ELBERT ALLISON,

Grievant,

v. DOCKET NO. 97-15-454

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Elbert Allison, employed as Supervisor of Transportation for the Hancock County Board of Education ("HCBOE"), alleges discrimination and uniformity violations, because the Supervisor of Maintenance for HCBOE was awarded a 261-day contract, while Grievant works under a 240-day contract. He requests that his contract be extended to 261 days for the 1997-1998 school year and all years following. After denials at the lower levels, Grievant appealed to level four on October 15, 1997. (See footnote 1) **A level four hearing was conducted in the Grievance Board's office in Wheeling, West Virginia, on December 18, 1997, and this matter became mature for decision upon receipt of the parties' fact/law proposals on January 22, 1998.**

The following findings of fact are appropriate in this matter, based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by HCBOE in its transportation department for approximately thirty years. He has been Supervisor of Transportation since August 8, 1995.

2. Grievant's contract of employment is for a 240-day term under which he receives no paid vacation days. He is expected to take off 21 unpaid days throughout the year.

3. Wilmon Culley is employed by HCBOE as Supervisor of Maintenance. He originally worked under a 240-day contract, but his contract term was extended to 261 days for the 1997-1998 school year. Under the 261-day contract, Mr. Culley receives paid vacation days,

but it is unknown how many he receives.

4. Under the 261-day contract, Mr. Culley works more days than Grievant.

5. Mr. Culley's contract was extended to 261 days, because he was frequently called out to work overtime during emergencies.

6. HCBOE's job description for Supervisor of Transportation describes the position as follows:

> **The Supervisor of Transportation will direct all school transportation activities, provide for safe and efficient transportation of all students, supervise the maintenance and repair of vehicles, buses, and other mechanical and mobile equipment used by the school system. In addition, this supervisor will coordinate all training, drug and alcohol testing, vehicle inspections, and maintain all records required by the West Virginia Department of Education as well as provide public relations to the community, parents, and schools regarding the Transportation Department. This position will work directly with the Superintendent to provide for an efficient transportation system.**

7. HCBOE's job description for Supervisor of Maintenance provides as follows:

> **The Supervisor of Maintenance will direct the upkeep and maintenance of all buildings, shops and grounds of the Board of Education. The supervisorwill plan and coordinate all maintenance activities, review and execute work orders, recommend staff training and safety programs, develop preventative maintenance programs and supervise all maintenance employees in assignments relating to the maintenance and/or repair of all structures, property and mechanical and electrical equipment of the Board of Education. In addition, the supervisor will be responsible for all compliance regulations pertaining to boilers, Board of Risk and Fire Marshal inspection recommendations, sewage plants, asbestos management plan, and the operation of the Honeywell energy management plan.**

Discussion

The issue presented in this case has been revisited many times by this Grievance Board. It is well-settled that employment terms and vacation benefits are, indeed, "benefits" which must be uniformly granted to employees, based upon W. Va. Code § 18A-4-5b. That statute provides that "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 pivotal question in such cases is whether the grievant is actually "performing like

assignments and duties" to those he has compared himself. See Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Robb v. Hancock County Bd. of Educ., Docket No. 9-15-356 (March 31, 1992); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990) (reversed on other grounds, Harrison County Bd. of Educ. v. Allman, Circuit Court of Harrison County, Civil Action No. 90-P-86-2, April 15, 1992). It was concluded in Stanley, supra, that, in order to be entitled to the same benefits, employees must have "like classifications, ranks, assignments, duties and actual working days." Although the employees' duties need not be identical, a grievant must show that their duties are substantially similar to other employees in order to prevail in a non- uniformity claim. See Weimer-Godwin v. Bd. of Educ., 179 W.Va. 423, 369 S.E.2d 726(1988). Even employees holding the exact same classification have been determined to have been properly granted different contract terms, based upon different work sites and duties. See Robb, supra. In cases in which employees have prevailed on their claims of entitlement to the same contract term, the grievants and those to whom they compared themselves worked in the same location or office, had the same schedule, performed the same duties, and worked the same hours and number of days. Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998); Allman, supra.

Grievant's claims in this case are based upon his belief that, because he and Mr. Culley are both supervisors of departments, they should have the same contract term. He contends that he and Mr. Culley perform various duties which are similar, such as being responsible for a department, dealing with the department's budget, working overtime during emergencies, planning and prioritizing repairs and maintenance, and training and supervising employees.

Grievant has not established that he and Mr. Culley perform "like duties and assignments." Maintenance and transportation are very distinct, separate departments of the school system, and the work performed in each is quite different from the other. While Grievant spends a great deal of time dealing with bus schedules, parent complaints, and student discipline, the maintenance department is continually involved with maintaining and repairing the various heating, cooling, plumbing, electrical and other systems of the school buildings. Moreover, probably the most significant difference between their responsibilities, and the reason for awarding Mr. Culley a 261-day contract, is the urgent nature of much of the maintenance work

performed by his employees. Evidence established that Mr. Culley is called out for emergencies almost as often as his subordinates, because of hisgreat expertise and responsibility for the final condition of the work. Although Grievant believes that he must put in almost daily overtime work in dealing with bus drivers who call in sick each morning and responding to telephone complaints from various parents and principals, the majority of his duties are completed during a regular work day and week. Conversely, maintenance difficulties can arise at all hours of the day and night and must be addressed immediately in many cases so that school can be held. Respondent has provided a rational basis for the distinction between Grievant's and Mr. Culley's contract terms.

Grievant has also raised allegations based upon discrimination. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "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." This Grievance Board has determined that a grievant seeking to establish a prima facie case of discrimination under this statute must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employees:**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular;**

and

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

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). In this case, Grievant has not established that he is "similarly situated" to Mr. Culley, and there is ample evidence that the difference in treatment here was the result of Grievant's and Mr. Culley's different job

responsibilities. Therefore, Grievant has not established a prima facie case of discrimination. Grievant did not prove by a preponderance of the evidence that HCBOE's decision to grant the Supervisor of Maintenance a 261-day contract violated either W. Va. Code § 18A-4-5b or W. Va. Code § 18-29-2(m).

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, the grievant bears the burden of proving each element of his claim by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. W. Va. Code § 18A-4-5b provides that "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."

3. Boards of education must provide uniform vacation benefits and employment terms to employees who have "like classifications, ranks, assignments, duties and actual working days." Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

4. In order to prevail in a pay uniformity claim under W. Va. Code § 18A-4-5b, a grievant must show that his duties are substantially similar to another service employee. See Weimer-Godwin v. Bd. of Educ., 179 W.Va. 423, 369 S.E.2d 726 (1988). 5. Grievant did not prove by a preponderance of the evidence that he performed like duties and assignments to Mr. Culley, Supervisor of Maintenance.

6. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employees:**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular;**

and

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

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Grievant did not establish a prima facie case of discrimination, because he is not similarly situated to Mr. Culley, and Respondent provided job-related reasons for the difference in treatment.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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.

Date: March 31, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

No information regarding proceedings at level one were contained in the record. A level two hearing was held on August 25, 1997, followed by a level two decision dated October 3, 1997, denying the grievance. HCBOE waived consideration at level three.