GREGORY JACKSON,

Grievant,

v v.

DOCKET NO. 00-50-040R

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance came on for hearing before the undersigned Administrative Law Judge on order of remand from the Wayne County Circuit Court, Civil Action No. 00-P-025 (Jan. 11, 2001), reversing a decision of this Grievance Board styled Jackson v. Wayne County Board of Education, Docket No. 00-50-040 (Apr. 21, 2000) ("Jackson I"), and directing the Grievance Board to address Grievant's claims in light of its reversal. (See footnote 1)

A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on December 10, 2001, and this matter became mature for decision on January 10, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School ServicePersonnel Association, and Wayne County Board of Education ("Board") was represented by David Lycan, Esq.

SUMMARY OF EVIDENCE ON REMAND (See footnote 2)

Joint Exhibits

Ex. 1 -

January 9, 2001 Board Minutes.

Ex. 2 -

December 11, 2001 memorandum from James J. Ross to Mary Jo Swartz, Administrative Law Judge.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of James J. Ross.

ISSUES ON REMAND

On remand, the issues to be decided are whether Grievant was the victim of discrimination and favoritism in that two other employees of the Board continued to be granted preauthorized overtime after his own overtime had been terminated, and whether the Superintendent's action in rescinding his preauthorized overtime resulted in a violation of the uniformity of pay requirements with regard to Grievant's pay.

FINDINGS OF FACT ON REMAND

The underlying facts in these proceedings are not in dispute, and are set forth in the following findings of fact.

1. Grievant is a service personnel employee of the Board, the only employee of the Board with the classification of truck driver. 2. Grievant's duties consist of transferring packages, letters, inter-county communications, supplies, etc., throughout the course of the day to public schools within Wayne County. Grievant normally visits half of the county's 21 schools on one day and the other schools the next day, and does so on a continuing rotation.

3. Grievant's work day begins at the Board's administrative offices in Wayne, which is located in central Wayne County. Grievant completes his work day by checking out at this same central location at the end of his work day.

4. Grievant's regular work hours are from 7:30 a.m. to 3:30 p.m. During the 1998-99 school year, the Superintendent gave Grievant and two other employees pre- authorization to work up to four (4) hours of overtime per pay period, if they deemed it necessary in order to complete their duties

within the county. The Superintendent did this so the employees would not have to contact either the Superintendent or a supervisor after regular hours in order to obtain permission to work overtime on a particular day.

5. In the Fall of the 1999-2000 school year, the Board was in a budget deficit situation and had been instructed by the West Virginia State Superintendent to seek ways of cutting its expenses. One of the measures taken by the Superintendent was to eliminate pre-authorization of Grievant's four hours of overtime per pay period.

6. During the conference with the Superintendent about this matter, Grievant asked him if he wanted the pager back that had been issued to Grievant. The Superintendent replied that it did not matter. Grievant then unhooked the pager and gave it to the Superintendent. The pager had originally been issued to allow the Superintendent or his staff to be in quick contact with Grievant if they needed to bring him into work. Grievant had only occasionally been contacted by pager, and carries a two-way radio and has access to school telephones during the day.

7. The two other employees, David Frasher and Ronald Preston, continued to be preauthorized for four hours of overtime per week. These employees are less senior than Grievant.

8. At the time this grievance was filed, Mr. Frasher was classified as a Locksmith, and Mr. Preston was classified as a Cabinetmaker. These two employees are the only two employees within the Maintenance Department, and in fact the entire county system, who report directly to the Board's warehouse, located at the former Westmoreland Middle School in the west end of Huntington in the northern end of Wayne County. These two employees have been the only employees to work at this warehouse since the warehouse was moved to its present location approximately three (3) years ago, and one of these employees is present at the warehouse any time any activity is being conducted there.

9. Mr. Frasher and Mr. Preston developed the system of receiving and storing materials, as well as the distribution system, and each of these employees spends at least 75% of his time during the regular work day at the warehouse.

10. The warehouse duties are an integral part of these employees' jobs, with most of their time being spent there, and the Board relies upon their expertise and experience to run the warehouse.

11. On January 11, 2001 (after the filing of this grievance), the Board reclassified Mr. Frasher as a Locksmith/Warehouse Clerk, and Mr. Preston as a CarpenterII/Warehouse Clerk. The majority

of each of these employees' duties fall within the Warehouse Clerk classification.

12. The warehouse is the only one in the county, and it serves twenty one (21) county schools. Nearly all items and supplies are stored there, including, but not limited to, paper supplies and perishable commodities. Often, the delivery trucks do not make delivery of items until late in the afternoon, which often necessitates that Mr. Frasher and/or Mr. Preston work overtime beyond their normal eight-hour days.

13. When the Superintendent was faced with cutting the budget, he recommended the termination of Grievant's preauthorized overtime because it had proved unnecessary with regard to his employment as Truck Driver/courier. In contrast, Mr. Frasher's and Mr. Preston's preauthorized overtime was still a necessity for the reasons stated above.

14. Grievant had once held the classification of Warehouse Clerk, but at the time he was classified as such, he did not report directly to the warehouse, but was actually performing the same duties he is performing now as a Truck Driver. He only occasionally did work at the warehouse under the supervision of an employee (since retired) who was in charge of the warehouse.

DISCUSSION

Grievant alleges the rescission of his preauthorized overtime constitutes discrimination and favoritism, and violates W. Va. Code § 18A-4-5b which provides for uniformity in salary and benefits for employees performing like duties and assignments. The Board contends its rescission of Grievant's preauthorized overtime was the result ofnecessary budget cuts, that Grievant is not similarly-situated to Mr. Frasher and Mr. Preston, and does not perform like duties and assignments as those two employees.

“Discrimination" is defined by 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." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code 18- 29-2(o).

The test to determine whether Grievant has established a prima facie case of discrimination or favoritism requires Grievant to establish by a preponderance of the evidence:

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

> (b) that the other employee(s) has/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.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra. Grievant also alleges Respondent has violated W. Va. Code 18A-4-5b, entitled "County Salary Supplements for School Service Personnel," the pertinent portion of which provides:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
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> 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 assignments and duties within the county. . . .

In order to prevail on a pay uniformity claim under W. Va. Code 18A-4-5b, Grievant must show that his duties are substantially similar to another service employee. See Weimer-Godwin v. Bd. of Educ., 369 S.E.2d 726 (W. Va. 1988); Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Meadows v. Jefferson County Bd. of Educ., Docket No. 19-88-192 (Dec. 29, 1988). (See footnote 3)

All of Grievant's claims, *i.e.*, discrimination, favoritism, and violation of uniform pay provisions, require an analysis of Grievant's duties and responsibilities vis-a-vis Mr. Frasher and Mr. Preston, and the outcome depends upon a finding that those duties and responsibilities are the same or substantially similar.

Grievant has failed to demonstrate that he is similarly-situated to, or that his position is so substantially similar to, Mr. Frasher's and Mr. Preston's, that he performs "like assignments and duties" requiring compensation on the same wage scale under W. Va.Code 18A-4-5b, or that he is the victim of discrimination and/or favoritism. See Wetherholt v. Cabell County Bd. of Educ., Docket No. 93-06-017 (June 30, 1993); Dillon v. Cabell County Bd. of Educ., Docket No. 89-06-702 (Aug.

31, 1990), aff'd Case No. 90-C-427 (Cabell County Cir. Ct. Sept. 10, 1990).

Grievant does not currently hold the same classification or classifications as those two employees. Grievant physically reports to the central office in the morning and leaves there in the evening, while the other employees report directly to and leave from the warehouse facility. Grievant is not required to work longer than his regular work day if a delivery truck arrives late in the afternoon like the other two employees, and thus has not established a need for preauthorized overtime. (See footnote 4)

Further, Grievant has not established any violation of the uniformity of pay provisions of W. Va. Code § 18A-4-5b. Quite simply, as the Circuit Court noted, Grievant is not entitled to overtime; no employee is “entitled” to overtime. An assertion that Grievant's regular rate of pay has been diminished because he does not have four hours of preauthorized overtime suggests that Grievant was recording and taking four hours of overtime, whether it was needed or not. That was clearly not the Superintendent's intention when granting preauthorized overtime, and if that was the case, then the Superintendent clearly would have been justified in rescinding it. Of course, that is not the reason given for the rescission of the preauthorized overtime; but suffice it to say that thereason given, budgetary restraints, is a legitimate reason for the decision which will not be overturned here.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of 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. “Discrimination" is defined by 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." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code 18- 29-2(o).

3. The test to determine whether Grievant has established a prima facie case of discrimination/favoritism requires Grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/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.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination/favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

4. Grievant has failed to establish a prima facie case of discrimination, as he has not shown he is similarly situated to Mr. Frasher and Mr. Preston.

5. W. Va. Code 18A-4-5b, entitled "County Salary Supplements for School Service Personnel," provides, in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimums 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 assignments and duties within the county. . . .

6. In order to prevail on a pay uniformity claim under W. Va. Code 18A-4-5b, Grievant must show that his duties are substantially similar to another service employee. See Weimer-Godwin v. Bd. of Educ., 369 S.E.2d 726 (W. Va. 1988); Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Meadows v. Jefferson County Bd. of Educ., Docket No. 19-88-192 (Dec. 29, 1988).

7. Grievant has failed to establish by a preponderance of the evidence that he performs “like duties and responsibilities” as Mr. Frasher or Mr. Preston.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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: January 15, 2002

Footnote: 1

The ALJ in Jackson I held that Wayne County Board of Education violated W. Va. Code § 18A-4-8 when it rescinded pre-approved overtime for Grievant up to a maximum of four hours per pay period. The Wayne County Circuit Court reversed that holding, finding that the "overtime agreement between the parties did not guarantee [Grievant] any pay for overtime (only a possibility of overtime pay up to four hours per pay); . . .".

Footnote: 2

The record from Jackson I is incorporated into this decision by agreement of the parties.

Footnote: 3

The undersigned does not believe this Code section applies to Grievant's claims regarding overtime, but as the Board did not argue this point, an analysis of Grievant's claims under this section will be included.

Footnote: 4

It should be noted that nowhere was it stated that Grievant could never be granted overtime should the need arise; the only difference is that now he must seek approval before working that overtime.