THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DENNIS PERSINGER, et al.,

Grievant,

v. **Docket No. 06-41-097**

RALEIGH COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) filed this grievance on December 8, 2005, stating: Grievants are employed by the Respondent in the maintenance department. They contend Respondent has given two maintenance employees a supplement of $175 per month and has failed to accord the same treatment to the Grievants. They allege a violation of W. Va. Code §§ 18A-4-5b and 18-28-2.

For relief Grievants seek "the grant of the $175 per month supplement to them retroactive to the date the two employees were granted this supplement. They also seek interest on all sums to which they are entitled." The grievance was denied at Levels I and II. Respondent waived participation at Level III, and Grievants appealed to Level IV. A Level IV hearing was held at the Grievance Board's Beckley office on June 9, 2006. Grievants were represented by John Roush, West Virginia School Service Personnel Association, and Respondents were represented by Gregory W. Bailey, Bowles Rice McDavid Graff & Love LLP. This case became mature on July 10, 2006, upon the parties' filing findings of fact and conclusions of law.

Issues and Arguments

Grievants argue they work side by side on projects with the HVAC (See footnote 2) Technicians performing like duties. Therefore, they should all be compensated in a like manner. Respondents assert the West Virginia Legislature has mandated that HVAC Technicians servicing public school buildings be paid a competitive salary.

Findings of Fact

1. Grievants are employed by Respondent and work in the maintenance department.

2. None of the Grievants presently hold the classification title of HVAC technician or mechanic.

3. Sometime during 2005, Respondent approved the creation of two new HVAC technician positions. Up until this decision, the county had only employed one HVAC technician, Ron Jennings, since 1992.

4. Racine O. Thompson, Assistant Superintendent, contacted the West Virginia State Department of Education to ascertain what the job description for the HVAC technician positions should contain. At that time, he was informed of The Air Quality In New Schools Act (*W. Va. Code* § 18-9E-1, *et. seq.*).

5. *W. Va. Code* § 18-9E-4 provides that county boards of education set a salary for HVAC technicians that is "competitive with other employers of HVAC technicians in the region after accounting for annual leave, sick leave, insurance benefits, retirement benefitsand any other benefits provided."

6. Mr. Thompson, at the suggestion of Mike Pickens of the West Virginia State Department of Education, undertook to ascertain salaries of HVAC technicians within the region.

7. Based on the information received from the other HVAC employers in the area, Mr. Thompson determined the competitive salary to be $15 an hour.

8. Mr. Thompson then sought the assistance of David Brook, Business Manager for Raleigh County Schools, to determine the rate of the monthly supplement on $15 an hour. Mr. Books determined the supplement to be $475 per month.

9. Prior to the current school year, all maintenance employees received a county supplement of $300 a month. (See footnote 3) Those employees classified as Crew Leader received an additional $250 a month.

10. Grievants sometimes work with the HVAC employees in solving various maintenance

issues throughout the county.

Discussion

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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.*

Grievants assert they are the victims of 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).

"[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

The pivotal question in this case is whether Grievants are "performing like assignments and duties" to those employees to whom they have compared themselves. The pay uniformity provision for service personnel employees in *W. Va. Code* § 18A-4-5b is essentially the same as the pay uniformity clause governing professional employees contained in *W. Va. Code* § 18A-4-5a. 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 that 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. The Court found that when the 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.

In applying *W. Va. Code* § 18A-4-5b to service personnel, this Grievance Board has determined that grievants may not rely upon this uniformity provision to obtain the same benefits as employees who hold a different classification title. *See, e.g., Allison v. Hancock County Bd. of Educ.*, Docket No. 97-15-454 (Mar. 31, 1998); *Pate v. Summers County Bd. of Educ.*, Docket No. 97-45-188 (Feb. 5, 1998); *Flint v. Harrison County Bd. of Educ.*, Docket No. 97-17-348 (Jan. 22, 1998), *aff'd*, No. 25898 (W. Va. Sup. Ct. of Appeals Dec. 10, 1999); *Ricca v. Hancock County Bd. of Educ.*, Docket No. 95-15-101 (June 8, 1995); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995).

Clearly Grievants, who are maintenance employees, hold a different classification title than the HVAC employees. However, of the three HVAC employees, one does hold the title of Crew Chief, the same title as one of the Grievants. While at first blush this may appear these two are similarly situated, when looking at the duties, they are not similar. *W. Va. Code* §18A-4-8(I)(29) defines crew leader as "personnel employed to organize the work for a crew of maintenance employees to carry out assigned projects." In addition, the*Code* section goes on to define other maintenance classifications, including HVAC positions. While the crew leaders are under the general title, it is clear the legislature intended for HVAC employees to be paid a competitive rate compared to other HVAC employees in the area. This is further indication that HVAC employees, including the crew leader, are not similarly situated with Grievants. Accordingly, Grievants have failed to prove they are similarly situated to HVAC employees.

Consistent with the foregoing discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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 ofanother or other employees." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

4. "[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

5. 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 that 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. The Court found that when the assignments and duties are "substantially similar," the uniformity requirement applies.

6. In applying *W. Va. Code* § 18A-4-5b to service personnel, this Grievance Board has determined that grievants may not rely upon this uniformity provision to obtain the same benefits as employees who hold a different classification title. *See, e.g., Allison v. Hancock County Bd. of Educ.*, Docket No. 97-15-454 (Mar. 31, 1998); *Pate v. Summers County Bd. of Educ.*, Docket No. 97-45-188 (Feb. 5, 1998); *Flint v. Harrison County Bd. of Educ.*, Docket No. 97-17-348 (Jan. 22, 1998), *aff'd*, No. 25898 (W. Va. Sup. Ct. of Appeals Dec. 10, 1999); *Ricca v. Hancock County Bd. of Educ.*, Docket No. 95-15-101 (June 8, 1995); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995). 7. *W. Va. Code* § 18A-4-8(l)(29) defines crew leader as "personnel employed to organize the work for a crew of maintenance employees to carry out assigned projects."

8. W. Va. Code § 18-9E-4 provides that county boards of education set a salary for HVAC technicians that is "competitive with other employers of HVAC technicians in the region after

accounting for annual leave, sick leave, insurance benefits, retirement benefits and any other benefits provided."

9. Grievants have not shown they are similarly situated to the HVAC technicians.

Accordingly, this grievance is **DENIED**.

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

DATE: August 25, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

James T. Godbey, Kevin E. Godbey, Tony Greco, Charles Jones III, Robert Lowe, Wesley Mason, Mark Morris, Dennis Persinger, Charles Stephes, Walter Donaldson, Ernest Epling, and Kenny O'Neal all participated in this grievance.

Footnote: 2

Technically the classification title is "Heating and air conditioning mechanic I" or "Heating and air conditioning mechanic II." W. Va. Code § 18A-4-8(l)(48) & (49). However, the acronym HVAC has been utilized throughout this proceeding and the undersigned will continue with that practice.

Footnote: 3

Mr. Brook actually intended for the $475 to be added to the $300 the maintenance employees were already making. However, there was a misunderstanding, and the supplement was set at $475, instead of $775. It does not appear this error was corrected.