THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY LYNCH, et al.

Grievants,

v. DOCKET NO. 07-41-365

RALEIGH COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants Tammy Lynch, Mitzi Akers, Patricia Tzystuck, Brenda Toney and Judith Chapman filed separate grievances on or about June 29, 2007, in which they claimed “two employees being treated favorably above others with like assignments and contracts (i.e. 261 vs 240). West Virginia Codes 18A-29-1, 18-29-2(m), 18-29-2(o), and 18A-4-5b.” As relief, they seek “Payment, sick leave and sick leave bonus retroactive to July 1, 2006, to reflect 1.5 additional days as per 261 day contract. Extended contracts to reflect 261 days beginning July 1, 2007.”

At the Level Two grievance hearing for Grievants Akers and Tzystuck, Grievants' counsel revealed that the two employees referred to in the Statement of Grievance were classified as Mechanics, and their statements of grievance were amended to refer to specific other employees who held the same classification titles as they do.

Following denials at levels one and two, level three was waived, and by Order dated November 26, 2007, the grievances were consolidated for hearing at level four. (See footnote 1) A levelfour hearing was held in the Grievance Board's office on January 11, 2008, before Administrative Law Judge Landon R. Brown. Grievants Lynch and Chapman appeared *pro se*, Grievant Toney was represented by counsel, Darl Poling of Poling Law Offices, and Grievants Akers and Tzystuck were represented by counsel, John E. Roush of the West Virginia School Service Personnel Association. Respondent was represented by counsel, Gregory W. Bailey of Bowles Rice McDavid Graff & Love,

LLP. The matter became mature for decision February 11, 2008, the deadline for the parties to submit their proposed findings of fact and conclusions of law. Thereafter, the case was reassigned to the undersigned Administrative Law Judge for decision.

Synopsis

Grievants, all 240-day employees, argue they are similarly situated to employees working under 261-day contracts, and are therefore entitled to 261-day contracts too. Grievants allege they are subject to discrimination and/or favoritism because they are not uniformly compensated. Grievants Chapman, Lynch and Toney did not meet their burden of proving they have been subjected to discrimination or favoritism. Grievants Akers and Tzystuck have met their burden of proving that other, similarly situated employees are favored over them by having 261-day contracts while the Grievants have only 240-day contracts. The consolidated grievance is therefore granted in part and denied in part.

Findings of Fact

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven: 1. Grievant Akers is multi-classified as a Secretary III, Accountant III and Payroll Supervisor, with a 240-day contract. She handles payroll for contracted mid-day, extracurricular assignments, overtime for transportation drivers and aides, and 12-month employees. She also covers overtime for service employees. She works with drug testing, worker's compensation, student/non-employee accidents and some employee accidents, and other duties as assigned.

2. Wilhemina Goins, a non-grievant, is classified as a Secretary III, Accountant III, and Payroll Supervisor. Ms. Goins has a 261-day contract that includes paid vacation days. Ms. Goins works with the same types of office machines and software as Grievant Akers. Although her duties differ in subject matter, the types of work tasks she performs are substantially similar to those of Grievant Akers.

3. Grievant Akers, as part of her job responsibilities, works with Workers' Compensation Insurance, but Ms. Goins does not. Ms. Akers also works with safety and loss control, and is the contact point for the Board of Risk and Insurance Management (BRIM), while Ms. Goins does not.

4. Grievant Chapman is multi-classified as an Accountant III and Secretary III, under a 240-day contract.

5. Grievant Lynch, at the time her grievance was filed, was working under a 240-day contract as Insurance Coordinator/Payroll Supervisor. While this grievance was pending, she applied for and was awarded a different position.

6. Grievant Toney is multi-classified as an Accounts Payable Supervisor, Accountant III and Secretary III, under a 240-day contract. 7. Gloria Freeman, a non-grievant employee to whom Grievant Toney compares herself, was classified as an Accounts Payable Supervisor/Accountant III and Secretary III, and was employed under a 261-day contract.

8. Garnet Mooney is employed in the Transportation Department in the Transportation Department as a Secretary III. She does not work in the central office.

9. Ms. Freeman retired June 30, 2007, and her position is currently vacant, but posted as a 240-day position.

10. Grievant Tzystuck is classified as a Secretary III with a 240-day contract. She reports to Jack Richmond, Career and Technical Education Director, Dr. Emily Meadows, Superintendent and Millard Francis, Attendance Director.

11. Alma Willis, the employee to whom Grievant Tzystuck compares herself, is classified as a Secretary III and holds a 261-day contract. Ms. Willis works in the central office and is the Secretary for two assistant superintendents who cover attendance, elementary and facilities and maintenance.

12. Grievant Tzystuck began working in her job after she filed her grievance, but knew she had been selected for it at the time. At the time she was hired, she knew it was a 240-day position.

13. The employees of Respondent that have 261-day contracts receive paid vacation days that reduce their annual number of work days to a level at or near the number of annual work days of employees with 240-day contracts.

Discussion

Since this grievance does not challenge a disciplinary action, Grievants bear the burden of proving their claims by a preponderance of the evidence. (See footnote 2) Grievants all holddifferent positions, but their claims arise under the same uniformity of pay provisions in West Virginia Code

section 18A-4-5b, which requires county boards of education to “provide uniform compensation to all persons performing like assignments and duties within the county.” Failure to provide uniform pay and benefits is favoritism. (See footnote 3) In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination or favoritism by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (See footnote 4)

(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.

In applying W. Va. Code § 18A-4-5b to service personnel, this Grievance Board has determined that grievants may not rely upon this uniformity provision to obtain the same benefits as employees who hold a different classification title. (See footnote 5) Citing *Flint v. Bd. of Educ. of the County of Harrison*, (See footnote 6) Grievant Toney's counsel argues in his Proposed Findings thata school board “is not allowed to evade the uniformity requirements by 'expanding the number of employees subject to multiclassification.'” That case actually says the exact opposite, as recognized by Justice McGraw in his dissent. (See footnote 7) *The Board of Education of the County of Tyler v. White*, (See footnote 8) which overruled *Flint*, nevertheless did not disturb the requirement that, for comparison purposes, employees must perform “substantially similar” work. These cases seem to demand a conclusion that, in a pay uniformity analysis, similarity of classification is required, but once identical classifications or multi- classifications are proven, the duties assigned to the positions must be substantially similar. Classification carries great weight, but does not alone prove the duties are similar.

Respondent's argument that the Grievants have duties dissimilar to those they are comparing themselves is distorted by the fact it does not focus on the work accomplished, but instead on the name given to the work by the Respondent. For example, secretarial duties assigned to a Secretary III may include “general clerical tasks; transcribing from notes, stenotype, mechanical equipment or a

sound-producing machine; preparing reports; receiving callers and referring them to proper persons; operating office machines; keeping records and handling routine correspondence." (See footnote 9) Receiving a call about Worker's Compensation and referring it to the appropriate Assistant Superintendent is not substantially different than receiving a call about a Vocational Program and referring thatto the appropriate Assistant Superintendent. The jobs are the same, but the subject matter is different. The general language in the Code defining the various job classifications takes this into account.

Mitzi Akers

Grievant Akers is multi-classified as a Secretary III, Accountant III, and Payroll Supervisor. She compares herself to Wilhemina Goins, who is also multi-classified as a Secretary III, Accountant III, and Payroll Supervisor. Ms. Goins has a 261-day contract that includes vacation days, but Grievant has a 240-day contract without vacation days. Grievant Akers knew of the difference in their contracts when she started her job, but did not know she may have a cause of action until she processed payroll paperwork relating to two mechanics who had filed a grievance relating to their terms of employment.

Ms. Goins is responsible for Payroll for a different class of employee than Grievant Akers, but generally she performs the same types of duties, and uses the same types of office machines. Both work in the central office, but report to different supervisors. There is no discernable reason why Ms. Goins' job would require a 261-day contract, as implemented by Respondent, when Grievant Akers' job would not. Grievant Akers has met her burden of proving she is the victim of favoritism by Respondent, because Ms. Goins receives preferential treatment for reasons not related to her job duties.

Judith Chapman

Grievant Chapman is multi-classified as an Accountant III/Secretary III. She has a 240-day contract. She did not identify any other employee who performed substantially similar duties. Although she did note that other persons with the Secretary III classification title, such as Alma Willis, held 261-day contracts, none of those employees held the samemulticlassification title or performed like duties. She did not meet her burden of proving she was similarly situated to another employee who was treated differently.

Tammy Lynch

Grievant Lynch, at the time her grievance was filed, was working under a 240-day contract as Insurance Coordinator/Payroll Supervisor. While this grievance was pending, she applied for and was awarded a different position. She did not amend her grievance to claim that there was a uniformity issue with her new position. “Insurance Coordinator” is not a classification title defined in W. Va. Code § 18A-4-8(i), but is simply a working title conferred by Respondent. She did not identify another employee whose position was substantially similar to hers for comparison purposes, so failed to meet her burden of proving she was discriminated against.

Brenda L. Toney

Grievant Toney is a Secretary III/Accountant III/Accounts Payable Supervisor, employed under a 240-day contract. At the lower-level hearings, Grievant Toney compared her position to that of Wilhemina Goins and Kathy Burleson, who are Payroll Supervisors working under 261-day contracts. Because they are not similarly classified, Respondent is under no obligation to make Grievant Toney's pay and benefits uniform with these other two employees.

At the level four hearing, Grievant Toney compared her position to that of Gloria Freeman, another Accounts Payable Supervisor. Ms. Freeman has a 261-day contract. Grievant Toney and Ms. Freeman are the only Accounts Payable Supervisors employed by Respondent, and they share the duties although the accounts they work with are different. They use the same equipment, the same software and perform the same tasks. However, Ms. Freeman retired effective June 30, 2007, just three days after this grievancewas filed, and long before Grievant ever identified her position as one for comparison purposes. Her position is currently posted as a 240-day position, the same as Grievant Toney's. There currently is no substantially similar, 261-day position for Grievant Toney to compare herself to, so her grievance is essentially moot. For this reason, the relief requested by Grievant Toney must be denied.

Patricia Tzystuck

Grievant Tzystuck is a Secretary III with a 240-day contract. She compares herself to another Secretary III, Alma Willis, who is employed under a 261-day contract. Both work in the central office. At Level two, Grievant Tzystuck provided no comparison of her actual job duties and Ms. Willis', other than the fact they work for different supervisors.

In the Level 2 Decision, Respondent erroneously applied *Crock v. Harrison County Board of Education* (See footnote 10) in its analysis as a justification for denying Grievant Tzystuck's claim. In

that case, the West Virginia Supreme Court of Appeals denied a uniformity claim because the Grievant was hired prior to the enactment of the uniformity provisions of West Virginia Code section 18A-4-5b. The court found that the statute was not retroactive. In this case, Respondent reasoned that, because Ms. Willis, the employee to whom Grievant compared herself, was hired prior to the 1984 enactment of the uniformity statute, it had no obligation to make Grievant uniform with her. However, Grievant Tzystuck was hired under the protection of the uniformity provisions, and it is her job to which she seeks to apply the uniformity provision, not Ms. Willis'.

Grievant provided no direct evidence of Ms. Willis' job duties and responsibilities at the lower-level hearings. She knew they both worked in the Central Office, but Grievant Toney had no knowledge of what Ms. Willis did. As stated earlier, similar classificationsare relevant evidence, but do not carry the whole burden. Bearing the burden of proof as she does, the lack of evidence on Ms. Willis' job was properly fatal to Grievant Tzystuck's case at the lower level, but at Level IV, Ms. Willis did testify and provided an accurate description of her job duties. She operates the same types of office machines as Grievant Toney, and the secretarial duties she performs are essentially identical, even if the subject matter of the work is different. In fact, the job descriptions for both employees are taken from the Code definition. Based on this evidence, Grievant has now met her burden of proof that she has been discriminated against.

The following Conclusions of Law support this decision:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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 Res.*, 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. “W. Va. Code § 18-29-2(m) defines 'discrimination' 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.'” *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No.

01-50-056 (Apr. 5, 2001).

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

(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.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S. E. 2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).

4. Favoritism is defined by 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." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000).

5. “County boards of education must provide uniform compensation to all persons performing like assignments and duties within the county. W. Va. Code § 18A-4- 5a.” *Reed v. Jackson County Bd. of Educ.*, Docket No. 03-18-287 (Feb. 11, 2004).

6. It is 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 assignments and duties are "substantially similar," the uniformity requirement applies. *Reed, supra; Weimer-Godwin v. Bd. of Educ. of the County of Upshur*, 179 W. Va. 423, 369 S.E.2d 726 (1988); *Ward v. Cabell County Bd. of Educ.*, Docket No. 03-06-211 (Dec. 17, 2003).

7. The uniformity requirement for service personnel, W. Va. Code § 18A-4-5b is the same as the requirement for professional personnel in § 18A-4-5a. For service personnel, salary schedules “shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupilparticipation, pupil enrollment, size of buildings, operation of

equipment or other requirements." W. Va. Code § 18A-4-5b. *See Newell v. Wood County Board of Educ*., Docket No. 07-54-146 (Sep. 27, 2007).

8. "'Like' refers to having a distinctive character, no matter how widely different in nonessentials. 'Like' has also been defined as having the same or nearly the same qualities or characteristics; resembling another; or substantially similar. [Citations omitted.]" *Weimer-Godwin*, *supra*.

9. "[W]here county board of education employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of work days to a level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits. *Bd. of Educ. of the County of Wood v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002)." *Crookshanks v. Wood County Bd. of Educ.*, Docket No. 02-54-289 (Dec. 31, 2002).

10. "'Payroll supervisor' means a person employed in the county board office who has primary responsibility for the payroll function and who either has completed twelve college hours of accounting from an accredited institution of higher education or has at least eight years of experience performing progressively difficult accounting tasks. Responsibilities of this class title may include supervision of other personnel." W. Va. Code § 18A-4-8(i)(67).

11. A "Secretary III" is "a person 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 in purchasing and financial control or any person who has servedfor eight years in a position which meets the definition of 'secretary II' or 'secretary III.'" W. Va. Code § 18A-4-8(i)(78).

12. "Accountant III" means a person employed in the county board office to manage and supervise accounts payable, payroll procedures, or both. W. Va. Code § 18A-4-8(i)(6)

13. "Accounts payable supervisor" means a person employed in the county board office who has primary responsibility for the accounts payable function and who either has completed twelve college hours of accounting courses from an accredited institution of higher education or has at least eight years of experience performing progressively difficult accounting tasks. Responsibilities of this class title may include supervision of other personnel. W. Va. Code § 18A-4-8(i)(7).

14. Grievants Chapman, Lynch and Toney have not met their burden of proving they have

been subjected to discrimination or favoritism.

15. Grievants Akers and Tzystuck have met their burden of proving that other, similarly situated employees are favored over them by having 261-day contracts while the Grievants have only 240-day contracts.

For the foregoing reasons, the grievances of Brenda Toney, Tammy Lynch, and Judith Chapman are **DENIED.**

The grievances of Grievants Mitzi Akers and Patricia Tzystuck are hereby **GRANTED**.

For those grievances which are granted, Respondent is ordered to grant the successful grievant 261-day contracts, and each is awarded back pay and benefits to which they would have been entitled had they been employed under such contracts for aperiod of one year prior to the filing of the grievance, or from the date they began their jobs, whichever is shorter.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. (See footnote 1) Neither the West Virginia Public 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.

December 10, 2008

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M. Paul Marteney

Administrative Law Judge

Footnote: 1 *In 2007, the Legislature in S.B. 442 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 being 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. Any references in this decision are to the former statutes, which continue to control theproceedings in this case.

Footnote: 2 *See W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.2.*

Footnote: 3 *W. Va. Code § 18-29-2(o); Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).*

Footnote: 4 *Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S. E. 2d 52 (2007); See Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); Chaddock v. Div. of Corr., Docket No. 04-CORR-278 (2005).*

Footnote: 5 *See, e.g., Allison v. Hancock County Bd. of Educ., Docket No. 97-15-454 (Mar. 31, 1998); Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998), aff'd, No. 25898 (W. Va. Sup. Ct. of Appeals Dec. 10, 1999); Ricca v. Hancock County Bd. of Educ., Docket No. 95-15-101 (June 8, 1995); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).*

Footnote: 6 *207 W.Va. 251; 531 S.E.2d 76 (1999).*

Footnote: 7 *"Under the rigid analysis employed by the majority, it is quite possible that the uniformity requirement of W. Va.Code § 18A-4-5b will soon become a nullity, since school boards are now free to evade this policy by simply expanding the number of employees subject to multiclassification." Id. at 258,347.*

Footnote: 8 *605 S.E.2d 814 (W. Va. 2004), citing Syllabus Point 5, Board of Educ. of County of Wood v. Airhart, 212 W.Va. 175, 569 S.E.2d 422 (2002).*

Footnote: 9 *W. Va. Code § 18A-4-8(i)(77).*

Footnote: 10 *211 W. Va. 40, 560 S.E. 2d 515 (2002).*