THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLORIA DUNLAP, et al.,
Grievants,
v. **Docket No. 2008-1433-CONS**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent,
and

DEBORAH K. MCGURTY, et al.,
Intervenors.

DECISION

Grievants are employed by the Marshall County Board of Education in the secretary classification and several Grievants also hold the accountant classification. They filed this grievance on or about April 1, 2008 with the Respondent and requested a conference to address their grievance. Grievants' Statement of Grievance alleges that "the reclassification of the central office secretarial employees, most of whom were granted the title of Executive Secretary, constitutes favoritism/discrimination [West Virginia Code 6C-2-2(g)(1)] and a violation of West Virginia Code §§ 18A-4-5b & 18A-4-8." For relief "Grievants seek restoration of equal treatment with the central office secretarial employees, preferably by the following means: (a) addition of title of Executive Secretary to the contract of each Grievant; (b) compensation for all wages lost as a result of the failure of Respondent to reclassify grievants as it did the central office secretarial employees retroactive to July 1, 2007; and, (c) interest at the legal rate on all sums to which grievants are entitled."

This grievance was denied at level one by Decision dated July 16, 2008. Level two mediation was conducted on December 2, 2008. Certain Executive Secretaries from the central office filed their requests to intervene pursuant to W. VA. CODE § 6C-2-3(f) on July 23, 2008 and September 29, 2008. A level three hearing was conducted before the undersigned Administrative Law Judge on October 9, 2009 and November 20, 2009 at the Marshall County Board of Education office in Moundsville, West Virginia. Grievants appeared in person and by their counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice McDavid Graff & Love. Intervenors appeared in person and by their counsel, Vincent Trivelli, Esq. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on January 21, 2010.

Synopsis

Grievants alleged that the reclassification of the central office secretarial employees to the title of Executive Secretary amounted to favoritism/discrimination and was a violation of the uniformity statute. Grievants were not similarly situated to the Intervenors in this case and did not perform like duties and assignments. Grievants did not prove that they were the victims of discrimination or favoritism nor did they establish a violation of the uniformity statute. The record did not establish that the Respondent erred in reclassifying the Intervenors in that they work in the central office for county wide administrators with significant administrative duties. This grievance is denied.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievants, with the exception of Ruth Ann Mercer, are all secretaries working in a school setting within Marshall County. All Grievants, with the exception of Ruth Ann Mercer, hold contracts for anywhere from 200 days up to 220 days.[1]

2. In early spring of 2008, Respondent reclassified a number of the employees assigned to the central office. These central office employees were reclassified from Secretary III to Executive Secretary. These employees comprise the Intervenors in this grievance.[2]

3. Grievant Ruth Ann Mercer was assigned to the central office in the secretary classification category. She was not reclassified in the spring of 2008 at the time other secretarial employees were reclassified to Executive Secretary. Ms. Mercer received the Executive Secretary classification title on July 1, 2009. Prior to this date she was contracted as a Secretary/Accountant for the Payroll and Child Nutrition Department at the central office. Ms. Mercer was reclassified to the Executive Secretary classification when she was assigned to work for Jim Tuel, the county treasurer. She remains a part of this grievance seeking back pay prior to that date.

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[1]These employees are Cathy Bartlett, Jamie Cain, Brenda Coffield, Kristy Crawford, Brenda Crow, LeAnne Dobbs, Gloria Dunlap, Susan Edgel, Kathy Harris, Carla Hubbs, Kathy Hughes, Sherry Johnson, Lisa McDiffitt, Mary Jo McKimmie, Karen Mercer, Barbara Peabody, Mindy Thomas, and Karen Yoders. Grievant Cathy Bartlett withdrew her appeal prior to the level three hearing.

[2]These employees are Donna Crawford, Diana Curfman, Michal Holt, Deborah McGurty, Beth Ann Miller, Mary O'Dessa Louden, Ellen Shook, Jane Snyder, and Leilani Williams.

4. Grievants demonstrated that they performed the following duties: (a) operated office machinery, such as a computer, a copying machine, and other normal office equipment; (b) performed clerical duties and prepared reports; (c) answered the phones and dealt with the public on the phone, as well as in person.

5. One or more of the Grievants indicated that she performed one or more of the following duties: (a) maintaining, organizing and protecting the confidentiality of student records; (b) maintaining payroll records for substitute employees; (c) overseeing lunch program records; (d) assisting various administrators throughout the school building; (e) maintaining school financial records and signing checks; (f) maintaining attendance records; (g) communicating through e-mails, correspondence, and faxes; (h) verifying enrollment forms for driver licenses; (i) entering data into the substitute employee computer system; (j) sending reports and completed purchase orders to the central office, and (k) dispensing medications.

6. Intervenors work under 220-day and 260-day contracts.

7. The central office administrators to whom the Intervenors are assigned include Robyn Fitzsimmons, personnel; Bonnie Ritz, curriculum and instruction; Wayne Simms, assistant superintendent; Richard Redd, special education; Debbie Schrader, food service; Susan Jones, pupil services and title I. They demonstrated that they perform significant administrative duties and, in turn, assign administrative duties to their individual executive secretaries.

8. Each of the central office administrators noted that Marshall County Schools Superintendent Alfred Renzella's management style is characterized as assigning duties

and tasks to each autonomous central office administrator, allowing each to exercise their independent judgment with respect to achieving the goals behind the assignments.

9. Robyn Fitzsimmons, Personnel Director, supervises Intervenor Michal Holt. Ms. Fitzsimmons explained that her position is one of county wide responsibility with significant administrative duties, in that she is responsible for all aspects of personnel administration for the entire county school system. These responsibilities include such matters as investigation of discipline, transfers, recommendation of policies, hiring, terminations, and evaluations. Ms. Holt reports directly to her in an assistant position, works independently without specific direction and has significant responsibilities in the department.

10. Dr. Bonnie Ritz, Administrative Director for Curriculum and Instruction, is the supervisor of Intervenor Beth Miller. Dr. Ritz explained that her own duties are characterized by independence of action and county wide administrative responsibilities in her area of expertise. In turn, Ms. Miller performs administrative duties and exercises independent judgment.

11. The Intervenors report directly to their assigned administrators in an assistant position, they have a tendency to work independently without specific direction and have significant responsibilities in their assigned departments. Intervenors perform administrative duties in a supporting role and they are called upon to exercise independent judgment.

12. Grievants perform vital duties and assignments for the principals to whom they are assigned at their respective schools; however, they do not appear to be assigned to a position characterized by significant administrative duties. Grievant Ruth Ann Mercer

shared this characterization when employed as a Secretary/Accountant for the Payroll and Child Nutrition Department at the central office; however, when she was assigned to the county treasurer and reclassified she was assigned to an administrator whose position is characterized by significant administrative duties.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "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).

Grievants assert that they perform similar assignments and duties to the central office secretaries and, therefore, are similarly situated to those secretaries thereby entitling them to the same classification and pay increase given to central office secretaries. Because the positions of the Grievants were not reclassified, they contend that they are victims of discrimination and favoritism. Respondent maintains the issue to be decided by

the undersigned is not whether Grievants should be classified as executive secretaries because they cannot be reclassified as a matter of law; however, the controlling issue in this grievance is whether each of the Intervenors are assigned to a central office administrator whose position is characterized by significant administrative duties. Intervenors maintain they are, and that Grievants are properly classified.

Service personnel classification titles are defined in W. VA. CODE § 18A-4-8(i). Those relevant to this discussion are as follows:

> (40) "Executive Secretary" means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties;
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> (77) "Secretary II" means a person employed in any elementary, secondary, kindergarten, nursery, special education, vocational or any other school as a secretary. The duties may include performing general clerical tasks; transcribing form notes, stenotype, mechanical equipment or a sound-producing machine; preparing reports; receiving callers and referring them to proper persons; operating office machines; keeping records and handling routine correspondence. Nothing in this subdivision prevents a service person from holding or being elevated to a higher classification;
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> (78) "Secretary III" means a person 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 in purchasing and financial control or any person who has served for eight years in a position which meets the definition of "secretary II" or "secretary III";

It is evident from the record of this case that Grievants all perform vital services in their respective schools, and they are quality, long tenured personnel. While there are similarities in the duties of secretaries in general, the analysis of whether a secretary is properly classified as an Executive Secretary turns on whether the administrator to whom the secretary is assigned is in a position characterized by significant administrative duties, not on the duties of the secretary. *See Sanders v. Putnam County Bd. of Educ.*, Docket

No. 01-40-630 (Mar. 19, 2002). That is, the distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned. The Grievance Board has approved of multiple executive secretaries within the same county when each was assigned to an administrator who had significant administrative duties. *See Smith v. Kanawha County Bd. of Educ.*, Docket No. 07-20-060 (Sept. 27, 2007); *Mathis v. Wayne County Bd. of Educ.*, Docket No. 03-50-257 (Dec. 17, 2003).

The issues raised by Grievants are related to allegations of discrimination/favoritism and one of uniformity in the school service personnel setting. Grievants' counsel aptly crystalizes the issues as whether Grievants are similarly situated to and performing like assignments and duties as those performed by the central office secretaries and, if so, are the administrative duties of the principals comparable with those of the supervisors of the central office secretaries. Based upon reasons more fully set out below, the undersigned answers the first query in the negative and, therefore, need not address the second query.

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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h).

In order to establish either a discrimination or favoritism 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

County boards of education are required to provide uniform benefits and compensation only 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); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees whom they are attempting to compare themselves. *Locket v. Fayette County Bd. of Educ.*, Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-165 (Sept. 24, 1997).[3]

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[3]W. VA. CODE § 18A-4-5b addresses the uniform treatment of county board of education service employees and states, in pertinent part:

> [C]ounty (salary) 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 requirement. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all

Grievants are assigned to work for principals of individual schools within the county school system, while the individuals to whom they compare themselves work for county wide administrators with significant responsibilities extending through the entire school system within Marshall County. Grievants presented evidence as to their duties at their respective schools. See Findings of Fact 4 and 5. By contrast, Intervenors report directly to their assigned administrators in an assistant position, they have a tendency to work independently without specific direction and have significant responsibilities in their assigned departments. Intervenors perform administrative duties in a supporting role and they are called upon to exercise independent judgment. In order for one service employee to compare herself with another service employee for the purposes of discrimination/favoritism, it is necessary that she be similarly situated. Given the difference in duties between the two groups, it cannot be said that they are similarly situated. Without a showing that they are similarly situated, Grievants have failed to prove an essential element in a claim of discrimination or favoritism.

Grievants also make a related claim that they perform like assignments and duties and are entitled to uniform treatment as it relates to salary and benefits. W. VA. CODE § 18A-4-5b requires uniformity in salaries, benefits, etc. for employees who are performing "like assignments and duties." The West Virginia Supreme Court of Appeals has determined that boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like

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> regularly employed and performing like assignments and duties within the county . . ..

classifications, ranks, assignments, duties and actual working days." *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

Grievants and Intervenors do not have the same actual working days. The record is clear that, with the exception of Leiliani Williams, Grievants hold contracts for anywhere from 200 days up to 220 days and Intervenors work under 220-day and 260-day contracts.

Although it is certainly true the duties Grievants perform are essential, numerous, and support the operation of their schools, Grievants are performing the duties within their classifications and not that of Intervenors. The record is replete with examples of this distinction based upon Intervenors' work assignments at the central office. The central office administrators to whom the Intervenors are assigned include Robyn Fitzsimmons, personnel; Bonnie Ritz, curriculum and instruction; Wayne Simms, assistant superintendent; Richard Redd, special education; Debbie Schrader, food service; Susan Jones, pupil services and title I. They demonstrated that they perform significant administrative duties and, in turn, assign administrative duties to their individual executive secretaries. Each of the central office administrators noted that Marshall County Schools Superintendent Alfred Renzella's management style is characterized as assigning duties and tasks to each autonomous central office administrator, allowing each to exercise their independent judgment with respect to achieving the goals behind the assignments.

Finally, the undersigned is not swayed by the contention that Intervenors are not properly classified as executive secretaries based upon the record of this case. It is well settled that county boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *Cowen v.*

Harrison County Board of Education, 195 W. Va. 377, 465 S.E.2d 648 (1995); *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). The evidence offered by administrators such as Dr. Ritz, Assistant Superintendent Simms, Ms. Fitzsimmons, Mr. Redd and others, illustrate that they act independently and their duties are of a higher administrative level than the duties of the school principals for whom the Grievants work. Since the duties are controlling, not just the mere job title of the person holding the position, Intervenors' classification is appropriate based upon the duties of their supervisors.[4]

There is no doubt that Grievants, over the years, have acquired and taken on significant duties in managing their areas of responsibilities, and deserve recognition for their efforts. Unfortunately, the undersigned cannot grant them the relief they seek in this grievance.

The following conclusions of law support the Decision reached.

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[4]W. VA. CODE § 18A-4-8(m) provides that "[w]ithout his or her written consent, a service person may not be: (1) Reclassified by class title; or (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years." However, Grievants, by their complaints, are alleging a violation of the uniformity clause of W. VA. CODE § 18A-4-5b. The non-relegation clause cannot be read or applied to preclude an employer from correcting a violation of law. *Brookover v. Wood County Bd. of Educ.*, Docket No. 07-54-231 (April 29, 2008). *But see Crock v. Harrison County Bd. of Educ.*, *per curiam*, 211 W. Va. 40, 560 S.E.2d 515 (2002). Grievants did not demonstrate Respondent's reclassification of the central office secretaries was improper or contrary to any law and, therefore, the issue of reclassifying the Intervenors need not be addressed.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "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).

2. 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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h).

3. In order to establish a discrimination or favoritism 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).

4. Grievants failed to demonstrate that they were the victims of discrimination or favoritism.

5. County boards of education are required only 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); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995).

6. Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees whom they are attempting to compare themselves. *Locket v. Fayette County Bd. of Educ.*, Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-165 (Sept. 24, 1997).

7. Grievants have failed to establish a violation of W. VA. CODE § 18A-4-5b, or that they were otherwise entitled to the same salary and classification as the Intervenors.

8. The distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities. Thus, the language in the Executive Secretary classification referring to "a secretary who is assigned a position characterized by significant administrative duties" refers to the administrator or

superior to whom the secretary is assigned, not the secretary. *Sanders v. Putnam County Bd. of Educ.*, Docket No. 01-40-630 (Mar. 19, 2002).

9. Grievants have failed to prove, by a preponderance of the evidence, that they are similarly situated to the central office secretaries who were reclassified as Executive Secretaries by virtue of their assignment to administrators whose positions are characterized by significant administrative duties.

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 (eff. July 7, 2008).

Date: April 2, 2010

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Ronald L. Reece
Administrative Law Judge