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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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PATTY R. BLEVINS

v.

Docket No. 10-87-161

FAYETTE COUNTY BOARD OF EDUCATION

DECISION

Grievant, Patty Blevins, is employed by the Fayette County Board of Education as director of pupil services. She filed a grievance on March 16, 1987 alleging a violation of the uniformity of salary provision of W.Va. Code, 18A-4-5a, sex discrimination violative of the Human Rights Act (W.Va. Code, 5-11-1) and various federal statutes forbidding gender based salary discrimination. Level two evidentiary hearings were conducted on April 30 and May 4 and a decision was rendered

on May 18, 1987.¹ On June 5, 1987 grievant filed an appeal with the Education Employees Grievance Board and an evidentiary hearing was conducted in Beckley on August 5, 1987.²

Grievant was employed as director of pupil services in September 1983 at a beginning salary of \$27,000.00 per annum (T.82). At that time she had a masters degree plus 15 hours and nineteen years actual experience (T.112).³ In July 1986

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The level two grievance evaluator had ruled that the grievance had not been timely filed as per W.Va. Code, 18-29-4 but proceeded to rule on the merits of the grievance. He held that the school board could differentiate in the salary of the various directors and that grievant had failed to prove the allegations of sexual and employment discrimination. However, he did recommend that the school board review recent additional job responsibilities given to grievant by the superintendent in relation to a salary adjustment. On May 29, 1987 the school board ostensibly refused to follow the recommendation of the level two grievance evaluator.

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At the level four hearing counsel for the grievant elicited the testimony of grievant on the issue of "timeliness" and counsel for the board was granted leave to contact former superintendent Hurt to determine if his testimony would be required in response thereto. The grievance was then submitted to the hearing examiner on the record made at level two, (T.____), the additional evidence taken on August 5 and the proposed findings of fact and conclusions of law submitted by counsel for the parties.

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The \$27,000.00 figure was calculated on a teacher's salary with a masters degree with nineteen years of experience (\$19,611.00) and an administrative supplement amounting to a total annual salary of \$27,000.00 (Respondent's Exhibit 1). At the time of the grievance her salary was \$35,563.00

After she accepted the position grievant learned that her predecessor in that position, Howard Perry, had (footnote cont.)

grievant became aware of a salary disparity between her salary and the other directors as a result of a study prepared by Douglas L. Kincaid, director of personnel for Fayette County Schools, titled A Comparison of 1985-86 Daily Wages for Selected Personnel. (Grievant's Exhibit 2;T.27). Grievant thereupon commenced what she characterized as the "informal grievance process" with superintendent Hurt (T.30) and on July 11, 1986 advised Mr. Kincaid that she would not execute the 1986-87 employment contract because she disagreed with the salary figure. Superintendent Hurt assured grievant that he would present the salary issue to the school board at the August meeting and on August 13 informed grievant that the board did not appear interested but that he would continue to present her claim to the board. Meanwhile, grievant persisted in her refusal to execute the contract despite Mr. Hurt's assurance that they could "work it out."

(footnote cont.)

a doctorate degree plus sixteen years experience and was paid \$30,800.00, (T.86). Grievant calculated that with their respective degrees and experience, \$2,600.00 of the \$3,800.00 disparity was based on sex discrimination (T.82). Over objection, grievant was also permitted to testify on avowal that Robert Stury, a co-employee at the State Department of Education with the same credentials and experience, had informed grievant that he had been offered the position at \$30,800.00. (T.94,99).

In October 1986 Mr. Hurt again attempted to persuade grievant to execute the contract on the assurances that he would pursue the matter again with the school board; grievant refused and in late November or early December he advised her that he had been unable to effectuate the raise at that time. However, grievant orally agreed that she would sign the contract but would note her disagreement with the salary. On that basis Mr. Hurt agreed to again speak with the school board and in January 1987 requested that she execute the contract, which she did, noting thereon that she disagreed with the salary.

Thereafter, on January 21, 1987 grievant had a conference with Zoe White, the associate superintendent for curriculum and instruction, and requested grievance forms because it appeared to grievant that Mr. Hurt would be unable to resolve the salary issue. However, on February 2, Mr. Hurt, aware of her intent to file a grievance, summoned grievant to his office and offered to present the issue to the school board again at the next meeting on February 13, 1987. Thereafter, on February 16, Mr. Hurt advised grievant that he was unable to resolve the matter and the grievance was filed on March 16, 1987.⁴

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In Carl W. Steele v. Wayne County Board of Education, Docket No. 50-87-062, a similar grievance on "timeliness", it was held that an employee who made a good faith effort to resolve a grievance and relied in good faith on representations of school officials that the matter would be rectified would not be barred from pursuing the grievance upon the denial thereof. This concept is based upon the (footnote cont.)

The evidence in this grievance is essentially uncontroverted and establishes that on the table of organization flow chart the grievant's position -- director of pupil services -- is directly under the bureau of curriculum and instruction and that each of the eight directors of the respective divisions are on the same organizational level (T.26).⁵ In April 1987 grievant obtained the job descriptions of the various director positions to examine the responsibilities of each position and to make a comparison thereof with her position. The comparison performed by grievant from this data included an analysis of seventy three areas of responsibility or duties performed by the eight directors and the conclusion reached by grievant was that her position entailed more responsibilities than the other seven director positions. (Grievant's Exhibits 3 and 4). She testified that she had never been offered any rationale to justify

(footnote cont.)

doctrine of equitable estoppel, whereby the board would be estopped to plead untimeliness where school officials have lulled an employee into a false sense of security. See, e.g., Duke University v. Stainback, 357 S.E.2d 690, 693 (N.C. 1987).

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Originally there were ten divisions on the county organizational chart, which was adopted on May 16, 1977 and revised December 14, 1982. These ten divisions were: secondary education, elementary education, pupil services, special programs, federal programs, vocational education, personnel, services, purchasing and budget and finance. (Grievant's Exhibit 1). Of these original ten there were eight director positions in existence at the time of the level two hearing. (T.35,36).

the salary discrepancy between the director positions and was not aware of any written policy which would explain the disparity. (T.60,61,138).⁶

Superintendent Hurt acknowledged that he had assured grievant he would attempt to reconcile the salary discrepancy and testified that he had done "everything he could" to get the pay increase. (T.65,66).⁷ He was of the opinion that grievant needed a salary increase that would be more compatible with the other directors and that there was no justification from a job responsibility

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Grievant also compared the educational credentials and experience of the eight directors with the salary each received and concluded that her 1986-87 salary (\$34,563.00) should be equal to the highest salary paid to the director of elementary education, i.e., \$39,101.00. (Grievant's Exhibit 4, page 4). From that data she prepared a more comprehensive job responsibility and salary comparison. (Grievant's Exhibit 5).

At level two this evidence was offered to strengthen grievant's credibility and to explain her resolve to pursue the grievance. The comparisons were admitted as the "personal opinion" of the grievant and not as the opinion of an expert witness. (T.39,49). However, there was no evidence offered to question the authenticity of the data used by grievant and appropriate weight was accordingly given to this evidence by the hearing examiner.

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Superintendent Hurt testified as an adverse witness and noted that he had also attempted to reconcile salary disparities as to other employees in addition to grievant. However, he concluded that among the salary differences of the directors grievant was the director who suffered most by the salary disparity (T.75).

standpoint for the salary disparity (T.68,69).⁸

As acting associate superintendent of schools and head of the bureau of curriculum and instruction Zoe White supervised the following directors: secondary education, elementary education, pupil services, vocational education and federal programs (T.43). From that position she was familiar with the job descriptions of each of the director positions and their actual responsibilities. In her opinion grievant's responsibilities and duties as director of pupil services were equal to or greater than the other directors she supervised, (T.150), and she was unaware of any existing written policy which might explain the reason grievant was paid less salary than other employees on the same level.⁹ She opined further that the salaries and responsibilities listed on the organizational chart should be equal

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He was not, however, of the opinion that the salaries of all directors should be identical and suggested no salary figure to the level two grievance evaluator; he opined only that it should be corrected (T.69,71).

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This opinion was based upon her observations, direct dealings with the other directors and the opportunity to observe them in their work environment. She was similarly unaware of any policy which would explain the reason the director of secondary education was paid over \$2,000.00 more than grievant. She noted that this "disparity was evident" in the written response she had made to the grievance. (Grievant's Exhibit 6; T.153).

As to the absence of policy she testified that there had been an administrator's salary index in effect in Fayette (footnote cont.)

(T.161) and testified that she had recommended to the superintendent that grievant should be treated as all other directors as far as salary, at least as to the comparable salary of the director of secondary education, the director of which had identical certification and number of years of experience as grievant. (T.168,169)¹⁰

Counsel for the grievant contends that W.Va. Code, 18-4-5a and decisions of the Education Employees Grievance Board compel the conclusion that while a school board has the right to fix salaries of its employees it must make these salaries uniform in regard to supplements; that the salary discrepancy is violative of West Virginia Human Rights Act as per W.Va. Code, 5-11-9; that it also amounts to unlawful employment discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. sections 2000, et seq.) and a violation of Title IX of the federal law.

(footnote cont.)

County when she was employed but that index had been discontinued in 1979 (T.158). Mr. Kincaid, the personnel director, testified that the index had not been used since the 1976-77 school year but attempted to somehow relate that index to grievant's case. (See, e.g., T.215,216). However, in the opinion of the hearing examiner the relevancy thereof was not demonstrated.

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This recommendation was also predicated upon what Ms. White termed as general motions of fairness and morale in the office. (T.175).

See, Mooney v. Marshall University, Docket No. 106-56-150, wherein an unwritten policy was utilized to justify a salary disparity between medical secretaries performing the same duties and similar observations were made. In Mooney it was noted that the "discrimination" was inherent in the unwritten policy and not directed personally at grievant.

Counsel asserts that, at a minimum, grievant's salary should be elevated to \$37,673.00 or to \$39,101.00 immediately and she should be awarded back pay, attorneys fees and costs.¹¹

Counsel for the school board contends that the grievance was not timely filed but that, notwithstanding, the State Superintendent and the Education Employees Grievance Board have upheld the right of a school board to differentiate salary supplements among its employees and administrative personnel; that grievant failed to show sex and/or unlawful employment discrimination as alleged because at least two current male directors are receiving salaries less than grievant and that since her employment by Fayette County Schools she has received salary increases totaling \$8,563.00, which is more than six male directors have received during the same period of time.

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As to the jurisdiction of the Education Employees Grievance Board in relation to the Human Rights Act, see Jawa v. McDowell County Board of Education, Docket No. 33-86-192; as to the jurisdiction over the federal statutes, see, Zban v. Cabell County Board of Education, Docket No. 06-87-010. As noted therein it is highly unlikely that the Education Employees Grievance Board has jurisdiction in those areas but is limited to allegations of "discrimination" as defined in W.Va. Code, 18-29-2(m). The test under all of these statutes would appear, however, to be very similar. See, e.g., Brobst v. Columbus Services Intern., 824 F.2d 271 (3rd Cir. 1987), citing Corning Glass Works v. Brennan, 417 U.S. 188 (1974). Moreover, counsel for grievant acknowledged at the level four hearing that the "discrimination" case was ancillary to the grievance and because the grievance is resolved on the basis of W.Va. Code, 18A-4-5a it is unnecessary to reach the discrimination issue. Obviously, almost every finding of salary disparity would involve an element of "discrimination."

As to court costs and attorney fees, the Education Employees Grievance Board is not authorized to make these awards. Wyatt v. Marshall University, BOR2-87-044; Davis v. Summers County Board of Education, Docket No. 45-87-119.

In addition to the foregoing factual recitation the following specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant has been employed by the Fayette County Board of Education as director of pupil services since September 1983, has a masters degree plus fifteen hours and twenty three years of experience.

2. In January 1986 Douglas L. Kincaid, director of personnel of Fayette County Schools, prepared a comparison of 1985-86 daily wages for selected personnel in which it was concluded, inter alia, that forty one school administrators (principals) earned more per day than the director of pupil services, as did two curriculum specialists; that directors' salaries should be increased by approximately \$5,000.00 to the \$42,000.00 range in order to alleviate the inequities set out in the report.

3. Grievant learned of the salary disparities in July 1986 and pursued the matter with then superintendent Hurt; on July 11, 1986 she advised Mr. Kincaid that she would not execute her 1986-87 teacher's contract because she disagreed with the salary contained therein. Over the next several months superintendent Hurt attempted to persuade grievant to execute the contract and throughout this period assured grievant that

the matter could be resolved. The details of those discussions and negotiations are set out elsewhere in this decision and will not be reiterated in these findings. Grievant did, in fact, rely in good faith upon the representations of superintendent Hurt in deferring action on her complaint about the salary disparity and was justified in so relying. In such a situation the school board is estopped from asserting the "untimeliness" issue.

4. In the Fayette County school system there are eight director positions and all are on the same level on the organizational chart. The evidence clearly preponderates that the job responsibilities and duties performed by grievant as director of pupil services were similar, equal to or greater than the other seven directors. The 1986-87 salary of each of the director positions is as follows:

Pupil services	\$35,563.00
Elementary education	39,101.00
Personnel	38,691.00
Secondary education	37,673.00
Vocational education	38,585.00
Federal programs	38,343.00
Service	38,343.00
Budget and finance	30,221.00

5. Among the directors having the same educational degrees and experience level grievant is the most poorly paid of all directors, earning \$2,110.00 less than the director of secondary education, who has identical certification and experience. Other

than a salary index system which was discarded in 1977, there is no evidence of a written or unwritten policy existing in Fayette County which would explain the rationale for the salary disparity and none is apparent from the record. The consensus of the professional opinions offered was that the salary of the above named directors should be better equalized not merely to correct the deficiency but to also improve the morale in the central office.

CONCLUSIONS OF LAW

1. An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials in lieu of filing a grievance and relies in good faith upon the representations of these officials that the matter will be rectified will not be time barred from pursuing the grievance pursuant to W.Va. Code, 18-29-4 upon the diligent filing of a grievance immediately after the cessation of or apparent futility of the efforts. Carl W. Steel v. Wayne County Board of Education, Docket No. 50-87-062.

2. County boards of education may fix special salary schedules for administrators in excess of minimum salaries but these excess salaries are to be uniform throughout the county as to training, classification, experience, responsibility and other requirements in accordance with W.Va. Code, 18A-4-5a. L. Kay Carpenter v.

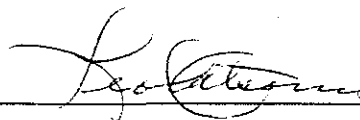
Webster County Board of Education, Docket No. 51-86-250.

3. W.Va. Code, 18A-4-5a provides for uniformity of additional salary increments or compensation for all employees performing like assignments and duties within the county and it is incumbent upon a grievant to establish a violation thereof by a preponderance of the evidence. Carl W. Steele v. Wayne County Board of Education, Docket No. 50-87-062; Turner v. Grant County Board of Education, Docket No. 12-86-257; Wright v. Putnam County Board of Education, Docket No. 40-86-328.

4. As a matter of law grievant has proved a violation of W.Va. Code, 18A-4-5a by a preponderance of the evidence.

The grievance is granted in part and denied in part. It is granted as to salary and Ordered that the Fayette County Board of Education increase grievant's salary to a minimum amount of \$37,673.00 retroactive to July 1, 1986. The grievance is denied as to the request for back pay prior to July 1, 1986 due to lack of evidence thereon and denied as to attorney fees and costs.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

A handwritten signature in cursive script, appearing to read "Leo Catsonis", is written over a horizontal line.

LEO CATSONIS
Chief Hearing Examiner

Dated: October 22, 1987