THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KAREN SMITH,

Grievant,

v. **Docket No. 07-20-060**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Karen Smith ("Grievant"), employed by the Kanawha County Board of Education ("KCBE") as a secretary, filed a level one grievance on January 19, 2007, in which she alleged a violation of *W. Va. Code* § 18A-4-8 when her classification was changed from Executive Secretary to Secretary IIIa. For relief, Grievant seeks classification as Executive Secretary, with back pay from November 6, 2006. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following an evidentiary hearing at level two, and Grievant elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c). (See footnote 1)

The grievance was appealed to level four on February 19, 2007, and an evidentiary hearing was conducted by Administrative Law Judge Wendy Campbell in the Grievance Board's Charleston office on May 9, 2007. Grievant was represented by Mary Jo Swartz,Esq., of Swartz Law Offices, PLLC, and KCBE was represented by Vaughn T. Sizemore, Esq. of Bailey & Wyant. The matter became mature for decision at the close of the hearing when both parties declined the opportunity to file proposed findings of fact and conclusions of law. Subsequent to ALJ Campbell's resignation, the grievance was reassigned to Administrative Law Judge Denise Spatafore on August 15, 2007. For administrative reasons, the matter was reassigned to the undersigned on September 24, 2007.

The following facts have been derived from a preponderance of the evidence made part of the level four record, including an "Agreed Stipulation of Material Facts," submitted by the parties at the level four hearing.

Findings of Fact

1. Grievant has been employed by KCBE as a secretary in the Maintenance Department at all times pertinent to this grievance.

2. On November 6, 2006, KCBE approved the reclassification of Terry Hollandsworth from Maintenance Director to Maintenance Administrative Assistant.

3. Pursuant to past practice, Mr. Hollandsworth requested that his secretary, Grievant, be reclassified from Secretary IIIa to Executive Secretary.

4. KCBE approved Superintendent Ronald Duerring's recommendation that Grievant be reclassified to Executive Secretary, made at the January 8, 2007, meeting. The effective date of the personnel action was December 15, 2006. 5. On January 18, 2007, KCBE approved Superintendent Duerring's recommendation that Grievant's reclassification be rescinded because it had not been reviewed by the reclassification committee.

6. No other secretary who was reclassified based upon the promotion of her supervisor has been required to request a review by the reclassification committee.

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 (2004); *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 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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

W. Va. Code § 18A-4-8 defines “Secretary III” as:

personnel assigned to the county board office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities of purchasing and financial control or any personnel who have served in a position which meets the definition of “secretary II” or “secretary III” in this section for eight years.

W. Va. Code § 18A-4-8 defines “Executive Secretary” as:

personnel employed as the county school superintendent's secretary or as a secretary who is assigned to a position characterized by significant administrative duties.

Grievant has established that all other secretaries assigned to Administrative Assistants are classified as Executive Secretaries. To deny her the same classification is discrimination, as 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." An employee attempting to prove discrimination under the education statute need only establish that she was treated differently from a similarly-situated employee, and the action was neither job-related nor agreed to by the grievant. *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). KCBE does not assert that Grievant's duties are different from those performed by the Executive Secretaries assigned to the other Administrative Assistants.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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 (2004); *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-4-8 defines “Secretary III” as:

personnel assigned to the county board office administrators in charge of various instructional, maintenance, transportation, food services, operationsand health departments, federal programs or departments with particular responsibilities of purchasing and financial control or any personnel who have served in a position which meets the definition of “secretary II” or “secretary III” in this section for eight years.

3. *W. Va. Code* § 18A-4-8 defines “Executive Secretary” as:

personnel employed as the county school superintendent's secretary or as a secretary who is

assigned to a position characterized by significant administrative duties.

4. The failure of KCBE to reclassify Grievant as an Executive Secretary is discrimination, 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."

Accordingly, this grievance is **GRANTED**, and KCBE is ORDERED to reclassify Grievant as an Executive Secretary, effective December 15, 2006, with all back pay and benefits to which she is entitled.

Any party may appeal this decision to the Circuit Court of Kanawha County within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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.

DATE: SEPTEMBER 27, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3- 1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.*