

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CAMERON MOFFETT,

Grievant,

v.

Docket No. 2018-0160-MasED

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Cameron Moffett, is employed by Respondent, the Mason County Board of Education. On July 31, 2017, Grievant filed the following grievance against Respondent:

Various West Virginia Board of Education, and Mason County Schools' policies have been violated via a continuing practice in regard to Mr. Cameron Moffett. Specifically, Mr. Moffett is being treated unfairly. This is due to the fact that one county director is being financially compensated using a different mathematical calculation than the one used to determine Mr. Moffett's salary. This action results in favoritism toward another employee who is being treated differently than Mr. Moffett.

Specific laws and policies which Mason County Schools is in violation of include:

- 1) State Board Policy 5902: Employee Code of Conduct (and corresponding Mason County Schools Policy 3210);
- 2) Mason County Schools Policy 1520: Employment of Administrative Staff; and
- 3) WV Code § 18A-4-5a – County salary supplements for teachers.

The relief sought states: Mr. Moffett respectfully requests that Mason County Schools be directed to utilize a fair and uniform system of supplemental compensation for county directors which takes into account education, experience, responsibility and other requirements. Furthermore, Mr. Moffett requests any and all compensation due him, including back pay, be paid to him forthwith.

A level one hearing was held on July 25, 2017, and a decision was issued on October 6, 2017, denying the grievance. Grievant appealed to level two on October 24, 2017, and a mediation session was held on December 19, 2017. Grievant appealed to level three of the grievance process on January 10, 2018. A level three hearing was held before Administrative Law Judge Carrie LeFevre at the Grievance Board's Charleston office on June 5, 2018.¹ Grievant was represented by Don Bucher. Respondent was represented by Leslie Tyree. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on July 24, 2018.

Synopsis

Grievant is employed by Respondent as the Director of Maintenance. Grievant alleges that Respondent is exhibiting favoritism towards its Transportation Director and that it uses a more favorable compensation formula to determine that employee's salary, thereby treating Grievant unfairly. Grievant alleges that Respondent's compensation formula violates the uniformity provisions of West Virginia Code § 18A-4-5. Grievant has not proven that Respondent compensates its directors in a non-uniform manner or that he has suffered any harm as a result of Respondent's conduct. Therefore, this grievance is denied.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant is employed by Respondent as Director of Maintenance.

¹ The grievance was thereafter transferred to Administrative Law Judge Joshua Fraenkel for administrative reasons.

2. On October 11, 2016, Respondent approved and has ever since utilized a salary index called the “Local Salary Increments for Administrators and Supervisors” which sets the minimum salary for each of its director positions at \$75,000 per year.²

3. The implementation of the \$75,000 minimum salary for Respondent’s director positions has not resulted in the reduction of any director’s salary.

4. Respondent pays Grievant \$81,349.50 per year, which is more than the \$75,000 minimum for a director position.

5. The “Local Salary Increments for Administrators and Supervisors” which Respondent approved on October 11, 2016, states that the “above listed rates shall be applied to Mason County Board of Education Salary Schedule and shall take into account degree levels, pay grade, and years of experience.”

6. Respondent employs 10 director positions.

7. Prior to the enactment of the minimum salary, only two of Respondent’s 10 directors had salaries below \$75,000 and were consequently affected by the enactment of the \$75,000 minimum salary. One of these affected positions was the Transportation Director.

8. The “Local Salary Increments for Administrators and Supervisors” and its \$75,000 minimum salary for directors was approved a few months after the current Transportation Director was hired.

9. The Transportation Director has held the position for two years, but was employed by the Mason County Board of Education for 13 years prior thereto.

² Respondent’s Exhibit 2.

10. In July of 2017, Respondent preliminarily transferred the employee currently holding the position of Transportation Director to the new position of Administrative Assistant to the Superintendent/Transportation, Central Office, without posting this new position.³ Grievant successfully challenged this transfer at the Respondent's regular board meeting and the transfer was not approved.

11. Mason County Schools Policy 1520 (Employment of Administrative Staff) states that "[t]he Superintendent shall list all vacant administrative positions on the school system's website, shall post notices of such vacancies in conspicuous working places for all professional personnel to observe for at least five (5) working days, shall give notice of such vacancies to all qualified personnel on the preferred recall list, and shall prepare administrative guidelines for the recruitment and selection of all administrators."⁴

12. The employee holding the position of Transportation Director was initially the Transportation/Safety Director before Respondent removed the safety responsibilities from his job description without reducing his compensation.

13. The Transportation Director currently supervises 79 employees, 57 full-time bus routes, and the transportation of 4,164 students a day.

14. Grievant, as Director of Maintenance, supervises 14 employees and maintains 12 schools and a central office.

15. Normal work hours for Respondent's director positions are 8:00 a.m. to 4:00 p.m.

³ Grievant's Exhibit 2.

⁴ Respondent's Exhibit 3.

16. The current Transportation Director has on occasion been asked to deal with transportation issues at 4:00 a.m., in conjunction with the routine early morning bus operations, and has been allowed to subsequently utilize exchange time.⁵

17. Grievant heard from a secondhand source that Grievant was ineligible to use exchange time.

18. Grievant has not submitted paperwork requesting exchange time during the period that the current Transportation Director has held the position.

19. Respondent strives to equalize duties and compensation between its directors.

20. Respondent uses a uniform formula to compensate its directors.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

In the instant matter, Grievant alleges that Respondent treated him differently than its Transportation Director when it used a more favorable supplemental salary formula to

⁵ Exchange time is time off given to employees to compensate them for hours worked over normal hours.

calculate the Transportation Director's compensation. Grievant is employed as Respondent's Director of Maintenance. This grievance is premised primarily on the uniformity of compensation mandate of West Virginia Code § 18A-4-5, as well as claims of favoritism and violations of State Board Policy 5902 and Mason County Schools Policy 1520.

Before addressing the merits of this grievance, we must explore whether the Grievant's Director of Maintenance and Transportation Director positions are professional or service personnel positions in order to determine which compensation uniformity code section applies. West Virginia Code § 18A-4-5a is titled "county salary supplements for teachers." West Virginia Code § 18A-4-5b is titled "county salary supplements for school service personnel." Both statutes discuss the need to have compensation uniformity within those two broad classifications of personnel, but neither speak to the need to have uniformity between the two categories. A determination of whether Director of Maintenance and Transportation Director are in the same classification is therefore crucial for a smooth analysis of Respondent's uniformity obligations.

West Virginia Code § 18A-4-8, which covers service personnel titles includes the definitions of "director or coordinator of services,"⁶ "supervisor of maintenance,"⁷ and

⁶ "Director or coordinator of services' means an employee of a county board who is assigned to direct a department or division." W. VA. CODE § 18A-4-8(i)(34).

⁷ "Supervisor of maintenance' means a skilled person who is not a professional person or professional educator as defined in section one, article one of this chapter. The responsibilities include directing the upkeep of buildings and shops, and issuing instructions to subordinates relating to cleaning, repairs and maintenance of all structures

“supervisor of transportation.”⁸ As such, “service personnel” appears to be the better fit for the duties of Director of Maintenance and the Transportation Director. West Virginia Code § 18A-4-5b applies to “service personnel” and allows county boards of education to establish salary schedules in excess of state minimums while mandating that “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.”

A grievant seeking to establish a violation of West Virginia Code § 18A-4-5b must establish the essential element of his or her claim by a preponderance of the evidence. *Fowler v. Mason Co. Bd. of Educ.*, Docket No. 94-26-037 (Oct. 6, 1994). Grievant alleges that Respondent’s failure to utilize a uniform compensation formula results in favoritism towards the Transportation Director and, by implication, discrimination towards Grievant. West Virginia Code 18A-4-5 requires uniformity of compensation for all persons performing like assignments and duties. *Mersing, et al., v. Preston County Bd. of Educ.*, Docket No. 89-39-513 (July 12, 1991); *Deal v. Mason Co. Bd. of Educ.*, Docket No. 96-

and mechanical and electrical equipment of a county board.” W. VA. CODE § 18A-4-8(i)(85).

⁸ “Supervisor of transportation’ means a qualified person employed to direct school transportation activities properly and safely, and to supervise the maintenance and repair of vehicles, buses and other mechanical and mobile equipment used by the county school system. After July 1, 2010, all persons employed for the first time in a position with this classification title or in a multiclassification position that includes this title shall have five years of experience working in the transportation department of a county board. Experience working in the transportation department consists of serving as a bus operator, bus aide, assistant mechanic, mechanic, chief mechanic or in a clerical position within the transportation department.” W. VA. CODE § 18A-4-8(i)(86).

26-106 (Aug. 30, 1996). Grievant made no claim and presented no evidence that he was being paid less than the Transportation Director to which he compares himself. Grievant's contention is that, in establishing a base salary of \$75,000 for all director positions, Respondent only increased the salaries of the two directors that were below this minimum and thereby did not uniformly increase the salaries of all 10 directors. Both Grievant and Transportation Director, being directors, are in the same classification category and perform like duties and assignments. As such, Respondent is obligated to compensate them uniformly.

It is well-settled that employment terms and compensation are benefits which must be uniformly granted to employees who perform like duties and assignments. See *Allison v. Hancock County Bd. of Educ.*, Docket No. 97-15-454 (Mar. 31, 1998). The pivotal question in such cases is whether the grievant is actually performing like assignments and duties to those of the employee to which he compares himself. See *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995); *Robb v. Hancock County Bd. of Educ.*, Docket No. 9-15-356 (March 31, 1992); *Allman v. Harrison County Bd. of Educ.*, Docket No. 89-17-215 (June 29, 1990) (reversed on other grounds, *Harrison County Bd. of Educ. v. Allman*, Circuit Court of Harrison County, Civil Action No. 90-P-86-2, April 15, 1992). It was concluded in *Stanley, supra*, that, in order to be entitled to the same benefits, employees must have "like classifications, ranks, assignments, duties and actual working days." 'Like' has been defined as having the same or nearly the same qualities or characteristics; resembling another; or substantially similar. BLACK'S LAW

DICTIONARY 834 (5th ed. 1979). *Miller v. Boone County Board of Education*, Docket No. 99-03-410 (February 17, 2000). The West Virginia Supreme Court has said that 'like' refers to having a distinctive character, no matter how widely different in nonessentials. *State v. Gaughan*, 55 W. Va. 692, 700, 48 S.E. 210, 213 (1904). *Miller v. Boone County Board of Education*, Docket No. 99-03-410 (February 17, 2000). The Transportation Director oversees many more employees than does Grievant. However, this is not necessarily a distinctive characteristic between the two positions that would make them unlike. It appears that Respondent has strived to equalize duties and compensation between its directors. Grievant has not presented sufficient evidence to the contrary.

Which brings us to the second aspect of Grievant's claim based on discrimination and favoritism. "Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W.VA. CODE § 6C-2-2(h). Discrimination is the converse of favoritism and "means 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 or favoritism claim asserted under the grievance statutes, an employee must prove that he or she has been treated differently from one or more similarly-situated employee(s), that the different treatment is not related to the actual job responsibilities of the employees, and 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 did not satisfy the first element of the *Frymier* test in that he failed to prove that he and his coworker were "treated differently." In making his case for being "treated differently," Grievant must prove that he was harmed. Without harm, there is no basis for relief. "A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See *Farley, et al., v. Wayne County Bd. of Educ.*, Docket No. 96-50-272 (Feb. 28, 1997); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994). *Wiley v. Raleigh County Bd. of Educ.*, Docket No. 01-41-531 (Apr. 3, 2002)." *McClung v. Nicholas County Board of Educ.*, Docket No. 02-34-223 (Sept. 16, 2002). Without harm, a grievant does not have standing. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy.' *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); See *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or

suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to ‘allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.’ *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).” *Preston v. DOT/DOH/DOP*, Docket No. 07-DOH-098 (Aug. 13, 2007). Grievant failed to prove that Respondent harmed him.

Grievant alleged (during the level 3 hearing) that Respondent showed favoritism towards the Transportation Director in other ways, such as, by establishing the \$75,000 minimum salary a few months after awarding him the Transportation Director position, by allowing him to use exchange time while disallowing Grievant from using it, by preliminarily transferring him to the new position of Administrative Assistant to the Superintendent/Transportation without posting it, and by eliminating safety oversight from his job duties.

On the first count of favoritism, Grievant did not prove that Respondent provided preferential treatment to the Transportation Director when it increased his salary to \$75,000, without increasing Grievant’s already higher salary, and premised this claim on the assumption that Respondent was already uniformly compensating its directors prior to its enactment of a base salary. Grievant presented no evidence showing he was

entitled to a higher salary than the Transportation Director and did not prove that the enactment of a base salary harmed him, even if its enactment was the result of favoritism.

On the second count, Grievant believed that the Transportation Director's use of exchange time was preferential treatment because Grievant heard from a secondhand source that Grievant was ineligible to utilize exchange time. Grievant never verified this with the superintendent and never submitted paperwork requesting exchange time over the two-year period that the current Transportation Director has held the position.

On the third count, even if the preliminary transfer of the current Transportation Director to the position of Administrative Assistant to the Superintendent/Transportation is evidence of favoritism, Grievant does not request appropriate relief or show evidence of any harm therefrom. Respondent did violate its own policy⁹ when it preliminarily transferred the Transportation Director to the administrative assistant position without posting the position. Had Grievant been precluded from applying for the position because Respondent failed to post it, he might justifiably request that the position be refilled after proper posting. However, Grievant successfully challenged the appointment at the Respondent's regular board meeting and the transfer was not approved. Grievant has not alleged that there was any further improper posting or filling of that position or that he was thereafter precluded from applying for the position.

⁹ Mason County Schools Policy 1520.

On the fourth count, Grievant did not present evidence sufficient to prove that the reduction in the Transportation Director's duties was favoritism or discrimination, or that such reduction was improper under the uniformity provision of West Virginia Code § 18A-4-5b. Respondent has the discretion to change or remove job responsibilities for the director positions without automatically enabling Grievant to then use this as evidence of favoritism or discrimination. The removal of responsibilities in itself is not conclusive of favoritism, and Grievant did not develop his claim that the removal of responsibilities was a result of favoritism.

Grievant did not sufficiently scrutinize and prepare his case. He contends that he is entitled to uniform compensation in conjunction with West Virginia Code § 18A-4-5. Yet he receives higher compensation than the employee he claims Respondent is treating preferentially. Grievant did not present any evidence regarding either the non-uniformity of Respondent's current compensation of its directors or the harm resulting from any discrimination by Respondent. Grievant did not present justification as to why he continues to receive a higher salary than the Transportation Director in spite of the fact that they are within the same job classification and presumably perform like assignments and duties. Grievant's case is premised on the assumption that Respondent was already uniformly compensating its ten directors before it established the \$75,000 base salary. Grievant presents no evidence for either the supposition that all directors were compensated uniformly prior to the enactment of the base salary or that their compensation was subsequently made non-uniform. The irony is that Grievant received

and continues to receive a higher salary than the Transportation Director. Grievant presented no evidence justifying his higher salary nor any salary amount or compensation formula that he believes should apply.

Ultimately, it appears that Respondent established a minimum salary so that its compensation of directors was more compliant with the uniformity provisions of West Virginia Code §18A-4-5b. Grievant has failed to meet his burden of proof. Accordingly, for the reasons set forth herein, this grievance is denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. West Virginia Code § 18A-4-5b, which is applicable to service personnel, requires that county boards of education may establish salary schedules in excess of state minimums but provides that “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.” West Virginia Code § 18A-4-5 requires

uniformity of compensation for all persons performing like assignments and duties. *Mersing, et al., v. Preston County Bd. of Educ.*, Docket No. 89-39-513 (July 12, 1991); *Deal v. Mason Co. Bd. of Educ.*, Docket No. 96-26-106 (Aug. 30, 1996).

3. A grievant seeking to establish a violation of West Virginia Code § 18A-4-5b must establish the essential element of his or her claim by a preponderance of the evidence. *Fowler v. Mason Co. Bd. of Educ.*, Docket No. 94-26-037 (Oct. 6, 1994).

4. “Discrimination’ means 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’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W.VA. CODE § 6C-2-2(h).

5. 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).

6. “A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See *Farley, et al., v. Wayne County Bd. of Educ.*, Docket No. 96-50-272 (Feb. 28, 1997); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994). *Wiley v. Raleigh County Bd. of Educ.*, Docket No. 01-41-531 (Apr. 3, 2002).” *McClung v. Nicholas County Bd of Educ.*, Docket No. 02-34-223 (Sept. 16, 2002).

7. Grievant proved that Respondent violated Mason County Schools Policy 1520 when it preliminarily transferred the current Transportation Director to a new administrative position without posting that position. Respondent proved that it rectified that violation by revoking the transfer and that Grievant was not harmed.

8. Grievant failed to prove that State Board Policy 5902 is applicable to this grievance or that Respondent violated this policy.

9. Grievant failed to prove non-uniformity in compensation between himself and the Transportation Director.

10. Grievant failed to prove that he was harmed by Respondent's conduct.

11. Grievant failed to prove his claims by a preponderance of the evidence.

12. 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: August 31, 2018

Joshua Fraenkel
Administrative Law Judge