paid a monthly salary as fixed by the county board." Thus, it appears that this statute removes county directors of attendance out of the generic "director" description in Code § 18A-4-8, and establishes that directors of attendance are not similarly situated to those other types of directors. See also, Keesecker v. Lewis County Bd. of Educ., Docket No. 21-86-020-2 (Nov. 26, 1986). However, just as this Code section intimates that a county board does not have to pay an attendance director the same as other directors, it certainly does not prohibit it from doing so. In this instance, no evidence was presented by the Board that it was relying on this particular Code provision to distinguish Grievant from other directors, and indeed, Superintendent Kelley agreed in this level three decision that Grievant should be treated the same as the other directors in Lincoln County.