JAN HADDOX,

Grievant,

v. **Docket No. 98-26-283**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Jan Haddox (Grievant), an employee of Respondent Mason County Board of Education (MCBE), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on March 4, 1998, alleging that he should be classified and compensated in the same manner as other "directors" employed by MCBE. After the grievance was denied at Level I, Grievant appealed to Level II, and a hearing was conducted on May 29, 1998. Thereafter, on June 8, 1998, Suzanne Dickens, the Superintendent's designee, issued a decision denying the grievance. Grievant appealed to Level III on June 11, 1998. On June 24, 1998, MCBE waived consideration of the grievance at Level III. Grievant initiated an appeal to Level IV which was first received by the Grievance Board on August 4, 1998. A Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on September 24, 1998. (See footnote 1) At the conclusion of the hearing, the parties agreed toa briefing schedule for post-hearing arguments. This matter became mature for decision on November 3, 1998, following receipt of the parties' written submissions.

In order to resolve the various issues raised in this grievance, the following Findings of Fact are made based upon a preponderance of the evidence presented in documents and witness testimony at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent Mason County Board of Education (MCBE) as its Attendance Director.

2. Grievant reports directly to MCBE's Superintendent, Dr. Larry Parsons. In addition to Grievant, an Assistant Superintendent and a Secretary report directly to Superintendent Parsons. See G Ex 2 at L II.

3. MCBE employs five other individuals who hold the title “Director.” The Director of Finance/Administration, Director of Transportation/Maintenance, Director of Special Education/Federal Programs, Director of Vocational Education, and Director of Curriculum and Instruction, all report to MCBE's Assistant Superintendent, George Miller.

4. Each Director described in Finding of Fact Number 3 currently operates an organizational division, supervises and evaluates employees, and participates in the process of developing the Board's annual budget. Grievant's current duties do not include any of these responsibilities, although he supervised and evaluated at least one Secretaryduring a previous Superintendent's tenure.

5. Grievant's primary job duties are contained in W. Va. Code §§ 18-8-3 and 4. He is specifically tasked with promoting regular school attendance. Grievant performs certain other duties for the Board, such as preparation of graphic art, on a voluntary basis. None of the other MCBE employees holding the title of “Director” have similar job responsibilities involving truancy.

6. Grievant is presently employed under a 210-day contract and is compensated at level 1.10 on MCBE's Administrative Salary Index. See G Ex 1 at L II. This equates to 110% of a classroom teacher's salary based upon Grievant's years of experience.

7. Other MCBE employees who hold the title of Director are employed under 261-day contracts and are compensated at level 1.45 on MCBE's Administrative Salary Index. See G Ex 1 at L II. This equates to 145% of a classroom teacher's salary, based upon each employee's years of experience.

8. As Attendance Director, Grievant is occasionally required to perform certain duties during the summer, such as appearing in court. Grievant has not been compensated for this time.

9. Grievant is available and willing to work during the summer encouraging dropouts to return to school. Some school systems in West Virginia assign such duties to their Attendance Directors, consequently extending the number of days on their contracts. However, MCBE has not elected to take this initiative.

10. In September 1997, Grievant questioned Superintendent Parsons regardinghis salary. The matter was referred to MCBE's Recertification and Reclassification Committee. After reviewing Grievant's duties and responsibilities, the Committee voted to raise Grievant's salary to the 1.10 level

of a “Coordinator,” an increase of $7.00 per day. See R Ex 5 at L II. This raise became effective January 29, 1998. See R Ex 1 at L II.

11. On February 19, 1998, Grievant initiated the grievance process at Level I through an informal conference with Superintendent Parsons. See R Ex B at L IV.

12. After the grievance was processed to Level III, Grievant was advised by letter dated June 24, 1998, that MCBE had elected to waive consideration of his grievance at Level III. See R Ex B at L IV. Grievant received this correspondence on June 25, 1998. See R Ex A at L IV.

13. Grievant appealed to Level IV on July 1, 1998, by placing his appeal form in regular United States mail. On or about August 3, 1998, Grievant called the Grievance Board's office in Charleston, West Virginia, and spoke to Cricket Powell, Secretary for the Board, regarding the status of his grievance. Upon being advised that his appeal had not been received, Grievant mailed a copy of his grievance appeal form that same day. The appeal was received by the Grievance Board on August 4, 1998. See R Ex B at L IV.

14. In June 1994 Grievant filed a grievance alleging that he was being required to perform additional duties without being compensated in the same manner as other administrators performing like assignments and duties. Although the grievance was not resolved, Grievant withdrew his grievance before a hearing was set at Level II. See R Ex C at L IV.

DISCUSSION

MCBE contends that this grievance was not initiated within the time limits specified in W. Va. Code § 18-29-4(a)(1):

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

MCBE further contends that this grievance was not advanced to Level IV within the time limits specified in W. Va. Code § 18-29-4(d)(1):

> If the grievant is not satisfied with the action taken by the chief administrator or, if appealed to level three, the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner . . . .

In addition, MCBE argues that this matter is barred from consideration under the doctrine of res judicata. This claim is based upon Grievant's filing a prior grievance involving similar claims and voluntarily withdrawing his grievance. Each of these contentions will be addressed before proceeding to the merits of this grievance.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE- 130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v.Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). As required by W. Va. Code § 18-29-3(a), Respondent asserted at the Level II hearing that this grievance was not initiated in a timely manner. L II HT at 60. See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

The general rule for timely grieving classification and compensation matters under W. Va. Code § 29-6A-1, et seq., is stated in Syllabus Point 5 of Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995). There, the Supreme Court of Appeals of West Virginia declared:

> W. Va. Code, 18-29-2 (1992), allows an employee to contest a misclassifica tion at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.

The preceding ruling relied upon an earlier holding by the Court applying the time limits in the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1, et seq. W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989) (Technology). In that case, a salary dispute alleging pay disparity was recognized as a “continuing violation” rather than a discrete event. Id. See Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996). See also West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 18, 1997); Coddington v. W. Va. Dep't of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994).

Grievant's claims of lack of uniformity, discrimination and favoritism in regard to his compensation

represent allegations that relate to a continuing violation under Martin andTechnology. Therefore, Grievant is not barred from pursuing his grievance for failure to file his complaint more than 15 days after the most recent change to his contract in January 1998. However, Martin further notes that, should Grievant prevail on the merits of his claim, he may only recover back pay from 15 days preceding the filing of this grievance. See Burgraff v. Bd. of Directors, Docket No. 97-BOD-523 (Nov. 24, 1998). MCBE also contends Grievant failed to elevate his grievance from Level III to Level IV in a timely manner. This contention is based upon evidence that Grievant received notice of MCBE's Level III waiver on June 25, 1998, but did not postmark an appeal to the Grievance Board at Level IV until August 3, 1998. Grievant testified that he mailed his appeal to the Grievance Board on July 1, 1998, but subsequently discovered that it was never received.

As previously discussed, MCBE bears the burden of establishing a timeliness defense by a preponderance of the evidence. Moreover, in situations like this, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally the ALJ should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence ornonexistence of any fact testified to by the witness, and the plausibility of the witness' information. See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Therefore, the facts regarding this issue of untimely filing will be discussed in detail.

Grievant's Level IV testimony before the undersigned was clear and unequivocal. Consistent with his testimony, the grievance form he submitted to Level IV was a copy, not an original. It was dated July 1, 1998. Grievant wrote a letter accompanying the form, explaining how he discovered that the original appeal had not been received. He then acted promptly to correct the problem. MCBE presented no evidence to directly contradict any of Grievant's testimony on this issue.

Not only did Grievant appear truthful in his testimony, he holds a position with MCBE as Attendance Director which places him in a quasi-law enforcement capacity where he is required to appear in court as a witness on a frequent basis. Although Grievant could have a motive to lie to avoid having his grievance dismissed as untimely, his attitude during the entire Level IV indicated that he would not fabricate a claim in order to obtain any relief to which he was not entitled by law. Accordingly, based upon Grievant's credible and uncontradicted testimony that he placed an appeal to Level IV in the mail to the Grievance Board on July 1, 1998, the undersigned finds that MCBE failed to establish that this grievance was not elevated to Level IV in a timely manner. See Lilly v. Harrison County Bd. of Educ., Docket No. 97-17-330 (Apr. 13, 1998); Jeffers v. Mason County Bd. of Educ., Docket No. 95-26-553 (Aug. 22, 1996); Dick v. Wayne County Bd.of Educ., Docket No. 92-50-028 (June 23, 1992).

Finally, MCBE submits that the merits of this grievance should be barred from consideration at Level IV under the doctrine of res judicata. Res judicata is a well- established legal doctrine which states that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Black's Law Dictionary 678 (abridged 5th ed. 1983). See Woodall v. W. Va. Dep't of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dep't of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991). Because Grievant withdrew his grievance without obtaining resolution, there was no adjudication such as to warrant invocation of the doctrine of res judicata.

The undersigned notes that W. Va. Code § 18-29-3(d) provides:

> An employee may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current. Such grievance may not be reinstated by the grievant unless such reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn.

While MCBE did not cite this provision, it would not be applicable in any event because the current grievance is not identical to the earlier grievance, and Grievant made no attempt to reinstate his earlier grievance, instead filing a new and separate grievance.

Having determined that MCBE's affirmative defenses may not be sustained, the merits of this grievance will now be discussed. Grievant alleges that MCBE is violating W. Va. Code § 18A-4-5b.

That statute provides in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimum fixed by this article.
>
> 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 duties and assignments within the county . . . .

Grievant submits that, as Attendance Director, he is responsible for certain aspects of the Mason County school system, in much the same manner as other MCBE employees who hold the “Director” title. Grievant acknowledges that his duties are not the same as any of the other Directors. He argues that although each Director's duties are equally dissimilar, each Director is nonetheless paid from the same level on the county's pay scale, and each Director holds a 261-day contract.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. Prior decisions of this Grievance Board have noted that W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay. Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Fowler v. Mason County Bd. of Educ., Docket No. 94-26-037 (Oct. 6, 1994). See Harper v. Pendleton County Bd. ofEduc., Docket No. 89-36-708 (Aug. 21, 1990).

After considering all evidence of record in this matter, the undersigned is persuaded that the greatest similarity between Grievant's position and other MCBE Directors is the use of the term “Director” in his job title. However, Grievant's title was not selected by MCBE. It was simply bestowed in accordance with W. Va. Code §§ 18-8-3 and 4, which require county boards to hire “a full-time county director of school attendance.” W. Va. Code § 18-8-3. Otherwise, Grievant's job, while important, does not involve the level of responsibility entrusted to other MCBE employees holding the

title of Director and receiving pay at level 1.45 of the Administrative Salary Index.

W. Va. Code § 18A-4-5b permits a county board to compensate employees at different levels based upon such factors as responsibility and duties. Thus, MCBE could pay each of its Directors differently without violating the Code. Apparently, MCBE has elected to compensate all Directors who supervise employees and operates an organization division at the same level on its Administrative Pay Scale based upon considerations of equity and employee morale.

W. Va. Code § 18-8-3 also provides that the"attendance director or assistant director shall be paid a monthly salary as fixed by the county board." This language appears to give MCBE substantial discretion in determining the proper level of pay and length of contract for its Attendance Director. See Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997), aff'd, Circuit Court of Fayette County, Civil Action No. 97-C-332-H (Jan. 27, 1998). See generally, State ex. rel Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58(1986).

Grievant also alleges that he is suffering from discrimination and favoritism prohibited under W. Va. Code § 18-29-2(m) and (o), in that he is employed under a shorter contract term and for less compensation than other MCBE employees with comparable responsibilities. 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." Similarly, § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), 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 the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, a grievant may show that theoffered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't 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 facts presented here, Grievant has not demonstrated that he is similarly situated to one or more other employees who are employed by MCBE as Directors. As indicated in the earlier discussion regarding W. Va. Code § 18A-4-5b, Grievant's job duties and level of responsibility are readily distinguishable from the duties and responsibilities assigned to MCBE's five Directors who report to Assistant Superintendent Miller. Thus, Grievant has not established a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o).

Finally, Grievant argues that MCBE's failure to extend his contract term beyond 210 days and compensate him at a higher level represents an arbitrary and capricious exercise of its discretion to set salaries and contract terms. Certainly, Grievant makes a logical argument that MCBE might benefit from an extension of his contract term. However, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Although reasonable minds may differover the appropriate level of pay for an Attendance Director and whether a longer contract term is warranted, the undersigned is not persuaded by the evidence presented that MCBE's determinations on these questions have no rational basis, or otherwise represent an abuse of the substantial discretion extended to county boards of education in making such determinations. See Long v. Logan County Bd. of Educ., Docket No. 95-23-506 (Apr. 29, 1996).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving 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.

2. A timeliness defense is an affirmative defense, which the employer must establish by a preponderance of the evidence. Evans v. Mason County Bd. of Educ., Docket No. 97-26-400 (Jan. 23, 1998); West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. Because claims alleging pay disparity are considered “continuing violations” which may be addressed at any time, Respondent failed to establish that this grievance alleging a lack of pay uniformity was barred by W. Va. Code § 18-29-4. See Martin v.Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989).

4. MCBE failed to establish by a preponderance of the evidence that this grievance was not elevated to Level IV in accordance with the time limits contained in W. Va. Code § 18-29-4(d)(1).

5. Although Grievant's claims in this matter are similar to claims raised in an earlier grievance submitted in 1994 and withdrawn at Level II, MCBE failed to establish that the claims are sufficiently identical to be barred by the doctrine of res judicata, or the provisions of W. Va. Code § 18-29-3(d) prohibiting an employee from reinstating a grievance that has been withdrawn. See e.g., Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Woodall v. W. Va. Dep't of Transp., Docket No. 93- DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dep't of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991).

6. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons performing like

assignments and duties. Mersing v. Preston County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89- 43-74 (Aug. 31, 1989). See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

7. Grievant, an Attendance Director, does not perform "like assignments and duties" within the meaning of W. Va. Code § 18A-4-5b as MCBE employees who serve as Director of Finance/Administration, Director of Transportation/Maintenance, Director of Special Education/Federal Programs, Director of Vocational Education, or Director ofCurriculum and Instruction. See Weimer-Godwin, supra; Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Wetherholt v. Cabell County Bd. of Educ., Docket No. 93-06-017 (June 30, 1993); Robb v. Hancock County Bd. of Educ., Docket No. 91-15-356 (Mar. 31, 1992); Skaggs v. Cabell County Bd. of Educ., Docket No. 90-06-054 (Mar. 27, 1990).

8. Grievant failed to establish by a preponderance of the evidence that MCBE is in violation of the pay uniformity requirements in W. Va. Code § 18A-4-5b by the manner in which it compensates him in his capacity as Attendance Director, as opposed to the manner in which it compensates other employees who have the term “Director” in their job title.

9. Discrimination is defined in W. Va. Code § 18-29-2(m) as "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."

10. Favoritism is defined in W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

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

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her,and that there is no known or apparent justification for this difference.

Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

12. Grievant failed to establish a prima facie case of discrimination or favoritism in regard to MCBE's decision to compensate him at 110% of the salary level of a classroom teacher and to limit his contract term to 210 days annually.

13. 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. State ex. rel Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

14. W. Va. Code § 18-8-3 provides that the"attendance director or assistant director shall be paid a monthly salary as fixed by the county board."

15. Grievant failed to demonstrate by a preponderance of the evidence that MCBE has acted in an arbitrary and capricious manner, or otherwise violated any law, statute, regulation or policy in regard to setting his contract term at 210 days or by compensating him at 110 % of the pay received by a classroom teacher with equivalent tenure.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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: November 30, 1998

Footnote: 1

Grievant was represented by Steve Angel with the West Virginia Federation of Teachers. Respondent was represented by counsel, Howard Seufer, of Bowles RiceMcDavid Graff & Love.