ANNETTA SWANSON and

LINDA SWANN,

Grievants,

v. DOCKET NO. 05-22-387

LINCOLN COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants filed separate grievances on September 13, 2005, claiming entitlement to a multiclassified Coordinator/Executive Secretary title, and seeking the same salary supplement as is received by the Executive Secretary assigned to the Superintendent. The grievances were consolidated at level two. At level four, the only issue is whether Grievants should receive the salary supplement given to the Superintendent's secretary.

A level four hearing was held in the Grievance Board's office on November 30, 2005. Grievants were represented by Gary Archer of the West Virginia Education Association, and Respondent was represented by Rebecca Tinder, Esq. of Bowles Rice McDavid Graff and Love, LLP. The matter became mature for decision on December 30, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Respondent asserts a timeliness defense based on the length of time the salary supplement in question has been in effect. Grievants claim they are similarly classified to the Superintendent's secretary, so they should receive the same county salary supplement. Theirs is essentially a discrimination claim that also includes an allegation that statutory uniform pay provisions are being violated. To this argument, Respondent contends the duties of the Superintendent's secretary merit a greater supplement than other Executive Secretaries receive.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant Linda Swann is employed by Respondent as an Executive Secretary/Accountant 2 in the transportation/maintenance office. Grievant Annetta Swanson is employed by Respondent as an Executive Secretary in the Special Education office.

2. According to the most recent version of Lincoln County's salary supplement schedule, Executive Secretaries like Grievants are entitled to a ten dollar per day supplement. The Executive Secretary assigned to the Superintendent is entitled to a thirty dollar per day supplement.

3. Until the 2005-2006 school year, Executive Secretaries as a class did not receive a salary supplement in Lincoln County. The Executive Secretary assigned to the Superintendent, however, has received a supplement since January 1995 (at that time, the supplement was seven dollars per day).

4. Lincoln County has established distinct written job descriptions for the positions of Executive Secretary and Executive Secretary to the Superintendent. Although similarly classified, they differ in several respects as follows:

Executive Secretary	Exec. Secretary to Superintendent
Secretary to and supervised by a specific department head.	Secretary to and supervised by Superintendent and indirectly works as secretary to Board of Education.
Assist department head in various responsibilities of the department, including scheduling appointments, corresponding, and reports.	Perform all major secretarial functions and specific administrative assistance tasks in order to facilitate effective operations of central office/school system.
	Characterized by significant administrative duties which require a thorough knowledge of the school system and the Superintendent's method of operation.

Discussion

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 1) The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. (See footnote 2) The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. (See footnote 3)

Respondent correctly points out that this grievance was brought more than fifteen days after the salary schedule with its differing supplements was created. Grievants successfully countered this claim by pointing out that they were not executive secretaries at that time, so it did not apply to them and they had no reason to be concerned about it. However, both Grievants testified they learned of the difference on July 1, 2005, but neither filed a grievance until September 13, 2005. While this timing was clearly beyond the fifteen-day maximum, the discrimination claims Grievants make effectively support acontinuing practice claim, or one in which a new cause of action arises each pay day. "[A] disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if [it] is filed within the statutory limitation period after such compensation disparity last occurred." (See footnote 4) If the discrimination is proven, the untimely filing would simply limit the amount of back pay, if any, to fifteen days prior to the filing of the grievance. (See footnote 5)

The statute authorizing county boards of education to provide salary supplements, W. Va. Code § 18A-4-5b, states:

> 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[.]

County Boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." (See footnote 6) In other words, according to the State Supreme Court of Appeals, similarly-classified employees are not necessarily entitled to the same supplements. Grievants seeking to enforce the uniformityprovisions must also establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. (See footnote 7)

Grievants correctly point out that assignments and duties need not be identical to be similar.

However, Grievants have the burden of proving this similarity, and presented no evidence of their duties or of the duties of the Superintendent's secretary. There is evidence that Grievants are assigned to different departments. Respondent, on the other hand, pointed out the Executive Secretary to the Superintendent has a different official job description than other Executive Secretaries, characterized by more significant administrative duties, a scope of work that covers the entire school system rather than one department, and a function as *de facto* secretary to the Board. Respondent further argued that Ms. Swann, who is multi-classified, has a significant amount of accounting duties, thus diluting the time she spends on Executive Secretary duties. Grievants have not met their burden of proving they have like assignments and duties.

Grievants likewise have failed to prove discrimination and/or favoritism. "'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." (See footnote 8) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 9) In *Board of Education v. White*, (See footnote 10) the West Virginia Supreme Court ofAppeals clarified the legal test for discrimination claims raised under the grievance procedure definition. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

An employee claiming favoritism must also show he is similarly-situated to another employee. (See footnote 11) As discussed above, the differences in the salary supplements grievants receive is related to their actual job responsibilities as compared to the Superintendent's secretary, and they are not similarly situated.

The following conclusions of law support this discussion:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

2. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4a. *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). 3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Seifert*, *supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. "[A] disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred." *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 498 (1996). If the discrimination is proven, the untimely filing would simply limit the amount of back pay, if any, to fifteen days prior to the filing of the grievance. *See, W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n*, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989); *Martin, supra*.

5. Although this grievance was untimely filed as to the date the grievants initially learned of the disparate treatment being complained of, they claim a continuing practice for which damages are limited to fifteen days prior to the filing of the grievance.

6. A board of education "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." W. Va. Code §18A-4-5b.

7. County Boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." *Bd. of Educ. v.Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002);

Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995).

8. Grievants seeking to enforce the uniformity provisions must also establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. *Locket v. Fayette County Bd. of Educ.*, Docket No. 01- 10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-165 (Sept. 24, 1997).

9. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

10. An employee claiming favoritism must also show he is similarly-situated to another employee. *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (1990).

11. Grievants did not prove they were similarly situated to the Executive Secretary assigned to the Superintendent because they did not present evidence of like assignments or duties.

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 Lincoln County. Any such appeal must be filed within thirty 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.

January 13, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (1997).

Footnote: 2

W. Va. Code § 18-29-4a; Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (2002).

Footnote: 3

Id.

Footnote: 4

Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 498 (1996).

Footnote: 5

See, W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989); Martin, supra.

Footnote: 6

Bd. of Educ. v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002).

Footnote: 7

Locket v. Fayette County Bd. of Educ., Docket No. 01-10-477 (2001); Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-165 (1997).

Footnote: 8

W. Va. Code § 18-29-2(m).

Footnote: 9

W. Va. Code § 18-29-2(o).

Footnote: 10

216 W. Va. 242, 605 S.E.2d 814 (2004).

Footnote: 11

Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (1990).