CAROLYN SUE MYERS, et al.,

Grievants,

v. **Docket No. 01-13-013**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Carolyn Sue Myers, Diana Borror-Garlow, and Kim Gorman ("Grievants") initiated grievances in September and October of 2000, alleging entitlement to a $6,250 payment which was made to other secretaries in their classification by Respondent Harrison County Board of Education ("HCBOE"). Grievants' supervisors lacked authority to grant relief at level one, and the grievances were consolidated for a level two hearing, held on October 30, 2000. The grievance was denied in a written level two decision on January 4, 2001. Level three consideration was bypassed, and Grievants appealed to level four on January 16, 2001. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on March 26, 2001. Grievants were represented by counsel, Michael J. Florio, and Respondent was represented by counsel, Basil R. Legg, Jr. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on May 9, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant Myers is employed by Respondent as a Secretary III and is assigned to the Central Office. 2. Grievant Borror-Garlow is employed by Respondent as a Secretary III and is assigned to the Maintenance Department.

3. Grievant Gorman is employed by Respondent as a Secretary III and is assigned to the Transportation Department.

4. On June 10, 1998, five secretaries sent a memorandum to then- Superintendent Robert Kittle, requesting "reclassification," because another Secretary III employed at their work location (the

Central Office) was employed under a 261-day contract, while they were employed under 240-day contracts. These secretaries were employed in the Secretary III classification and assigned to the Central Office.

5. Employees with 240-day contracts are required to take 21 days of unpaid vacation each year, while 261-day employees receive that amount in paid vacation days.

6.` The request filed by the five secretaries was placed on “hold” status, pending the outcome of another grievance involving similar claims, which was ultimately decided by the West Virginia Supreme Court of Appeals. See Flint v. Board of Education, 207 W. Va. 251, 531 S.E.2d 76 (1999).

7. After the Flint decision was issued, the five secretaries, through their attorney engaged in negotiations with Sharon Brisbin, Supervisor of Personnel. (See footnote 1) It was ultimately agreed that the five secretaries would each receive a payment of $6,250, which was approved by the Board on September 19, 2000, and was referred to in the Board minutes as a “grievance settlement.” 8. Sheila Harrison was employed by Respondent as a Secretary III at the Central Office under a 261-day contract until her retirement on July 1, 1998. Respondent has not employed any Secretary III as a 261-day employee since Ms. Harrison's retirement.

9. Effective July 1, 2000, all HCBOE employees who previously held 240-day contracts were converted to 250-day employees, with ten days of paid vacation.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Grievants allege that, because no actual grievance was ever filed by the five secretaries who received the $6,250 payment, the payment constituted additional compensation which should have been provided to all Secretary IIIs. They contend that Respondent's actions in this regard constituted violations of the uniformity, discrimination and favoritism statutes. Respondent argues that it acted within its authority to settle a potential grievance by these secretaries, who asserted a uniformity violation in their June 10, 1998, memorandum to Superintendent Kittle. The Board further contends that Grievants are not similarly situated to the five

secretaries who received the payment, so no uniformity or other statutory violations have been committed.

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 andperforming like assignments and duties within the county[.]” Grievants believe that, because they share the same classification as the five secretaries who received the settlement payment, the uniformity statute entitles them to the same compensation. However, regardless of whether the payment made in this case is referred to as salary, compensation, or a settlement, one key element of the uniformity analysis is missing, in that the record in this grievance lacks evidence that Grievants perform “like assignments and duties” to the other five secretaries. While it is true that Grievants and these secretaries share the same classification title, this alone does not establish that they are performing similar or the same duties. Boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000); Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

In Flint, supra, while it was determined that two of the grievants had established a uniformity violation by showing that they shared the same classification as another employee who was employed under a longer contract term, it was also established that the other employee performed the same duties as the grievants. In fact, the grievants proved that they worked side-by-side and on the exact same schedule as the other employee. See Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998). In the instant case, although Grievant Myers is also assigned to the Central Office, there is absolutely no evidence regarding the job duties of the grievants as compared to the five secretaries who received the payment. In fact, it is doubtful that Grievants Borror-Garlowand Gorman would be able to sustain their claim even with such evidence, since they are assigned to entirely different departments. Nevertheless, absent such evidence, Grievants' claim of a uniformity violation must fail.

For similar reasons, Grievants have not proven discrimination and favoritism violations. 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." W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism, grievants must establish the following:

> (a)that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b)that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); See Flint, supra.

Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason to substantiate its actions. Thereafter, grievants may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't ofCommunity Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievants cannot make a prima facie case of discrimination or favoritism pursuant to the above standard without evidence that they are similarly situated to the five secretaries who received the payment from Respondent. As discussed above, there is no evidence in the record which would indicate that Grievants are performing similar job duties to the other five individuals. Moreover, the evidence which has been introduced actually indicates that Grievants are not similarly situated. While Grievants testified that they knew about the ongoing Flint case and heard rumors of various grievances being filed regarding the uniformity in contract term issue, they took no steps to preserve their rights in this regard while Ms. Harrison--the last 261-day Secretary III_was employed by the Board. The other five secretaries elected to take action, requesting the appropriate relief from the Superintendent, then negotiating a settlement of their claim. Grievants have not established that they

are similarly situated to the five secretaries who received the settlement.

Grievants' frustration is understandable, in light of the large amount of the payment which has been given to these five individuals, who are employed in the same classification as they are. Grievants have contended in this proceeding that the other secretaries should not have received a payment when they did not actually file a grievance. However, this Grievance Board has previously recognized that boards of education are permitted to “head off” potential grievances by engaging in negotiations and settlements prior to any formal action being filed. Porter v. Marion County Bd. of Educ., Docket No. 97-24-473(June 11, 1998). In addition, we have long recognized the principle that grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). Similarly, the West Virginia Supreme Court of Appeals has observed that "the law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation." McDowell County Bd. of Educ. v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994). It has not been proven here that this settlement contravened any of the applicable laws or any public policy.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. 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. Grievants have not proven by a preponderance of the evidence that they are performing “like assignments and duties” to the five secretaries who received a settlement payment in September, 2000. 4. 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."

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

6. In order to establish a prima facie case of discrimination or favoritism, grievants must establish the following:

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

(b)that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); See Flint v. Bd. of Educ., 207 W. Va. 251, 531 S.E.2d 76 (1999).

7. Grievants have failed to establish a prima facie case of discrimination or favoritism.

8. Grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). 9. It has not been proven by a preponderance of the evidence that the settlement paid to five secretaries in the Central Office contravened any law or public policy or was unfairly made.

Accordingly, this grievance is **DENIED**.

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

Date: May 23, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The evidence revealed that Board counsel Basil R. Legg, Jr., was not consulted during these negotiations, nor was the former superintendent involved. However, while much ado was made of this at the level four hearing, it has no effect on the ultimate outcome of this Decision.