WILLIAM KIRK,

Grievant,

v. **Docket No. 98-29-141**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, William Kirk, filed this grievance alleging the Mingo County Board of Education ("MCBOE" or "Board") violated:

> WV Codes 18A-4-8, 18A-4-8a, 18A-4-5b and 18-29-2 for pay and job related benefits. He seeks pay equalization, a county vehicle to drive, days returned to 261, (See footnote 1) back pay and benefits for the inequity of pay for the last seven years.

This grievance was denied at Level II and waived at Level III. Upon appeal to Level IV, a hearing was held on June 2, 1998. At Level II, former Superintendent Everrett Conn asked to intervene. At Level IV, the parties agreed there was no longer any issue which affected him, and he withdrew as an Intervenor. (See footnote 2) This case became mature for decision on July 17,1998, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 3) MCBOE and Grievant agreed timeliness would not be raised as an issue in this grievance.

The undersigned Administrative Law Judge makes the following findings based on the record in its entirety.

Findings of Fact

1. Grievant was initially hired in 1982 as the Transportation Director for MCBOE.

2. Grievant has retained that position to the current time, and is compensated at Pay Grade H. He has also received a supplement to this salary since approximately 1994. He is to wear his pager from 8 a.m. to 8 p.m.

3. Grievant's contract, like most of the contracts with MCBOE, was reduced for the 1997-1998 year at the direction of the State Department of Education ("SDOE") due to severe fiscal problems.

4. Originally, Grievant's contract was to be reduced to 200 days. He agreed to accept additional duties as the Maintenance Supervisor, and his contract was increased to 240 days. When Grievant accepted these additional duties he was aware there would be no additional compensation. Spence, supra. These additional duties were assumed on July 1, 1997, and are reflected in his contract.

5. In September 1997, the Director of Maintenance position was posted and Grievant applied. The record does not explain why the position was posted. The posting was revoked during 1997, as unfilled. 6. When Grievant began the duties of Maintenance Supervisor, he started driving the car the former Director of Maintenance drove on a full-time basis, to and from his house. Superintendent Conn directed Grievant use his own car in the performance of his duties. Grievant, like many other MCBOE directors and coordinators receives mileage for any traveling he does on behalf of MCBOE. There is a car available for Grievant's occasional use.

7. The 1996 -1997 financial compensation for employees with similar duties to Grievant is as follows:

Name	Experience	Contract Days	Total Earnings
Bobby Jarrell	7 years	261 days	$35,038.68
Grievant	14 years	261 days	$29,450.04
Alex Hunt	16 years	261 days	$30,578.12
Paul Hall	22 years	261 days	$34,543.85

8. Mr. Jarrell, the former Director of Maintenance, retired on December 31, 1996. His salary was greater than the other employees because he combined two positions when he first started work with MCBOE. At the time he was hired as Director of Maintenance, he had been receiving a part-time salary of $18,000.00 as the Sanitary Engineer in charge of all of MCBOE's sewage treatment plants. Mr. Jarrell agreed to become the full-time Director of Maintenance for an additional $12,000.00.

9. Mr. Hunt, the Transportation Director in charge of mechanics, is also certified as a mechanic. He earns overtime when he functions in this capacity after normal workhours. The salary for the 1996 -1997 school year reflects this overtime. He retained his 261 day contract because much of the work overhauling buses occurs during the summer. He is on call 24 hours a day, and is

provided a truck with tools for his use.

10. Mr. Hall is the Coordinator of the Electricians, but he is classified as an Electrician II. He earns overtime when he functions in this capacity after normal work hours. The salary for the 1996 - 1997 school year reflects this overtime. He retained his 261 day contract because much of the work of repairing buildings occurs during the summer. See Browning, supra. He is on call 24 hours a day, and is provided a truck with tools for his use.

11. All maintenance employees and mechanics retained their 261-day contracts for the reasons stated above. They were the only MCBOE employees who did so, with the exception of the Superintendent, Treasurer, and the two Assistant Superintendents.

12. When Superintendent Everrett Conn was informed he would not be reappointed to his position for the 1997-1998 year, he resigned and was moved into the Director of Maintenance position. Although MCBOE was obligated to pay Mr. Conn for a 261 day position at his previous salary, Mr. Conn, because of the financial problems at MCBOE, accepted a 240 day position at an Assistant Superintendent's salary. Mr. Conn's other duties include helping the new Superintendent with the transition period and assisting the Chapter I Director.

13. The following table identifies the 1997 -1998 financial compensation for the employees discussed above:

Name	Experience	Contract Days	Total Earnings
Grievant	15 years	240 days	$26,696.40
Alex Hunt	17 years	261 days	$26,714.35
Paul Hall	23 years	261 days	$29,088.45
Everrett Conn	24 years	240 days	$52,413.60

14. At this time, Grievant is to assist with maintenance only on an emergency basis. The new Superintendent has directed Grievant to focus his attention on his transportation duties. Grievant now performs some duties such as checking roads and calling substitutes that he did not do last year. Although he no longer retains the maintenance duties, Grievant still retains the 240 day contract.

15. Contrary to Grievant's testimony, Mr. Don Runyon and his paint crew do not have possession of a van. They do have a van that only they use, but it is parked in the evenings at Kermit where they all live. No one drives the van home.

16. In prior years, the former Director of Maintenance, Mr. Jack Bowes, had a truck at his

disposal. This practice was discontinued by Superintendent Conn in 1994.

17. Many department heads are not provided with vehicles, and they are reimbursed for mileage the same as Grievant.

18. Of the employees discussed in this grievance, Grievant is only more senior than Mr. Jarrell. Messrs. Hunt, Conn, Bowes, and Hall have more seniority than Grievant.

Issues

Grievant alleged violations of W. Va. Code §§ 18A-4-8 and 18A-4-8a. No clarification was offered as to how MCBOE violated these Code Sections. The key issue as addressed by the parties is the alleged violation of W. Va. Code § 18A-4-5b, which discusses uniformity of pay and compensation. Grievant has also alleged discrimination and favoritism.

Respondent argues it has not violated any of the above-cited Code Sections. They state the placement of Superintendent Conn was correct, Grievant is similarly situated to other directors in that he does not have a car, but is reimbursed for mileage, and Grievant's duties are not the same as either Mr. Jarrell's or Mr. Conn's.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

It is noted that county boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel. The exercise of that discretion must be in the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). Further, a board of education has the discretion to determine the number of schoolservice personnel and length of their employment terms as these are primarily management decisions. Without a clear statutory requirement to do otherwise,

such employment decisions should remain with a board of education. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994).

With these guidelines in mind, the first issue to examine is whether Grievant is and has been unfairly compensated since he began his employment. W. Va. Code § 18A-4-5b states that uniformity of compensation shall apply "for all persons regularly employed and performing like assignments and duties . . . ". This Code Section also requires uniformity with regard to experience, responsibilities, years of employment, and training classification.

As regards Mr. Jarrell, Grievant has failed to demonstrate they performed like assignments and duties. At the time they were working simultaneously, Mr. Jarrell was always on 24 hour call. Grievant was not and only had to be avaliable by pager from 8 a.m. to 8 p.m., during a portion of the time they worked together. Mr. Jarrell retired on December 31, 1996, and it is unknown what possible changes could have occurred in his salary with the mandate from SDOE to cut positions and compensation. (See footnote 4) Although Grievant now appears to be working more in his "off" hours, he cannot compare his work now with Mr. Jarrell's work previously. At the time of the comparison, the employees were not similarly situated. Additionally, there was no evidence to suggest that even now Grievant is required to be on call 24 hours a day. Further, although Grievant demonstratedhe had more seniority than Mr. Jarrell, he did not discuss Mr. Jarrell's experience or training vis a vis his own.

Grievant's argument that he should receive the same compensation as Mr. Conn, is also without merit. Mr. Conn is paid as a professional educator, has many more years of experience, and is not performing like assignments and duties. In addition to his duties as Director of Maintenance, Mr. Conn is assisting the Chapter I Director and the transition of the new Superintendent.

As far as the pay comparison between Grievant and Messrs. Hunt and Hall, that issue is easily answered. Because of their classifications and duties they receive overtime. Both employees have more seniority than Grievant. Thus, Grievant has failed to demonstrate that he is performing like assignments and duties that would require MCBOE to compensate him at a higher level. It should be noted Grievant is already compensated at the highest service personnel Pay Grade, H, and receives a supplement.

As for the issue of the car, Grievant has failed to demonstrate he is treated differently than all the other directors or supervisors. Some employees have full-time access to a car. This is based on their

job duties; others, like Grievant, are reimbursed for mileage.

Although inherent in the above-discussion, Grievant also alleges discrimination and favoritism, saying he was and is treated differently than similarly situated employees. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment ofan employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

To prove discrimination or favoritism, a grievant must establish a prima facia case which consists of demonstrating:

> (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 other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of either discrimination or favoritism. He was not similarly situated to the other employees to whom he compared himself. Further, the differences in the treatment afforded him were related to his actual job duties as compared to theirs. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel. The exercise of that discretion must be in the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

3. A board of education has the discretion to determine the number of school service personnel and length of their employment terms as these are primarily management decisions. Without a clear statutory requirement to do otherwise, such employment decisions should remain with a board of education. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994).

4. W. Va. Code §18A-4-5b requires uniformity of pay for "all persons . . . performing like assignments and duties within the county."

5. Grievant has failed to demonstrate that MCBOE violated W. Va. Code §18A- 4-5b, and to prove he was performing like assignments and duties in comparison with the employees addressed in this grievance. 6. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

7. W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

8. To prove discrimination or favoritism a grievant must establish a prima facia case which consists of demonstrating:

(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 other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. Grievant has failed to establish a prima facie case. He was not similarly situated to the other employees to whom he compared himself. Further, the differences in the treatment afforded him were related to his actual job duties as compared to theirs.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 5, 1998

Footnote: 1

The issue of 261 days was resolved in the Browning v. Mingo County Board of Education, Docket No. 97-29-297 (May 25, 1998). Additionally, the parties agreed the undersigned Administrative Law Judge could review that

decision for findings helpful to the resolution and understanding of the instance grievance. Further, the parties directed the undersigned Administrative Law Judge to Spence v. Mingo County Board of Education, Docket No. 97-29-245 (Apr. 6, 1998), a grievance in which Grievant was an Intervenor.

Footnote: 2

Mr. Conn appeared at the Level IV hearing as a witness.

Footnote: 3

Grievant was represented by Mr. Steve Angel from the West Virginia Federation of Teachers, and MCBOE was represented by Mr. W. C. Totten, Superintendent's designee.

Footnote: 4

Testimony at Level II indicated the September 1997 posting for the Director of Maintenance position had a salary of $28,000.