DR. PAT J. WHITE,

Grievant,

v.

DOCKET NO. 02-23-419

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dr. Pat J. White, filed this grievance against his employer, the Logan County Board of Education ("Board") on October 8, 2002:

> Violation of § 18A-4-5A in that I, Dr. Pat J. White, do not receive and have not received a county salary supplement that is uniform with other persons performing like assignments & duties within Logan County. Also failure to comply with Title I budget approved by State insofar as Project Director's salary is involved, therefore in violation of Title I assurances signed by county.
>
> Relief sought: Back wages and increased salary to reflect uniformity in county supplement and the budgeted Title I project.

Following adverse decisions at the lower levels, Grievant appealed to level four on December 23, 2002. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on March 3, 2003, and this grievance became mature for decision on April 6, 2003, the deadline for the parties' submission of proposed findings of fact andconclusions of law. Grievant was represented by Rebecca Mick, Esq., Crandall, Pyles, Haviland & Turner, and the Board was represented by Leslie K. Tyree, Esq., General Counsel.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Employee Assignments/Contracts for Walter H. Watson, Jr., 1997-2003.

Ex. 2 -

Employee Assignments/Contracts for Brenda K. Williamson, 2003.

Ex. 3 -

Logan County Schools Administrators Salary Information, 2001.

Ex. 4 -

Employee Assignments/Contracts for Pat J. White, 1998-2003.

Ex. 5 -

Employee Assignments/Contracts for Brenda K. Skibo, 1997-2003.

Ex. 6 -

Employee Assignments/Contracts for David M. Godby, 1999-2003.

Ex. 7 -

July 9, 1998 handwritten note.

Ex. 8 -

Central Office Administration Supplement Schedule (240 Days)

Ex. 9 -

Handwritten chart of county supplements for 200 days.

Ex. 10 -

Other Professional County Supplements.

Ex. 11 -

Logan County Teacher Salary Schedule 2002-2003.

Ex. 12 -

Logan County Teachers Salary Schedule 2002-2003.

Ex. 13 -

Logan County Service Personnel Salary Schedule 2002-2003.

Ex. 14 -

Professional Contract of Employment for Brenda Skibo; Employment Data Forms for Pat J. White and Raymond Woolsey.

Ex. 15 -

Personnel Schedules.

Ex. 16 -

Employee Assignments/Contracts for Raymond Woolsey.

Ex. 17 -

Assistant Superintendent Job Description.

Ex. 18 -

Assistant Superintendent Job Descriptions.

Ex. 19 -

Organization Chart.

Ex. 20 -

Transportation Coordinator/Bus Supervisor Job Description.

Ex. 21 -

Supporting Activities Completed; Additional Job Assignments.

Ex. 22 -

Director of Federal Programs (ESSIA Chapter I) Job Description.

Ex. 23 -

Composite Budget Description NCLB Title I Budget.

Board Exhibit

Ex. 1 -

Professional Contract of Employment for Pat J. White.

Testimony

Grievant testified in his own behalf, and presented the testimony of Walter Watson and David Godby. The Board presented the testimony of Wilma Zigmund and Patricia Young.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is currently employed by the Board in the capacity of Assistant Superintendent/Director of Title I.

2. Walter Watson is currently employed by the Board in the capacity of Assistant Superintendent/Treasurer/Business Manager.

3. Brenda Skibo was employed by the Board as an Assistant Superintendent and Superintendent until approximately October 2002.

4. David Godby is currently employed by the Board as Superintendent, and was employed as Director of Title I and Assistant Superintendent.

5. At all times pertinent to this grievance, the Board has paid its Assistant Superintendents the same flat-rate salary, with some slight differences that will be discussed further.

6. Grievant was hired as an Assistant Superintendent in school year 1997-1998, replacing Raymond Woolsey. Ms. Skibo was an Assistant Superintendent that year, and Mr. Watson was Business Manager/Treasurer. (See footnote 1) That year Grievant, Ms. Skibo and Mr. Watson were paid $58,245.03 on 261-day contracts. (See footnote 2)

7. In school year 1998-1999, Grievant and Mr. Watson were paid $59,231.61, but Ms. Skibo was paid $64,451.61. Ms. Skibo was the Assistant Superintendentresponsible for personnel. The Vocational Director retired, and the Board saw an opportunity to eliminate a position. The Board

asked Ms. Skibo if she would assume responsibility for vocational programs. Ms. Skibo agreed to assume the duties of the Vocational Director, and the Board paid her an additional $20.00 per day for school year 1998-1999, resulting in her higher salary.

8. In school year 1999-2000, Grievant and Mr. Watson were paid $63,638.40. Ms. Skibo was paid $68,857.20.

10. In school year 2000-2001, Grievant and Mr. Watson were paid $64,545.60. Ms. Skibo was paid $70,825.20.

11. In school year 2001-2002, Ms. Skibo became Superintendent, and Mr. Godby was hired as Assistant Superintendent. The Board saw another opportunity to eliminate a position, that of Director of Title I, and asked Mr. Godby to retain his Title I duties as Assistant Superintendent. He agreed, and the Board paid him the same $20.00 per day it had paid Ms. Skibo for assuming additional responsibilities.

12. That same year, 2001-2002, Mr. Watson officially became Assistant Superintendent/Treasurer/Business Manager. Grievant and Mr. Watson were paid $71,172.09, and Mr. Godby was paid $76,848.84.

13. In school year 2002-2003, Ms. Skibo left the Board's employ, and Mr. Godby became Superintendent. Grievant and Mr. Watson are the only Assistant Superintendents at this time. Grievant's salary is $74,184.03, and Mr. Watson's salary is $73,440.18. The slight discrepancy in their salaries is the result of legislation which created an increment payment for 29-plus years of service. Grievant has 29 years of service, and Mr. Watson has 28, and therefore, he did not receive the increment payment. 14. When Mr. Godby became Superintendent, he asked Grievant to assume the Title I duties. Grievant agreed to assume those duties, but was not paid any additional monies. Mr. Watson was asked to assume responsibility for facilities, but he also was not paid any additional monies.

15. The Board uses a computer program to calculate employee salaries. First, a “table amount” is entered into the computer. The table amount is the statutory minimum salary set forth in the salary schedules found in the West Virginia Code for school employees. These schedules calculate a minimum salary based upon degree level for professional employees, or classification for service employees, and years of service.

16. County boards of education can pay employees more than the statutory minimum salary. In

some instances, the statutory minimum salary is “supplemented” by county funds.

17. For instance, in school year 2002-2003, the Board paid all of its directors the same county supplement of $9,375.00, in addition to their statutory minimum salaries. See LIV G. Ex. 3.

18. On the computer program, there is an entry where this “supplement” can be recorded, called “other amount.” Thus, the director's statutory minimum salary (“table amount”), plus the uniform county supplement (“other amount”), equals the director's “total” salary, based upon a 200-day contract. (See footnote 3) For employees with 261-day contracts, the computer calculates a pro-rata amount based upon the 200-day contract total, and addsthe difference between 200 and 261 days, resulting in a “contract amount.” For one director, the above is illustrated as follows:

Table Amount:

$44,781.00

Other Amount: 9,376.00

Total:

54,157.00

Adjusted Amount:

54,157.00

Contract Amount:

64,988.40

See LIV G. Ex. 2.

19. Superintendents and Assistant Superintendents are paid differently than directors, teachers, or service personnel. They are given flat-rate salaries agreed upon by the Board and themselves. In the case of Assistant Superintendents, the Board decided it would pay them the same salary.

20. The computer program used by the Board has data fields that must be completed, and so it cannot compute a flat rate salary. Therefore, the Assistant Superintendents' statutory minimum

salaries are entered into the “table amount.” The agreed-upon higher salary is the “total” amount. The computer then subtracts the statutory minimum (table amount) from the negotiated salary (total amount), and plugs the difference into the “other amount” category. Then the computer continues to calculate just as it does with any other employee. It takes the adjusted amount, pro rates it based upon 200 days, adds the difference for a 261-day contract, and comes up with the “contract amount.”

21. Looking at the 2001-2002 school year, Grievant's and Mr. Watson's salary computations are as follows:

Grievant	Mr. Watson
Table Amount:	
42,994.00	Table Amount: 41,168.00
Other Amount:	
11,544.00	Other Amount: 13,370.00
Total:	
54,538.00	54,538.00
Adjusted Amount:	
54,538.00	Adjusted Amount 54,538.00
Contract Amount:	
71,172.09	Contract Amount: 71,172.09

See LIV G. Exs. 1, 4. (See footnote 4)

22. In order to make the final salaries for Grievant and Mr. Watson the same, the “other” amount for Mr. Watson is higher than Grievant's, but Grievant's table amount is higher than Mr. Watson's.

23. The “other amount”, when calculating the Assistant Superintendents' salaries, is merely a function of the computer program used by the Board, and does not reflect a county “supplement.”

24. Grievant's salary calculation is done in exactly the same way as any other Assistant Superintendent in the county.

DISCUSSION

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 § 4.21 (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. "The preponderance standardgenerally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant alleges the Board has violated the uniformity provisions of W. Va. Code § 18A-4-5b by not paying him the same “supplement” as Mr. Watson. Grievant also alleges he has been the victim of discrimination and favoritism because he has not received an additional $20 per day for assuming additional duties, as did Ms. Skibo and Mr. Godby in years past. The Board argues that Assistant Superintendents do not receive county “supplements,” and thus Code § 18A-4-5b does not apply, and denies any discrimination or favoritism has occurred with respect to Grievant's assignment of duties and salary calculation.

County boards of education may establish salary schedules in excess of state minimum salaries, provided they are uniform for all salaries, rates of pay, benefits, increments or compensation for all

regular employees “performing like assignments and duties within the county.” W. Va. Code § 18A-4-5b. Grievant has looked at Mr. Watson's “other amount,” seen that it is higher than his “other amount,” and concluded Mr. Watson has received a higher county “supplement” than he, in violation of Code §18A-4-5b. This is incorrect. Assistant Superintendent salaries are not based upon the statutory minimum salary schedules, nor do they receive county “supplements.” The reason Mr. Watson's “other amount” is higher than Grievant's is because Grievant's “table amount” is higher than Mr. Watson's. In order to equalize their salaries, that is the amount needed to be added to Mr. Watson's table amount. It is merely a computer fiction that Mr. Watson hasbeen given some “higher” amount than Grievant. In the end, their salaries are exactly the same. They merely reflect an amount the Board determined it could pay Assistant Superintendents, irrespective of degree level, seniority, years of service, or any other qualifying factor. It is simply a flat-rate amount that needed to be put into a computer program which was not designed to handle flat rate amounts. The uniformity provisions of W. Va. Code § 18A-4-5b simply do not apply to the calculation of the Assistant Superintendents' salaries, and thus, there can be no statutory violation.

W. Va. Code § 18-29-2(m) defines “discrimination” 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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a 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. Thereafter, the grievant 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. Dept. ofCommunity Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Favoritism is similarly defined by W. Va. Code § 18-29-2(o) 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 favoritism, Grievant must establish the following:

(a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if a grievant establishes a prima facie case of favoritism, an employer may rebut this showing by articulating a legitimate reason for its action. However, the grievant can still prevail if he can demonstrate that the reason proffered by the employer was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, supra; Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant claims discrimination and favoritism because he should have been paid equally with Ms.

Skibo and Mr. Godby, at the time the Board paid them $20 per day forassuming additional duties. He also claims he should receive additional monies now, as he agreed to assume the Title I duties.

At the time Grievant became an Assistant Superintendent, in school year 1997- 1998, he was responsible for Administration and Transportation, and Brenda Skibo was responsible for Personnel, and they were paid the same amount of money. It was not until Ms. Skibo took on additional duties that she began making more money than Grievant as Assistant Superintendent.

In school year 1998-1999, Ms. Skibo, while Assistant Superintendent, was paid an additional $20 per day for assuming the duties of Vocational Director, a position which was eliminated, and continued to receive those additional monies until she became Superintendent in school year 2001-2002. At that time, Grievant did not assume any additional duties.

In school year 2001-2002, David Godby, while Assistant Superintendent, was paid an additional $20 per day for retaining the duties of Title I Director, and he continued to paid those monies until he became Superintendent in school year 2002-2003. At that time, Grievant did not assume any additional duties.

In October 2002, when Mr. Godby became Superintendent, he asked Mr. Watson to take on additional responsibilities for Facilities, and he asked Grievant to assume the Title I Director duties he had previously held. Mr. Godby decided not to pay either Assistant Superintendent any additional monies for assuming these duties.

Grievant has established a prima facie case of discrimination and favoritism with regard to Ms. Skibo and Mr. Godby. Both were employed as Assistant Superintendents at the same time as Grievant, but Ms. Skibo and Mr. Godby received additional monies thatGrievant did not. However, the Board has articulated a legitimate, business reason for the differences in salaries among the three. Ms. Skibo and Mr. Godby were given additional duties above and beyond that of Assistant Superintendent and Grievant was not. Just as there is no statute or law which mandates the Board pay its Assistant Superintendents the same salaries, there is nothing which prohibits it from paying one or more of them additional monies for assuming additional duties. The Board saw opportunities to eliminate some positions by combining titles and duties, and paid those individuals additional monies for agreeing to assume the additional work. Grievant has failed to establish he was discriminated against compared to Ms. Skibo or Mr. Godby when they were Assistant Superintendents.

Currently, only Grievant and Mr. Watson are Assistant Superintendents. Both have been asked to assume additional duties by current Superintendent Godby, but have received no additional monies. Clearly, this treatment is different than that received in the past by Ms. Skibo and Mr. Godby; however, as between Grievant and Mr. Watson, they are being treated the same. There is nothing which mandates the Board continue to compensate its Assistant Superintendents additional monies for assuming additional duties because it did so in the past. Grievant has failed to establish any discrimination or favoritism exists currently between him and Mr. Watson.

CONCLUSIONS OF LAW

1. 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 § 4.21 (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. County boards of education may establish salary schedules in excess of state minimum salaries, provided they are uniform for all salaries, rates of pay, benefits, increments or compensation for all regular employees "performing like assignments and duties within the county." W. Va. Code § 18A-4-5b.

3. W. Va. Code § 18A-4-5b does not apply to the flat rate salaries set by the Board for its Assistant Superintendents, and thus there can not have been any statutory violation in the setting of Grievant's salary.

4. W. Va. Code § 18-29-2(m) defines "discrimination" 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a 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. Thereafter, the grievant 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. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

5. Favoritism is similarly defined by W. Va. Code § 18-29-2(o) 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 favoritism, Grievant must establish the following:

(a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See See McFarland v.

Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if a grievant establishes a prima facie case of favoritism, an employer may rebut this showing by articulating a legitimate reason for its action. However, the grievant can still prevail if he can demonstrate that the reason proffered by the employer was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). 6. Grievant has failed to establish discrimination or favoritism with respect to the setting of his salary versus those of Ms. Skibo, Mr. Godby, and Mr. Watson.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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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MARY JO SWARTZ

Administrative Law Judge

Dated: May 5, 2003

Footnote: 1

The Board has always considered Mr. Watson's position to be equal to that of an Assistant Superintendent, and has paid him accordingly.

Footnote: 2

All Assistant Superintendents are employed for 261-days.

Footnote: 3

The computer is set up to calculate based upon a 200-day employment contract.

Footnote: 4

The 2001-2002 school year is used for illustrative purposes because the 2002-2003 school year calculation reflects the slight difference in salary caused by the 29-year increment given to Grievant.