HELEN BAIR,

Grievant,

v. Docket No. 01-43-575

RITCHIE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Helen Bair, filed this grievance against her employer, the Ritchie County Board of Education ("RCBOE") on August 22, 2001. The Statement of Grievance alleges:

> **Grievant, a regularly employed secretary who holds a 225-day[(See footnote 1)] employment term, contends that she holds the same classification and performs the same duties and responsibilities as other secretaries who hold a 261-day employment term. Grievant alleges a violation of W. Va. Code §[§] 18A-4-5b and 18-29-2(m).**
>
> **Relief Sought: Grievant seeks the instatement of a 261-day contract for the 2001-2002 and all future school years, retroactive wages and benefits, and interest on all monetary sums.**

This grievance was denied at all lower levels, and Level III was by-passed. Grievant appealed to Level IV on November 9, 2001, and a hearing was scheduled for January 15, 2002. The parties agreed to submit this case on the record developed below. This case became mature for decision on March 5, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

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. **Grievant is employed by RCBOE in the Central Office as a Secretary III.**

2. Prior to 2001 - 2002, Grievant was employed in a 210-day position. For the two years before this school year, Grievant also bid on and received an additional assignment for twenty days in the summer. This assignment was for summer food services. For the 2001 - 2002 school year, RCBOE increased her regular contract term to 230 days, and the additional assignment was added to her duties.

3. There are three, more senior Secretary III's in the Central Office who have 261-day contracts. **(See footnote 3)**

4. RCBOE'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 RCBOE. Employees at the top of the scale receive 15 days of paid vacation annually. Employees with 261-day contracts receive a maximum of fifteen paid vacation days. The Secretaries in Finding of Fact 3 each receive fifteen days of vacation, and are required to work 246 days each year.

5. To fulfill her contract for 2001-2002, Grievant will be required to work 230 days and take 31 "non-calendar" days. Non-calendar days are days when an employee does not work and does not receive compensation. She does not receive any paid vacation time. Grievant decides when to take her non-calendar days after discussion with her supervisor.

6. There is no evidence that RCBOE needs Grievant to be employed more than the 230 days of her contract, as Grievant's duties are in the areas of food services and attendance.

7. The three employees to whom Grievant compares herself do not work in her area, and it is unclear from the record what their duties include. Connie Bean works in the areas of transportation, the educational trust, and with the school nurse(s); Gail Collins works in the area of Special Education; and Grievant did not know what Beverly Fosters' duties were. **(See footnote 4)**

Issues and Arguments

Grievant argues the issue in this grievance is controlled by the West Virginia Supreme Court of Appeals case, Flint v. Harrison County Board of Education, Docket No. 97-17-348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil Action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, No. 25898 (Dec. 10, 1999). **(See footnote 5)**

Grievant alleges she should have 261-day contract instead of a 230-day contract because she is in the same classification and performs assignments and duties that are "like" the other Central Office Secretaries. She avers she has been discriminated against by this failure to increase her contract to that of a year around employee. Grievant argues Flint stands for the proposition that if an employee is performing like or similar duties to, and is within the same classification as another employee, who has a 261-day contract, it isdiscriminatory for her contract to be for the lesser term of 230 days, and her contract must be increased to a 261-day employment term with vacation days.

Respondent avers the Flint decision should not control the outcome of this grievance as the facts of the two cases are different. Respondent asserts Grievant did not demonstrate she performs "like assignments and duties," or that she works the same number of days. Additionally, Respondent avers a board of education has discretion to contract with employees to meet the needs of the school system, and requiring RCBOE to employ Grievant for a longer term removes the discretion given in W. Va. Code § 18A-4- 8. (See footnote 6) **RCBOE notes it needs some employees for longer contract terms than others, and since Grievant's duties are in food services and attendance, the need for her services are not year around.**

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where theevidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The Flint case gives directions for the outcome of this Decision, and the facts and holding of that case must be examined to see how they compare with the instant grievance. In Flint,

the winning grievants held 240-day contracts. They worked the same number of days and were in the same classifications as the employees to whom they compared themselves, and they performed the same duties. The West Virginia Supreme Court of Appeals found two grievants were able to establish uniformity and discrimination violations because the grievants "perform[ed] the same duties, h[e]ld the same classifications, and work[ed] the same number of days." Flint at 82. (Emphasis Added.)

Grievant is alleging RCBOE a violation of W. Va. Code §18A-4-5b, which states "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." Grievant also charges she is a victim of discrimination 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 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), the employer is provided an opportunity to articulate legitimate, nondiscriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show 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 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 paid 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. Flint, supra. See, e.g., Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); 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); 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).

Here, although Grievant has demonstrated she has the same classification as other RCBOE employees who hold 261-day employment contracts, Grievant has not demonstrated she is performing substantially similar or like assignments and duties to the other 261-day employees in her classification. See Covert, supra; Flint, supra; Weimer- Godwin, 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). She holds the same classification, but this does not mean she engages in "like assignments and duties." Grievant's testimony was clear; she did not know what duties the other secretaries performed.

Her testimony about their duties was based on assumptions and generalizations. Grievant did not meet her burden of proof on this issue. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93- BOD-400 (Apr. 11, 1995). Additionally, Grievant has not established a prima facie case of discrimination under W. Va. Code § 18-29-2(m). She has not demonstrated she is similarly situated to the other RCBOE employees to whom she compares herself. The Flint Court stated the grievants had proven their case because they established they "perform[ed] the same duties, h[e]ld the same classifications, and work[ed] the same number of days." See Flint, supra. This holding was applied in Airhart v. Wood County Board of Education, Docket No. 99-54-419 (May 19, 2000). In Airhart, the grievants held 240-day contracts, performed the same duties, held the same classifications, and in some instances worked more days than the 261-day employees, who received 21 days of vacation. In this grievance Grievant works 230 days, and the secretaries to whom she compares herself work 246 days. Thus, she does not meet the test outlined in Flint, and used in Airhart. (See footnote 7)

Additionally, Respondent indicated Grievant's services are not needed on a full-time basis, and Grievant has not proven this statement was incorrect. Grievant's work is in the areas of attendance and food services. Even though there are some food services offered in the summer, the record shows this need was handled through an additional, twenty day, extra-duty assignment before 2001 - 2002, and now Grievant's contract has been changed so she does not have to bid on this contract, but these duties are now contained in her regular contract. RCBOE contends it is within its discretion to determine the needs of the school system. W. Va. Code § 18A-4-5b.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has 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 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."

3. 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." Flint v. Harrison County Board of Education, Docket No. 97-17-348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, No. 25898 (Dec. 10, 1999); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

4. 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."

5. 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 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).

6. Once a grievant establishes a prima facie case of discrimination, 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).

7. Grievant has not proven by a preponderance of the evidence that she is similarly situated to 261-day employees as she did not establish she performed like assignments and duties or was required to work the same number of days.

8. Grievant has not proven by a preponderance of the evidence that she performed substantially similar duties.

9. Grievant did not establish Respondent violated W. Va. Code §§ 18-29-2(m) and/or18A-4-5b.

Accordingly, this grievance is DENIED. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ritchie 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.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: March 28, 2002.

Footnote: 1

This information is incorrect; Grievant holds an 230-day contract.

Footnote: 2

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, Respondent was represented by Attorney Howard Seufer from Bowles Rice McDavid Graff & Love.

Footnote: 3

Grievant initially stated there were five, but she was incorrect about the other employees' classifications.

Footnote: 4

Although Grievant clearly outlines her duties, when asked what the other Secretary III's did her responses were all assumptions.

Footnote: 5

The West Virginia Supreme Court of Appeals basically affirmed the original order of the Grievance Board.

Footnote: 6

This Code Section allows a board of education to contract with "all or part" of its employees for a term of employment longer than 200 days.

Footnote: 7

See also Covert, supra, where the grievant had a 250-day contract and worked at least as many days as the employees to whom she compared herself.