CHERYL NELSON,

Grievant,

v. **Docket No. 05-38-050**

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Cheryl Nelson ("Grievant") initiated this proceeding on November 30, 2004, alleging entitlement to a salary supplement for National Board Certification, retroactive to November 21, 2003. The grievance was denied at level one on December 3, 2004. A level two hearing was conducted on January 28, 2005, and the grievance was denied by decision dated February 3, 2005. Level three participation was waived, and Grievant appealed to level four on February 10, 2005. After a level four hearing was scheduled, the parties elected to have a decision rendered based upon the record developed below, supplemented by fact/law proposals, which were received by the undersigned on May 16, 2005. Grievant was represented in this matter by Mary Snelson, UniServ Consultant, and Respondent was represented at level four by counsel, Gregory W. Bailey.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent for approximately 13 years as a classroom teacher. Her current position is Reading First Reading Mentor teacher and Grant Coordinator. 2. At a meeting on April 14, 2003, the Pocahontas County Board of Education ("BOE") voted to provide a $1000 supplement for teachers who obtained National Board Certification ("NBC"). State law already provides for a $2500 annual supplement for such teachers.

3. Barbara Lewis, another BOE employee, obtained NBC in November of 2002. She received the prorated $2500 state supplement for the remainder of the 2002-2003 school year.

4. Ms. Lewis began receiving the $1000 BOE supplement at the beginning of the 2003-2004 school year.

5. Grievant obtained NBC on November 21, 2003. She received the state supplement for the remainder of the 2003-2004 school year.

6. Consistent with BOE's previous practice, it began paying Grievant the $1000 county supplement at the beginning of the 2004-2005 school year.

7. Although Ms. Lewis is no longer employed by BOE, she and Grievant performed similar duties while she was still a BOE employee.

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. Grievant contends that she was entitled to receive the $1000 county supplement asof the date she received NBC, on November 21, 2003, rather than at the beginning of the following school year. She alleges violations of W. Va. Code §§ 18A-4-5a and 18-29-2(m). W. Va. Code § 18A-4-5a allows county boards of education to “establish salary schedules . . . in excess of the state minimums” and these schedules must be uniform for employees with similar “training, experience, responsibility and other requirements” and that “[u]niformity also shall apply to . . . additional salary increments or compensation for all persons performing like assignments and duties within the county.” The West Virginia Supreme Court, in Weimer-Godwin v. Board of Education 179 W. Va. 423, 369 S.E.2d 726 (1988), 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. In the instant case, there appears to be no dispute that Grievant and Ms. Lewis were performing like assignments and duties, and that Grievant was entitled to the same supplement as Ms. Lewis.

Grievant also contends that she has been subjected to discrimination in violation of W. Va. Code § 18-29-2(m). That statute 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." As recently held by the West Virginia Supreme Court of Appeals, an employee attempting to prove discrimination under the education statute need only establish that he/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, 605 S.E.2d 814 (W. Va. 2004). Just as with Grievant's claim regarding uniformity, there appears to be no question that Grievant and Ms. Lewis were similarly situated and were performing similar duties. However, the issue at hand is whether or not there was a difference in their treatment by the BOE, and the evidence establishes that there was not. Both Grievant and Ms. Lewis began receiving the county supplement at the beginning of the next full school year after they had obtained NBC. There was no formal policy requiring that the supplement be paid in this manner, but the BOE treated both employees the same. BOE was not required to pay an additional supplement to these employees at all, and when it did so, it was only required to treat similarly situated employees in a uniform and consistent manner, which it did. Grievant has, therefore, failed to establish any entitlement to receive the supplement retroactive to November of 2003.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-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-4-5b 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 shallapply to such additional salary increments or compensation for all persons performing like assignments and duties within the county."

3. An employee attempting to prove discrimination under the education statute need only establish that he/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, 605 S.E.2d 814 (W. Va. 2004).

4. Grievant has failed to establish that any uniformity violation or discrimination occurred with regard to the $1000 county supplement for National Board Certification.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Pocahontas County. Any 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 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: June 6, 2005

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DENISE M. SPATAFORE

Administrative Law Judge