

PHYLLIS COVERT,

Grievant,

v.

Docket No. 99-40-463

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On July 22, 1999, Phyllis Covert (Grievant) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Putnam County Board of Education (PCBE) failed to grant her the same 261-day contract that has been awarded to other similarly situated service personnel employees. The grievance was denied at Level I on July 26, 1999. Grievant appealed to Level II, and an evidentiary hearing was conducted on September 2, 1999. A Level II decision denying the grievance was issued by the Superintendent's designee, Harold Hatfield, on September 28, 1999. Grievant appealed to Level III, and PCBE waived consideration of the grievance on October 20, 1999, as permitted under W. Va. Code § 18-29-4(c). Grievant appealed to Level IV on November 1, 1999. On January 6, 2000, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia. ([See footnote 1](#)) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on February 7, 2000, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Putnam County Board of Education (PCBE) in the school service personnel multi-classification of Secretary/Accountant.

2. Grievant is assigned to the Purchasing and Finance Department in PCBE's Central Office. She has been employed under a 250-day annual contract for over 12 years.
3. At the time Grievant made application for her current position, the position was posted as a 250-day position.
4. Grievant's immediate supervisor is Robert Smith, PCBE's Coordinator of Purchasing. Mr. Smith reports to Bill Duncan, PCBE's Treasurer. Thus, Treasurer Duncan is Grievant's second-level supervisor. However, Grievant's annual leave and other days off are subject to approval by Treasurer Duncan.
5. Mr. Smith and Treasurer Duncan are employed under 261-day annual contracts. J Ex 1 at L IV.
6. PCBE's Central Office is open 261 days per year. Duncan testimony at L IV.
7. In addition to Grievant, 6 Central Office employees hold the multi- classification of Secretary/Accountant; Brenda Dillon, Vi Mullins, Ann Summers, Diana Anthony, Kathy Cornell, and Donna Sergent. J Ex 1 at L IV.
8. PCBE Treasurer Duncan is the immediate supervisor of Ms. Dillon, Ms. Mullins, Ms. Summers, and Ms. Cornell. Ms. Summers, Ms. Mullins, and Ms. Dillon are employed under 261-day annual contracts. Ms. Cornell holds a 230-day employment term. J Ex 1 at L IV.
9. Pat Homberg, PCBE's Director of Exceptional Education, is the immediate supervisor of Ms. Sergent and Ms. Anthony. Ms. Homberg is employed under a 250-day annual contract. Ms. Sergent holds a 210-day employment term, while Ms. Anthony has a 250-day contract. J Ex 1 at L IV.
10. Grievant's primary duties as a Secretary/Accountant involve processing purchase orders for procurement of school supplies and equipment.
11. Ms. Mullins' primary duties as a Secretary/Accountant involve accounts payable. She processes payments for completed purchase orders, most of which are generated by Grievant. Ms. Mullins performs some other duties including processing payments that are not covered by regular purchase orders, such as utilities, travel expense reimbursements, and personal services.
12. Other employees who report directly to Treasurer Duncan are involved with handling payroll, banking, employment security, and insurance matters, as well as entering data into the West Virginia Education Information System (WVEIS).
13. PCBE employees who hold 250-day employment contracts, including Grievant, receive up to 15 days of paid vacation annually. In addition, 250-day employees must take 11 "non-calendar" days annually. Non-calendar days are

days when the employees do not work and do not receive compensation.

14. PCBE's employees who hold 261-day employment contracts receive vacation days in accordance with a sliding scale which is based upon the number of years the employee has worked for PCBE. Employees at the top of the scale receive 21 days of paid vacation annually. PCBE's 261-day employees do not have non-calendar days. Thus, 261-day employees with sufficient seniority to receive 21 vacation days are actually at work only 5 days more per year than 250-day employees.

15. The purchase order workload assigned to Grievant involves more activity between the spring and summer in preparation for the beginning of a new school year, but purchase orders are processed at all times during the year. Because of the increased workload, Treasurer Duncan requests employees in the Finance Department, including Grievant, not to schedule time off (either annual leave or non-calendar days) from the last 5 working days in June through the first 10 working days in July. G Ex 1 at L IV.

16. Grievant is a very efficient and dedicated employee. She carefully plans her work and works extra hours when necessary to be able to take leave. When she is on leave, some of her duties must be, and are, performed by Mr. Smith. For these reasons, Grievant is able to complete all of her assigned duties during her 250-day employment term. 17. There is sufficient workload in the Purchasing Section of PCBE's Finance Department to keep Grievant meaningfully employed during a 261-day term of employment.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Grievant alleges that PCBE 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, Grievant also charges that she is the victim of discrimination and favoritism prohibited by W. Va. Code §§ 18-29-2(m) and (o).

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, W. Va. Code § 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 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.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 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 under W. Va. Code § 18-29-2(m), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the 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. 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).

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), the West 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). Grievant holds the same classification title, Secretary/Accountant, as 3 employees in PCBE's Central Office who hold 261-day employment contracts. Grievant contends her duties and assignments are most similar to Vi Mullins, a 261-day Secretary/Accountant who processes accounts payable, including all of the completed purchase orders generated by Grievant.

As contemplated by W. Va. Code § 18A-4-5b, Ms. Mullins and Grievant are performing like assignments and duties. See Flint, supra; Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), rev'd on other grounds, Civil Action No.90-P-86-2 (Cir. Ct. of Harrison County Apr. 15, 1992). Generating purchase orders for school supplies and equipment, and making payments to vendors when the purchase orders have been filled, are at least as closely related as vocal music and instrumental music. See Weimer-Godwin, supra. Moreover, for purposes of establishing a prima facie case of discrimination under W. Va. Code § 18-29-2(m), Grievant has demonstrated that she is similarly situated to Ms. Mullins and other Central Office Secretary/Accountants, and that she is receiving disparate, less favorable, treatment because she has a shorter employment term, and thereby receives fewer vacation benefits than Ms. Mullins and other 261-day employees. See Flint, supra.

PCBE contends that there are legitimate, job-related reasons for the differences in treatment between Grievant and other 261-day Secretary/Accountants. One reason proffered by PCBE is that Grievant's work is "seasonal." Therefore, PCBE does not require a Secretary/Accountant to process purchase orders throughout the year. Further, PCBE notes that Grievant completes all of her assigned duties in the course of her 250- day employment term, indicating that there is no need for

her services on the additional 5 days that a 261-day employee with sufficient seniority to receive 21 days of vacation would actually be on the job. The undersigned finds that the reasons given for treating Grievant disparately and in a non-uniform manner are pretextual. See Burdine, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Sheperdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). A preponderance of the evidence indicates that the Secretary/Accountants in PCBE's Finance Department, including Grievant, experience a peak workload as one school year ends in June, and the following school year begins in July. This period of heightened activity is directly related to the fact that the Finance Department operates on a fiscal year basis. For this reason, Treasurer Duncan has placed limits on the ability of all employees under his supervision, including Grievant and Ms. Mullins, to take leave during this portion of the year. In these circumstances, Grievant's work is no more "seasonal" than the work performed by other employees who work for Treasurer Duncan.

As for the lack of need for Grievant's services, her immediate supervisor, Robert Smith, is employed under a 261-day contract. Mr. Smith described the workload as a "never-ending task" in terms of trying to stay caught up on all purchase orders. In order to take leave, he and Grievant have to work extra, either before or after their absence, to stay caught up. When Grievant is absent, Mr. Smith is required to perform some of her duties, particularly in regard to "emergency" purchase orders. A preponderance of the evidence indicates Grievant is an extremely efficient and hard-working employee, and her ability to accomplish all assigned tasks in the scope of her 250-day contract is more due to her foresight and diligence than any lack of meaningful duties. Mr. Smith testified that the workload would justify employing Grievant for an additional 5 workdays annually. Treasurer Duncan stated that he did not believe he could persuade the school board to increase Grievant's employment term by what amounts to 5 working days. However, he did not refute Mr. Smith's testimony that work would be available for Grievant on those additional working days. Equally significant, PCBE could not explain why Ms. Mullins could not complete her assigned duties in 5 fewer workdays, the same as a 250-day employee.

Mr. Smith also noted that, like other Central Office administrative tasks, the work performed in his unit is not dependent on school being in session. In other words, Grievant's duties are distinguishable from the duties of the Secretary/Accountants who work for the Director of Exceptional Education, whose duties are more closely aligned with activities that occur while students are in school. Thus,

the facts in this case are distinguishable from this Grievance Board's decision in Halstead v. Boone County Board of Education, Docket No. 99-03-066 (Apr. 30, 1999), where Custodian positions were properly differentiated on the basis of the size of the building, the amount of surrounding grounds, and the number of days the building is open for school or community activities. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. 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."

7. 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.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 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).

8. 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, the 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. 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).

9. Grievant has proven by a preponderance of the evidence that she is similarly situated to other Secretary/Accountants in Respondent's Central Office who hold 261-day employment contracts in that she performs like assignments and duties. Respondent's claims that Grievant's work is seasonal and that her services are not required on a year- round basis are without merit. Accordingly, Grievant is entitled to the same employment term as the 261-day Secretary/Accountants.

Accordingly, this grievance is **GRANTED**. Respondent Putnam County Board of Education is hereby **ORDERED** to instate Grievant to a 261-day employment contract, effective July 1, 1999, and to make Grievant whole, to include, but not limited to, paying back pay, with interest, for any "non-calendar" days she has taken off during the 1999- 2000 school year, prior to the date of this decision.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 29, 2000

[Footnote: 1](#)

Grievant was represented by counsel, John E. Roush, of the West Virginia School Service Personnel Association. Respondent was likewise represented by counsel, John A. Grafton.