WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER SISSON
Grievant,

v. **Docket No. 2009-0945-CONS**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Christopher Sisson, and two other employees initiated a grievance against their employer, Raleigh County Board of Education ("RCBE"), Respondent, at Level One on or about January 26, 2009.[1] By agreement of the parties, the grievance was waived to Level Three on or about February 9, 2009. The written statement of grievance provides:

> Grievants contend that they perform like duties and assignments with other employees holding their classification title(s). These other employees hold 261-day employment terms and Grievants do not. Grievants allege a violation of W. Va. Code 18A-4-5b & 6C-2-2(g)(1).

The statement of relief sought provides:

> Grievants seek a 261 day employment contract with compensation for lost wages and benefits retroactive to the maximum extent allowable by law. Grievants also seek interest.

The grievances of the two other employees, Grievants Thomas Clay and Curtis Gunnoe, were resolved and settled prior to the Level Three hearing. A Level Three

[1] Originally, this matter was a consolidated grievance with three Grievants,Thomas Clay, Curtis Gunnoe and Christopher Sisson entitled, *Thomas Clay et al. v. Raleigh County Board of Education*, Docket No. 2009-0945-CONS. However, as a result of procedural developments, the caption of this grievance matter has been updated, the Docket Number has been retained Docket No. 2009-0945-CONS. Grievance Board Orders severing Thomas Clay and Curtis Gunnoe as parties were issued on September 21, 2009.

hearing was held before the undersigned Administrative Law Judge on May 15, 2009, in Beckley, West Virginia. Grievant Sisson appeared in person and through counsel, John Roush, Esq., WV School Service Personnel Association. Respondent was represented by Gregory Bailey, Esq., Bowles, Rice, McDavid, Graff & Love, LLP.

This matter became mature for decision on or about June 15, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals. West Virginia Public Employees Grievance Board Orders severing Thomas Clay and Curtis Gunnoe as parties to the instant matter were issued on September 21, 2009.

Synopsis

Grievant, a multi-classified employee, employed under a 240-day annual contract, filed a grievance asserting that he is entitled to compensation and benefits comparable to those received by 261-day contract employees who do the same or substantially similar duties. Grievant alleges a violation of W. VA. CODE §§ 18A-4-5b and 6C-2-2(g)(1).

Grievant alleges that the RCBE has violated W. VA. CODE § 18A-4-5b, requiring that uniformity 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[.]" Grievant claims that current circumstances subject him to discrimination and favoritism within the meaning of the grievance statutes and in violation of W. VA. CODE § 6C-2-2(g)(1).

Respondent contends Grievant is not similarly situated or performing like assignment and duties as the classified employee(s) whom Grievant seeks to compare himself. Respondent maintains that no other service employee holds the identical multi-

classified title as Grievant (citing *Flint v. Board of Education*, 207 W.Va. 251, 531 S.E.2d 76 (1999)). Grievant did not identify a single 261-day employee who holds the exact same multi-classification. Employees who do not have the same classification titles are not performing "like assignments and duties" and, therefore, are not subject to comparison in establishing a claim under W. VA. CODE §18A-4-5b or on the basis of discrimination or favoritism. *Id* Grievance is DENIED.

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

Findings of Fact

1. Grievant is currently employed by the Respondent under a 240-day annual contract. Grievant has been employed by Respondent in one capacity or another for approximately five years.[2] Grievant was first employed by Respondent as a substitute in September 2004.

2. Grievant is a multi-classified employee.[3] Grievant holds the classification titles Plumber II/Heating and Air Conditioning Mechanic II.[4] No other service employees

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[2] Prior to becoming a Heating and Air Conditioning Mechanic/Plumber II, Grievant was employed as a Plumber II.

[3] W. VA. CODE § 18A-4-8 (2007) defines "multiclassification" as " a person 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."

[4] "Heating and Air Conditioning Mechanic" is the statutory version of the classification title, which seems to be interchangeable with the acronym "HVAC". During the course of the Level Three hearing, the Heating and Air Conditioning Mechanic II job title was alternatively referred to as HVAC Technician and HVAC Mechanic.

employed by the Respondent hold the multi-classified titles Plumber II/Heating and Air Conditioning Mechanic II.[5]

3. County policy grants paid vacation to 261-day employees. Employees with a 240-day contract do not receive a paid vacation, but receive 21 days off without pay each year. In contrast, employees with a 261-day contract are provided a paid vacation of up to 24 days per year, based on years of service.[6]

4. Classification titles serve to identify and define the duties and responsibilities associated with a position. *See* W. VA. CODE §18A-4-8.

5. Respondent employs several employees with the Plumber II classification title with a 261-day employment term.

6. Respondent employs several employees with the Heating and Air Conditioning Mechanic classification title with a 261-day employment term.

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[5] W. VA. CODE § 18A-4-8 (2007) defines the duties and responsibilities of a Plumber II as follows: "means a person employed as a journeyman plumber," and defines the duties and responsibilities of a Heating and Air Conditioning Mechanic II as: "means a person employed at the journeyman level to install, repair and maintain heating and air conditioning equipment and related electrical equipment."

[6] As discussed by the West Virginia Supreme Court, it is readily acknowledged and a matter of record that:

> Employees serving under a 261-day contract accrue paid vacation on a sliding scale, . . . : employees having served seven years or fewer receive two weeks of paid vacation; employees with seven to fifteen years experience receive three weeks; employees with sixteen or more years experience receive four weeks. Employees serving under a 240-day contract do not receive paid vacation and must request twenty-one "non-calendar" unpaid days annually. Thus, a 261-day contract employee with sixteen or more years experience works only one more day per year than a 240-day contract employee, but the 261-day contract employee receives twenty-one more paid days of employment.

Durig v. Board of Education, 215 W. Va. 244, 599 S.E.2d 667 (2004)

7. Grievant Sisson compares his duties and responsibilities to several 261-day contract service employees:

- an employee with a single classification as Plumber;
- a service employee with a multi-classification job title Plumber/Crew Leader;
- and a service employee with a multi-classification job title Electrician/Heating and Air Conditioning Mechanic II/Crew Leader.

8. There are partial overlaps in classification titles between Grievant and various employees holding 261-day contracts. There is no direct or identical multiclassification titled personnel employed by Respondent comparable to Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

In establishing his claim that he is entitled to compensation and benefits comparable to those received by 261-day contract employees, Grievant seeks to compare his duties

and responsibilities to a service employee with the single classification as Plumber; a service employee with a multi-classification job title Plumber/Crew Leader; and a service employee with a multi-classification job title Electrician/Heating and Air Conditioning Mechanic II/Crew Leader, all of whom hold 261-day contracts. Thus, a major issue in this grievance is whether Grievant is similarly situated and performs like assignments and duties with employees who hold the classification of Plumber II or Heating and Air Conditioning Mechanic, but do not hold the exact classification title of Plumber II/Heating and Air Conditioning Mechanic.

It is well-recognized that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). County boards of education may not arbitrarily discriminate against employees and must provide uniform benefits to employees performing like assignments and duties. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The burden is upon Grievant to establish that he is arbitrarily being treated differently than another similarly situated employee.

Intertwined with the discrimination analysis is the consideration of the uniformity requirement contained in WEST VIRGINIA CODE § 18A-4-5b. WEST VIRGINIA CODE § 18A-4-5b provides, in part, that:

> 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.

Employees performing like assignments and duties must be compensated uniformly.

It is not necessary for employees to perform *identical* duties in order to meet the "like assignments and duties" requirement for uniform benefits under WEST VIRGINIA CODE § 18A-4-5b. *Reed v. Jackson County Bd. of Educ.*, Docket No. 03-18-287 (Feb. 11, 2004); *Ward v. Cabal County Bd. of Educ.*, Docket No. 03-06-211 (Dec. 17, 2003). When assignments and duties are "substantially similar," the uniformity requirement applies. *Id*. "'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." *Weider-Godwin v. Bd. of Educ. of the County of Upshur*, 179 W. Va. 423, 437, 369 S.E.2d 726, 731

(1988)(citations omitted). *C.f. Durig v. Bd. of Educ. of County of Wetzel*, 215 W.Va. 244, 599 S.E.2d 667 (2004)(per curiam)(finding a violation of the uniformity statute where another employee did nearly all the welding work and the grievant was absent, pursuant to his contract, from the workplace for a three-week summer period and did not perform mechanic duties during this time).

In *Weimer-Godwin v. Board of Educ. of Upshur County*, 179 W.Va. 423, 369 S.E.2d 726 (1988), the West Virginia State Supreme Court of Appeals examined the degree to which job duties and responsibilities must be comparable in order to warrant identical benefits under the uniformity statute. *Id*. at 427, 369 S.E.2d at 730. In *Flint v. Board of Education*, 207 W.Va. 251, 531 S.E.2d 76 (1999), the West Virginia State Supreme Court examined the relevant statutes and addressed their impact on the 240-261 day contract controversy. The Court recognized that where an educational employee's contract was for 240 days and the employee sought uniformity with a 261 day contract, he or she must identify a comparable employee who holds the same classification as a 261 day contract. The Court stated that "employees who do not have the same classification are not performing 'like assignments and duties.'" *Id.* at 257, 531 S.E.2d at 82.[7] Hence, Respondent highlights that in order to prevail, the instant multiclassified Grievant must identify another identically multiclassified employee who is receiving a 261-day contract. Grievants may not rely upon the uniformity provision to obtain the same benefits as employees who hold different classification titles and perform different duties. *Flint*, *supra*.

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[7] The *Flint* case concerned multi-classified employees attempting to compare themselves with other multi-classified employees who did not hold the precise multi-classifications held by the *Flint* grievants.

See Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); *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); *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); *Ketz v. Raleigh Co. Bd. of Educ.*, Docket No. 07-41-374 (June 25, 2008).

Not surprisingly, Grievant, by counsel frames the question/issues of this grievance somewhat differently than the Court in *Flint*. Grievant argues that the fact that he does not hold the identical multiclassification title as any of the employees with whom he compares himself is not dispositive. Grievant presented testimony regarding his performance of the same duties and responsibilities as various other employees working under 261-day annual contracts (not one particular employee, but as performed by various employees holding 261-day contracts).[8] Grievant's Counsel contends this is practical and Grievant is entitled to relief, even if *Flint* is given full vigor. Grievant seeks a 261-day employment contract and all associated benefits which accompany such terms of employment.

This Administrative Law Judge recognizes Grievant's contention but disagrees with the position two fold; (1) Grievant is unequivocally expanding the holding of relevant and demonstrative precedent, e.g., *Flint, supra*. By comparing Grievant's duties to a composite of other employees' duties is not the same as identifying a comparable employee. The

[8] Further, it may be relevant to note that Grievant's argument made no real day to day allowance for the percentages of time devoted to duties and responsibilities associated with the specific duties and responsibilities of the service employees he targeted for comparison. E.g., one multi-classified individual does not equate to the duties that can be simultaneously performed by two individually classified employees.

principles of uniformity demand that a similarly situated employee receive similar benefit(s). In the scenario created by Grievant, there is no real flesh and blood employee. There is only a theoretical employee which could and would be constructed and reconstructed at will from here to perpetuity; (2) If Counsel were to bastardize *Flint* as he attempts in these facts, it would destroy the comparison principle. Grievant's contention if permitted would constitute a Pandora's box of complications for every county school board in the State.

The importance of identical classification title in the context of uniformity/ discrimination/ favoritism cases is emphasized in *Flint, supra.* Other cases have also visited the issue, see *Board of Education of County of Wood v. Airhart*, 212 W.Va. 175, 569 S.E.2d 422 (2002); *Durig v. Board of Education*, 215 W. Va. 244; 599 S.E.2d 667 (2004); see also *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Ketz v. Raleigh Co. Bd. of Educ.*, Docket No. 07-41-374 (June 25, 2008).

Nevertheless 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)),held that employees who do not have the same classification titles are not performing "like assignments and duties" and, therefore, are not subject to comparison in establishing a claim under W. VA. CODE §18A-4-5b or on the basis of discrimination or favoritism. This is a manageable mandate, not always easily discernable to all employees but readily practical in a real world, day to day application.

Again, this Administrative Law Judge recognizes Grievant's contention but disagrees with the practical application of the proposal. The question present by this case is whether

it is proper for this multi-classified grievant to establish entitlement to a 261-day contract pursuant to W. VA. CODE §§18A-4-5b and § 6C-2-2(d) by comparing himself to multiple individuals, indiscriminately juggling classifications to establish same and/or similar duties. The answer is No. Consideration must be given to classification when comparing "like assignments and duties." This Administrative Law Judge is not empowered to second-guess the State Supreme Court and ignore the guidelines provided by relevant precedent. An Administrative Law Judge is required to adhere to the requirement of the law. Until such time as the West Virginia Supreme Court of Appeals or another Court of competent jurisdictions authorizes such computation, this is not perceived to be proper. Classification titles serve to define the duties and responsibilities associated with a position. See West Virginia Code §18A-4-8. Neither the evidence nor arguments advanced by Grievant support a conclusion that he and other employees holding 261-day contracts, in a legal sense, perform "like assignments and duties" nor that *Flint* somehow loses its vitality because Grievant is a multi-classified employee. Grievant has not demonstrated that he was unlawfully denied uniformity with regard to his salary, benefits and/or terms of employment.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. Pursuant to the provisions of West Virginia Code § 18A-4-5b, boards of education are required to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

3. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant has *not* established discrimination in the facts of this case.

6. Employees who do not have the same classification titles are not performing "like assignments and duties" and, therefore, are not subject to comparison in establishing

a claim under W. VA. CODE §18A-4-5b or on the basis of discrimination or favoritism. *Flint et al. v. Board of Education*, 207 W.Va. 251, 531 S.E.2d 76, (1999).

7. Grievant has not proven, by a preponderance of the evidence, that he is being treated differently from similarly situated employees, and the difference in treatment constitutes a violation of W. VA. CODE §18A-4-5b.

8. Grievant has *not* established by a preponderance of the evidence entitlement to a 261-day employment contract.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 18, 2009

Landon R. Brown
Administrative Law Judge