KATIE THACKER,

Grievant,

v.

DOCKET NO. 97-22-104

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Katie Thacker, filed this grievance on February 17, 1995, alleging that the Lincoln County Board of Education ("Board") violated W. Va. Code § 18A-4-5b by failing to provide uniform compensation for directors or coordinators in Pay Grade H, and seeking the position pay provided to other directors or coordinators and all back pay to which she is entitled from the date of her reclassification, July 20, 1992. A level two hearing was held on April 29, 1996, and a decision denying the grievance was rendered by Superintendent Dallas Kelley on July 15, 1996. A level three hearing was conducted on August 27, 1996, but no decision was rendered at that level. Grievant appealed to level four on February 25, 1997, and a hearing was conducted on August 11, 1997. This matter became mature for decision on August 25, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Statement of Grievance, dated February 17, 1995.

Ex. 2 -

November 28, 1995 Board of Education meeting agenda.

Ex. 3 -

December 4, 1995 Board of Education meeting agenda.

Ex. 4 -

Undated 1992 Board of Education meeting agenda.

Ex. 5 -

Handwritten note from Grievant to Superintendent Dallas Kelley, dated December 20, 1994.

Ex. 6 -

1994-95 Service Personnel Certified Employment List

Ex. 7 -

1994-95 Professional and Service Personnel Position Codes

Testimony

Grievant testified in her own behalf. Respondent offered no witnesses. (See footnote 1)

ISSUE

The issue is whether the Grievant has proven by a preponderance of the evidence that the Board violated W. Va. Code § 18A-4-5b by: (1) not paying her the county supplement, or "position pay", of $140.00/month upon her reclassification on July 20, 1992, to Coordinator of Payroll and Auditing Services; or (2) by not paying her the county supplement at the same time it began paying it to Sid Atkins, Director of Finance/Treasurer, on July 1, 1994.

AFFIRMATIVE DEFENSE

The Board raised the affirmative defense of timeliness for the first time at level four. (See footnote

2) Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer at or before the level two hearing. W. Va. Code § 18- 29-3. Therefore, the Board's defense fails.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant has been employed by the Board since October 1, 1969.

2. Grievant was reclassified as Coordinator of Payroll and Auditing Services on July 20, 1992, at pay grade H, effective July 1, 1992. G. Ex. 4.

3. Grievant did not receive any county supplement or “position pay” at the time she was reclassified.

4. Following her reclassification, Grievant and Sid Atkins, Director, Finance/Treasurer, were the only school service personnel employed by the Board in the director or coordinator classification category.

5. The Board began supplementing Mr. Atkins' salary with a $140.00/month director's “position pay” on July 1, 1994.

6. On July 28, 1994, Grievant requested a corresponding salary increase for her position from Superintendent Dallas Kelley. 7. On December 20, 1994, Grievant once again asked Superintendent Kelley if she could receive the same position pay as Mr. Atkins since they were both school service personnel classified in the director or coordinator classification category.

8. Jackie Wilkinson, multi-classified as an executive secretary, accountant I, and coordinator of services, filed a grievance claiming a violation of W. Va. Code § 18A-4-5b, because she did not receive the $140.00/month position pay another executive secretary was receiving. Wilkinson v. Lincoln County Bd. of Educ., Docket No. 95-22-248 (Sept. 7, 1995).

9. Jackie Wilkinson won her grievance and the Board voted to begin paying her the $140.00/month position pay on November 28, 1995, with the effective date of January 17, 1995, the date of her reclassification to coordinator of services.

10. The Board voted that same date, November 28, 1995, to begin paying Grievant the $140.00/month position pay, with the effective date of July 1, 1995.

DISCUSSION

The titles for all county board of education school service personnel positions are set forth and described in W. Va. Code § 18A-4-8, which defines a “Director or coordinator of services” as “personnel who are assigned to direct a department or division.” Minimum salaries for each of the positions included in section eight have been prescribed by the Legislature in Code § 18A-4-8a. Pursuant to Code § 18A-4-5b, county boards of education may establish salary schedules for service personnel in excess of the state minimums set forth in section 8a. With regard to the uniformity of salaries for school service personnel, section 5b states as follows:

> These county salary schedules shall be uniform throughout the county with regard to training classification, experience, years of employment, responsibility, duties, 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: . . .

The Board has established a salary schedule for its central office administrators, and within this schedule, those employees who hold the title of director receive a salary based upon their certification and experience, along with “position pay' of $140.00 per month. While the majority of the individuals who hold these various positions are professional employees, it is undisputed that the Board does employ service personnel, including Grievant, in coordinator or director positions. The evidence establishes that Sid Atkins, now retired, was a service personnel employed in a director position who received the $140.00 per month position pay afforded other professional directors.

As the Board began paying Grievant the $140.00 position pay she requested effective July 1, 1995, Grievant's complaint at level four is that the Board violated W. Va. Code 18A-4-5b by not paying her the $140.00 per month “position pay” retroactive to the date of her reclassification, July 1, 1992.

The Board argues that, prior to Sid Atkins being awarded director's position pay on June 30, 1994, school service employees in the director or coordinator category of employment did not receive position pay, and therefore it could not have violated W. Va. Code § 18A-4-5b by not paying her the position pay at that time. I agree with the Board that no violation of Code § 18A-4-5b occurred with respect to Grievant and Sid Atkins prior to June 30, 1994. The evidence established that Grievant and Sid Atkins were the only school service employees in a director or coordinator position

at that time. Thus, Grievantis not entitled to retroactive position pay from the date of her reclassification to June 30, 1994.

Next the Board argues that Grievant is not entitled to the position pay subsequent to June 30, 1994, in comparison to Sid Atkins, because Grievant is a coordinator, while Sid Atkins was a director. Thus, the Board argues, Grievant did not perform like assignments and duties to Sid Atkins.

In order to prevail on a pay uniformity claim under W. Va. Code § 18A-4-5b, a grievant must show that his or her duties are substantially similar to those of another service employee. See Weimer-Godwin v. Bd. of Educ., 369 S.E.2d 726 (W. Va. 1988); Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Meadows v. Jefferson County Bd. of Educ., Docket No. 19-88-192 (Dec. 29, 1988). It is insufficient to establish a uniformity violation for Grievant merely to show that she shares the same Code § 18A-4-8 classification as another employee. Grievant must also show that her duties and responsibilities are similar to those of the other employee. Wetherholt v. Cabell County Bd. of Educ., Docket No. 93-06-017 (June 30, 1993).

Although not perfectly clear, the evidence alludes to the fact that Grievant reported to Sid Atkins, and they were not considered equal on the organizational hierarchy of the Board. Superintendent Kelley argued at level two that it was within the Board's discretion to establish a hierarchy placing directors of departments above coordinators of divisions. I do not disagree with Superintendent Kelley's argument so long as those within the director or coordinator positions are then compensated uniformly.

In Dillon v. Cabell Co. Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994), a service employee, classified as a coordinator of technical services, complained that his salary wasnot in conformity with that paid to the board's coordinator of systems development. (See footnote 3) In Dillon, the focus was not on the classification of the two employees, but instead, on the "similar skills, duties and responsibilities" of the employees. Id., at 3, citing Dillon v. Cabell County Bd. of Educ., Docket No. 89-06-702 (Feb. 28, 1990), remanded for further proceedings Case No. 90-C-427 (Cabell County Cir. Ct. Aug. 6, 1990). The Administrative Law Judge stated that "[n]ot all employees who perform support functions and hold a similar title need to be paid identically under §18A-4-5b." Id., at 10, citing, Wetherholt v. Cabell County Bd. of Educ., Docket No. 93-06-017 (Jun. 30, 1993). In the 1994 Dillon decision, the conclusion was that the two employees, although they both held the same service personnel class title and provided support functions to the school's infrastructure, did not hold

positions which were "substantially similar"; therefore, they did not perform "like assignments and duties" requiring payment under the same wage scale pursuant to Code §18A-4-5b.

In the instant case, Grievant testified that as Coordinator of Payroll and Auditing Services, she is “totally responsible for every aspect of the payroll and the school auditing.” LII Tr., p. 4. She is responsible for the annual audit of both the food and general funds for approximately 20 schools; she is responsible for reporting all payroll and auditing information to the State Department of Education in a timely manner; and she communicates directly with the principals of each school on the appropriate use of their school funds. LII Tr., p. 4. However, Grievant presented no evidence to establish that she performed like assignments and duties to Sid Atkins prior to his retirement. A grievantmust prove she is performing like assignments and duties to the employee with whom she is comparing herself in order to show an entitlement to uniform compensation under W. Va. Code § 18A-4-5b. This Grievant did not do. Therefore, Grievant has failed to prove she is entitled to the $140.00 per month position pay from the date Sid Atkins began receiving that compensation on June 30, 1992.

Finally, Grievant argues she should have been given the $140.00 per month position pay at least back to January 17, 1995, the date Darlene Neil and Jackie Wilkinson were given that pay. As noted above, those employees were awarded that pay based upon the decision in Wilkinson, supra, which was based upon the employees' executive secretary status, not their coordinator status. Grievant is not an executive secretary, and failed to prove that she performed like assignments and duties as Ms. Neal or Ms. Wilkinson. Therefore, Grievant has failed to prove the Board violated W. Va. Code § 18A-4-5b in not awarding her position pay back to January 17, 1995. (See footnote 4)

CONCLUSIONS OF LAW

1. Prior to June 30, 1994, Grievant and Sid Atkins were the only school service personnel employed within the director or coordinator classification category, and prior to that date, neither of them received position pay. Thus, Grievant has failed to prove by apreponderance of the evidence that she is entitled to position pay from the date of her reclassification to coordinator on June 30, 1994.

2. Grievant failed to establish by a preponderance of the evidence that the Board violated W.

Va. Code § 18A-4-5b in failing to award her a salary inclusive of $140.00 per month "position pay" effective July 1, 1994, as it chose to do with Sid Atkins, a director, because she failed to prove she performed like assignments and duties as Mr. Atkins.

3. Grievant failed to establish by a preponderance of the evidence that the Board violated W. Va. Code § 18A-4-5b in failing to award her the $140.00 per month "position pay" it awarded other service employees on the basis of their status as executive secretaries, because she failed to prove she performed like assignments and duties as those employees.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: December 1, 1997

Footnote: 1 Superintendent Dallas Kelley acted as the hearing examiner at level two, and during that hearing appeared to testify to events on behalf of the Board. However, Superintendent Kelley was not sworn to testify during that hearing, and his remarks are therefore only given the weight a representative's argument would be given in similar circumstances.

Footnote: 2 It is possible that the Board raised a timeliness defense at the level three hearing, but since neither the transcript of that hearing, nor a level three decision, has ever been provided by the Board, it is impossible to make that factual determination. In any event, the defense would still fail because it was raised too late by the Board.

Footnote: 3 The school board had created levels of pay grade "H" which is a recognized paygrade in Code §18A-4-8a.

Footnote: 4 Neither Grievant nor the Board satisfactorily explained why the Board decided to give Grievant the $140.00 per month position pay from June 30, 1995, forward. Superintendent Kelley opines in the level two hearing that it was probably a mistake to do it at all. However, the Board did not attempt to argue that Grievant should not have been given

the position pay, and I will not disturb that decision here. Suffice it to say that the Board has succeeded in creating a very confusing situation with regard to its directors and coordinators and the uniformity of pay issue.