ELLENDA WARD, et al.,

Grievants,

v v.

Docket No. 03-06-211

CABELL COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievants, Ellenda Ward, James Boggess, Fred Christian, Linda Harrison, Kathy McCoy, Allyson Schoenlein, Karen Veazey, and Emma Sue Smith filed this grievance on or about March 13, 2003, against their employer, the Cabell County Board of Education ("CCBOE" or "Board"). Their Statement of Grievance states:

> Violation of W V Code 18A-4-5a, 18-29-2 section "m" discrimination and 18- 29-3, section "o" favoritism with regard to uniformity of employment days. Grievants are substantially similarly situated with professional employees under 261 day contracts. All Grievants are 240 day contracted employees.
>
> Relief sought: Relief sought is for grievants to be granted 261 day contracts and any compensation/benefits due.

This grievance was denied at all lower levels. A motion for default was filed at Level III on July 15, 2003, and an Order Denying Default was issued on August 25, 2003. Subsequently, Grievants appealed to Level IV on September 2, 2003, and a Level IV hearing was held on October 2, 2003, at CCBOE's Board office, at the request of the parties. This case became mature for decision on October 24, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievants assert they are similarly situated to other Central Office Administrators who have 261-day contracts, and they are not being treated the same as other employees who are performing like

or similar duties. Grievants maintain this action results in discrimination and favoritism. (See footnote 2)

Respondent avers the grievance is not timely filed. Respondent also maintains Grievants are not similarly situated to the employees to whom they compare themselves, as they do not perform the same duties and responsibilities.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are all employed as Supervisors in the Central Office, and all have 240-day contracts.

2. Grievants Boggess, Harrison, and Schoenlein are curriculum supervisors. Grievant Boggess supervises the curriculum in the areas of math and science. Grievant Harrison supervises the curriculum in the areas of art, music, physical education, health, driver education, family and consumer science, business education, and technology. Grievant Schoenlein supervises the curriculum in the areas of language arts, social studies, and foreign languages. 3. Grievants Boggess, Harrison, and Schoenlein are supervised by the Director of Curriculum and Instruction, Mary Campbell, who has a 261-day contract. Director Campbell has responsibility for the entire curriculum, and she supervises, directs, and evaluates the work of Grievants Boggess, Harrison, and Schoenlein, as well as the work of the Literacy Facilitators. Director Campbell reports directly to Superintendent Roach, attends the Superintendent's weekly cabinet meeting, regularly attends Board meetings, and is responsible for the budget in her area. Director Campbell assigns Grievants Boggess, Harrison, and Schoenlein a portion of this budget for their assignment areas.

4. Grievants Boggess, Harrison, and Schoenlein routinely perform duties not performed by Director Campbell, and she regularly performs duties which they do not.

5. Grievants Ward, Christian, McCoy, Veazey, and Smith are employed by CCBOE as Special Education Supervisors. They work with teachers, principals, and other staff members to provide programmatic services to Special Education students.

6. Grievants Ward, Christian, McCoy, Veazey, and Smith are supervised, directed, and evaluated by the Director of Special Education, Gerry Sawrey. Director Sawrey also supervises and

directs the School Psychologists and some clerical staff. She is responsible for all areas relating to Special Education, including a $5,500,000 budget. Director Sawrey responds to all Special Education complaints filed with state and federal agencies, attends the Superintendent's weekly cabinet meeting, and regularly attends Board meetings. Director Sawrey allocates Grievants Ward, Christian, McCoy, Veazey, and Smith a portion of the Special Education budget for their assigned areas. Director Sawrey reports directly to the Assistant Superintendent for Student Services.

7. Grievants Ward, Christian, McCoy, Veazey, and Smith routinely perform duties not performed by Director Sawrey, and she regularly performs duties which they do not.

8. Because of their administrative positions, both Director Sawrey and Director Campbell are paid according to the administrative pay scale. Grievants are paid on a teachers' pay scale.

9. CCBOE also employs School Psychologists, most of whom have 261-day contracts. (See footnote 3) One of the main functions of these Psychologists is to evaluate Special Education students through testing. Additionally, the Psychologists evaluate at-risk students, attend eligibility meetings, consult with teachers and parents, and conduct occasional emergency counseling.

10. While the Special Education supervisors and the School psychologists have similar goals, their work is different, as the School Psychologists deal with the evaluation of various students, and the Special Education supervisors are knowledgeable about and give advice on what programs are available to meet the needs of the Special Education students.

11. Grievants do not possess the required license to perform the duties assigned to School Psychologists.

12. Grievants also compared themselves to the top two administrators in the Technology Department, the Technology Specialist, Dennis Adams, and his supervisor,the Network Engineer, Bryan Cordle. Mr. Adams is basically in charge of the software portion, and Mr. Cordle is in charge of the hardware.

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.

The issues presented by the parties will be addressed separately.

A. Timeliness

Respondent has asserted the grievances are untimely, as Grievants have known of the difference in their contract terms for some time. This issue was clearly addressed and answered by the West Virginia Supreme Court of Appeals in 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). The West Virginia Supreme Court of Appeals found the Flint grievance was timely filed, and held the failure to provide uniform vacation benefits to similarly situated employees through a 261-day contract for 240-day employees was a continuing practice under the holding in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.3d 399 (1995). (See footnote 4) Since the action has been found to be a continuing practice, this grievance is timely filed. **B. Merits**

Grievants allege CCBOE is violating W. Va. Code §18A-4-5a, which states, in pertinent part, "[t]he board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements" and "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county." In addition, Grievants also assert they are the victims of discrimination and/or favoritism prohibited by W. Va. Code §§ 18-29-2(m) and (o). 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." Similarly, W. Va. Code § 18-29-2(o) defines "favoritism" to mean "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/or favoritism under W. Va. Code §§ 18-29-2(m) and (o), 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), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory 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, 179 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 professional employees is contained in W. Va. Code § 18A-4-5a, and this Code Section was discussed 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 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 was paying to teachers who provided instruction in band and string instruments.

Applying the Weimer-Godwin reasoning to this set of facts reveals Grievants are not performing substantially similar or like assignments and duties as the 261-day employees to whom they compare themselves. Weimer-Godwin, supra; See Flint, 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). In comparing Grievants to their supervisors, it is clear that while they have the same goals and purpose in the work they perform for CCBOE, they do not have the same responsibilities and do not function in the same manner. This difference was simply

explained by Director Sawrey. She had functioned as a Special Education Supervisor prior to becoming the Director, and pronounced the difference between the two positions as "stunning." She then spoke to the numerous tasks she is expected to perform that the Supervisors were not. Director Campbell also confirmed this dissimilarity. Uniformity in contract terms is not required when the prerequisite similarly is not present. This same reasoning applies in comparing Grievants to the School Psychologists. Again, these employees have the same focus in mind, to meet the needs of students, but their positions, duties, and responsibilities are not similar. It is also clear Grievants do not perform substantially similar or like assignments and duties as the Technology Administrators.

In response to the assertions of discrimination and favoritism, Grievants have not shown they are similarly situated to employees who are treated differently than they are. Grievants are all Supervisors, and they have not shown other Supervisors are treated differently.

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, 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); Hollyv. 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 failure to provide uniform vacation benefits is a continuing practice. Flint v. Harrison County Bd. of Educ., 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 Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.3d 399 (1995); 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).

3. This grievance is timely filed.

4. W. Va. Code §18A-4-5b states, in pertinent part that, "[t]he board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and

other requirements" and "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county."

5. 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; when the assignments and duties are "substantially similar," the uniformity requirement applies. Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988). See Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995). 6. Grievants do not perform "substantially similar" duties as their supervisors, the School Psychologist, or the Technology Administrators.

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 defined in 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) and (o), 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).

10. 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, 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, 179 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).

11. Grievants have not proven a case of discrimination or favoritism, as they have not demonstrated they have not been treated differently as similarly situated employees.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 GrievanceBoard. 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: December 17, 2003

Footnote: 1

Grievants are represented by Susan Hubbard of the West Virginia Education Association, and CCBOE is represented by Attorney Howard Seufer of Bowles Rice McDavid Graff and Love.

Footnote: 2

At Level IV, Grievants attempted to compare themselves to the Literacy Facilitators, but dropped this argument when they discovered the Literacy Facilitators all had 240-day contracts. Grievants' comparison with the Attendance Director will not be discussed further for the same reason. Additionally, even though Grievants compared themselves to a 261- day Secretary, the Undersigned Administrative Law Judge will not address this issue as the duties and responsibilities of the two groups are completely different.

Footnote: 3

One psychologist has chosen to remain at a 200-day contract.

Footnote: 4

"It has been held by this Grievance Board that the failure to provide uniform vacation benefits for similarly situated employees is a continuing practice." Flint, supra.