THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

REBECCA NEWELL,

Grievant,

v. **Docket No. 07-54-146**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rebecca Newell, is employed by the Wood County Board of Education ("WCBOE" or "employer") on a 220-day contract as a secretary and is assigned to Emerson Elementary School. She filed her grievance at Level I on October 17, 2006, alleging that other elementary schools with lesser enrollment than Emerson employed secretaries on 261-day contracts. Grievant claimed violation of the uniformity of salaries requirement of the statutes, as well as discrimination and favoritism. She seeks a 261-day contract.

On October 31, 2006, the grievance was denied at Level I, and the Grievant appealed to Level II that same day. There were several mutually agreed delays at Level II, and the grievance was denied at that level on April 18, 2007. On May 1, 2007, the Grievant appealed at Level IV, seeking the same relief she sought below. At Level II and before this Board, Grievant was represented by WVEA representative Bruce Boston; the employer was represented by Dean Furner, Esq.

The parties elected to submit the case on the record developed below. They filed proposed findings and conclusions on or before August 17, 2007, the deadline set by the Board, and on that date the case became mature for decision. The case was transferredto the undersigned for

administrative reasons on September 7, 2007.

Synopsis

The Grievant asserts that her status as a 220-day contract secretary, and WCBOE's failure to employ her instead on a 261-day contract, violate the statutory requirement that salaries of school service personnel be uniform throughout the county. She also claims that these circumstances subject her to discrimination and favoritism within the meaning of the grievance statutes.

Respondent maintains that its decisions on which schools should have 261-day contract secretaries are based on legitimate, job-related criteria, and that decisions based on such criteria are permitted under the uniformity of salary statute. As a result, WCBOE maintains that it has not engaged in discrimination or favoritism.

The Grievant demonstrated that another secretary, who had a 261-day contract, worked at a school with lower enrollment than the Grievant's. This is inconsistent with the student enrollment criterion in the salary uniformity statute. However, the enrollment discrepancy involved only one other teacher, and the School Board proved that it properly considered a number of other statutory criteria in deciding which schools should have 261- day secretaries. For those reasons, and because to prevail in this kind of case a grievant must prove that a school board's decision is arbitrary and capricious _ a difficult standard to meet _ her grievance must be denied.

After thorough review of the record, the undersigned makes the following Findings of Fact:

Findings of Fact

1 1. Grievant is employed by the Wood County Board of Education ("WCBOE") as a secretary on a 220-day contract and is assigned to Emerson Elementary School.

2 2. At the time of the hearing, she had been employed in that capacity at Emerson for seven years; she had been employed by WCBOE for a total of sixteen years.

3 3. The 2006-2007 enrollment at Emerson was 426. Grievant's Exhibit 1.

4 4. The following Wood County schools employed secretaries on 261-day contracts, and had the following enrollments, in 2006-2007:

Blennerhassett

539

Jefferson

579

Lubeck

531

Mineral Wells

767

Williamstown

508

Franklin

341

Level II hearing transcript at p. 17. Grievant's Exhibit 1.

5 5. Peggy Swisher, the school secretary at Franklin Elementary Center, had a 261-day contract, and her school had a lower enrollment than Emerson Elementary. Level II hearing transcript at p. 13.

6 6. As identified by Lawrence Hasbargen, Assistant Superintendent - School Services, the following were the criteria used by WCBOE for maintaining school secretaries on 261-day versus 220-day contracts:

a.

The presence of a vice-principal at a school, because such schools have larger staffs. Level II hearing transcript at pp. 15-16.

b.

Increased community activities at a school, because such activity requires staff presence outside of regular hours. *Id.*

c.

The number of children requiring an IEP (individualized education program) at a school also entered into the employer's decisions on where to place 261-day secretaries. *Id.*

7 7. There are no significant differences in the nature or types of tasks performed by the two secretaries.

Discussion

Burden of Proof

Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, (See footnote 1) 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Salary Uniformity Requirement

The West Virginia Supreme Court of Appeals has consistently acknowledged that "county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, in part, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); Syl. Pt. 3, *Cahill v. Mercer County* Bd. of Educ., 208 W. Va. 177, 539 S.E.2d 437 (2000).

When reviewing the actions of a board of education in setting salaries, this Board is required by law to give deference to the administrators' actions. Their decisions must be reasoned, however, and may not be arbitrary or capricious. In *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996), a case involving a civil service commission, the Supreme Court (Justice Cleckley) has said that a commission's actions can be considered arbitrary or capricious:

> if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d

399, 406 (1995).

See Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the board of education. *See Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Within the scope just described, this Board's reviews the salary determinationsmade by the WCBOE in this case under the statutes which govern salary decisions, and under the Supreme Court's decisions interpreting those statutes. In that context, the Supreme Court has said that "[a] board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met." *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 SE 2d 487, 490 (1994).

> Determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education. Although W. Va. Code 18A-4-8 [1993] requires a minimum employment term of "ten months" for service personnel, this Code section also states that a "board of education *may* contract with all or part of these personnel for a longer term (emphasis added)."

Id.

W. Va. Code § 18A-4-5b (See footnote 2) requires uniformity in salary schedules and provides, in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
>
> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, 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 . . . .

The Grievant cites the 261-day contract held by her counterpart at the Franklin school as

evidence that Grievant's lower salary, and her otherwise less advantageous 200-day contract, violate the salary uniformity statute quoted immediately above. She also cites that difference as evidence of discrimination and favoritism by the WCBOE.

In support of her contention that the salary difference between her and the Franklin secretary violates the uniformity requirement of § 18A-4-5b, Grievant relies on *Cutright v. Lewis County Board of Education*, Docket No. 05-21-335 (January 18, 2006). Cutright was a "regular custodian" in Lewis County with a 200-day contract and was a classified as a Custodian III. In addition, Cutright had contracts as a “summer maintenance” employee, for which the usual employment term was about 40 days. Five of Cutright's fellow employees had 250-day contracts under which they were multiclassified as custodian/general maintenance. Their contracts provided for custodial duties for the 200- day school term, and for work as “itinerant” maintenance employees during the summer. The result was that Cutright and his fellow employees had essentially the same duties, and the same work schedules. In fact, Cutright actually worked more days each year than one of his five fellow employees, who also received several paid vacation days. As a 200-day employee, Cutright received no paid vacation days.

In *Cutright*, the Grievance Board found that, "[d]espite his alleged multi-classified title, it is obvious that, just like Grievant, [his co-employee] works as a custodian throughout the school year, along with performing additional maintenance duties during the summer, just like Grievant." *Id.* at p. 6. Mr. Cutright won his grievance because he and the employees with whom he compared himself shared "like assignments and duties," within the language of § 18A-4-5b. In *Cutright*, not only did both employees perform the same types of work, but Cutright (the 200-day employee with whom the Grievant comparesherself) actually worked more days than one co-employee who had the longer contract.

Grievant's situation is not like Mr. Cutright's. The Grievant in this case works 220 days while Swisher, the employee with whom she most closely compares herself, works 261. Even taking Swisher's paid vacation into account, Swisher has more actual work days than the Grievant. Like the Grievant, Cutright received no vacation days in his Lewis County position, but in Cutright's case, his lack of vacation days was the *only* significant difference between him and the other employee with whom he was compared. Cutright was found to be performing "like assignments and duties" to the 250-day employees in Lewis County, and this Board found no significant differences between the

employees except their vacation time. In this grievance, in contrast, there are several significant differences other than vacation, and other than pupil enrollment, as listed in Finding of Fact No. 6. The salary uniformity statute allows a board of education to use those differences in setting salaries.

Section 18A-4-5b requires that the uniformity standard be applied with due consideration of the listed factors: "responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements" (among other factors). The testimony of Assistant Superintendent Hasbargen established that the School Board's decisions on where to place 261-day secretaries were based on criteria which § 18A-4-5b recognizes as legitimate.

The Grievant established that pupil enrollment was lower at Franklin than at Emerson, but Grievant's Exhibit 1 showed that this was the case only at Franklin. The rest of the schools, which had vice-principals, had more pupils than Emerson. Although the Grievant proved that the duties and responsibilities of the 220-day and the 261-daysecretarial positions were similar,, the employer established that the criteria for its determinations of where to place 261-day secretaries were: after-hours use of the facility; higher numbers of pupils requiring individualized education plans (IEPs); and the presence of a vice-principal (as an indicator of higher staffing). Level II hearing transcript at p. 24.

In *Halstead v. Boone County Board of Education,* Docket No. 99-03-066, April 30, 1999*, aff'd,* Civil Action No. 99-AA-84, Jan. 25, 2001 (Judge Stucky), in which the board of education made a contract decision based on factors such as pupil participation and the size of the school buildings involved, this Board said, "It is clear from the record that [the school board's] determination that the Custodian III position at SHS be posted as a 261- day position was not arbitrary and capricious, but was based on a reasonable rationale." The same is true in this case.

The rule established in *Flint v. Board of Education of Harrison County*, 207 W. Va. 251, 531 S.E.2d 76 (1999) (*per curiam*) (disapproved of on another point in *Board of Education of Tyler County v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004)), does not apply to the facts of this case. First, Flint and White involved comparisons of 261-day with 240- (not 220-) day employees; second, unlike in *Flint* and *White*, in this case there are a number of significant differences between the Grievant and the 261-day secretaries. In *Flint* and *White*, on the other hand, the grievants prevailed because the court found that paid vacation vs. no paid vacation was the only difference between the employees.

On this record, the Grievant has failed to meet her burden to establish that WCBOE's maintaining

her on a 220-day contract, while maintaining other secretaries on 261-daycontracts, was arbitrary or capricious. This Board is therefore required by law to defer to WCBOE's decision.

Discrimination and Favoritism

The Grievant also relies on the prohibitions against discrimination and favoritism in the grievance statutes. W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

> [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.

Bd. of Educ. of Tyler County v. White, 216 W. Va. 242, 605 S.E.2d 814, 820 (2004).

Viewed in light of the Grievant's burden of proof, the facts established on this record do not make the showing required by *White, id.*, because by a preponderance of the evidence, the employer's offer of a 220-day contract was "related to the actual job responsibilities of the employees." That is so because WCBOE's decisions on 261-day contracts used factors listed in W. Va. Code § 18A-4-5b, and all of the factors the Board used are "related to the actual job responsibilities of the employees." The Grievant has therefore failed to prevail on her claim of discrimination or favoritism.

Conclusions of Law

1 1. In a non-disciplinary matter, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2 2. The rule established in *Flint v. Board of Education of Harrison County*, 207 W. Va. 251, 531 S.E.2d 76 (1999) (*per curiam*) (disapproved of on another point in *Board of Education of Tyler County v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004)), does not apply to the facts of this case. First, *Flint* and *White* involved comparisons of 261-day with 240- (not 220-)day employees; second, unlike in *Flint* and *White*, in this case there are a number of significant differences between the Grievant and the 261-day secretaries. In *Flint* and *White*, on the other hand, the grievants prevailed because the court found that paid vacation vs. no paid vacation was the only difference between the employees.

3 3. "[C]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, in part, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); Syl. Pt. 3, *Cahill v. Mercer County* Bd. of Educ., 208 W. Va. 177, 539 S.E.2d 437 (2000). 4 4. When reviewing the actions of a board of education in setting salaries, this Board is required by law to give deference to the administrators' actions. Their decisions must be reasoned, however, and may not be arbitrary or capricious. In *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996), a case involving a civil service commission, the Supreme Court (Justice Cleckley) said that the commission's actions could be considered arbitrary or capricious:

> if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).

See Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the board of education. *See Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

5 5. "A board of education has the discretion to determine the number of jobs for and the

employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met." *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 SE 2d 487, 490 (1994).

> Determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education. Although W. Va. Code 18A-4-8 [1993] requires a minimum employment term of "ten months" for service personnel, this Code sectionalso states that a "board of education *may* contract with all or part of these personnel for a longer term (emphasis added)."

Id.

6 6. W. Va. Code § 18A-4-5b requires uniformity in salary schedules, but the evidence in this case fails to establish a violation of § 18A-4-5b.

7 7. W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

8 8. In *Halstead v. Boone County Board of Education,* Docket No. 99-03-066, April 30, 1999, *aff'd,* Civil Action No. 99-AA-84, Jan. 25, 2001 (Judge Stucky), this Board said, "It is clear from the record that [the school board's] determination that the Custodian III position at SHS be posted as a 261-day position was not arbitrary and capricious, but was based on a reasonable rationale." The same is true in this case. On this record, the Grievant has failed to meet her burden to establish that WCBOE's failure to offer her a 261- day contract, while offering them to other secretaries, was arbitrary or capricious. This Board is therefore required by law to defer to WCBOE's decision.

9 9. Viewed in light of the Grievant's burden of proof, the facts established on this record do not make the showing required by *Board of Education of Tyler County v. White*, 216 W. Va. 242, 605 S.E.2d 814, 820 (2004), because by a preponderance of the evidence, the employer's offer of a 220-day contract was "related to the actual job responsibilities of the employees." That is so because WCBOE's decisions on 261-day contracts used factorslisted in W. Va. Code § 18A-4-5b, and all of the factors the Board used are "related to the actual job responsibilities of the employees." The

Grievant has therefore failed to prevail on her claim of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (2006). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they 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 on the 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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Thomas J. Gillooly

Administrative Law Judge

Date: September 27, 2007

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 2

Other than the references contained in footnote 1, references in this Decision to the West Virginia Code are taken from the Code as maintained online by Casemaker, updated with bills through 2006 1st Extraordinary Sess.