ARTHETTA BROWNING and

BARBARA WILSON,

Grievants,

v v.

Docket No. 04-50-146

WAYNE COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievants, Arthetta Browning and Barbara Wilson, filed this grievance on or about November 14, 2003, against their employer, the Wayne County Board of Education ("WCBOE" or "Board"). Grievant Browning's Statement of Grievance states: (See footnote 1)

> Violation of WV Code 18A-4-5a, 18-29-2 section "m" discrimination and 18- 29-2 section "o" favoritism with regard to uniformity of employment days. Grievant is substantially similarly situated with other directors under 261 day contracts.
>
> Relief sought: Relief sought is for Grievant to be granted 261day contract with any compensation and benefits due back to 1999.

These grievances were denied at all lower levels. Grievants appealed to Level IV on April 19, 2004, and a Level IV hearing was held on June 1, 2004, at WCBOE's Board office, at the request of the parties. This case became mature for decision on July 16, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievants assert that while their duties are not exactly the same as other directors, they do perform "like assignments and duties" as required by W. Va. Code § 18A-4-5a and they should receive a 261-day position instead of their current 240-day position. (See footnote 3) Additionally, Grievants assert WCBOE's failure to grant them 261-day contracts is demonstrates discrimination

and favoritism. Grievants did not appear to want to take off all the vacation time they would receive with a 261-day position, but wish to be paid for the extra time they are putting in.

Respondent maintains Grievants did not prove they perform "like assignments and duties" and were only able to compare their duties in a cursory manner. Additionally, Respondent notes that if these grievances were granted, W. Va. Code § 18-29-3(v) limits the relief to one year in a grievance dealing with a continuing practice.

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

Findings of Fact

1. WCBOE employees who hold 261-day employment contracts receive vacation days in accordance with a sliding scale that is based upon the number of years the employee has worked for WCBOE.

2. WCBOE employees who hold 240-day employment contracts, including Grievants, take 21 “non-calendar” days annually. (See footnote 4) Non-calendar days are days when anemployee does not work and does not receive compensation. Employees in 240-day positions do not receive vacation.

3. Grievant Browning, who received her Doctorate in 1999, was employed as the Director of Technology and Staff Development. After thirty-three years with WCBOE, she retired on May 31, 2004. (See footnote 5)

4. Grievant Browning was initially hired as a Supervisor, but applied for and received a Director's position after it was posted in 1996. The position was posted as a 240-day position. She is listed as a Director of an Instructional Service.

5. When Grievant Browning first received the position, there were approximately 200 computers in the schools. Now there are approximately 3,000 computers within the school system, as well as distance learning facilities in all the schools. Grievant Browning duties include being in charge of all the computers, all business learning installations, E- rate payment, Title V, and staff development. Because she does the majority of the staff development during the summer, she routinely donates part of her off time to complete the duties of her position. Grievant Browning writes grants, is responsible for two schools, actively participates on the curriculum committee, and is

responsible for a budget.

6. Grievant Wilson, who has a MA+45, has been employed by WCBOE for thirty-two years. She worked eighteen years as a teacher, six years as a vocational supervisor, and nine years in her current position as Director of Child Nutrition, Food Services, and Supervisor of Art. She is listed as a Director of a Support Service. 7. Grievant Wilson's duties include being in charge of all food and nutritional concerns for nineteen schools; supervising, testing, and training approximately 75 cooks; working with all the secretaries and principals in all the schools; overseeing a two million dollar budget; completing a yearly nutritional budget; visiting and evaluating each school on a yearly basis as required; supervising all vending issues; managing commodity distribution; and dealing with food orders and subsequent invoices. Additionally, Grievant Wilson's work with summer programs has increased each year and is a source of funding for WCBOE. She does much of the staff development before the start of school each year, and is also involved in grant writing as it relates to food services and nutrition. Grievant Wilson also supervises the county's art programs, and is responsible for two schools as are the majority of the other directors.

8. Grievant Wilson had a 240-day position prior to the 2002 - 2003 school year. In the Summer 2002, Grievant Wilson was asked to perform even more duties than she normally does. She told her supervisor she would be willing to do so if she received a 261- day contract. Her supervisor went to WCBOE with this request, and Grievant Wilson was then given ten additional days which she did not want. She now has a 250-day contract and works more days than the employees in 261-day positions. Because of her work load this past year, Grievant Wilson was unable to take off all the non-calendar days she is entitled to receive.

9. The Directors who have 261-day positions are: 1) Dennis Bradley, Director of Secondary Education and Vocational Schools; 2) Annette Schoew, Director of Federal Programs; 3) James Ross, Director of Personnel and Supervisor of Music; 4) Dinah Ledbetter, Director of Certification, Library Services, and Alternative Schools; 5) Jay Fry,Director of Research, Planning, and Operational Facilities; and 6) Dwight Russell, Director of Transportation. (See footnote 6) It is noted that three of the positions are listed as Instructional and three are listed as Support, and four of these six Directors are male. Their duties are similar to the duties Grievants perform, and are limited to their designated areas.

10. The Directors who have 240-day positions are: 1) Grievant Browning; 2) Grievant Wilson;

3) Glenna Plymale, Director of Middle Schools/Testing and Guidance; and 4) Della Ryan, Director of Special Education. (See footnote 7) Their duties are similar to the duties Grievants perform, and are limited to their designated areas. (See footnote 8) Many of these directors are involved in grant writing, budget concerns, and curricular issues. Most Directors have seen an increase in their total duties. All the 240-day positions are filled by females.

11. Katie Casey is a Director of Elementary Education and an Administrative Assistant. She has a 261-day position.

12. Director Bradley's duties have increased over the years. His 240-day position was changed to a 261-day position when he agreed to assume additional responsibilities. He no longer has the majority of these duties, but continues to maintain the 261-daycontract and has assumed other additional duties. Mr. Ross, Ms. Schoew, and Mr. Fry also began their positions with 240-day contracts, but they received 261-day positions when they agreed to an increase of duties.

13. Grievants have repeatedly requested to have their positions switched to 261- day positions, but this request has been refused.

14. W. Va. Code § 18A-1-1(c)(4) defines "Central office administrator" as "a superintendent, associate superintendent, assistant superintendent and other professional educators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the countywide school system. . . ."

15. W. Va. Code § 18A-1-1(c)(3) defines "Supervisor" as a "professional educator who, whether by this or other appropriate title, is responsible for working primarily in the field with professional and other personnel in instructional and other school improvement. . . ."

16. W. Va. Code § 18A-4-8 (i)(34) defines a "Director or coordinator of services" as:

> personnel who are assigned to direct a department or division. Nothing in this subdivision may prohibit professional personnel or professional educators as defined in section one, article one of this chapter, from holding this class title, but professional personnel may not be defined or classified as service personnel unless the professional personnel held a service personnel title under this section prior to holding class title of 'director or coordinator of services.' Directors or coordinators of service positions shall be classified as either a professional personnel or service personnel position for state aid formula funding purposes and funding for directors or coordinators of service positions shall be based upon the employment status of the director or coordinator either as a professional personnel or service personnel. . . .

17. There is no written policy or criterion that addresses the difference between a 261-day Director and a 240-day Director. The four Directors whose contracts were increased assumed

additional duties.

18. Grievant Browning and Grievant Wilson have assumed additional duties during their tenure as Directors.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 issues presented by the parties will be addressed separately.

A. Uniformity

Grievants allege WCBOE is violating W. Va. Code §18A-4-5a, which states, in pertinent part, "[t]he board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements" and "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county." The pay uniformity provision for professional employees in W. Va. Code § 18A-4-5a, was discussed in Weimer-Godwin v. Board of Education, 179 W. Va. 423, 369 S.E.2d 726 (1988). The West Virginia Supreme Court of Appeals determined it was not necessary foremployees to be performing identical duties in order to meet the "like assignments and duties" requirement for uniform pay in W. Va. Code § 18A-4-5a. The Court found that when assignments and duties are "substantially similar," the uniformity requirement applies. Thus, in Weimer-Godwin, the county board of education was required to pay the same salary supplement to teachers who provided instruction in general and choral music, as it was paying to teachers who provided instruction in band and string instruments.

Applying the Weimer-Godwin reasoning to this set of facts reveals Grievants are performing substantially similar or like assignments and duties as the 261-day directors to whom they compare themselves. Weimer-Godwin, supra. See Flint v. Harrison County Bd. of Educ., Docket No. 97-17-

348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil Action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, 207 W. Va. 251, 531 S.E. 2d 76 (1999); Airhart v. Wood County Bd. of Educ., Docket No. 99- 54-419 (May 19, 2000), rev'd Wood County Cir. Ct., Civil Action No. 00-P-81 (June 19, 2000), rev'd, No. 30103 (Apr. 5, 2002); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), rev'd on other grounds, Civil Action No. 90-P-86-2 (Cir. Ct. of Harrison County Apr. 15, 1992).

In comparing Grievants to the other Directors, it is clear that while they all function in different areas, they have similar responsibilities and duties within their area of expertise. Additionally, the majority of the Directors have similar duties relating to budgetary concerns, curricular issues, and grant writing. Further, the majority of the Directors, including Grievants, are responsible for two schools. (See footnote 9) It is also noted that the dutiesGrievants are required to perform have increased significantly, similar to the amount of increase of the Directors who received 261-day contracts. Uniformity in contract terms is required when the prerequisite similarity is present.

B. Discrimination and favoritism

In addition, Grievants also assert they are the victims of discrimination and/or favoritism prohibited by W. Va. Code §§ 18-29-2(m) and (o). W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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." Similarly, W. Va. Code § 18-29-2(o) defines "favoritism" to mean "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 and/or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

(a) that she 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 her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); 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 under W. Va. Code § 18-29-2(m), and/or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

In response to the assertions of discrimination and favoritism, Grievants have shown they are similarly situated to other Directors, who have received more favorable contract terms than they have. Respondent did not articulate a legitimate, non-discriminatory reasons for its actions. Mr. Ross, Director of Personnel, testified he did not know how the Board decided who received 261-day contracts. That question would have to be answered by the Board, and he was not privy to their rationale.

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, Grievants have the burden of proving their 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. The failure to provide uniform vacation benefits is a continuing practice. Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil Action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, 207 W. Va. 251, 531 S.E. 2d 76 (1999); Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000), rev'd Wood County Cir. Ct., Civil Action No. 00-

P-81 (June 19, 2000), rev'd, No. 30103 (Apr. 5, 2002). See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.3d 399 (1995); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), rev'd on other grounds, Civil Action No. 90-P-86-2 (Cir. Ct. of Harrison County Apr. 15, 1992).

3. W. Va. Code §18A-4-5b states, in pertinent part that, "[t]he board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements" and "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county."

4. The West Virginia Supreme Court of Appeals determined it was not necessary for employees to be performing identical duties in order to meet the "like assignments and duties" requirement for uniform pay in W. Va. Code § 18A-4-5a; when the assignments and duties are "substantially similar," the uniformity requirement applies. Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988). See Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

5. Grievants perform "substantially similar" duties as other WCBOE Directors in that they have the responsibility and authority to resolve problems and concerns withintheir specific areas. Additionally, they are also similarly situated as Grievants have had a significant increase in their duties as have the Directors whose contracts were increased from 240-day positions to 261-day positions.

6. Discrimination is defined in 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."

7. Favoritism is defined in 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."

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

(a) that she 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 her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. ofEduc., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

10. Grievants have proven a case of discrimination and/or favoritism, as they have demonstrated they have been treated differently as similarly situated employees.

11. Respondent did not offer a legitimate reason to substantiate its actions.

Accordingly, this grievance is **GRANTED**.

WCBOE is directed to issue Grievant Wilson a 261-day contract and to pay both Grievants for the correct amount of vacation days they would have earned if they had been covered by a 261-day contract during the 2003-2004 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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 byW. 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.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: August 31, 2004

Footnote: 1

Although Grievants filed separate grievances, their Statements of Grievance were the same with the same requested relief. The Level II hearing consolidated the grievances and was held on January 28, 2004.

Footnote: 2

Grievants were represented by Susan Hubbard of the West Virginia Education Association, and WCBOE was represented by Attorney David Lycan.

Footnote: 3

The evidence presented about the duties of the Attendance Director was not considered in this Decision. The terms of his contract are controlled by a different Code Section, and he is not similarly situated. See W. Va. Code § 18-8-3.

Footnote: 4

Although this term was not specifically used by the parties, this term has been used in other grievances dealing with similar issues.

Footnote: 5

Although retired, the outcome of this grievance could affect Grievant Browning's retirement and result in additional compensation.

Footnote: 6

This position was somewhat unclear from the record, but it is clear this position is listed under support services, and is filled by Mr. Russell. Grievant's attorney stated in his proposals that the position was a 240-day position, but it is listed in Grievant's Exhibit Number 3 at Level II as a 261-day position. As the Level II Exhibit was admitted into the record, it will be accepted as correct.

Footnote: 7

Carl Steele, Director of Attendance, was not considered as a Director for this grievance. Additionally, Donald Smith, who was a Director with a 240-day position, is now retired. See note 3 supra.

Footnote: 8

Although not clear from the record, it appears the Director of Maintenance has a 261-day position. His duties were not discussed at hearing and will not be addressed further.

Footnote: 9

The exact nature of this responsibility was not explained by the parties.