THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JENNIFER FRYE and

WANDA WATTS,

Grievants,

DOCKET NO. 06-50-115

v. M. Paul Marteney,

Chief Administrative Law Judge

WAYNE COUNTY BOARD

OF EDUCATION,

Employer.

DECISION

Grievants filed nearly identical grievances on January 12, 2006, alleging violations of W. Va. Code §§ 18A-4-5b and 18A-4-8 with regards to classification and uniformity of compensation. Both seek to have their positions multiclassified, with appropriate back pay.

A level four hearing was held in the Grievance Board's Charleston office on June 2, 2006. Grievants were represented by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by counsel, David Lycan, Esq. The matter became mature for decision on July 3, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants are both Accountants 2 and seek multi-classified job titles and 261-day contracts. Respondent avers Grievants are appropriately classified for the duties assigned to their positions. Grievants met their burden of proving they should be multiclassified, and based on a comparison of duties to classification definitions, they should be classified as Accountant II/Auditor/Secretary III. Grievants are not similarly situated with other Secretaries III employed in the central office, and are

not entitled to 261-day contracts. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants are employed by the Wayne County Board of Education (WCBOE) as Accountants 2, on 240-day contracts.

2. Grievants both work under the supervision of WCBOE Treasurer John Thompson. Mr. Thompson has no secretary and does some of his own clerical work, but both grievants are responsible in part for preparing memoranda and letters for him.

3. In addition to their financial department duties, both Grievants are assigned on a rotating basis with central office secretaries to cover the central office switchboard when the regular switchboard operator is away for lunch or other extended periods. Grievants each cover the switchboard for about an hour, and occasionally for as much as a half day, about once every two weeks.

4. Ms. Frye spends approximately 95% of her time entering payroll data for Respondent, and these are the same duties she has performed since she began working in her position.

5. Respondent utilizes a statewide computer system, WVEIS, for managing information related to employees and payroll. Although counties can customize queries and reports on the system, no programming is involved. Ms. Frye is responsible for customizing WVEIS for WCBOE.

6. WCBOE has established a written official job description for Accountant II positions. Under the heading “Primary Function/Duties,” the description lists:

> 1. Maintains accounting records and is responsible for the computerized accounting process associated with payroll, insurance, accounts payable, accounts receivable, purchase orders, and related finance office operations.
>
> 2. Performs annual school audits and works with each school to ensure that all pertinent financial regulations and laws are adhered to.
>
> 3. Performs such other tasks and assumes such other responsibilities and duties as assigned by the superintendent or immediate supervisor as needed.

7. Grievants' predominant duties generally fell within these primary functions. These duties are

divided so that Ms. Watts is responsible for insurance payroll deductions and benefits, tax and unemployment, and Ms. Frye is responsible for payroll checks, wages, voluntary deductions, salary adjustments, and direct deposits. Both answer phones and field employee inquiries, open and distribute mail, compile reports, and operate office equipment.

8. During the last fiscal year, the school auditing function of the treasurer's office has been outsourced. Grievants work with the schools when they call with questions about preparing their financial statements and assist them in preparing correct record keeping, and Grievants also perform limited review of school financial statements for accuracy.

Discussion

Ms. Frye seeks to be reclassified as an Accountant 3/Programmer/Secretary 3, while Ms. Watts seeks the classification title of Accountant 3/Auditor/Secretary 3. Both also seek 261-day contracts. Because a misclassification grievance is non-disciplinary in nature, Grievants have the burden of proving their case by a preponderance of the evidence. (See footnote 1) "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." *(See footnote 2)*

> "[S]imply being required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render a grievant misclassified, *per se*." *Midkiff v. Lincoln County Bd. of Educ.*, Docket No. 95-22-262 (Mar. 19, 1996), citing *Hamilton v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991). While a worker may be required to perform occasional "overlap" duties of another distinct class, if the assignments are specified in the worker's job description and are reasonably related to the duties contemplated by the statutory description of the presently-held classification, reclassification or multi-classification is not required. *See Boyer v. Wood County Bd. of Educ.*, Docket No. 90-54-196 (Jan. 29, 1991). Conversely, when a worker regularly performs work in her own and another classification, multi-classification is required. *Bailey v. Mercer County Bd. of Educ.*, Docket No. 91-274-158 (Jan. 31, 1992).

Beahm and Himes v. Randolph County Bd. of Educ. 98-42-241 (Jan. 7, 1999).

West Virginia Code § 18A-4-8 contains the definitions for the various service personnel classification titles, and briefly describes the duties attributed to each of the classifications at issue here as follows:

> (5) "Accountant II" means personnel employed to maintain accounting records and to

be responsible for the accounting process associated with billing, budgets, purchasing and related operations;

(6) "Accountant III" means personnel who are employed in the county board office to manage and supervise accounts payable and/or payroll procedures;

(13) "Auditor" means personnel employed to examine and verify accounts of individual schools and to assist schools and school personnel in maintaining complete and accurate records of their accounts;

(61) "Multiclassification" means personnel employed to perform tasks that involve the combination of two or more class titles in this section. In these instances the minimum salary scale shall be the higher pay grade of the class titles involved;

(71) "Programmer" means personnel employed to design and prepare programs for computer operation;

(77) "Secretary III" means personnel assigned to the county board office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities of purchasing and financial control or any personnel who have served in a position which meets the definition of "secretary II" or "secretary III" in this section for eight years;

When a statutory definition is very generally worded, it must be broadly applied. *(See footnote 3)* This is consistent with the principle that "School personnel regulations and laws are to be strictly construed in favor of the employee." (See footnote 4) Broadly applying the definition of “multiclassification” provided by the statute, there is no range of percentages of duties that when performed by a person singularly classified, triggers an additional classification. While it is axiomatic that most employees will occasionally be assigned duties that do not easily fit within their classification description, ongoing or persistent duty assignments suggest multiclassification is appropriate. Here, Grievants' secretarial duties are of this type of assignment: they both regularly perform duties associated with the Secretary III classification as part of their normal workload. While the fractional percentage of these types of duties compared to their overall workloads is small, their secretarial duties are regular and are a permanent part of their jobs. Grievants should have the

Secretary III classification added to their job descriptions.

Comparing the Accountant III and Accountant II classifications hinges on the responsibility level assigned to the position. An Accountant II is “employed to maintain accounting records” and “responsible for the accounting process.” while an Accountant III “manage[s] and supervise[s] accounts payable and/or payroll procedures.” In this case, there seems to be no dispute that the overall management and supervisorial responsibility for the accounting functions performed by Grievants lies with Treasurer John Thompson. Grievant's perform mostly data entry work and report preparation at his direction. Grievant's accounting work is mostly routine and standardized, and theyare not responsible to the Board for payroll management. Grievant's have failed to prove they are inappropriately classified as Accountants II.

Ms. Watts seeks the addition of the Auditor classification to her title. Here, again, the definition is broad: “'Auditor' means personnel employed to examine and verify accounts of individual schools and to assist schools and school personnel in maintaining complete and accurate records of their accounts.” (See footnote 5) While the school board's records are formally audited by an outside, independent accountant, the WCBOE Job description for Accountant II specifically includes auditing duties. These specific statements of duties assigned to the position cannot be ignored. Number two of the list of “Primary Function/Duties” is “Performs annual school audits and works with each school to ensure that all pertinent financial regulations and laws are adhered to.” One of the specific tasks listed is “Audit individual school accounting records.” Although the formal audit of school records is outsourced, Grievant's do check records received from the schools and assist them in accurate record keeping. These primary duties go beyond maintaining accounting records as contemplated by the Accountant II classification specification, and fit easily into the Auditor classification definition. Accordingly, both Ms. Watts and Ms. Frye should be Auditors in addition to Accountants II.

Ms. Frye seeks the addition of “Programmer” to her classification title. Programmers are “personnel employed to design and prepare programs for computer operation.” (See footnote 6) This is a fairly straightforward definition, and there is no evidence Ms. Frye performs any of these types of duties. While she does prepare custom spreadsheets, queries and reports, she utilizes standard programapplications to do so. Any actual programming or more complicated customization is performed by a state-contracted programmer or RESA personnel. Although Ms. Frye's predecessor was classified as a programmer, there is no conclusive evidence that she was classified correctly and

it is more likely than not that she was not actually a Programmer either. Ms. Frye has not met her burden of proving she should be classified as a programmer.

Grievants support their claim to a 261-day contract by reference to the uniformity provisions of W. Va. Code § 18A-4-5b. (See footnote 7) All other central office secretaries are 261-day employees. "Where county board of education employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of work days to level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits." *(See footnote 8)*

It is 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-4-5b; when assignments and duties are "substantially similar," the uniformity requirement applies. (See footnote 9) "'Like' refers to having a distinctive character, no matter how widely different in nonessentials. 'Like' has also been definedas having the same or nearly the same qualities or characteristics; resembling another; or substantially similar. [Citations omitted.]" (See footnote 10)

Here, there are substantial differences between Grievants' positions and the other secretarial staff, and the differences are in the essentials. The employees are classified as either Secretaries III or Executive Secretaries, and secretarial duties are the main focus of their jobs. In contrast, Grievants are predominantly Accountants, with very minimal secretarial duties compared to the other components of their appropriate multiclassification titles. Under the set of facts proven here, I cannot find Grievants perform like assignments and duties compared to other Secretaries III who have 261-day employment terms.

Respondent has argued this grievance is untimely with respect to Grievants' status prior to fifteen days before the grievance was filed, given the Grievants' position that their jobs have been misclassified from the beginning. Respondent does not contend the claim does not amount to a continuing practice, but that any relief as far as back pay should be limited to the period of fifteen days preceding the filing of the grievance. When a position is multiclassified, “the minimum salary scale shall be the higher pay grade of the class titles involved.” (See footnote 11) Accountant II and Secretary III are both in pay grade F, but Auditor is in pay grade G. *(See footnote 12)* Adding the Auditor classification to Grievants' positions, as this decision orders, raises the pay grade of those positions to pay grade G.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuingpractice. (See footnote 13) In case of misclassification “any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.” (See footnote 14) As Grievants asserted their positions were misclassified from the beginning, and the filed their grievance long past fifteen days after they became aware of this fact, they must rely on the continuing practice nature of the misclassification claim, and are limited to relief dating from fifteen days prior to the filing of their grievance.

The following conclusions of law support this discussion:

Conclusions of Law

1. Because a misclassification grievance is non-disciplinary in nature, Grievants have the burden of proving their 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, et al. 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).

2. When a statutory definition is very generally worded, it must be broadly applied. *Sites and Murphy v. Pendleton County Bd. of Educ.*, Docket No. 94-36-1112 (May 31, 1995). *See Midkiff, supra.* This is consistent with the principle that "School personnel regulations and laws are to be strictly construed in favor of the employee." *Syl. Pt. 1, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). 3. It is 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-4-5b; when assignments and duties are "substantially similar," the uniformity requirement applies. *Reed v. Jackson County Bd. of Educ.*, Docket No. 03-18-287 (Feb. 11, 2004)*; Ward v. Cabell County Bd. of Educ.*, Docket No. 03-06-211 (Dec. 17, 2003); *Weimer-Godwin v. Bd. of Educ. of the County of Upshur*, 179 W. Va. 423, 369 S.E.2d 726 (1988). "'Like' refers to having a distinctive character, no matter how widely different in nonessentials. 'Like' has also been defined as having the same or nearly the same qualities or characteristics; resembling another; or substantially similar. [Citations

omitted.]" *Weimer-Godwin*, *supra*.

4. Grievants' positions are not substantially similar to other Secretaries III employed by Respondent who have 261-day contracts, because their positions are essentially accountants and only tangentially secretarial.

5. Broadly reading the definitions of Secretary III and Auditor, both are appropriate for Grievants' positions. Mr. Frye's position does not fall within the definition for Programmer.

6. When a position is multiclassified, “the minimum salary scale shall be the higher pay grade of the class titles involved.” W. Va. Code § 18A-4-8(61).

7. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code §18-29-4(a)(1). *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002).

8. In case of misclassification “any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.” Syl pt. 5, *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995). 9. This grievance is based on a continuing practice, and untimely as to periods prior to fifteen days preceding the filing of the grievance.

For the foregoing reasons, this grievance is hereby **GRANTED** in part. Respondent is **Ordered** to reclassify Grievants as Accountant II/Secretary III/Auditor. In addition, Respondent is **Ordered** to increase Grievants to pay grade G, and to compensate them for any additional pay and benefits they would have earned from fifteen days prior to the filing of the grievance, and credit them with seniority from that date.

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

September 8, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

Perdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (Mar. 29, 1993).

Footnote: 2

Porter, et al. 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).

Footnote: 3

Sites and Murphy v. Pendleton County Bd. of Educ., Docket No. 94-36-1112 (May 31, 1995). See Midkiff, supra.

Footnote: 4

Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Footnote: 5

W. Va. Code § 18A-4-8(13).

Footnote: 6

W. Va. Code § 18A-4-8(71).

Footnote: 7

Under that provision, "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."

Footnote: 8

Durig v. Bd. of Educ., 215 W. Va. 244; 599 S.E.2d 667 (2004); Syl. Pt. 5, Board of Educ. of County of Wood v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002) (Both overruled on other grounds).

Footnote: 9

Reed v. Jackson County Bd. of Educ., Docket No. 03-18-287 (Feb. 11, 2004); Ward v. Cabell County Bd. of Educ., Docket No. 03-06-211 (Dec. 17, 2003).

Footnote: 10

Weimer-Godwin v. Bd. of Educ. of the County of Upshur, 179 W. Va. 423, 369 S.E.2d 726 (1988).

Footnote: 11

W. Va. Code § 18A-4-8(61).

Footnote: 12

See W. Va. Code § 18A-4-8a.

Footnote: 13

W. Va. Code §18-29-4(a)(1). Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

Footnote: 14

Syl pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).