THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BRENDA TANNER,

Grievant,

v. **Docket No. 06-06-018**

CABELL COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Brenda Tanner, filed a grievance on September 21, 2005, alleging violation of *West Virginia Code* § 18A-4-3, discrimination and favoritism. For relief sought Grievant requests to be compensated "for loss of salary and benefits with interest due for incorrect salary as an administrator." The grievance was denied at Levels I and II, and Grievant bypassed Level III. A Level IV hearing was held at the Grievance Board's Charleston Office on March 29, 2006. Grievant was represented by Susan Hubbard of WVEA, and Respondent was represented by Howard Seufer, Jr., of Bowles Rice McDavid Graff & Love LLP. This case became mature for decision on April 18, 2006, upon the parties' submission of findings of fact and conclusions of law.

Issues and Arguments

Grievant argues that as Assistant Principal of Cabell County Career Technology Center ("Career Center") she is due a county supplement based on enrollment, as is provided to assistant principals of elementary, middle, and high schools. Respondent asserts the Career Center differs significantly from its other schools, and therefore,Grievant is not similarly situated to assistant principals in the other schools throughout the county. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Since the 2004-2005 school year, Grievant has been the Assistant Principal for the Career Center.

2. As Assistant Principal for the Career Center, Grievant is awarded a 235-day employment term contract. Assistant high school principals hold 230-day contracts. Assistant middle school principals hold 215-day contracts, and assistant elementary school principals hold 213-day contracts.

3. The posting for Assistant Principal of the Career Center clearly stated the successful applicant would be paid according to the county salary schedule.

4. For the school years of 2004-2005 and 2005-2006, all principals and assistant principals were paid a daily rate that was a multiple of the basic daily salary for teachers. The multiple, or index, varied according to each individual's degree level and the number of professional educators assigned to his/her school. The indices for assistant principals were exactly half the size of the indices paid to principals. These indices, which were the same for both years, were based on the principal pay provisions of *W.Va. Code* § 18A-4-3.

5. The county salary scales that took effect on July 1, 2004 and July 1, 2005, expressly provided all principals and assistant principals would receive a county supplement, *except* the assistant principal at the career center. Specifically, the Cabell County Board of Education Principal and Assistant Principal Salary Schedule lists both astate index and a county supplement. The state index is based on the number of professional educators assigned to each school on a full time basis. The county supplement is based on enrollment. At the bottom of the document under the section titled “Exceptions to the Above Salary Schedule are as Follows:” the document reads, “The Career Center Assistant Principal salary is determined by the State Assistant Principal FTE 25-38.” Respondent's Level II Exhibit 4. The county supplement was a dollar amount that varied depending upon whether the administrator was assigned to an elementary, middle, or high school, and according to the size of the school's student enrollment.

6. The enrollment at the Career Center fluctuates. While it has an enrollment of over 400 students, there are never more than 200-250 students present at the Career Center at any one time.

7. Currently, the Career Center serves approximately 100 high school vocational students who attend during either the morning or the afternoon, but not both. For the 2004-2005 school year, there

were approximately 140 high school students attending the Career Center half a day. These students are counted as enrolled students at one of the two high schools in the county.

8. The Career Center serves approximately 120 at-risk high school students, but the Career Center is not a “stand alone” school for these students. They are treated as students from the county high schools.

9. The Career Center also serves adult students who participate in adult education programs. In 2005-2006 there were approximately 110 adults attending such programs during the day and 100 other attending the evening programs. No administrator is at the Career Center while the evening programs are in operation. 10. The Career Center has no athletic teams and no extracurricular activities that require evening supervision. In contrast the county's high schools and middle schools have a number of athletic teams and extracurricular activities that require evening supervision.

11. Grievant has no after-hour duties required of her, unlike the assistant principals from other schools.

12. Respondent amended its county salary scales for principals and assistant principals effective November 1, 2005. This amendment was the result of the pay increase given to teachers by the Legislature which was to take effect November 1, 2005.

13. Included in the November 1, 2005, amendment to the principal and assistant principal compensation scales was an increase for Grievant, as assistant principal of the Career Center.

14. Grievant received the increase partly because of the salary increase to teachers, but also, the new Superintendent intends to add duties to Grievant's job. The additions to her duties would further Respondent's plan to improve student attendance and achievement.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep'tof Health and Human Res.*, 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 discrimination and favoritism. “*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.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). Favoritism is 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." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

Grievant asserts that because enrollment was not a factor in determining her salary for school year 2004-2005 and the beginning of school year 2005-2006 Respondent was discriminatory and showed favoritism. 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 or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004). Enrollment was used to calculate the salary of the other principals and assistant principals throughout the county. The Career Center is unique in that, while many students attend throughout the day and evening, the students are transient and are counted as students from one of the two county high schools. Because of the unique nature of the Career Center, Grievant has failed to prove she is similarly situated with assistant principals in elementary, middle, and high schools. First, Grievant's contract differs from any other assistant principal in the county. Also, the Career Center's enrollment varies during day, and the high school students who attend are treated as students from the county high schools. Grievant is not required to supervise the extracurricular activities imposed on assistant principals in elementary, middle, or high schools in the county. Also, Grievant currently has no after hour duties required of her, unlike assistant principals from other schools. Grievant's duties vary dramatically from the duties of assistant principals in elementary, middle or high schools. Therefore, she is not similarly situated to other assistant principals in the county.

Grievant also claimed Respondent violated *W. Va. Code* § 18A-4-3 with respect to uniformity in

salary. *W. Va. Code* § 18A-4-3 provides that principals will be paid an additional salary increment based upon the number of teachers supervised by each principal. That code section also provides increments for assistant principals will be determined in the same manner but will be half of that provided for the principals. The statute further provides that "[n]othing herein shall prevent a county from providing, *in a uniform manner*, salary increments greater than those required by this section." *W. Va. Code* § 18A-4-3 (emphasis added). Respondent has chosen to allow a supplement based on the enrollment figure for the school. In doing so, it considered the various duties preformed by the assistant principals in it's county, and opted to forgo providing Grievant's position with a supplement based on enrollment. By its terms, *W. Va. Code* § 18A-4-3 permits such additional supplements, so long as they are "uniform." *W. Va. Code* § 18A-4-5a likewise mandates that any additional salary increments or compensation awarded to persons performing like assignments and duties within the county must be uniform. *See Weimer-Godwin v. Bd. of Educ.*, 179 W. Va. 423, 369 S.E.2d 726 (1988).

In this case, Respondent's decision to grant supplements based on enrollment has been applied uniformly. Grievant does not perform similar duties to other assistant principals throughout the county.

In addition to the foregoing discussion, the following conclusions of law are appropri ate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See* W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, 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.* 2. "*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.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

3. Favoritism is 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." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

4. *W. Va. Code* § 18A-4-5a likewise mandates that any additional salary increments or compensation awarded to persons performing like assignments and duties within the county must be uniform. *See Weimer-Godwin v. Bd. of Educ.*, 179 W. Va. 423, 369 S.E.2d 726 (1988).

5. Grievant has failed to show Respondent violated any statute or policy in not considering enrollment in her supplement.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County. Any such appeal must be filed within thirty 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. Theappealing 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 31, 2006

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Wendy A. Campbell

Administrative Law Judge