J. WALTER COPLEY, JR.,

Grievant,

v. **Docket No. 97-34-027**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This is a grievance by J. Walter Copley, Jr. (Grievant), submitted pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that his employer, Respondent Nicholas County Board of Education (NCBE), violated W. Va. Code § 18A-4-3, and his right to due process of law, when it adopted a new administrative salary schedule for the 1996-97 school year. This grievance was initiated on September 22, 1996, and waived to Level II as Grievant's supervisor was without authority to grant the grievance. A Level II hearing was held on October 8, 1996. A decision denying the grievance at Level II was issued by Travis R. Harrington, Jr., the Superintendent's designee, on November 1, 1996. Grievant appealed to Level III where NCBE waived consideration of the grievance as authorized by W. Va. Code § 18-29-4(c). Thereupon, Grievant appealed to Level IV on December 20, 1996, and, following a continuance for good cause shown, an evidentiary hearing was conductedat the West Virginia University Institute of Technology in Oak Hill, West Virginia, on April 21, 1997. This matter became mature for decision at the conclusion of that hearing.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent Nicholas County Board of Education (NCBE) as Principal

of Cherry River Elementary School.

2. From 1989 through the 1995-96 school year, NCBE paid a salary supplement to principals under a salary schedule which did not differentiate between elementary and secondary principals.

3. On April 29, 1996, NCBE adopted a revised salary schedule for principals, effective July 1, 1996. Grievant and other similarly situated employees were not provided advance notice that changes to their salary schedule were being considered. Grievant received notice of the new salary schedule at a principals' meeting conducted by NCBE's Superintendent on June 12, 1996.

4. Elementary principals are employed by NCBE under a 210-day term of employment. Secondary principals have a 240-day employment term. These terms of employment did not change under the new salary schedule. 5. Both the old and new salary schedules provide that elementary and secondary principals receive supplemental pay based upon the number of professional full-time employees they supervise.

6. Grievant's annual salary did not decrease under the new salary schedule. Rather, Grievant's annual income of $46,866.25 for the 1996-97 school year reflects an increase of $89.00 over the previous year. L II HT at 64. However, secondary principals supervising the same number of full-time professional employees now receive an annual supplement from the county that is $850.00 greater than Grievant's county supplement as an elementary principal. L II HT at 89.

7. Had NCBE paid Grievant for the 1996-97 school year in accordance with the prior salary schedule, his annual salary would have been less than under the new salary schedule. See Administration Ex 1 at L II.

8. Although elementary and secondary principals share similar working conditions, their duties and responsibilities differ in that secondary principals generally must manage more complex class schedules, oversee a significantly greater number of extracurricular activities, administer more complex student activities and accounts, and coordinate graduation activities.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-3 provides that principals will be paid an additional salary increment based upon the number of teachers supervised by each principal. The statute further provides that "[n]othing herein shall prevent a county from providing, in a uniform manner, salary increments greater than those required by this section." W. Va. Code § 18A-4-3 (emphasis added). A preponderance of the evidence of record indicates that, under NCBE's revised salary schedule, Grievant still receives the minimum salary increment to which he is entitled under W. Va. Code § 18A-4-3. However, NCBE has elected to differentiate between elementary and secondary principals when compensating secondary principals with an additional county supplement to their salaries. By its terms, W. Va. Code § 18A-4-3 permits such additional supplements, so long as they are "uniform." W. Va. Code § 18A-4-5a likewise mandates that any additional salary increments or compensation awarded to persons performing like assignments and duties within the county must be uniform. See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

In addition to contending that the new salary schedule adopted by NCBE is not "uniform" because it improperly differentiates between similarly situated persons employed as principals, Grievant alleges that this differentiation violates the prohibition against "discrimination" contained in W. Va. Code § 18-29-2(m). As these contentions relating to a lack of uniformity and disparate treatment resulting in discrimination are inextricably intertwined, they will be addressed concurrently. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibili ties of the employees or agreed to in writing by the employees." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Once a grievant establishes a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26- 106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Applying this prima facie analysis to the evidence presented in this grievance, the undersigned administrative law judge is unable to conclude that Grievant has satisfied the third element of this test. Although the generic job descriptions of elementary and secondary principals employed by NCBE are substantially identical, the record indicates that there are significant differences in the duties performed by employees in theserespective categories. Cf. Barnhart v. Kanawha County Bd. of Educ., Docket No. 20-87- 201-1 (Apr. 6, 1988) (institutional level, i.e., junior high, senior high, properly considered in salary schedules for principals and assistant principals); Gillespie v. Kanawha County Bd. of Educ., Docket Nos. 93-20-058/057 (June 8, 1993) (disparate supplemental pay for principals and assistant principals at middle and junior high school levels based upon student populations noted without comment).

Even if Grievant did establish a prima facie case of discrimination in regard to the disparate pay of elementary and secondary principals under the new salary schedule, NCBE's conclusion that additional pay for secondary principles is warranted based upon the additional responsibilities generated by the greater number of extracurricular activities, including sports and student organizations requiring oversight, demonstrates a rational, job- related reason for its actions which Grievant did not demonstrate to be a pretext for discrimination under § 18-29-2(m). See Deal, supra. Likewise, NCBE's rationale for paying a greater supplement to secondary principals than it pays to elementary principals is supported by substantial evidence of record indicating the more complex, albeit similar, duties performed by secondary principals who are under contract to work an additional 30 days per year.

The same differences in duties which NCBE has documented, and Grievant does not contest, support NCBE's position that its new pay scale is "uniform" within the meaning of W. Va. Code §§ 18A-4-3 and 18A-4-5a, because the same supplement is paid to all elementary principals, and a larger supplement is paid to all secondary principals, consistent with the board's determination that

such additional compensation is warranted by the difference in duties. See Gillespie, supra; Barnhart, supra. Grievant further contends that NCBE violated his right to due process of law when it changed the salary schedule for principals without prior notice. An individual's right to procedural due process is based upon language in the Fifth and Fourteenth Amendments to the United States Constitution which prohibit governmental actions that deprive "any person of life, liberty or property without due process of law." U.S. Const. amends. V & XIV. Obviously, Grievant is not contending that NCBE's actions impact on his "life" or "liberty" interests, as those terms have been interpreted by the courts. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Freedman v. Maryland, 380 U.S. 51 (1965). Thus, Grievant must necessarily be arguing that NCBE improperly deprived him of his "property" interest in his salary as an employee.

In order to establish a property interest protected by the due process clause, Grievant must show a continuing entitlement to the benefit in question. See Perry v. Sindermann, 408 U.S. 593 (1972). See also Board of Regents v. Roth, 408 U.S. 564 (1972). As a tenured professional employee of a county board of education, Grievant has a property interest in his salary which is protected by due process. Board of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); State ex rel. McLendon v. Morton, 162 W. Va. 431, 249 S.E.2d 919 (1978). See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). However, this grievance involves a situation where the employer increased Grievant's salary by enacting the new salary schedule. In these circumstances, Grievant was not entitled to advance notice that the schedule would be changed as he did not suffer any loss of an entitlement he was already receiving. To the extent Grievant suffered the loss of an expected salary increase he would have received under the old salary schedule, the grievance procedureprovided to education employees by the legislature, W. Va. Code §§ 18-29-1, et seq., allowing Grievant an opportunity to challenge NCBE's actions after the fact, provides all the constitutional due process to which Grievant is entitled. See generally Matthews v. Eldridge, 424 U.S. 319 (1976).

Although NCBE acted on this matter without first notifying Grievant and his peers of its intentions, the record indicates that NCBE's action was not taken precipitously. Rather, NCBE exercised its substantial discretion to make a rational and deliberate judgment of comparable worth about which reasonable people could differ. See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). This record does not support a finding that NCBE's decision was arbitrary and capricious in the

circumstances. An administrative law judge is not permitted to substitute his judgment for that of the county board of education when reviewing such decisions. See Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 28, 1997); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

In addition to the foregoing discussion, the following conclusions of law are appropri ate in this matter:

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. LoganCounty 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). See W. Va. Code § 18-29-6.

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. W. Va. Code § 18A-4-3 prescribes certain minimal annual salary increments for principals on a statewide basis. In addition, W. Va. Code § 18A-4-3 permits county boards to provide greater salary increments, so long as such compensation is provided in a uniform manner.

4. W. Va. Code § 18A-4-5a provides any additional salary supplements or compensation shall be uniform for all persons performing "like assignments and duties." See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

5. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

6. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Grievant failed to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m) in regard to his being paid from the lower of two salary schedules which NCBE has established for employees performing differing duties but all holding the similar title of Principal. See Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-010 (Nov. 22, 1994); Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele, supra. Docket No. 89-50-260 (Oct. 19, 1989).

8. Assuming that Grievant did establish a prima facie case of discrimination, Respondent articulated legitimate, nondiscriminatory reasons for its actions sufficient to refute such charges. See Burdine v. Tex. Dept. of Community Affairs, 450 U.S. 248 (1981); Williams, supra; Steele, supra.

9. NCBE did not violate Grievant's right to procedural due process under the Fifth or Fourteenth Amendments to the Constitution of the United States by failing to provide advance notice of a change in the salary schedule applicable to Grievant and other principals in its employ, because Grievant was not deprived of any property or entitlement by NCBE's action adopting a new pay schedule. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970); Perry v. Sindermann, 408 U.S. 593 (1972).

10. The current salary schedule adopted by Respondent Nicholas County Board of Education does not violate W. Va. Code §§ 18A-4-3, 18A-4-5a, or any other statute, policy, rule, regulation, or written agreement applicable to Grievant.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 18, 1997