OLLIE HUNTING,

Grievant,

v.

DOCKET NO. 01-22-241

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ollie Hunting, filed this grievance against his employer, the Lincoln County Board of Education ("Board"), on or about April 9, 2001, protesting his transfer from a 240- day employee to a 200-day employee, alleging the transfer constitutes a violation of the uniformity provisions of W. Va. Code § 18A-4-5b, discrimination, favoritism, and is further barred by this Grievance Board's previous decision in Hunting v. Lincoln County Board of Education, Docket No. 97-22-103 (Sept. 18, 1997)(Hunting I). The parties agreed to bypass level one, and a level two hearing was held on April 26, 2001. The grievance was denied by Grievance Evaluator Kathryn R. Bayless, Esq., by decision dated May 1, 2001, and the Board bypassed participation at level three. Grievant advanced his appeal to level four on May 4, 2001, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, offices on June 7, 2001. This matter became mature for decision on June 22, 2001, the deadline for the parties' proposed findings of fact andconclusions of law. Grievant was represented by Anita Mitter, West Virginia Education Association, and the Board was represented by James W. Gabehart, Esq.

SUMMARY OF EVIDENCE

Level II Grievant's Exhibits

Ex. 1 -

Hunting v. Lincoln County Board of Education, Docket No. 97-22-103 (Sept. 18, 1997).

Ex. 2 -

Lincoln County Board of Education 2000-2001 Schedule #16 - Central Office Administrators.

Ex. 3 -

Job Description - Attendance Director.

Ex. 4 -

January 20, 1999 memorandum from R. P. Powell, Superintendent, to All Schools & Departments, All Faculty Senates, with attached Board Agenda.

Ex. 5 -

April 13, 1999 letter from R. P. Powell to Ollie D. Hunting.

Ex. 6 -

April 16, 1999 memorandum from Ollie D. Hunting to Rick P. Powell.

Ex. 7 -

April 19, 1999 letter from R. P. Powell to Ollie D. Hunting.

Ex. 8 -

April 29, 1999 letter from R. P. Powell to Ollie D. Hunting.

Ex. 9 -

April 21, 1999 memorandum from R. P. Powell to All Schools & Departments, All Faculty Senates with attached Board Agenda.

Ex. 10 -

July 16, 1999 letter from Peggy Adkins to Ollie Hunting.

Ex. 11 -

August 10, 1999 letter from county Directors to Peggy Adkins.

Ex. 12 -

September 7, 1999 letter from Peggy Adkins to Ollie Hunting.

Ex. 13 -

February 23, 2001 letter from William K. Grizzell to Ollie D. Hunting.

Ex. 14 -

Lincoln County Board of Education Personnel Schedule - March 27, 2001.

Ex. 15 -

March 29, 2001 letter from William K. Grizzell to Ollie Hunting.

Ex. 16 -

September 21, 1999 memorandum from Peggy Adkins with attached September 20, 1999 Board Agenda.

Ex. 17 -

Grievance Form dated April 9, 2001.

Ex. 18 -

Bd. of Educ. v. Dyer, Civil Action No. 97-AA-8, Circuit Court of Lincoln County and Bd. of Educ. v. Hunting, Civil Action No. 97-AA-9, Circuit Court of Lincoln County, Order Granting Motion to Dismiss, dated May 29, 1998.

Board Exhibits

Ex. 1 -

Transcript from June 18, 1997 level four hearing in Hunting v. Lincoln County Bd. of Educ., Docket No. 97-22-103 (Sept. 18, 1997).

Ex. 2 -

Level two Decision in Hunting I grievance 97-03 before the Board, dated February 4, 1997.

Ex. 3 -

Transcript of August 6, 1996, level two hearing in Hunting I grievance 97-03.

Ex. 4 -

Portion of Board minutes of June 17, 1996.

Testimony

Grievant testified in his own behalf, and presented the testimony of William Grizzell, Larry Bays, Dwight Coburn, and Birdie Gandy. The Board presented the testimony of William Grizzell.

FINDINGS OF FACT

The following findings of fact are derived from a review of the record in its entirety.

1. Grievant is employed by the Board, and since the 1996-97 school year, has been serving as an Attendance Director. Bd. Ex. 4. (See footnote 1)

2. Grievant's employment term of 240 days was established by Board action taken on January 19, 1999, due to the decision in Hunting I. That decision was based entirely on stipulations entered by the parties, with little additional evidence or testimony at level four. It was found, based on those stipulations, that Grievant proved he was not employed in a uniform manner in comparison with other directors during the 1996-97 school year. Grievant was awarded back pay for the 1996-97 school year. G. Exs. 1, 4. (See footnote 2)

3. Soon thereafter, Grievant was notified by then-Superintendent Rick Powell, that he would be recommended for transfer for the 1999-2000 school year from “Attendance Director” to “Attendance Director/Subsequent Assignment”. Mr. Powell told Grievant he was recommending the transfer because additional duties needed to be assigned to employees in the central office and, given the declining enrollment andGrievant's extended 240-day, he had time available to perform additional duties. The Board approved that transfer. G. Exs. 5-9.

4. On July 16, 1999, Grievant was assigned additional duties by then- Superintendent Peggy Adkins as follows: management of the home schooling program; administration of student transfers; responsibility for work permits; assist with WVEIS pertaining to the attendance area; work under the supervision of the transitions week coordinator to assist in transitions week activities. G. Ex. 10. After the Fall term started in 1999, Grievant agreed to accept the additional assignment of supervision of the Alternative Learning Center (“ALC”). G. Ex. 12.

5. By letter dated February 23, 2001, Superintendent William K. Grizzell notified Grievant that we would recommend that Grievant's 240-day contract be terminated and replaced with a 200-day

contract at the close of the school year due to a decline in enrollment and lack of need of services. G. Ex. 13.

6. Grievant requested and received a hearing before the Board prior to the State Superintendent's action on March 27, 2001, to approve the recommendation. (See footnote 3) Grievant was notified of that action, and this grievance was timely filed. G. Exs. 14, 15.

7. Superintendent Grizzell recommended the reduction of contract days for Grievant after learning, in February 2001, that enrollment had declined by approximately 225 students for the 2000-2001 school year, and realizing the state funding for the next year would decline as well. 8. The duties assumed by Grievant after being transferred to the Attendance Director/Subsequent Duties title will be assumed by other employees, leaving Grievant with only his Attendance Director duties for the upcoming school year.

9. The position of Attendance Director, unlike that of other directors employed by county boards, is statutorily created. W. Va. Code § 18-8-3 provides that a county board shall employ "at least a half-time director of school attendance" if the county's net enrollment is equal to or less than 4,000 students. W. Va. Code § 18-8-4 sets forth the duties of an attendance director and provides that an attendance director "hired for more than 200 days may be assigned other duties determined by the superintendent during the period in excess of 200 days."

10. Other Directors employed by the Board are responsible for the operation of programs with budgetary and supervisory authority, and have 240-day contracts.

11. Grievant does not operate a program with budgetary and supervisory authority.

DISCUSSION

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 § 4.21 (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. Grievant contends that the termination of his 240-day contract and replacement with a 200-day contract violates the uniformity provisions of W. Va. Code § 18A-4-5b, and constitutes discrimination and favoritism. Code § 18A-4-5b 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 Lincoln County school system, in much the same manner as other Board employees who hold the "Director" title. Grievant acknowledges that while his duties are not the same as any of the other Directors, each Director is nonetheless paid from the same level on the county's pay scale, and each Director holds a 240-day contract. In addition, Grievant argues that the matter of uniformity was upheld in Hunting I, and although not specifically pled, that the principles of res judicata should therefore apply.

The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). "The identicality of issues litigated is the key component to the application of administrative res judicata . . . . Res judicata focuses onwhether the cause of action in the second suit is the same as in the first suit." Liller, at 646. Grievant maintains that Hunting I dispensed with the uniformity issue in his favor. However, a review of the entire Hunting I record, which was introduced by the parties into evidence, shows quite convincingly that the matters set forth herein were not in any way litigated in that proceeding. At the time Hunting I was decided, the Board employed in- house legal counsel and his title was Director of Legal Services. Because the issue in Hunting I dealt with uniformity of pay among directors, the Board's legal counsel believed he had a conflict of interest and could not effectively litigate the case. However, despite this belief, he did not recuse himself from Hunting I, but instead merely agreed with Grievant's representative, to a stipulation of facts. Those stipulations formed the entire presentation to this Grievance Board upon which a decision was to be made, and being so constricted, the Administrative Law Judge made the decision that Grievant had prevailed by a preponderance of the evidence. The Board's counsel ultimately did attempt to withdraw as counsel

upon appeal to the Circuit Court, and in the process of that confusion, missed the briefing schedule, leading to a dismissal of the case from the Circuit Court.

The undersigned concludes the principles of res judicata do not apply in this case, as the underlying issues, uniformity, discrimination and favoritism, were not litigated in the prior proceeding, and the Board was further precluded by the actions of its counsel from being afforded a “full and fair” opportunity to litigate the matters presented therein.

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. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). See also Weimer-Godwin v. Bd. of Educ. of Upshur County, 179 W. Va. 423, 369 S.E.2d 726 (1988).

The evidence in this case establishes that the directors employed by the Board have control over the operations of an entire program, be it food services, transportation, maintenance, or the like, with full budgetary responsible for the program, and full supervisory responsibility over employees within that program. Grievant has no similar duties as Attendance Director. He does not have budgetary authority, nor does he have supervisory duties in his role as Attendance Director. The undersigned is persuaded that the greatest similarity between Grievant's position and other Board Directors is the use of the term "Director" in his job title.

However, Grievant's title was not selected by the Board. It was simply bestowed in accordance with W. Va. Code §§ 18-8-3 and 4, which require county boards to hire a full or half-time county director of school attendance. W. Va. Code § 18A-4-5b permits a county board to compensate employees at different levels based upon such factors as responsibility and duties. 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 the Board substantial discretion in determining the proper level of pay and length of contract for its Attendance Director. Haddox, supra. 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). Apparently, the Board has elected to compensate all Directors who

supervise employees and operates an organization division at the same level on its salary schedule. Otherwise, Grievant's job, while important, does not involve the level of responsibility entrusted to other Board employees holding the title of Director and a 240-day contract.

Grievant also alleges 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 Board 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." Favoritism is similarly defined by 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." In order to establish a prima facie case of discrimination and favoritism, 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 the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. 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 the Board as Directors. As indicated in the 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 the Board's

other Directors. Thus, Grievant has not established a prima facie case of discrimination or favoritism under W. Va. Code §§ 18- 29-2(m) or (o).

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 §§ 4.21 (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. The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). "The identicality of issues litigated is the key component to the application of administrative res judicata . . . . Res judicata focuses on whether the cause of action in the second suit is the same as in the first suit." Liller, at 646.

3. Grievant has failed to prove by a preponderance of the evidence that the matters set forth in this grievance were fully and fairly litigated in Hunting I, and therefore, the principles of res judicata do not apply in this matter.

4. 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).

5. Grievant, an Attendance Director, does not perform "like assignments and duties" within the meaning of W. Va. Code § 18A-4-5b as other Board employees who serve as Directors of various programs. Haddox v. Mason County Bd. of Educ., 98-26-283 (Nov. 30, 1998). 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).

6. Grievant failed to establish by a preponderance of the evidence that the Board 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.

7. 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."

8. Favoritism is similarly defined by 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.” 9. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) or (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).

10. Grievant failed to establish a prima facie case of discrimination or favoritism in regard to the Board's decision to limit his contract term to 200 days annually.

Accordingly, this Grievance is **DENIED** .

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 13, 2001

Footnote: 1

Exhibits refer to evidence entered at the level two hearing.

Footnote: 2

Hunting I was appealed to the Circuit Court of Lincoln County by the Board. The appeal was subsequently dismissed by The Honorable Judge Jay Hoke by Order dated May 29, 1998, when the Board failed to meet the prescribed briefing schedule.

Footnote: 3

The Lincoln County school system is temporarily being overseen by the State Superintendent.