THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL WATSON,
Grievant,

v. **Docket No. 2010-0499-RalED**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

Grievant, Michael Watson, is employed by the Raleigh County Board of Education ("Board") as a Carpenter II. Mr. Watson filed a level one grievance form dated October 21, 2009. As his Statement of Grievance, Mr. Watson alleges the following:

> Grievant, a regularly employed Carpenter with a 240-day contract of employment, contends that he and Russell Shrewsbury perform like duties and assignments. Mr. Shrewsbury is employed as a Carpenter/Crew Leader with a 261-day contract of employment. Grievant alleges the failure to grant him a 261-day contract of employment violates W. VA. CODE §§ 18-4-5b (uniformity) & 6C-2-2 (favoritism/discrimination).[1]

As relief his statement requests the following:

> Grievant seeks instatement into a 261-day contract of employment, back pay retroactive to the extent permitted by law, benefits and interest on all sums to which he is entitled.

A level one conference was held on May 3, 2010, and a level one decision denying the grievance was issued on May 14, 2010. A level two mediation was held on August 24, 2010, and an Order related to the mediation was entered the next day. Grievant then filed a timely appeal to level three.

A level three hearing was held in Beckley, West Virginia, on January 4, 2011. Grievant personally appeared at the hearing and was represented by John E. Roush, Esq.

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[1] This specific Statement of Grievance comes from Grievant's level two grievance form, but it makes virtually the same allegations that are made in the level one form.

of the WVSSPA.[2] Respondent, Raleigh County Board of Education, was represented by Gregory W. Bailey, Esq.[3] At the conclusion of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals, the last of which was received by the West Virginia Public Employees Grievance Board on February 7, 2011. The grievance became mature for decision on that date.

Synopsis

Grievant asserts that he performs like assignments and duties as a co-worker, yet the co-worker receives a longer employment term and vacation which the Grievant is not provided. Grievant argues that the failure of Respondent to provide him the same pay of this similarly situated co-worker constitutes unlawful discrimination and violates the uniformity provision found in W. VA. CODE § 18A-4-5b. Respondent demonstrated that the co-worker cited by Grievant holds an additional classification title of Crew Leader and that of additional classification requires the co-worker to perform duties and carry a higher level of an responsibility than is required of Grievant. Consequently, the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Michael Watson, is employed by the Respondent Board as a Carpenter II.

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[2] West Virginia School Service Personnel Association.

[3] Mr. Bailey is with the law firm of Bowles, Rice, McDavid, Graff and Love.

2. Grievant is employed under a contract that provides for a 240-day employment term. Grievant does not receive paid vacation days.

3. The maximum employment term for school service personnel is for 261 working days. Employees working for Respondent who have 261-day employment terms receive paid vacation days during their employment term.

4. The Board employs three service personnel who hold the Carpenter Classification. Grievant is classified as a Carpenter II. Grievant's immediate supervisor, Russell Shrewsbury, is multi-classified as a Carpenter II/Crew Leader and Mark Morris is multi-classified as a Carpenter/Electrician/Painter.

5. Both Mr. Shrewsbury and Mark Morris have 261-day employment terms.

6. Russell Shrewsbury became Grievant's supervisor after the retirement of the previous Crew Leader, Kevin Godby. The position of Crew Leader was posted and Mr. Shrewsbury was the successful applicant.

7. Grievant and Shrewsbury both perform a wide variety of carpentry work for Respondent.

8. In addition to his normal carpentry work, Mr. Shrewsbury organizes and assigns the work each day for himself, Grievant and any carpentry work that needs to be done by Mr. Morris. If he is going to be absent, Mr. Shrewsbury assigns work in advance to be done in his absence. Additionally, Crew Leader Shrewsbury is required to prioritize the carpentry work orders, field daily communication related to projects and emergency work that may need to be done, attend periodic Crew Leader meetings and make recommendations related to the evaluations of the two employees he supervises.

9. The additional 21 days in the Crew Leader's employment term is part of the compensation that Crew Leaders receive for the additional duties and responsibilities they are required to perform.[4]

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). 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).

Grievant's argument centers around W. VA. CODE § 18A-4-5b which states in part that:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
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> 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* . . .

(Emphasis added). This portion of the statute is generally referred to as the uniformity provision and it requires that all employees who are "performing like assignments and duties" be treated the same with regard to salary and benefits. The provision has been

[4] Level three testimony of Racine O. Thompson, Jr., Raleigh County Assistant Superintendent for Facilities and Maintenance.

addressed by the West Virginia Supreme Court of Appeals in cases specifically involving employees who were working under 240-day contract terms and allegedly performing "like assignments and duties" as other employees with 261-day contract terms. *See Flint v. Bd. of Educ. of the County of Harrision,* 207 W.Va. 251, 531 S.E.2d 76 (1999); *Bd. of Educ. of the County of Wood* v. *Airhart,* 212 W. Va. 175, 569 S.E.2d. 422 (2002); and *Durig v. Bd. of Educ. of the County of Wetzel,* 215 W. Va. 244, 599 S.E.2d. 667 (2004). At syllabus point three in *Durig supra.* the Court wrote:

> 3. "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." Syllabus Point 5, *Bd. of Educ. of the County of Wood* v. *Airhart,* 212 W. Va. 175, 569 S.E.2d. 422 (2002).

In *Airhart supra*. the Court also specifically noted that:

> Duties of the compared personnel do not have to be identical. This is not the test . . . substantial similarity was sufficient to invoke the statutory protections of uniformity.

Id. (citing *Weimer-Godwin v. Bd. of Educ. of Upsher County,* 179 W.Va. 423, 369 S.E.2d 726 (1988).

In the present case, Grievant and Mr. Shrewsbury both perform carpentry work for the majority of their work day. For the first half hour or so each morning, Crew Leader Shrewsbury organizes the work orders and decides which job he will assign to each carpenter including himself. He then gives those assignments to Grievant and Mr. Mason when necessary and each carpenter goes to their assigned job and works independently. During the time Crew Leader Shrewsbury is organizing and assigning the daily workload,

Grievant gathers tools and equipment that he will need for the day's work. Grievant opines that this half hour period of time each day when Crew Leader is performing supervisory functions is not sufficient to differentiate his assignments and duties from Grievant's.

Crew Leader Shrewsbury is, however, Grievant's supervisor. Even though they both perform all levels of carpentry work a majority of the time, Mr. Shrewsbury is responsible for prioritizing and assigning the work. He makes the ultimate determination as to whether the work is done properly and if orders are issued to address emergency situations, it is Mr. Shrewsbury's responsibility to adjust assignments to meet those needs. Additionally, Mr. Shrewsbury must periodically participate in Crew Leader meetings and he is responsible for providing information regarding Grievant's work performance that is the basis for Grievant's regular performance evaluations. These supervisory duties not only require a portion of Mr. Shrewsbury's time, but they impart upon him a greater level of responsibility that Grievant does not have to bear. It is for these specific duties and heightened responsibilities that Mr. Shrewsbury is rewarded by receiving a longer employment term that results in paid vacation. Because Grievant does not perform these duties he is not entitled to uniform compensation with Mr. Shrewsbury because they do not perform like assignments and duties.

_____Grievant argues that his lack of a 261-day employment term constitutes unlawful discrimination pursuant to the statutory grievance procedure. 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). Grievant is not similarly situated with Mr. Shrewsbury. While they perform similar types of work, Crew Leader Shrewsbury is Grievant's immediate supervisor and he is ultimately responsible for ensuring that all carpentry work required by the Board is performed in a competent and timely manner. This additional responsibility, as well as supervisory duties clearly differentiates Mr. Shrewsbury's job from Grievant's.

_____Grievant did not prove that he performed like assignments and duties as those assigned to Crew Leader Shrewsbury. Nor did Grievant prove that he is similarly situated to Mr. Shrewsbury. Consequently, the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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).

2. Pursuant to W. VA. 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. *Cutright*

v. Lewis County Bd. of Educ., Docket No. 05-21-335 (Jan. 18, 2006) (*citing: 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)).

3. Grievant did not prove by a preponderance of the evidence that his assignments and duties were sufficiently similar to Crew Leader Shrewsbury's to trigger the uniformity requirements of W. VA. CODE § 18A-4-5b.

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 did not prove by a preponderance of the evidence that he was similarly situated to Crew Leader Shrewsbury and therefore he is not subject to unlawful discrimination as that term is defined in W. VA. CODE § 6C-2-2(d).

Accordingly, the 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: MAY 17, 2011

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE