PEGGY FREEMAN,

Grievant,

v. **DOCKET NO. 02-10-154**

FAYETTE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Peggy Freeman, an Associate Superintendent employed by Respondent, filed this grievance at Level I on March 18, 2002, on two grounds. First, she alleges, that on March 1, 2002, Respondent arbitrarily and capriciously appointed the principal of Fayetteville High School as Interim Superintendent instead of appointing her to the position, exhibiting gender discrimination and favoritism. Second, she alleges that she has been inequitably paid compared to past male Associate Superintendents, and that persons under her supervision would soon be paid at higher rates than she received.

As relief, she seeks instatement into the Interim Superintendent Position until June 30, 2002, back pay and benefits as Interim Superintendent from February 25, 2002, a revised contract as Associate Superintendent with percentage or yearly increments, and attorney fees.

The grievance was denied at Level I and Level II, and Level III was waived. A Level IV hearing was held in the Grievance Board's Beckley office on June 26, 2002. Jane Moran, Esq. represented Grievant and Erwin Conrad, Esq. represented Respondent. Theparties agreed to submit their proposed findings of fact and conclusions of law by August 1, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is employed by Respondent as Associate Superintendent of Curriculum and Instruction and is female. She has been employed in various capacities by Respondent for 27 years, and assumed her current position in August, 1999.

2. Superintendent Harry E. Hoffer resigned effective February 25, 2002.

3. Respondent, reduced to three members because two Board members had been removed from office, met to elect an interim Superintendent, who would serve until a permanent replacement could be hired.

4. The three board members each had a different preference as to who should be appointed as the interim replacement. Grievant was one of the candidates under consideration. None of the candidates had applied, and the job was not posted. Board member Steve Pilato suggested a compromise candidate be chosen, and suggested Fayetteville High School Principal Charles Garvin, III, a male.

5. At the time, Fayette County was in an upheaval over the issue of school consolidation. Mr. Hoffer was a proponent that consolidating schools was in the best interests of the county, and the Board wished to distance itself from the issue after his forced resignation. It considered that Grievant, who had been in Mr. Hoffer's administration, might interfere with its retreat, even though she had never publically offered an opinion on the subject and did nothing wrong in the eyes of the Board during the contentious period. 6. Mr. Garvin was selected as a unanimous compromise. He had never served as a central office administrator before, but met the minimum qualifications of the position. 7. In the past when an interim superintendent was needed, the Board appointed the Associate Superintendent to the position. On the two most recent previous occasions, that person was male.

8. Some of Grievant's male subordinates who have 31 years seniority will receive a salary increment effective July 1, 2002, granted as a part of their state minimum salary by an amendment to W. Va. Code § 18A-4-2. Grievant, who does not have 31 years of seniority, will not receive the increment.

9. Some of the subordinates who will receive the increment will receive more pay than Grievant as a result.

10. When Grievant learned she was not elected to the Interim Superintendent position, she met with the board to renegotiate her salary. She told them that her subordinates should not receive more pay than her. The Board refused to grant her additional pay.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's

allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Grievant first claims Respondent should have appointed her to the Interim Superintendent position because she was qualified for the position and in the past it had selected the Associate Superintendent for that job. She claims its failure to do so was the result of discrimination and favoritism, and was arbitrary and capricious. Although there is no dispute that Grievant could have ably performed the duties of Interim Superintendent, or even as a permanent Superintendent, she provided no authority for the proposition that Respondent had any duty to even consider her for the position, much less place her in it. There is no state or local policy or rule, and no statute (See footnote 1) that would mandate such a promotion. Although she has shown the Board deviated from past practice, she provides no authority mandating Respondent continue that practice or converting that practice into enforceable policy.

While Grievant does cite Villers v. Kanawha County Board of Education, Docket No. 97-20-294 (Jan. 30, 1998) and W. Va. Code § 18A-4-7(a) as defining the criteria by which a county board of education must evaluate a prospective professional employee, a Superintendent, and by extension an Interim Superintendent, is an officer of the board, not an employee, and a different standard applies. "A county Superintendent of Schools, elected and appointed by the board of education pursuant to W. Va. Code § 18-4-1, is an officer of the school board, and not an employee within the meaning of W. Va. Code §§ 18-29-1, et seq. Church v. McDowell County Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987). See Lookabill v. Wyoming County Bd. of Educ., 172 W. Va. 225, 304 S.E.2d 678 (1983); Hall v. Pizzino, 164 W. Va. 331, 263 S.E.2d 886 (1980); Jackson v. Bd. of Educ., 128 W. Va. 154, 35 S.E.2d 852 (1945)." Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998). As such, the Grievance procedure is not meant to apply to claims relating to that position. *See*, Whalen, *supra.*

Grievant's second allegation is that she has been discriminated against because her salary is inequitably low compared to male employees. "Discrimination" means anydifferences 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. W. Va. Code § 18-29-2(m). In order to establish a claim of discrimination or favoritism, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, Grievant must show:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant fails to make a *prima facie* case. When Grievant applied for and then accepted her position as Associate Superintendent, the salary for the job was listed in the posting and agreed to by her. The longevity increase was mandated by the amendment of W. Va. Code § 18A-4-2 by the State legislature, and was effective for the first time July 1, 2001. (See footnote 2) The salary supplement she seeks is given only to employees, male or female, who have reached 30 years of service. No other prior Associate Superintendents received the salary supplement Grievant seeks. Respondent's implementation of the salary increase is mandated by state law - it must add the longevity increment to the teacher's salary.

Grievant also claims that the Board's failure to renegotiate her contract so her subordinates would not surpass her in pay is a violation of the equal pay for equal work provisions of W. Va. Code § 18A-4-1 *et seq.* However, the inclusion of the provision thatwill cause the salary disparity in the very Code chapter she cites is evidence that the legislature's intention was to make the longevity increment a part of every professional educator's regular salary.

Grievant argues that it undermines her authority to be paid less than her subordinates. At the same time, Grievant argues that she should be paid more than her subordinates, she asserts the pay disparity violates the principle of pay equity. Grievant's position fails on two fronts: “Under W. Va. Code, 18A-4-5 [1969] and its successor, W. Va. Code, 18A-4-5a [1984], once a county board of education pays additional compensation to certain teachers, it must pay the same amount of additional compensation to other teachers performing 'like assignments and duties[.]'" Weimer-Godwin v. Bd. of Ed. of Upshur County, 179 W. Va. 423, 369 S.E.2d 726 (1988). “In order to prevail on a claim of a violation of the uniformity in pay provisions of [W. Va. Code] §18A-4-5a, a grievant

must show that [she] and other employees perform 'substantially similar' duties. [Weimer- Godwin, *supra*].” Mahone v. Mingo County Bd. of Educ., Docket No. 93-29-159 (Feb. 7, 1994).

In the first place, the salary increment Respondent is giving to Grievant's subordinates is not “additional compensation,” it is “considered a part of the state minimum salaries for teachers.” W. Va. Code § 18A-4-2(c). Secondly, Grievant cannot both argue that their substantially similar duties justify pay equity with her subordinates while claiming that her superior position demands a higher salary.

The following conclusions of law support this discussion:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. “A county Superintendent of Schools, elected and appointed by the board of education pursuant to W. Va. Code § 18-4-1, is an officer of the school board, and not an employee within the meaning of W. Va. Code §§ 18-29-1, et seq. Church v. McDowell County Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987). See Lookabill v. Wyoming County Bd. of Educ., 172 W. Va. 225, 304 S.E.2d 678 (1983); Hall v. Pizzino, 164 W. Va. 331, 263 S.E.2d 886 (1980); Jackson v. Bd. of Educ., 128 W. Va. 154, 35 S.E.2d 852 (1945).” Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998). An Interim Superintendent of Schools is also an officer of the Board.

3. The Grievance procedure is not meant to apply to claims relating to the selection of a superintendent or interim superintendent. *See*, Whalen, *supra.*

4. "Discrimination" means 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. W. Va. Code § 18-29-2(m).

5. In order to establish a claim of discrimination or favoritism, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, Grievant must show:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievant failed to state a *prima facie* claim that the failure to award her a longevity pay increment was the result of discrimination.

7. Under W. Va. Code, 18A-4-5 [1969] and its successor, W. Va. Code, 18A-4- 5a [1984], once a county board of education pays additional compensation to certain teachers, it must pay the same amount of additional compensation to other teachers performing like assignments and duties[.]" Weimer-Godwin v. Bd. of Ed. of Upshur County, 179 W. Va. 423, 369 S.E.2d 726 (1988).

8. "In order to prevail on a claim of a violation of the uniformity in pay provisions of [W. Va. Code] §18A-4-5a, a grievant must show that [she] and other employees perform "substantially similar" duties. [Weimer-Godwin, *supra*]." Mahone v. Mingo County Bd. of Educ., Docket No. 93-29-159 (Feb. 7, 1994).

9. Grievant failed to establish a non-uniformity of pay.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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 byW. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 6, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The appointment of an interim superintendent is controlled by W. Va. Code § 18-4- 1, which is silent on the issue of how the selection should be made.

Footnote: 2

The amendment added subsection (c), and adds a $534 increment to the state minimum salaries for teachers with 31-35 years of experience.