WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CATHY MCCOMAS, DEBRA WHEELER,
TAMMY PARSONS and SUSIE MCCANN
Grievants,

v. **Docket No. 2011-1169-CONS**

LINCOLN COUNTY BOARD OF EDUCATION
and DEPARTMENT OF EDUCATION,
Respondents,

and,

TAMMY BARRETT, MARSHA WEAVER
and ANGIE PRICHARD,
Intervenors.

DECISION

Grievants, Cathy McComas and Debra Wheeler are employed by Respondent, Lincoln County Board of Education ("Board") and are in the Secretary III job classification. Ms. McComas and Ms. Wheeler filed a level one grievance form dated February 14, 2011, alleging they are misclassified because they each serve as secretaries for administrators with significant administrative duties. They contend that the Board's action violates W. VA. CODE § 18A-4-8. As relief, both Grievants seek a "Change of classification to Executive Secretary." Susie McCann and Tammy Parsons each filed a grievance with the same allegations and are seeking the same remedies as Ms. McComas and Ms. Wheeler. Ms. McCann's grievance was dated February 15, 2011, and Ms. McCann's was dated February 17, 2011.

A level one conference was held with Grievants McComas and Wheeler on February 22, 2011, and the grievances were denied by two separate letters dated March 3, 2011. Upon request of the Respondent, all four of these grievances were

consolidated for purposes of hearing and decision by the undersigned Administrative Law Judge ("ALJ") in an Order dated March 30, 2011.

A level two mediation was held on June 8, 2011, and an Order was entered the following day. The Grievants appealed to level three in June 2011.[1] On November 16, 2011, Trina Barrett requested to intervene in the grievances and an Order granting her request was entered on February 13, 2012. Respondent filed a motion objecting to the intervention of Ms. Barrett and other employees of the Board on February 16, 2012, arguing that it did not have notice and that there was no indication that the intervenors would be substantially and adversely affected by a ruling in the grievances. An Order was entered on February 15, 2012, granting Intervenor status to Tina Barrett, Marsha Weaver and Angela Prichard. The Intervenors are employed by the Board and are multi-classified. Among other classifications, each Intervenor is classified as an Executive Secretary.

A level three hearing was held on three days at the Board's Office in Hamlin West Virginia: February 27, 2012, February 29, 2012, and August 29, 2012.[2] Grievants McComas and Wheeler were present and represented by John Roush, Esquire, WVSSPA.[3] Grievants McCann and Parsons were present and represented by Jeremy Radabaugh, WVEA.[4] Respondent was represented by Rebecca Tinder, Esquire, Bowles Rice McDavid Graf and Love, LLP. Intervenors Barrett, Weaver and Prichard were present and represented by Ben Barkey, WVEA. The parties agreed to submit

[1] Grievants McComas and Wheeler appealed on June 21, 2011. Grievants Parsons and McCann appealed on June 16, 2011.
[2] The first two days of hearing were conducted by Administrative Law Judge Jennifer Stallings-Parr. Thereafter, Judge Stollings-Parr took new employment and the matter was assigned to the undersigned Administrative Law Judge to conduct the final day of hearing and render this decision.
[3] West Virginia School Service Personnel Association
[4] West Virginia Education Association.

Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on October 16, 2012. This matter became mature for decision on that date.

Synopsis

Grievants claim that they are misclassified as Secretary IIIs and they should be classified as Executive Secretaries because they are performing substantially similar duties as other employees who are classified as Executive Secretaries, and to give them a lower classification with a lower pay grade constitutes discrimination or favoritism. Grievants also argue that the Board has expanded the Executive Secretary job description beyond the definition set out in statute and their positions meet the expanded job description.

Respondent argues that the employees who are classified as Executive Secretaries are all directly supervised by the Superintendent, Assistant Superintendent or the Treasurer. These Administrators are higher on the administrative hierarchy than the Directors who supervise Grievants. They also note that the Executive Secretaries are all multi-classified and carry more responsibilities than Grievants, therefore, the two groups are not similarly situated. Respondent also argues its Executive Secretary position description is antiquated and does not reflect how the employees are presently assigned.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Cathy McComas is employed by Respondent in the Secretary III classification and has a 240 day employment term. Her direct supervisor is Charlene Colburn, Respondent's Federal Program Director/Literacy Supervisor. Grievant McComas also works for Danny Dailey, Respondent's Technology Director and Danna Snyder, Respondent's Director of Special Programs.[5]

2. As Director of Federal Programs, Ms. Colburn writes grants securing significant amounts of federal funding for Board programs, and she oversees these programs. The Director of Technology, Danny Dailey, is responsible for planning, purchasing and maintaining technology equipment for Lincoln County schools. A large amount of money is involved in this process. Director Dailey oversees the federal program for virtual learning (ERATE), and the Tools for Schools program. Dana Snyder, Director of Special Projects, is responsible for the system-wide student assessment and is responsible for 21st Century and Counseling grants. All of these duties and responsibilities are important to the successful operation of Lincoln County Schools.

3. Grievant McComas provides secretarial and clerical services to Director Colburn, including but not limited to, handling telephone calls and electronic communications, preparing correspondence, scheduling events, completing reports and maintaining a website related to professional development. Prior to the 2011-2012 school year, Ms. McComas filled in for Tina Black[6] for one hour each day to give Ms.

[5] Grievant McComas' duties require her to spend a little more than half her time working for Director Colburn and the remainder of her time is split between the other two directors.
[6] Ms. Black is classified as an Executive Secretary.

Black a lunch break. At the beginning of the 2011-2012 school year, a rotation[7] was established so that all Central Office secretaries take turns filling in for one hour for Ms. Black and Grievant McComas is part of that rotation.

4. Grievant Wheeler is the secretary for Respondent Board's maintenance department. Dana Smith, Director of Maintenance, is her supervisor. She is classified as a Secretary III and works a 240 day employment term.

5. Director of Maintenance Smith is responsible for maintaining all of the Board's buildings and facilities. He supervises six employees and oversees a budget exceeding three million dollars per year. Maintenance of the Board's facilities is essential to the health and safety of staff and students, as well as the successful completion of the Board's mission.

6. In addition to providing routine secretarial and clerical services to Director Smith, Grievant Wheeler assigns the daily jobs to maintenance workers and has been delegated the authority to prioritize the order of assignments. Among other duties, Grievant Wheeler prepares the payroll for the maintenance department, contacts independent contractors for specific work, orders supplies and coordinates in-service training for maintenance workers. Grievant Wheeler takes part in the rotation to cover the one hour of time when Tina Black is at lunch.

7. Grievant Susan McCann is employed by the Respondent as the secretary for the Special Education Department. She is classified as a Secretary III and works a 240 day contract term. Grievant has been employed by the Board for 21 years. Her immediate Supervisor is Jeremy Brunty, Director of Special Education for the Board.

[7] This rotation results in each secretary covering one hour per day for Ms. Black about four weeks of the year.

She took this position after it was vacated by Anita Swanson. Ms. Swanson was classified as an Executive Secretary and Grievant is responsible for all the duties performed previously by Ms. Swanson. The job was posted for the Secretary III classification when Grievant McCann applied for it.

8. Special Education Director Brunty is responsible for ensuring that special education services are being provided to eligible students in Lincoln County in compliance with State Board Policy 2419 as well as federal and state laws. He also oversees the Critical Skills program and Title Nine compliance. Director Brunty is responsible for federal and state Special Education funding, as well as Medicaid funding and reporting. A large number of employees and resources are involved in providing these services. Providing Special Education services is required by law and an essential responsibility of the Board.

9. In addition to providing routine secretarial and clerical services for Director Brunty, Grievant McCann works with WVEIS[8] reports, processes purchase orders, inventories and requisitions, assists teachers in accessing IEP[9] sites, prepares and processes large mail projects, schedules and prepares packets for staff meetings. Grievant McCann participates in the rotation for covering Tina Black's duties for one hour each day.

10. Tammy Parsons has been employed by the Board for seven years. For the last three years, she has served as the secretary for the Transportation Department. Grievant Parsons is classified as a Secretary III and is employed for a 240 day employment term. Grievant took this position after it was vacated by JoAnne Adkins.

[8] West Virginia Education Information System.
[9] Individual Education Plans required for each special education student.

Ms. Adkins was classified as an Executive Secretary and Grievant performs all the duties and responsibilities that were performed by Ms. Adkins. The position was posted for a Secretary III when Grievant Parsons accepted it. The direct supervisor for Grievant Parsons is Rod Cummings, the Board's Transportation Director.

11. Transportation Director Cummings is responsible for the Board's fleet of vehicles including the school buses used to transport students to and from school. His department must ensure that all the vehicles are maintained in compliance with state and federal regulations, and that all the vehicles are operated safely. There are many employees in the Transportation Department and various reporting requirements must be met. Safe transportation of students is an essential responsibility of the Board.

12. Grievant Parsons is responsible for providing routine secretarial and clerical work for the Transportation Department. Her duties include, but are not necessarily limited to, preparing and transmitting reports to the State Department of Education, monitoring diesel and gas inventories, managing the radio to stay in communication with bus operators and deal with emergencies, staying familiar with transportation policies and procedures, assisting the Director in formulating policy memorandums for the bus operators and preparing the Transportation Department payroll. Grievant Parsons participates in the rotation for covering Tina Black's duties for one hour each day.

13. All of the Grievants perform nearly all of the duties and responsibilities listed in the Board's job descriptions for Executive Secretaries[10] and Secretary III.[11]

[10] Grievant's Exhibit 1.
[11] Grievant's Exhibit 7.

14. Birdie Gandy is the Treasurer for Respondent Board. She is responsible for the Board's budget and finances. Treasurer Gandy reports directly to the Superintendent, Patricia Lucas, and the Board of Education. Two of the three intervenors are directly supervised by Treasurer Gandy. They are Tammy Barrett and Marsha Weaver.

15. Intervenor Barrett holds three classifications; Payroll Coordinator, Accountant III and Executive Secretary. She has worked in the Board's finance office since 1988. Ms. Barrett is responsible for all payroll reports that come to the Board related to professional personnel and after school programs. She is also the Board's coordinator for Workers Compensation benefits. In that regard, she distributes appropriate information packets to the work sites. She receives and reviews all accident reports that result in claims. Ms. Barrett gathers doctors' reports, reviews the claims and determines if the Board should contest a claim. Ms. Barrett provides secretarial services and prepares reports as needed for Treasurer Gandy.

16. Intervenor Weaver is also multi-classified and her classifications are Insurance/Benefits Coordinator, Accountant I/II and Executive Secretary. She has been working for the Board for thirty-nine years. Ms. Weaver works with payroll and accounts payable for the entire county. She is also responsible for coordinating Public Employees Insurance Agency benefits, Delta Dental/Vision insurance benefits and other benefits for Respondent's employees. She also performs secretarial and clerical functions for Treasurer Gandy.

17. Darlene Sherry Neil also works for Treasurer Gandy. She is classified as Purchasing Coordinator, Accountant II, and Executive Secretary. She has held the

position of Purchasing Coordinator since 1995 and has been an Executive Secretary since 1993. Ms. Neil began working for the Board as an Accountant II in 1986. As purchasing Coordinator, Ms. Neil sends notices of allocations to all of the schools regarding how much funds they have in their various accounts and makes certain that all budget items are properly coded. She ensures grants are encumbered and spent out at appropriate times. Ms. Neil is also responsible for reconciling the purchasing card statements and requesting bids and quotes when necessary for purchase of specific items. She also prepares reports and performs secretarial tasks for Treasurer Gandy.

18. Joanne Adkins has been employed by the Board for twenty years and is classified as an Executive Secretary. Her direct supervisor is Assistant Superintendent, Jeff Midkiff[12] and she also works closely with Superintendent Lucas. Ms. Adkins works with the Personnel Department and prepares all professional job postings, hiring matrixes, compiles certification lists and reports including the Certified List of employees that goes to the State Department of Education each year for determining state funding for school personnel. She is involved with preparations and notifications required for annual transfer and reductions in force. Ms. Adkins prepares numerous reports related to personnel and performs other routine secretarial tasks for her supervisors. When Ms. Adkins bid on her present position it was posted as a Secretary III position. She requested and received an upgrade in classification from the prior Superintendent, David Roach.

19. Angela Prichard is employed by the Board and classified as a Food Service Coordinator and Executive Secretary. Her immediate supervisor is Assistant

[12] As Assistant Superintendent of Schools, Mr. Midkiff is responsible for supervision of all programs in the county school systems. His direct supervisor is Superintendent Lucas and all Directors are subordinate to him.

Superintendent Midkiff. Ms. Prichard's supervisor for a number of years was the Director of Food Services. In 2012, the Director of Food Services left that position and the Board contracted with RESA 2[13] for those services. At that point, the Assistant Superintendent became her immediate supervisor and Ms. Prichard works with the Director of Food Services from Cabell county through the RESA contract. As a result of this change, Ms. Prichard has taken on a large number of the duties and responsibilities that were previously performed by Respondent's Director of Food Services. *See* Respondent's Exhibit 1. These changes took place more than a year after these grievances were initially filed.

20. Tina Black is employed by the Board and is multi-classified as Receptionist/Switchboard Operator, Executive Secretary and Clerk II. Her direct supervisor is Assistant Superintendent Midkiff. In addition to answering the telephone and transferring calls, Ms. Black is responsible for calling out all professional and service personnel substitutes between 8:00 a.m. and 4:00 p.m. Ms. Black also monitors the security cameras for the central office building in addition to providing general secretarial and clerical services as needed.

21. Brenda Powell is the Coordinator of Services and Executive Secretary for the Board. Her direct supervisor is Superintendent Lucas.[14]

22. The Respondent's job description for Executive Secretary, under the heading of "Responsibilities" states, "to serve as secretary to specific department/department head, assisting to assure that the office operates smoothly and efficiently." Under the heading "Relationship to Others," the job description states,

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[13] Regional Education Service Agency.

[14] *See Powell v. Lincoln County Bd. of Educ. & Barrett, et al.,* Docket No. 2010-0592-LinED (Feb. 14, 2011).

"Works under the direct supervision of the department head/director." Grievant's Exhibit 1.

23. The Respondent's Job description for Secretary III, in the area of "Responsibilities" requires the employee, "To report all pertinent information to the Superintendent or his designee in an efficient and professional manner. In the area of "Relationship to Others," the job description requires the employee to, "Work under the direct supervision of the Superintendent or his designee." Grievant's Exhibit 7.

24. Sometime after these grievances were initiated, the Superintendent developed a chart entitled "Lincoln County Board of Education Executive Secretary Chart." The chart demonstrates that Brenda Powell is directly supervised by Superintendent Lucas. Joanne Adkins, Tina Black, and Angela Prichard are directly supervised by Assistant Superintendent Midkiff. Marsha Weaver, Trina Barrett, and Darlene Neil are directly supervised by Treasurer Gandy. Grievants and their supervisors are not listed on the chart. Respondent's Exhibit 3. The Board's job descriptions for Executive Secretary and Secretary III are not amended by this chart and remain in effect.[15]

25. The Board's Directors have substantial administrative duties that are comparable in difficulty and responsibility. However, they are lower on the administrative hierarchy than the Assistant Superintendent, Treasurer and Superintendent.

[15] Superintendent Lucas testified that she believes these job descriptions are antiquated and should be rewritten. However, no testimony was presented that they have actually been revised or are in the process of revision.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Generally, in order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than that under which the employee's position is categorized. *Sammons/Varney v. Mingo County Bd. of Educ.*, Docket No. 96-29-356 (Dec. 30, 1996); *Savilla v. Putnam County Bd. of Educ.*, Docket No. 89-40-546 (Dec. 21, 1989). A school service employee who establishes, by a preponderance of the evidence, that he or she is performing the duties of a higher WEST VIRGINIA CODE §18A-4-8 classification than that under which he or she is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.* Docket No. 95-29-006 (July 19, 1995); *Hatfield v. Mingo County Bd. of Educ.,* Docket No. 91-29-077 (Apr. 15, 1991); *Holliday v. Marshall County Bd. of Educ*., Docket No. 89-25-376 (Nov. 30, 1989); *Scarberry v. Logan County Bd. of Educ*., Docket No. 89-23-63 (Oct. 30, 1989). However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him or her misclassified *per se*. *Carver v. Kanawha County Bd. of Educ*., Docket No. 01-20-057 (Apr. 13, 2001).

Grievants contend that they are misclassified as Secretary III's and they should be classified as Executive Secretaries. They make two main arguments in support of that contention. First, Grievants note that they are performing substantially similar duties as other employees who are classified as Executive Secretaries and to give them a lower classification with a lower pay grade constitutes discrimination or favoritism. Next, Grievants point out that the Board has a specific job description for Executive Secretary which includes employees who, "serve as secretary to specific department/department head . . ." and are under the direct supervision of such a department head. Grievant's Exhibit 1. Grievants aver that they fit that job description and the Board is bound by it and must place them in the Executive Secretary classification.

Respondent counters that the employees who are classified as Executive Secretaries are all directly supervised by the Superintendent, Assistant Superintendent or the Treasurer. These administrators are higher on the administrative hierarchy than the directors who supervise Grievants. The Respondent argues that the statutory definitions of the Secretary classifications justify placing the Secretaries of these Administrators in a higher classification. They also note that the Executive Secretaries are all multi-classified and therefore, carry more responsibilities than Grievants so the two groups are not similarly situated. With regard to the job description, Respondent argues that it is antiquated and does not reflect the Board's present employee configuration.

The classifications at issue in this matter are defined in the WEST VIRGINIA CODE § 18A-4-8 as follows:

> "Executive secretary" means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties;[16]
>
> "Secretary III" means 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 served for eight years in a position which meets the definition of "secretary II" or "secretary III";[17]

Given the definition of "Executive Secretary," a great deal of the testimony centered on whether the Directors who supervised Grievants held positions characterized by "significant administrative duties." All of these Directors are in charge of extremely important and substantial programs which are essential to the success of the Board's mission. They are in charge of budgets that exceed a million dollars and provide mandatory programs like special education, transportation and maintenance. Some of the Directors attempted to avoid the term "significant" by describing their duties as "important" or "substantial." However, the terms "important," "substantial" and "significant" are synonyms and can generally be used interchangeably. Roget's 21st Century Thesaurus, Third Edition Copyright © 2013 by the Philip Lief Group. Clearly their duties are significant to the Board's operation in the general sense of the word.

Fortunately, the Legislature provided some guidance as to how "significant duties should be viewed in these definitions. It is apparent from the way the statutory definitions are written that, "[t]he distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities."

[16] W. VA. CODE § 18A-4-8(h)(40).
[17] W. VA. CODE § 18A-4-8(h)(78).

Francisco v. Fayette County Bd. of Educ., Docket No. 03-10-108 (Aug. 21, 2003) (citing, *O'Neal v. Fayette County Bd. of Educ.,* Docket No. 02-10-369 (Mar. 6, 2003); *Sanders v. Putnam County Bd. of Educ*., Docket No. 01-40-630 (Mar. 28, 2002)).

Employees assigned to "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" fit within the Secretary III classification. (Emphasis added) W. VA. CODE § 18A-4-8(h)(78). Significantly, the Directors who are the Grievants' direct supervisors are in charge of the Federal Programs, Special Education, Transportation and Maintenance Departments. Accordingly, their duties fit within the Secretary III classification. The significant duties set out in the statutory Executive Secretary classification appear to mean something more than the duties of these Directors.

Next, Grievants compare their positions to the employees who are classified as Executive Secretaries and argue that they are similarly situated to these employees. Grievants argue that placing them in a lower classification than the other central office secretaries constitutes discrimination or favoritism. For purposes of the grievance procedure, "discrimination" is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-

2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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 Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways,* Docket No. 2008-1714-DOT (May 13, 2009); *Westfall v. Dep't of Transp./Div. of Highways,* Docket No. 2009-0339-DOT (Oct. 30, 2009).

In the present case, Grievants have failed to prove that they are similarly situated to the employees who are classified as Executive Secretaries. First, these employees are directly responsible to the Treasurer, Assistant Superintendent or Superintendent, who are higher in the administrative hierarchy than the Directors who supervise Grievants.[18] This is very significant because these classifications are defined as much by who the employee is responsible to as what their duties are. Additionally, all of the Executive Secretaries except Joanne Adkins, the secretary to the Board, are multi-classified with Coordinator or Clerk duties, while Grievants are not. Grievants have

[18] The title of these administrators is not as important as the fact that they hold positions of higher administrative authority and responsibility. *See Combs v. Berkeley County Bd. of Educ*., Docket No. 2011-1844-BerED (Jan. 30, 2013) (Concerning an employee classified as an Executive Secretary whose direct supervisor is the Executive Director of Special Education and an employee classified as a Secretary III whose direct supervisor is the Director of Special Education).

failed to prove that they are similarly situated to the employees who are classified as Executive Secretaries. Accordingly, they have failed to prove claims of discrimination or favoritism.

Finally, Grievants note that the job description of "Executive Secretary" adopted by the Board includes any employee who "serves as secretary to specific department/department head, assisting to assure that the office operates smoothly and efficiently," and a secretary who "[w]orks under the direct supervision of the department head/director." Grievants clearly meet this definition. As Grievants point out, "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. VA. CODE §18A-4-8." *Powell v. Lincoln County Bd. of Educ.,* Docket No. 2010-0592-LinED (Feb. 14, 2011) *See also Ohio County Bd. of Educ. v. Hopkins*, 193 W.Va. 600, 457 S.E.2d 537 (1995); *Hancock County Bd. of Educ. v. Hawken*, 209 W.Va. 259, 262, 546 S.E.2d 258, 261 (1999); and *Randolph County Bd. of Educ. v. Scott*, 217 W. Va. 128, *617 S.E.2d 478* (2005). The Board's job description has expanded the definition of Executive Secretary to include secretaries assigned to department heads and Grievants work for Directors who are the heads of their particular departments. Once again, "[t]he distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities." *Francisco, supra.* This expansion is consistent with the statutory job description. It merely indicates that the Board included their Directors as administrators who perform

"significant administrative duties." The evidence undoubtedly demonstrates that Grievant's fit within the job description of Executive Secretary adopted by the Board.

Respondent argues that the job description is antiquated and needs to be rewritten.[19] However, the description remains in effect and no evidence was presented that it has been rewritten, replaced or updated. The Superintendent prepared an "Executive Secretary Chart"[20] which showed the present executive secretaries and their direct supervisors, but that chart was created after the grievances were filed and is not anything like a job description.

The West Virginia Supreme Court has regularly held that, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs," even if those procedures are more generous than employees might otherwise be entitled to. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). Grievants have proven that they are entitled to be classified as Executive Secretaries because they meet the Board's expanded job description for that position. Accordingly the consolidated grievances are GRANTED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. In order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than

[19] Level three testimony of Superintendent Lucas.
[20] Respondent's Exhibit 3.

that under which the employee's position is categorized. *Sammons/Varney v. Mingo County Bd. of Educ.*, Docket No. 96-29-356 (Dec. 30, 1996); *Savilla v. Putnam County Bd. of Educ.*, Docket No. 89-40-546 (Dec. 21, 1989).

3. A school service employee who establishes, by a preponderance of the evidence, that he or she is performing the duties of a higher WEST VIRGINIA CODE §18A-4-8 classification than that under which he or she is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.,* Docket No. 95-29-006 (July 19, 1995); *Hatfield v. Mingo County Bd. of Educ.,* Docket No. 91-29-077 (Apr. 15, 1991); *Holliday v. Marshall County Bd. of Educ*., Docket No. 89-25-376 (Nov. 30, 1989); *Scarberry v. Logan County Bd. of Educ*., Docket No. 89-23-63 (Oct. 30, 1989).

4. The distinction between the Secretary III and Executive Secretary classifications set out in WEST VIRGINIA CODE § 18A-4-8(h), depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities. *Francisco v. Fayette County Bd. of Educ.*, Docket No. 03-10-108 (Aug. 21, 2003) (citing, *O'Neal v. Fayette County Bd. of Educ.,* Docket No. 02-10-369 (Mar. 6, 2003); *Sanders v. Putnam County Bd. of Educ*., Docket No. 01-40-630 (Mar. 28, 2002)).

5. Grievants did not prove by a preponderance of the evidence that their positions met the statutory "Executive Secretary" classification as defined in WEST VIRGINIA CODE § 18A-4-8(h) (40).

6. For purposes of the grievance procedure, "discrimination" is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing

by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h).

7. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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 Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways,* Docket No. 2008-1714-DOT (May 13, 2009); *Westfall v. Dep't of Transp./Div. of Highways,* Docket No. 2009-0339-DOT (Oct. 30, 2009).

8. Grievants did not prove by a preponderance of the evidence that they were similarly situated to the Respondent's other secretaries who are classified as Executive Secretaries and therefore, did not prove their claim of discrimination or favoritism.

9. "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. VA. CODE §18A-4-8." *Powell v. Lincoln County Bd. of Educ.,* Docket No. 2010-0592-LinED (Feb. 14, 2011)

See also Ohio County Bd. of Educ. v. Hopkins, 193 W.Va. 600, 457 S.E.2d 537 (1995); *Hancock County Bd. of Educ. v. Hawken*, 209 W.Va. 259, 262, 546 S.E.2d 258, 261 (1999); and *Randolph County Bd. of Educ. v. Scott*, 217 W. Va. 128, *617 S.E.2d 478* (2005).

10. Grievants proved by a preponderance of the evidence that Respondent has adopted a description of Executive Secretary that is expanded, but not contrary, the statutory description of that classification.

11. A county board of education must abide by the remedies and procedures it properly establishes to conduct its affairs, even if those procedures are more generous than employees might otherwise be entitled to. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

12. Grievants proved by a preponderance of the evidence that their positions are included in the expanded job description of Executive Secretary which the Board has adopted and utilized.

Accordingly, the consolidated grievances are GRANTED. The Board is Ordered to reclassify each Grievant to the classification of Executive Secretary effective the date set forth on each individual level one grievance form. The Board is further Ordered to upgrade each Grievant's pay to the Executive Secretary level as of the same date as their reclassification and provide any additional benefits that Grievants may be entitled to receive as a result of the reclassification, including statutory interest on the back pay.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: APRIL 17, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE