KEVIN DURIG and RODNEY WADE,

Grievants,

v. Docket No. 00-52-127

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Kevin Durig and Rodney Wade ("Grievants") initiated this grievance on January 28, 2000, alleging that Respondent Wetzel County Board of Education ("WCBOE") failed to grant them the same 261-day contracts that have been awarded to other similarly situated employees. The grievance was denied at level one on February 9, 2000. Upon appeal to level two, a hearing was held on March 23, 2000, followed by a written decision denying the grievance dated April 6, 2000. Level three consideration was bypassed, and Grievants appealed to level four on April 12, 2000. A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on May 31, 2000. Grievants were represented by counsel, John E. Roush of the West Virginia School Service Personnel Association, and Respondent was represented by counsel, Larry W. Blalock. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 13, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant Durig has been employed by WCBOE since 1996. On December 15, 1999, he was reclassified from Mechanic Assistant to Mechanic, with a 240-daycontract.

2. Grievant Wade was employed by WCBOE as an Electrician II/General Maintenance under a 240-day contract from January 4, 1999, until March 3, 2000, when he resigned his employment.

3. Two other WCBOE employees--Johnny Greathouse and Jimmy Titus--are classified as Mechanics, and they hold 261-day contracts.

4. Grievant Durig does not work during June and July. Mr. Greathouse and Mr. Titus work during this time and perform maintenance work on buses which is not performed during the regular school year, such as body work, repair of seats, and in-depth, time- consuming repair jobs. During the regular school year, Grievant, Mr. Greathouse and Mr. Titus do only those repairs necessary to keep the buses running, and in-depth repair projects are not performed.

5. The only other WCBOE employee holding the exact same classifications as Grievant Wade was Mark Batton, who also held a 240-day contract.

6. Hursel Willey has been employed by WCBOE since 1981, and he is classified as a Carpenter/Electrician II/General Maintenance. He holds a 261-day contract.

7. Mr. Willey is assigned to two schools, Hundred High School and Long Drain Elementary. He is required to perform all repair and maintenance work which is necessary at those two schools. His specific duties include repairing lights and electrical fixtures, repairing outlets, repairing plumbing, mowing grass, repairing holes in the parking lot, indoor painting, and small miscellaneous repairs. He does no snow removal work. Mr. Willey only does occasional carpentry work, such as building shelves, when needed.

8. Like Mr. Willey, Grievant Wade was required to perform all repair work whichwas needed at the schools to which he was assigned, Magnolia and New Martinsville Elementary Schools. He performed duties similar to those of Mr. Willey, except he did not mow grass or paint. In addition, Grievant Wade was required to do snow removal.

9. Grievant Wade has never held the Carpenter classification.

10. WCBOE's 261-day employees receive paid vacation of two to four weeks, depending on experience level. Employees with 240-day contracts receive no vacation and are required to take 21 days off without pay as out-of-calendar days.

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. Grievants allege that WCBOE is violating W. Va. Code

§18A-4-5b, which states 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." In addition, Grievants also charge that they have been victims of discrimination, which is prohibited by W. Va. Code §§ 18-29-2(m).

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." 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). Once a grievant establishes a prima facie case of discrimination under Code §18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. Dillon v. Cabell County Bd. of Educ., Docket No. 97-06-570 (May 29, 1998). See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

The pivotal question in this case, as can be seen from the above discussion, is whether or not Grievants are “performing like assignments and duties” to those employees to whom they have

compared themselves. The pay uniformity provision for service personnel employees in W. Va. Code § 18A-4-5b is essentially the same as the pay uniformity clause governing professional employees contained in W. Va. Code § 18A-4-5a. In Weimer-Godwin v. Board of Education, 179 W. Va. 423, 369 S.E.2d 726 (1988), theWest Virginia Supreme Court of Appeals determined that it was not necessary for employees to be performing identical duties in order to meet the "like assignments and duties" requirement for uniform pay in W. Va. Code § 18A-4-5a. The Court found that when the assignments and duties are "substantially similar," the uniformity requirement applies. Thus, in Weimer-Godwin, the county board of education was required to pay the same salary supplement to teachers who provided instruction in general and choral music as it was paying to teachers who provided instruction in band and string instruments.

In applying W. Va. Code § 18A-4-5b to service personnel, this Grievance Board has determined that grievants may not rely upon this uniformity provision to obtain the same benefits as employees who hold a different classification title. See, e.g., Allison v. Hancock County Bd. of Educ., Docket No. 97-15-454 (Mar. 31, 1998); Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998), aff'd, No. 25898 (W. Va. Sup. Ct. of Appeals Dec. 10, 1999); Ricca v. Hancock County Bd. of Educ., Docket No. 95-15-101 (June 8, 1995); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995). Although Grievant Wade admits that Mr. Willey holds one classification that he does not, he contends that his duties are virtually identical to Mr. Willey's, who testified that he does “very little” carpentry work.

In Flint, supra, the Supreme Court noted that, employees who have some classifications, but not all, in common with other employees are not performing like assignments and duties, due to the additional duties related to the additional classifications held. Even if Mr. Willey's carpentry duties are limited, he does hold that classification and is required to perform the duties required of that classification. Accordingly, Grievant andMr. Willey are not performing the same duties, so Grievant Wade has not established a prima facie case of discrimination, and WCBOE is not required by the uniformity provision to provide Grievant with the same contract term as Mr. Willey.

As to Grievant Durig, he has not disputed WCBOE's evidence regarding the additional duties performed by Mr. Greathouse and Mr. Titus during the summer months. Even employees holding the exact same classification have been determined to have been properly granted different contract

terms because of differences in their job duties. See Robb v. Hancock County Bd. of Educ., Docket No. 91-15-356 (March 31, 1992). Mr. Greathouse and Mr. Titus work additional periods when Grievant does not, during which time they perform duties not assigned to Grievant. Accordingly, as discussed above, Grievant Durig has not established entitlement to a 261-day contract term.

Consistent with the foregoing discussion, the following conclusions of law are appropriate in this matter.

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); 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. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. W. Va. Code §18A-4-5b states 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."

4. Boards of education must provide uniform vacation benefits to similarly situated service employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

5. 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."

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. Grievants have failed to prove that they are performing like assignments and duties to other employees holding 261-day contracts, so they have not established a prima facie case of discrimination or a violation of the uniformity provision of W. Va. Code §18A-4-5b.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Wetzel 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. 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.

Date: June 28, 2000 _____

DENISE M. SPATAFORE

Administrative Law Judge