MARLENE WOOFTER, et al.,
Grievants,

v. **Docket No. 00-17-362**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievants Marlene Woofter, Mitzie Reider, and Patty Gonzalez are employed by the Harrison County Board of Education (HCBOE) as service personnel multiclassified as Accountant III/Auditor/Secretary III's. Grievant Veronica Bumgardner is employed by HCBOE as a professional employee, the Coordinator of Finance. Grievants initially filed a level one grievance on April 14, 1998, in which they alleged a violation of W. Va. Code §18A-4-5b, because a Secretary III and Coordinator each held 261-day employment contracts, while they were employed only 240 days per year. Grievants' immediate supervisors lacked authority to resolve the matter at level one. The grievance was denied at level two, and BCBOE waived participation at level three, as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on November 25, 1998, at which time Grievants requested that the matter be held in abeyance pending a ruling on a similar matter by the West Virginia Supreme Court of Appeals. A level four hearing was conducted on January 18, 2001, at which time Grievants were represented by William

White of WVEA, and HCBOE was represented by Basil Legg, Esq.[1] The matter became mature for decision on March 9, 2001, the due date for final post-hearing submissions.

The following facts derived from the record in its entirety, are undisputed and may be set forth as formal findings of fact.

Findings of Fact

_____1. Grievants Woofter, Reider, and Gonzalez are employed by HCBOE as service personnel, and are multiclassified as Accountant III/Auditor/Secretary III.

2. Grievant Bumgardner is employed by HCBOE as a professional employee, and holds the title of Coordinator of Finance. The requirements for this position include a college degree.

3. All Grievants held a 240-day employment contract at the time the grievance was initiated.

4. In April 1998, Sheila Harrison was employed by HCBOE as a Secretary III, and held a 261-day employment contract.

5. In April 1998, Beverly Lantz was employed by HCBOE as Coordinator of Purchasing, a service personnel position. Ms. Lantz held a 261-day employment contract.[2]

6. HCBOE produced an undated memorandum which states as follows:

---

[1]By letter dated June 13, 2000, Mr. White advised the undersigned that the matter, then styled Steadman, et al. v. Harrison County Board of Education, had been settled and could be removed from the docket. A Dismissal Order was subsequently issued on June 29, 2000. In November 2000, Mr. White verbally notified the undersigned that only included in his letter of June 13, 2000. An Amended Dismissal Order reflecting the correction was issued on December 5, 2000. Noting HCBOE's objection to the Amended Order, the merits of the case will be considered.

[2]Ms. Harrison, the last Secretary III employed by HCBOE to hold a 261-day employment contract, retired on June 30, 1998. Ms. Lantz retired effective June 30, 2000.

> All 261 Day Service Employees remain the same contract status.
>
> All 240 Day Service Employees receive 10 paid days vacation to become 250 day contract employees.
>
> No additional hiring of 261 employees.
>
> All 250 day contracts begin July 1, 2000.
>
> No back pay or carry over of TAW days for 250 day contract employees or additional Sick Leave days to be added.

The memorandum did not indicate who issued the document, and was not signed by any administrative officer or representative.

7. The memorandum was signed by twenty-eight employees, including Grievants Gonzalez, Reider, Woofter, and Bumgardner.

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 §4.21 (2000); 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievants allege that HCBOE violated the uniformity provision of W. Va. Code §18A-4-8b, by providing longer, more lucrative, employment contracts to similarly situated employees.[3] In support of their claim, Grievants rely upon Flint v. Board of Education, ___ W. Va. ___, 531 S.E.2d 76 (1999), which they argue "stands for the proposition that if employees are performing like or similar duties to, and are within the same classification as another employee who has a 261-day employment contract, it is discriminatory for their contract to be for the lesser term of 240 days." Grievants note that they work approximately the same number of days each year as employees with 261 contracts.

Grievant Bumgardner states that she holds the exact same classification, i.e., Coordinator, as Ms. Lantz, while Grievants Woofter, Gonzalez, and Reider argue that while they compare themselves to an employee who holds the single classification of Secretary III, they are entitled to the same employment term because they perform all of the duties which she performs, and other duties as well. They assert that by performing duties beyond those of Secretary III, their positions are even more rigorous than those of Ms. Lantz, entitling them to at least equal pay and benefits. Grievants deny that there was any understanding they would abandon this claim when they accepted the extended employment term offered by HCBOE.

HCBOE also relies upon Flint, supra, when arguing that, as multi-classified employees, Grievants Woofter, Reider, and Gonzalez are not similarly situated to an employee who held the single classification of Secretary III, therefore, there was no violation of W. Va. Code §18A-4-8b, and no discrimination. Addressing Grievant

[3]Employees who hold 261-day employment contracts receive a paid vacation while 240-day employees receive twenty-one days of unpaid leave per year.

Bumgardner, HCBOE asserts that although she holds the same classification title of coordinator as Ms. Lantz, there is no evidence to establish that she performs assignments and duties similar to those of the Coordinator of Purchasing. Further, Grievant Bumgardner is a professional employee, and HCBOE suggests that it is patently unfair and irrational to compare herself to a service personnel employee who was paid a lower annual salary. In fact, HCBOE asserts that Ms. Lantz was paid less per year, including her paid vacation, with a 261-day employment contract, than Grievant is paid for working 240 days per year.

HCBOE further asserts that the grievance must be denied because Grievants entered into a settlement agreement to resolve any and all outstanding claims relating to their entitlement to a 261-day employment contract. In exchange for their right to pursue this, or any other claim, HCBOE asserts that Grievants were given a 250-day employment contract which includes ten days of paid vacation per year. If the claims were not part of the settlement, HCBOE argues that there was no proper consideration for the extended employment term as part of the settlement agreement.

It cannot be determined that Grievants entered into a settlement agreement. As previously noted, the document was not dated, or signed by any HCBOE official. Further, it does not state that the offer was in consideration of the employees withdrawing any pending actions related to this issue. As a binding contract, this document is inadequate, and Grievants remain at liberty to pursue the pending grievance.

Although Grievants Woofter, Reider, and Gonzalez make a unique argument as to why they are entitled to the same employment term as a single classified employee, it simply cannot be accepted. W. Va. Code §18A-4-5b requires that uniformity 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[.]" While Grievants do spend a portion of their day performing duties similar to an employee who works all day as a Secretary III, they also perform duties of Auditor and Accountant III. Grievants recognize, as indicated in their argument, that they perform duties beyond those of Secretary III. This fact inherently determines that Grievants are not performing like assignment and duties as the person to whom they compare themselves.

_____In Flint, the W. Va. Supreme Court of Appeals held that "employees who do not have the same classifications are not performing 'like assignments and duties.' Even those employees who have some classifications in common with another service employee would not be performing 'like assignments and duties' because they have additional duties in relation to the other classifications they hold." Therefore, Grievants Woofter, Reider, and Gonzalez are not performing duties and responsibilities similar to those performed by Ms. Harrison. LeMasters and White v. Tyler County Bd. of Educ., Docket No. 00-48-121 (Dec. 19, 2000); Airhart v. Wood County Bd. of Educ., Docket No. 99-54-419 (May 19, 2000).

Grievant Bumgardner's situation differs in that she holds the same classification title as an employee who held a 261-day employment contract; however, it is clear that she also does not perform like assignments and duties, since her position requires a college degree and the Coordinator of Purchasing does not. Grievant Bumgardner offered no other evidence to support her claim, and the record does not provide any additional

information relating to the specific duties of either herself or Ms. Lantz.[4] Grievant Bumgardner has also failed to prove that she is entitled to a longer employment term.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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 §4.21 (2000); 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. W. Va. Code §18A-4-5b requires that uniformity 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."

3. "[E]mployees who do not have the same classifications are not performing 'like assignments and duties.' Even those employees who have some classifications in common with another service employee would not be performing 'like assignments and duties' because they have additional duties in relation to the other classifications they hold." Flint v. Board of Education, ___ W. Va. ___, 531 S.E.2d 76 (1999).

---

[4]Although discrimination was not specifically alleged by Grievants, the Court in Flint held that a claim of discrimination fails for the same reason, i.e., Grievants are not performing like assignments and duties, and are not similarly situated.

4. Grievants do not perform assignments and duties like those of the employees to whom they compare themselves.

5. Grievants have failed to prove by a preponderance of the evidence that HCBOE acted in violation of W. Va. Code §18A-4-5b, or engaged in discrimination.[5]

Accordingly, the grievance is **DENIED**.

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

Date: March 22, 2001

Sue Keller
Senior Administrative Law Judge

[5] In their proposed findings and conclusions Grievants alleged for the first time a violation of HCBOE policy GCRH, which provides for paid vacation time for twelve month employees. This issue was not included in the statement of the grievance or addressed at the level four hearing, and will not be considered at this time, except to note that Grievants are not twelve month employees.