MARY CLARK,

Grievant,

v. Docket No. 99-20-088

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Mary Clark, is employed as a Warehouse Foreman, with the Kanawha County Board of Education ("KCBOE"). Grievant contends she is misclassified as a Warehouse Foreman, and she should be classified as a Supervisor of Maintenance. She alleges violations of W. Va. Code §§ 18A-4-8, 18A-4-5b, and 18-29-2(m) & (o). Grievant also believes she has been discriminated against because of her gender. She seeks as relief: 1) reclassification as a supervisor, retroactive to July 1, 1997; 2) use of a county vehicle or reimbursement for her travel; 3) all wages and benefits afforded supervisors including "comp" time; and 4) interest on all monetary sums.

She filed this grievance on July 25, 1997, and it was denied at Level I on August 4, 1997. Due to settlement negotiations and a serious illness, a Level II hearing was not held until January 12, 1999. This grievance was then denied at Level II. Grievant appealed to Level IV, and a Level IV hearing was held on May 6, 1999. This case became mature for decision on June 18, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant argues she performs the same duties as other male employees who are classified as Supervisors of Maintenance. She also maintains the failure to reclassify her is gender discrimination, discrimination in general, and favoritism. (See footnote 2)

Respondent avers Grievant is properly classified as her job duties more closely match those of a working foreman, and do not demand the travel and expertise required by the

Supervisor of Maintenance positions. Respondent also notes Grievant does not have the authorization to operate in an independent manner like the Supervisors of Maintenance, and her decision-making input and involvement in budgetary decisions are limited. Respondent also asserts Grievant's classification is not the result of gender discrimination, as the position was classified as Warehouse Foreman for many years prior to Grievant's selection for the position, and the prior Warehouse Foreman was a male.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by KCBOE for approximately twenty-five years. Prior to becoming the Warehouse Foreman, she was employed as a Warehouse Clerk from 1985 to 1993. In 1993, the former Warehouse Foreman, Floyd Doddrill retired, and Grievant received the position.

2. Prior to 1989, the supervisors of the various craft areas were classified as Foremen. In approximately 1989, these foremen, with the exception of Mr. Doddrill, werereclassified as Supervisors of Maintenance. Each of these individuals was placed in charge of one of the following categories: General Crafts, Carpentry, Plumbing/HVAC, Electrical Maintenance, or Painting. Mr. Doddrill was not reclassified at that time, because his job duties were not viewed by KCBOE as rising to the same level as the new supervisors. The supervisor of the Supervisors of Maintenance is Ben Shew, Director of Maintenance and Energy Management.

3. The statutory definitions and pay grades of the applicable positions are as follows:

> **"Foremen" means skilled persons employed for supervision of personnel who work in the areas of repair and maintenance of school property and equipment. Pay grade G.**

> **"Inventory supervisor" means personnel who are employed to supervise or maintain operations in the receipt, storage, inventory and issuance of materials and supplies. Pay grade D.** (See footnote 3)

> **"Supervisor of maintenance" means skilled personnel not defined as professional personnel or professional educators as in section one, article one**

> **of this chapter. The responsibilities would include directing the upkeep of buildings and shops, issuing instructions to subordinates relating to cleaning, repairs and maintenance of all structures and mechanical and electrical equipment of a board. Pay grade H.**

4. In approximately 1997, each Supervisor of Maintenance also became an Area Supervisor for Maintenance for a group of about 20 schools in a specific area. This change resulted in new duties, including facilitating communication with the school,prioritizing of work schedules, giving and receiving information on various crafts projects, and dealing with emergency situations.

5. Grievant's duties consist of the following: 1) Supervising and assigning the work for her nine supervisees; 2) Keeping daily attendance records and time sheets for her supervisees; 3) Calling substitutes, when necessary; 4) Conducting performance evaluations; 5) Performing on the job training; 6) Assisting her supervisees in filling orders, checking stock, and resolving delivery problems; and 7) Helping to load and unload trucks. Additionally, once or twice a year, Grievant works closely with the Director of Counseling to deliver tests and directions for the standardized testing project. This delivery is time sensitive, and the materials require confidentiality. This activity, while very important and performed admirably by Grievant, represents a small percentage of her overall work time. Further, Grievant does not personally identify the specifications for the equipment and vehicles in her area. Grievant obtains input from the operators of this equipment, gives input of her own into the decision-making, and assesses the equipment in her area for routine maintenance and replacement. Her general manner of replacing equipment is either to present the Purchasing Department or her supervisor with the serial number from the older piece of equipment.

6. Grievant's supervisor is the Director of Purchasing, Terry Richardson.

7. The Warehouse Foreman position requires a high school education, and training and experience in warehouse management, as well as computer literacy. The employee must be able to operate a lift truck and to drive a delivery truck. This employee also needs leadership ability, but past leadership experience is not required or stated aspreferred. The position is one of a working supervisor, and the Warehouse Foreman is expected to assist employees in filling orders and delivering and receiving supplies if there is a backlog.

8. All of the Supervisor of Maintenance positions require a high school education, and the employee must have a set amount of experience in a specified field as well as additional

abilities. 1) The Supervisor - General Crafts must have five years of experience in one of the construction crafts with special training in "blueprints, planning, et cetera, plus one year in a supervisory or lead capacity." 2) The Supervisor - Electrical Shop must have five years of experience in electrical work, a state journeyman electrician's license, and one year in a supervisory or lead capacity is preferred. This supervisor must be able to read and interpret blueprints and the National Electrical Code. 3) The Supervisor - Carpentry Shop must have five years of experience in carpentry, be able to read and interpret blueprints, and have one year of successful experience in a supervisory or lead capacity. 4) The Supervisor - Plumbing/HVAC must have five years of experience in plumbing and heating systems, knowledge of welding and insulation, a journeyman plumber's license, and one year in a supervisory or lead capacity is preferred. 5) The Supervisor - Painting must have three to five years of experience as a painter, knowledge of how to operate various pieces of equipment, such as spray and sand blasting equipment, striping machines and scaffolding, and some supervisory or lead capacity experience. (See footnote 4) **9. When ordering or requesting equipment or supplies, the Supervisors of Maintenance identify the specifications for non-routine products and equipment.**

10 . Grievant accrues overtime, while the Supervisors of Maintenance do not. Grievant's salary, with the overtime, is approximately equal to the salaries of the Supervisors of Maintenance. The Supervisors of Maintenance are called out when an emergency occurs; Grievant is not.

11. Grievant has limited decision-making input and little input into budgetary decisions. Supervisors of Maintenance have greater independence and control over their areas, and greater input into budgetary decisions.

12. While the amount varies from position to position, in general, the Supervisors of Maintenance are required to possess specific knowledge and expertise in a specific area. Supervisory or leadership experience is either required of preferred. Grievant's position does not require prior leadership experience, only leadership ability.

13. Grievant seldom travels in her position except to and from her place of work at the Crede Warehouse. Occasionally, Grievant drives one of the vehicles belonging to the warehouse. 14. Sometime in 1994 - 1995, one of the Supervisors of Maintenance told

Grievant she would never make as much money as he did because she was a woman. This Supervisor of Maintenance has never had any type of control over Grievant's position, and indeed, is supervised by a separate supervisor. No one in authority over Grievant, nor any other Supervisors of Maintenance, have indicated any type of gender bias toward Grievant.

Discussion

Because a misclassification grievance is non-disciplinary in nature, Grievant has the burden of proving her case by a preponderance of the evidence. Perdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (Mar. 29, 1993). "In order to prevail in a misclassification grievance an employee must establish, by a preponderance of the evidence, that her duties more closely match those of another W. Va. Code §18A-4-8 classification than that under which [her] position is categorized." Porter v. Hancock County Bd. of Educ., Docket No. 93-15-493 (May 24, 1994). Hamilton v. Jackson County Bd. of Educ., Docket No. 91-18-264 (Mar. 31, 1992). Conversely, simply being required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render a grievant misclassified, per se. Hamilton v. Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1991). Additionally, when a statutory definition is very generally worded, as here, it must be broadly applied. Sites and Murphy v. Pendleton County Bd. of Educ., Docket No. 94-36-1112 (May 31, 1995). A county board of education is required by W. Va. Code § 18A-4-8b to review each service personnel's jobdescription annually and reclassify all service personnel as required by the job classifications.

Although the issues are overlapping, this grievance will be discussed as two separate issues: misclassification and discrimination.

1. Misclassification

A careful review indicates Grievant performs some of the same type or similar duties as other Supervisors of Maintenance, but frequently not to the same level or with the same amount of independence or input. See Thacker v. Lincoln County Bd. of Educ., Docket No. 97-22-104 (Dec. 1, 1997); Wilkinson v. Lincoln County Bd. of Educ. Docket No. 95-22-248 (Sept. 7, 1995). Supervisors of Maintenance are frequently involved with the purchase and selection of equipment and supplies for their area. The information presented at hearing did not reflect

Grievant as having the same degree of involvement and control.

An example should be helpful in clarifying this statement. When the Supervisors of Maintenance wish to order a piece of equipment such as a gear switch or a sand blaster, they give the purchasing department, after consultation with Mr. Shew, the specifications for the article. After bids are received, if they are necessary, the Supervisor of Maintenance compares the specifications with the bid specifications to see if they are sufficient to meet the requirement for the equipment.

This process is not the same for Grievant. When a piece of equipment has problems, Grievant "suggests" to Mr. Richardson, her supervisor, that the situation be checked, and he works with Grievant to determine the need. If new equipment is needed,Grievant obtains the model or serial number from the existing equipment, and Mr. Tim Easterly, a buyer in the Purchasing Department, or Mr. Richardson develop the specifications. (Testimony of Grievant, Mr. Richardson, and Mr. Easterly.) For example, Mr. Richardson told Grievant the warehouse needed a new supply truck, and asked her to work with the driver to find out what the driver would want in and on a new vehicle. Grievant did this and took the driver's requests and list to Mr. Richardson. Mr. Richardson made the final decision about the type of vehicle that would be ordered.

2. Discrimination

A. Gender Discrimination

Grievant has alleged both gender discrimination and discrimination, in general. 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." Both of Grievant's allegations of discrimination must be reviewed against the above-stated definition. (See footnote 5) **To prove discrimination a grievant must establish a prima facie 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 exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the 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 alleged sexual discrimination on two bases. First, a Supervisor of Maintenance once told her she would never be paid the same amount as he, because she was a woman. This employee does not work in Grievant's department, does not have the same supervisor, and in no way has any control or input into her position and its salary. While the remark was inappropriate and rude, it does not rise to the level of proving the KCBOE is guilty of sexual discrimination. Additionally, Grievant's own testimony indicated she had never experienced sexual discrimination from any of her supervisors at KCBOE. (See footnote 6)

The second reason Grievant complains she has been sexually discriminated against must also fail. Grievant complains that because all the Supervisors of Maintenance are male, and she is the only foreman, and she is female, this is clear evidence of discrimination. This argument flies in the face of the facts of the situation. At the time theother Foremen positions were changed from Foremen to Supervisors of Maintenance in 1989, the Warehouse Foreman position was filled by a male. His position remained as a Foreman position, and was still a Foreman when Grievant applied for and received the position. This set of facts will not support a finding of sexual discrimination.

B. Discrimination in general

Grievant also argues she has been discriminated against as she is similarly situated to the other employees classified as Supervisors of Maintenance. She maintains she performs the same work as they and has not been treated in the same way. Grievant has failed to meet her burden of proof. Although Grievant does perform some duties similar to the Supervisors of Maintenance, such as evaluating employees and supervising each aspect of the warehouse, the level of her expertise, input into decision-making, in general, and in budget decisions, in particular, do not rise to the same level as the other Supervisors of Maintenance. Additionally,

Grievant does not supervise a school catchment area as the other Supervisors of Maintenance are required to do. (See footnote 7) As is clear by the pay grade for the two positions of Foreman and Supervisor of Maintenance, the expectations of the two positions are different, and the level of control, the area of control and the degree of control are less for a foreman. Grievant's job duties are less than those of a Supervisor of Maintenance. Grievant is correctly classified as a Foreman, and the differences in her classification are directly related to her actual job responsibilities.

3. Use of a county vehicle

One other argument must be addressed. Grievant alleges she has been discriminated against because she has not been afforded a car as have the other Supervisors of Maintenance. The use of vehicles is controlled by W. Va. Code § 18-5-13 (15) which states a board of education may allow employees to use a county vehicle if "the usage is subject to the supervision of the board and is directly connected with and required by the nature and in the performance of the employee's duties and responsibilities . . . ." Since Grievant is not required by her position to travel to various sites in her car with any frequency, and is not subject to emergency call out, as are the Supervisors of Maintenance, KCBOE could not provide her with the use of a vehicle even if she were reclassified as a Supervisor of Maintenance, as the duties of her position do not require a vehicle. For KCBOE to provide a vehicle for Grievant to drive to and from her place of work and home would be a violation of the above-cited Code Section.

The above-discussion will be supplemented by the following findings of fact and conclusions of law.

Conclusions of Law

1. Boards of education are required to classify service personnel according to the duties they perform. W. Va. Code §§18A-2-5 and 18A-4-8.

2. "In order to prevail in a misclassification grievance an employee must establish, by a preponderance of the evidence, that her duties more closely match that of another W. Va. Code §18A-4-8 classification than that under which [her] position iscategorized." Porter v. Hancock County Bd. of Educ., Docket No. 93-15-493 (May 24, 1994). See Gregory v. Mingo County Bd. of Educ., Docket No. 95-29-006 (June 19, 1995); Hamilton v. Jackson County Bd.

of Educ., Docket No. 91-18-264 (Mar. 31, 1992); Hatfield v. Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1991).

3. Grievant has failed to demonstrate she is misclassified and has not demonstrated the duties she performs more closely match those of a Supervisor of Maintenance as opposed to a Foreman.

4. Grievant has failed to establish any type of discrimination in the actions of KCBOE, either of gender discrimination or discrimination in general.

5. W. Va. Code § 18-5-13(15) would prevent the assignment of a vehicle to Grievant, as her duties and responsibilities do not, by their nature and performance, require county provided transportation.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 19, 1999

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney James Withrow.

Footnote: 2

As no evidence on favoritism was presented, this argument is deemed abandoned.

Footnote: 3

Although it appears this classification would apply to Grievant's duties, the parties did not see this classification as appropriate. It is noted this classification is two pay grades lower than the one to which Grievant is currently assigned and receives less compensation.

Footnote: 4

The testimony of Mr. Charles Kemplin was introduced by Grievant to demonstrate that the duties alleged were not performed by the Supervisors of Maintenance. Mr.Kemplin had acted in the role of Painting Supervisor from time to time for varying amounts of time: one time for four weeks, another for several months. Many of these acting supervisor situations occurred before the Supervisors of Maintenance also became Area Supervisors of Maintenance. He stated he assigned jobs, called in substitutes, and completed time sheets. He indicated he ordered nothing and everything he needed was in stock. Mr. Shew testified the expectations for individuals serving in an acting capacity were to cover the day to day activities, and when a Supervisor of Maintenance was absent for an extended period, he assumed many of their duties. Thus, while Mr. Kemplin's testimony was seen as credible, it was not deemed helpful to proving Grievant's case as Mr. Shew's testimony was credible and unrebutted.

Footnote: 5

Due to the broader definition of discrimination contained in W. Va. Code § 18-29- 2(m) it is not necessary to analyze Grievant's claim of gender discrimination under the Human Rights Act, as such claims are subsumed by the W. Va. Code § 18-29-2(m) claim. See Vest v. Bd. of Educ., 193 W. Va. 227, 455 S.E.2d 781 (1995). It is noted these are statutes under which Grievant works as defined in the grievance procedure for education employees. W. Va. Code §18-29-2(m). Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R- 215 (Sept. 24, 1996). See generally Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

Footnote: 6

It is unclear when KCBOE learned of this statement. No evidence was presented as to when the statement was made, and whether or when Grievant informed KCBOE.

Footnote: 7

Grievant noted this duty was added after she filed this grievance. Since she presented no evidence that this addition was made to defeat this grievance, this issue need not be addressed further.