BARBARA SLONE and CAROLYN ELSWICK,

Grievants,

v. Docket No. 03-03-332R

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Barbara Slone and Carolyn Elswick, filed this grievance against their employer, the Boone County Board of Education ("BCBOE") on September 23, 2003, seeking to replace their extra-duty contract for repairing and maintaining the computers at their respective schools with payment for each planning period they used for this activity. This grievance was denied at Level IV on March 16, 2004.

The Kanawha County Circuit Court reversed this decision and remanded it to Level IV. The undersigned Administrative Law Judge was directed to determine, "the amount of back pay due [Grievants] based upon work previously performed during their planning periods. Such back pay is to be offset by the annual compensation received by [Grievants] under their extra-duty contracts." (Emphasis added). BCBOE was ordered "to compensate [Grievants] for each planning period used for addressing computer-related problems. . . ." (Emphasis added).

A Level IV remand hearing was held on December 13, 2004, and this case became mature for decision on January 11, 2005, the date the parties' proposed findings of fact and conclusions of law were received. (See footnote 1)

Issues and Arguments

At the Level IV remand hearing, Grievants asserted they worked 90 to 95 percent of their planning periods. Grievants do not have a record of the planning periods they worked.

BCBOE maintained Grievants have no data to support these assertions. BCBOE averred Grievants did not prove how much time they spent each day on computer-related work, or that this work was accomplished during their planning periods, as opposed to other times of the

day. BCBOE also noted inconsistencies in Grievants' testimony throughout these proceedings and argued Grievants did not have accurate and complete records.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant Slone was employed as an adult business teacher at the Boone County Career Center. During the pendency of this grievance, Grievant Slone retired. Grievant Elswick is employed at Madison Middle School as a computer teacher.

2. For many years Grievants helped other teachers in their schools with computer-related problems.

3. In approximately 1999, BCBOE decided to post and pay a teacher in each middle and elementary school to be the Technology Coordinator. This position was to resolve all software problems, maintain inventory, write needed reports, and tag computers for repair. Resp. No. 1, at Level IV.

4. For the 2000 - 2001 school year, Grievants responded to a posting for Technology Coordinators and applied for the positions. The contract is specified as anextra-duty contract, and the yearly payment is based on the number of computers at the school.

5. Grievants receive $1,250.00 a year to be Technology Coordinators at their schools.

6. This same position is in all the middle and elementary schools. The time to perform the Technology Coordinator duties was not specified in the posting. Grievants have performed this work during their planning periods, but also have spent time before and after school, during their lunch breaks, and class time to perform these duties. Grievants have more computer-related work during the first month of the school year.

7. Grievants were told to keep records of the time they spent performing computer-related work during their planning periods for the 2003 - 2004 school year. They did not do this. (Apparently, the parties were engaged in settlement talks at the time.)

8. Grievants testified at the Level IV remand hearing that they worked 90% to 95% of their planning periods. This testimony is not supported by their other testimony and documentation.

9. Grievant Elswick kept a partial record of her planning period work for three weeks, from September 2 to September 23, 2003, sixteen days. She did not note the amount of time she spent each planning period, only wrote down what she did. It was unclear what portion, if any, of this work was related to her own teaching duties. During this sixteen-day period, Grievant did not perform computer-related work during her planning period two days. (This reflects working during 87% of the planning periods, during the period Grievants testified was their busiest time.) Grievant Elswick stopped keeping this record because it was too much trouble. 10. Grievant Slone kept a record of the computer-related activities she completed each day, but these activities were not always during her planning period. Many of the activities listed were directly related to her teaching duties, and some were other tasks not related to computer duties at all, such as typing a school report. Many days Grievant Slone did not report any computer-related work.

11. Grievant Slone submitted a list reporting she had worked one and one-half hours for several weeks in August and September of 2003. The amount of time listed differed from her testimony that stated her planning period was one and one quarter hour. Grt. No. 3 at Level IV. This list did not specify that this work was performed during her planning period.

12. The individual who currently performs Grievant Slone's computer-related duties reported it takes him one to two planning periods a week to accomplish these duties.

Discussion

At this point in the grievance procedure, Grievants have the burden of demonstrating how many planning periods they worked during the time in question. 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 and Human Res., Docket No. 92-HER-486 (May 17, 1993). The undersigned Administrative Law Judge has been directed to determine how many planning periods Grievants worked. Following the clear directions of the circuit court, the undersigned Administrative Law Judge

will not consider any other time worked on computer-related projects for payment. The undersigned Administrative Law Judge reviewed the Level II and both Level IV transcripts and documents. Grievants' evidence and testimony are contradictory, and the evidence presented by BCBOE does not support Grievants worked 90% to 95% of their planning periods.

In reviewing the evidence several problems became clear. First, because Grievants could do their computer-related assignment at any time of their choosing, some of their work was not completed during a planning period. Indeed, Grievant Slone had much free time during the school day because her average student load was four adult students, and Grievant Elswick was clear she did work at other times, including while other teachers watched her class.

Second, Grievants' testimony at Level II indicated they worked most of their planning periods during the first month of the school year, and then worked usually three days a week and sometimes four. Even the three-week period Grievant Elswick reported showed she did not work 90% of the time, even in September.

Third, part of the work Grievants wish to be paid for is computer-related work they would be expected to complete because they are both computer teachers. It would be inappropriate for BCBOE to pay Grievants twice for this work. Grievants, like all other teachers, are expected to be prepared to teach. Teachers are expected to facilitate learning for their students by preparing handouts, selecting assignments, decorating bulletin boards, reviewing teaching aids, and organizing additional learning materials, etc. Just because Grievants are computer teachers does not change this responsibility. When Grievants install programs on their students' computers for their learning or prepare computers for test taking, these are their own personal educational duties required by their position as teachers.

Fourth, there is no data indicating when, or if, Grievants were sick, took personal leave days, used their planning periods for educational purposes, had meetings, left early, or spent only fifteen minutes of their planning period as opposed to the entire time.

Fifth, while Grievant Slone did keep some records and could be questioned about these and errors could be noted, Grievant Elswick failed to keep these records, relied only on her memory, and there was no data upon which to question her about her recollections.

Sixth, the employee currently fulfilling Grievant Slone's prior duties has informed the principal at the Boone County Career Center that it takes him one to two planning periods a

week complete the required duties.

However, it is also clear Grievants did work some of their planning periods, and per the directions of the circuit court, they are to be compensated for this work. The only thing the undersigned Administrative Law Judge can do is to attempt to devise relief that is fair and equitable in accordance with the provisions of the grievance statutes, while being mindful of the West Virginia Supreme Court of Appeals direction in Spencer v. Steinbrecher, 152 W. Va. 490, 164 S. E. 2d 720 (1968) which states at Syllabus Point 1, "The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." See W. Va. Code § 18-29-5(b). The Spencer court also noted that an amount needs to be ascertained with reasonable certainty, or else it should be set aside. See Rodgers v. Bailey, 68 W. Va. 186, 69 S. E. 698 (1910). Accordingly, the undersigned Administrative Law Judge finds Grievants are to be paid for 87% of their planning periods for the first month of school and for 40% of their planning periods the rest of the 2003 - 2004 school year. (To clarify, this directive means Grievants are to receive payment for the entire length of each compensated planning period.) Of course, holidays and other leave days should be deducted from the amount of days before the 40% is calculated. No additional back pay is awarded, as Grievants accepted these contracts for years, the amount of compensation in these contracts has increased over the years, and there was no "intentional effort by the Board to deprive these employees of appropriate compensation and benefits." Airhart v. Wood County Bd. of Educ., 212 W. Va. 175, 560 S.E.2d 422 (2002). Additionally, no valid data documentation was submitted for the prior year which would support Grievants' assertions that they should receive money for the prior year.

The above discussion will be supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. As this case is on remand, Grievants have the burden of proving the number of planning periods they worked 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. "The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." Syl. Pt. 1, Spencer v. Steinbrecher, 152 W. Va. 490, 164 S. E. 2d 720 (1968).

3. An undersigned administrative law judge can devise relief that is fair and equitable in accordance with the provisions of the grievance statutes. See W. Va. Code § 18-29-5(b).

Accordingly, BCBOE is ORDERED to follow the directions given in this Decision .

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County and 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.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2005

Footnote: 1

Grievants were represented by Robert Smith, Esq., and Respondent was represented by counsel, Tim Conaway, Esq.