**SUZANNE VISKI, ROBERT SYPOLT,**

**and, JANICE COOL,**

**Grievants,**

**v. Docket No. 99-39-271**

**PRESTON COUNTY BOARD OF EDUCATION,**

**Respondent.**

# D E C I S I O N

**Grievants, Suzanne Viski, Robert Sypolt, and Janice Cool, filed this grievance against their employer, the Preston County Board of Education ("PCBOE") on May 21, 1999. Grievants stated that since another Central Office Administrator was being paid a principal's salary supplement, they should be paid one as well. The requested relief was to receive the same supplement as this individual. This grievance was denied at the lower levels, and Grievants appealed to Level IV on July 14, 1999. A Level IV hearing was held in the Grievance Board's Morgantown office on October 13, 1999. This case became mature for decision on November 1, 1999, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 1)

**After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

## Findings of Fact

**1. Grievants are employed as Directors in PCBOE's Central Office. Grievant Viski has administrative duties in special education and alternative education. GrievantCool has administrative duties in Title I and K-6 curriculum. Grievant Sypolt has administrative duties in food service, testing, and Title XI.**

**2. When the principal at Central Preston Middle School ("CPMS") resigned during the 1998-1999 school year, Earl Snyder was promoted from Assistant Principal to Principal.**

**3. Mr. Snyder began having multiple health problems, and he believed he was seriously ill. Because of these health problems he submitted his resignation effective at the end of the school year. This resignation was accepted by PCBOE.**

**4. Mr. Snyder was frequently absent during this time. During a two week hospitalization, Grievant Viski served as principal pursuant to Superintendent Charles Zinn's directive. When Mr. Snyder was released from the hospital, he would come to work for a only portion of each day. Much of the time there was no administrator at the school. 5. Superintendent Zinn received multiple phone calls from staff, teachers, and parents. The board of education was concerned about the lack of administrative coverage at CPMS.**

**6. Superintendent Zinn talked to Mr. Snyder sometime in February about the possibility of an alternative assignment as a Temporary Assistant Administrator. Superintendent Zinn, after consultation with legal counsel, planned to transfer Mr. Snyder to the Central Office to work on a number of tasks that needed to be completed. Superintendent Zinn also felt that this change would decrease Mr. Snyder's stress level. With Mr. Snyder's qualifications and thirty years of experience, Superintendent Zinn believed Mr. Snyder would be an excellent choice to complete these tasks. 7. These tasks were in areas where the Superintendent had received complaints and/or had concerns. He wanted to fill this position with an educator who could examine the various areas and problems from a new perspective, and also wanted the professional educator to be without ties to a specific program to facilitate this non-biased look at the issues.**

**8. If Mr. Snyder was in another position, his principal position at CPMS could be posted and filled within a short time.**

**9. Mr. Snyder was amenable to this suggestion that he be transferred to the Central Office, and felt it would decrease his stress level.**

**10. Mr. Snyder's position was posted, and Michael Teets was selected on March 22, 1999, to fill this position. He was to be placed in the position for the remainder of the school year.**

**11. Grievant Sypolt filed a grievance over the failure to post the Temporary Assistant Administrator position.** **(See footnote 2)**

**12. This grievance was granted, and the position was posted on April 19, 1999, as a**

**Temporary Assistant Administrator with an employment term of 39 days. Mr. Snyder was the only applicant for the position. He started in this position on May 3, 1999, and Mr. Teets was finally placed at CPMS. 13. Mr. Snyder signed a new contract of employment as Temporary Assistant Administrator, and his salary remained unchanged.** (See footnote 3)

**14. Although Mr. Snyder's salary remained the same, he was no longer receiving a principal's supplement. (Grt. Ex. No. 5 and Resp. Ex. No. 1) Mr. Snyder's prior salary was calculated with a principal's supplement.**

**15. While in this Temporary Assistant Administrator position, Mr. Snyder was assigned to assess and report on a variety of areas in which Superintendent Zinn and Assistant Superintendent Sharon Harsh had concerns. Mr. Snyder was particularly qualified for this position as he had approximately 30 years of experience. Since he was not tied to any specific program, he could perform this assessment without a personal allegiance to a project he administered. Further, as he was leaving the school system he was free to give an honest opinion of how he saw various programs functioning and where improvement was needed. During his time in this position, he completed the multiple assignments given to him. Some of the areas he evaluated were in the bailiwicks of Grievants.**

**16. Mr. Snyder studied the area of citizen coaches and developed an evaluation form to assess the functioning of these temporary employees.** (See footnote 4) **Mr. Snyder also evaluated the current alternative learning program, and the prospect of developing a program for themiddle school setting. Further, Mr. Snyder studied the problem of school violence, recommending the use of a pilot program, and found a teacher willing to field test this program. Mr. Snyder examined the Early Literacy Program and completed a report with recommendations.**

**17. Mr. Snyder's immediate supervisor was Assistant Superintendent Harsh, and his assignments were given to him by either Superintendent Zinn or Assistant Superintendent Harsh. Superintendent Zinn testified the Temporary Assistant Administrator position was similar to an Assistant Superintendent position, and on a higher level than that of a Director, as these duties were not tied to a specific area of responsibility.**

**18. Both Assistant Superintendent Harsh and Superintendent Zinn found Mr. Snyder's contributions helpful and honest.**

**19. Mr. Snyder retired at the end of the school year.**

## Issues and Arguments

**The main focus of Grievants' arguments is that Mr. Snyder was receiving a principal's supplement while he was working as a Central Office Administrator, and this was an illegal act. They also argue they were being discriminated against, as they did not receive this supplement. Further, Grievants argue the duties performed by Mr. Snyder were Director duties, thus, they were similarly situated, and any salary or payment to Mr. Snyder that was greater than theirs would violate the Code's uniformity requirements. Grievants also seem to argue that to hire Mr. Snyder in the position was an incorrect management decision, and should not be allowed. Respondent argues that although Mr. Snyder was receiving his same salary as before, it did not include a principal's salary supplement. Further, Respondent notes the position of Temporary Assistant Administrator is not listed in W. Va. Code §§ 18-1-1 or 18A-4-8, and as such, Superintendent Zinn is allowed to set the salary as he sees fit. Respondent also notes the action taken was the humane thing to do, and was in the best interest of the school system. Respondent asserts it was not arbitrary and capricious for Superintendent Zinn to consider Mr. Snyder's health problems in making his decision to place him in the temporary position. Additionally, Respondent maintains Grievants were not similarly situated to Mr. Snyder, and thus, there can be no discrimination or a violation of the uniformity clause.**

## Discussion

**As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.**

**The arguments raised by Grievants will be addressed separately.**

**A. Principal's Supplement**

**Grievants did not prove Mr. Snyder received a principal's supplement while he was employed as Temporary Assistant Administrator. They did prove Mr. Snyder continued to receive the same salary as he did before. Testimony demonstrated the salary for the Temporary Assistant Administrator position was calculated by taking Mr. Snyder's priordaily rate of pay, and then multiplying it by 39 days. Grievants' Exhibit Number 5 is a copy of Mr. Snyder's Employee Assignment/Salary Agreement after he became principal at CPMS. It clearly shows Mr. Snyder's annual base salary, plus the additional supplement for his principal's position. Mr. Snyder's Employee Assignment/Salary Agreement for the Temporary Assistant Administrator position shows no such calculation, but only states his salary in the new position. (See footnote 5) No principal's supplement is noted in this calculation. Thus, Grievants have failed to demonstrate Mr. Snyder received this payment.**

**B. Discrimination**

**Grievants' next contention centers on the argument that they were similarly situated to Mr. Snyder, and to pay him a greater salary is discrimination. (See footnote 6) As support for this contention, Grievants cite the W. Va. Code § 18A-1-1 definition for Central Office Administrators. This Code Section reads:**

> **(4) "Central office administrator" - The superintendent, associate superintendent, assistant superintendent and other professional educators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the county-wide school system.**

**Grievants argue that since Mr. Snyder was a Central Office Administrator, and they were Central Office Administrators, they are similarly situated and should receive the same rate of pay. Grievants were employed as Directors. That definition reads:**

> **"Director or coordinator of services" means personnel who are assigned to direct a department or division. Nothing herein may prohibit professional personnel or professional educators as defined in section one [§ 18A-1-1], article one of this chapter, from holding this class title, but professional personnel may not be defined or classified as service personnel unless the professional personnel held a service personnel title under this section prior to holding class title of "director or coordinator of services": Provided, That funding for professional personnel in positions classified as directors or coordinators of services who were assigned prior to the first day of May, one thousand nine hundred ninety-four, may not be required to be redirected from service personnel categories as a result of this provision until the first day of July, one thousand nine hundred ninety-six. Thereafter, directors or coordinators of service positions shall be classified as either a professional personnel or service personnel position for state aid formula funding purposes and funding for directors or coordinators of service positions shall be based**

**upon the employment status of the director or coordinator either as a professional personnel or service personnel.**

**As previously noted, there is no statutory definition for the position Temporary Assistant Administrator.**

**W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:**

**(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 job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.**

**If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).**

**Grievants have not met their burden of proof and demonstrated a prima facie case of discrimination, as they have not proven they were similarly situated to Mr. Snyder. They were classified as Directors, while Mr. Snyder's title was Temporary Assistant Administrator. Superintendent Zinn testified Mr. Snyder's position was above that of the Directors, and he clarified this statement to mean Mr. Snyder did not supervise Grievants, but his position was on a higher level, with more wide-ranging job responsibilities. This fact was born out by the evidence. Grievants each work in and have responsibility for clearly identified areas. Mr. Snyder, pursuant to his Job Description, completed whatever task was assigned him by Superintendent Zinn or Assistant Superintendent Harsh, and the areas of responsibility varied**

**greatly, from citizen coaches to alternative education for troubled students.**

**Grievants' argument that they are similarly situated because they were all Central Office Administrators is also flawed. The definition of Central Office Administrator includes Superintendents and Assistant Superintendents. It is doubtful Grievants would argue theyare similarly situated to these individuals, just because they are included in the same statutory definition. The same can be said for Mr. Snyder. While he was employed as a Central Office Administrator, he was not similarly situated to Grievants.**

**C. Uniformity of pay**

**Grievants' argument on uniformity of pay, while similar to the argument on discrimination, will be discussed next. W. Va. Code § 18A-4-5a discusses uniformity of pay for teachers and states:**

> **County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.**
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> **Counties may fix higher salaries for teachers placed in special instructional assignments, for those assigned to or employed for duties other than regular instructional duties, and for teachers of one-teacher schools, and they may provide additional compensation for any teacher assigned duties in addition to the teacher's regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day. Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county: . . . .**

**Additionally, this Grievance Board, in a case dealing with uniformity of pay and the almost identical language in W. Va. Code § 18A-4-5b relating to service personnel, held "[g]rievants must show that their duties are substantially similar to [the other] employee." Clark v. Kanawha County Bd. of Educ., Docket No. 95-20-559 (Apr. 15, 1996). Weimer- Godwin v. Bd. of Educ. of Upshur, 176 W. Va. 423, 369 S.E.2d 726 (1988). Further, this Grievance Board in Napier v. Logan County Board of Education, Docket No. 94-23-54 (April 25, 1995), has discussed the discretion of a Superintendent and a board of education, and has stated the Superintendent and board of education have the authority to:**

> reorganize and manage a county school system. Boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities . . . ." W. Va. Code §18-5-13(l); Cox v. Bd. of Educ. of Hampshire County, 355 S.E.2d 365, 369 (W. Va. 1987). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel", subject to the approval of the board, . . . W. Va. Code §18-4-10(3). Additionally, a county superintendent's duties include "powers of independent judgment and discretion." Hall v. Pizzino, 363 S.E.2d 886, 888 (W. Va. 1980). Clearly, a superintendent is allowed to reorganize the duties of his administrative staff when the personnel involved voluntarily accept the change.

As previously discussed in the section dealing with discrimination, Grievants have failed to demonstrate that their duties were substantial similar. Additionally, the argument that all Central Office Administrators must be paid uniformly is incorrect. A board of education is not required, nor does it typically pay, its Superintendent and its Assistant Superintendent the same as other Central Office Administrators even though they are discussed in the same Code Section.

D. Management decision

Grievants' contention that Superintendent Zinn's decision to hire Mr. Snyder in the position of Temporary Assistant Administrator was incorrect or "bad" management resulting in a duplication of services is without merit. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisionsviolate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." Rice v. Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). See W. Va Code § 18-29- 2(a); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). Grievants did not allege that Superintendent Zinn's decision to hire Mr. Snyder interfered with their job performance or their health and safety.

E. Arbitrary and capricious

Grievants also allege Superintendent Zinn's decision to hire Mr. Snyder was arbitrary and capricious. As has been previously stated by this Grievance Board, a party does not have standing to question a hiring decision if the party did not apply or was not qualified for the position. Phillips v. Div. of Corrections, Docket No. 96-CORR-112 (June 19, 1996). See Farley v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Muncy v. McDowell County Bd. of Educ., Docket No. 96-33-297 (May 19, 1997); Mullins v. Kanawha County Bd. of

**Educ. Docket No. 94-20-364 (Dec. 29, 1994); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994).**

**However, this issue will be addressed briefly. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a mannercontrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).**

**Superintendent Zinn's decision cannot be seen as arbitrary and capricious. He was faced with a difficult problem. A long-term professional educator, with many years of service to the county, was ill and unable to perform the stressful job he had been placed in as the result of his principal's departure in the middle of the school year. The administration of this school was not covered for much of the day, and teachers, staff, and parents had no one to go to with concerns and problems. A new principal was needed, but one could not be placed in the position as long as it was held by Mr. Snyder. Further, it was clear that there were concerns on a broad scale within the county that needed addressing, and there was no one currently available with the proper perspective and distance from the issues to do so. It cannot be seen as arbitrary and capricious to engage in an act of humanity, and transfer Mr. Snyder to the Central Office to a temporary position for a couple of months. This move was obviously beneficial to both PCBOE and Mr. Snyder, and was in the best interest of the school system.**

**The above discussion and findings of fact will be supplemented by the following conclusions of laws.**

## Conclusions of Law

**1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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); Hollyv. 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. Grievants have not established they were discriminated against, as they were not similarly situated to Mr. Snyder.**

**3. Grievants failed to establish PCBOE violated the uniformity clause of W. Va. Code § 18A-4-5a as they did not perform substantially similar duties. Weimer-Godwin v. Bd. of Educ. of Upshur, 176 W. Va. 423, 369 S.E.2d 726 (1988); Clark v. Kanawha County Bd. of Educ., Docket No. 95-20-559 (Apr. 15, 1996).**

**4. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." Rice v. Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). See, W. Va Code § 18-29-2(a); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997).**

**5. "County superintendents have the authority to make organizational changes in their administrative staff when the personnel involved accept these changes." Napier v. Logan County Bd. of Educ., Docket No. 94-23-54 (Apr. 25, 1995). Accord Hall v. Pizzino, 164 W.Va. 331, 363 S.E.2d 886, 888 (1980)**

**6. A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reacheda decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).**

**7. As Grievants did not apply for the position, they were not aversely affected by Superintendent Zinn's decision to hire Mr. Snyder, and thus, have no standing to contest that selection. Phillips v. Div. of Corrections, Docket No. 96-CORR-112 (June 19, 1996). See Farley v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Muncy v. McDowell County Bd. of Educ., Docket No. 96-33-297 (May 19, 1997); Mullins v. Kanawha County Bd. of Educ. Docket No. 94-20-364 (Dec. 29, 1994); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994).**

**8. Superintendent Zinn's decision to place Mr. Snyder, the only applicant, in the**

**Temporary Assistant Administrator position was not arbitrary and capricious.**

**Accordingly, this grievance is DENIED.**

**Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Preston County. Any 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.**

**JANIS I. REYNOLDS**

**ADMINISTRATIVE LAW JUDGE**

**Dated: November 30, 1999**

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***Footnote: 1***

***Grievants were represented by Attorney Cynthia Evans, and Respondent was represented by Attorney Greg Bailey.***

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***Footnote: 2***

***There was some discussion of the reasons for Grievant Sypolt's filing of this grievance. This discussion was not germane to the issues before the undersigned Administrative Law Judge.***

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***Footnote: 3***

***Mr. Snyder had requested that if he took the Temporary Assistant Administrator position that his salary would remain unchanged. Superintendent Zinn indicated that whoever was selected to serve in the new position would maintain their current salary.***

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***Footnote: 4***

***At the time Mr. Snyder worked on this project, there was cause for concern, especially from head coaches and principals, as the number of citizen coaches had increased as the school systems' budget had decreased. There was no form for the evaluation of these individuals.***

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***Footnote: 5***

***Initially, Karen Davis, PCBOE's secretary for professional personnel, testified that there was no recalculation***

***or change in pay when Mr. Snyder changed positions. She recanted this testimony when presented with Respondent's Ex. No. 1, Mr. Snyder's Employee Assignment/Salary Agreement. She stated she had been incorrect in her prior testimony, and she had indeed drawn up this document indicating Mr. Snyder's new position and salary agreement.***

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***Footnote: 6***

***This argument is closely aligned with Grievants' argument on uniformity of pay. These issues will be discussed separately for clarity's sake.***