**BARBARA SLONE and CAROLYN ELSWICK,**

**Grievants,**

**v. Docket No. 03-03-332**

**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. The Statement of Grievance reads:**

> **Boone County Board of Education violated W. Va. Code §[§] 18-29-2(m) and 18A-4-14 by failing to provide us with compensation for planning periods used to repair and maintain computers at our school. This benefit was provided to other teachers performing like duties and assignments.**
>
> **RELIEF SOUGHT: To resolve this grievance we request compensation for all planning periods utilized to repair and maintain computers and all back- pay (sic) for past planning periods for which we were not compensated.**

**This grievance was denied at Levels I and II, and Level III was waived by BBCOE. Grievants appealed to Level IV on October 29, 2003, and a Level IV hearing was held on January 15, 2004. This case became mature for decision on February 9, 2004, the date the parties' proposed findings of fact and conclusions of law were received.** (See footnote 1)

## Issues and Arguments

**Grievants assert they are performing "like assignments and duties" as the computer teachers in the high schools. Grievants wish to receive payment for each planning period they work, and back pay for all planning periods they have worked in the past. Grievants do not have a record of the planning periods they have worked in the past. Respondent notes**

**Grievants are paid for the work they perform pursuant to a posting and contract they signed. Respondent maintains Grievants do not perform "like assignments and duties" as the computer teachers in the high school. Additionally, Respondent notes one of these high school teachers, Doug Smith, who is responsible for the care and feeding of the computers at Van High School and Van Elementary School, did not ask for compensation last school year.**

**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 is employed as an adult business teacher at the Boone County Career Center. 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, BBCOE 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 2001 - 2001 school year, Grievants responded to a posting for Technology Coordinators and applied for the positions. The contract is specified as an extra-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 is not specified in the posting, and Grievants have typically chosen to perform this work during their planning periods instead of before and/or after school and during their lunch breaks. Grievants have also used other times to work on computers, such as lunch and class time.**

**7. For several years, the high school computer teachers did much of the software and hardware work on the computers in their schools. Approximately in 1999, they went to the then Superintendent, showed him the hours they were spending on this work, and asked to be compensated. At this time, the high schools had many more computers than other schools.**

**BCBOE approved this request.**

**8. In 2000, each high school received a distance learning system to provide more course options for their high school students. This complex system requires much repair, maintenance, paper work, and coordination, and troubles within the system cause severe problems in students' curriculum.**

**9. Although these high school teachers may spend more than the time of their planning periods working on their computer duties, including distance learning, they only receive payment for their planning period.**

**10. At this time, Grievant Slone has approximately 130 computers at her school, Grievant Elswick has approximately 170 computers at her school.**

**11. At this time, Scott High School has approximately 300 computers and a distance learning lab, Sherman High School has 200 computers, as well as the nervecenter of the distance learning lab, and Mr. Smith at Van High School has 115 computers, a distance learning lab, and responsibility for the computers at Van Elementary.**

## Discussion

**As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2000); 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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.**

**Grievants allege BCBOE is violating W. Va. Code §§ 18A-4-14, 18A-4-5a, and 18- 29-2(m). W. Va. Code § 18A-4-14 states:**

> **(2) Every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. Such planning period shall**

> **be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher shall be assigned any responsibilities during this period, and no county shall increase the number of hours to be worked by a teacher as a result of such teacher being granted a planning period subsequent to the adoption of this section (March 13, 1982).**
>
> **. . .**
>
> **(3) Nothing in this section shall be construed to prevent any teacher from exchanging his lunch recess or a planning period or any service personnel from exchanging his lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent ofschools or his agent: Provided, That a teacher and the superintendent or his agent may not agree to terms which are different from those available to any other teacher granted rights under this section within the individual school or to terms which in any way discriminate among such teachers within the individual school, and that service personnel granted rights under this section and the superintendent or his agent may not agree to terms which are different from those available to any other service personnel within the same classification category granted rights under this section within the individual school or to terms which in any way discriminate among such service personnel within the same classification category within the individual school.**

**(Emphasis added).**

**This Code Section indicates a teacher may agree to give up his or her planning period for additional compensation. This is what the high school teachers have done. This action was mutually agreed upon, and both parties receive a benefit from this arrangement. The Code Section also requires teachers within the same school to be treated the same. Grievants are not at the same school, so this Code Section does not confer upon Grievants the right to receive the compensation received by the high school computer teachers. There is no violation of this Code Section.**

**Grievants also allege W. Va. Code §18A-4-5a has been violated. This Code Section states, in pertinent part, "[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 shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county." It is noted Grievants are**

**currently paid for their Technology Coordinator duties is a similar fashion as other elementary and middle school Technology Coordinator.However, if Grievants can demonstrate they are performing "like assignments and duties" and have similar responsibilities, they can establish a violation.**

**The pay uniformity provision for professional employees contained in W. Va. Code § 18A-4-5a, was discussed in Weimer-Godwin v. Board of Education, 179 W. Va. 423, 369 S.E.2d 726 (1988). The West Virginia Supreme Court of Appeals 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. Thus, in Weimer-Godwin, the county board of education was required to pay the same salary supplement to teachers who provided instruction in general and choral music, as it was paying to teachers who provided instruction in band and string instruments.**

**Applying the Weimer-Godwin reasoning to this set of facts reveals Grievants are not performing substantially similar or like assignments and duties as the high school computer teachers to whom they compare themselves. Weimer-Godwin, supra; See Flint v. Harrison County Board of Education, Docket No. 97-17-348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, No. 25898 (Dec. 10, 1999); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), rev'd on other grounds, Civil Action No. 90- P-86-2 (Cir. Ct. of Harrison County Apr. 15, 1992). Grievants are expected to resolve software issues in their schools. While they have been doing some hardware work, such as replacing hard drives, this is not an expectation of the Technology Coordinator position. The high school computer teachers are expected to resolve both software andhardware issues in their schools.** (See footnote 2) **The high school computer teacher at Sherman High School has 300 computers and a distance learning lab. The high school computer teacher at Scott High School has 200 computers, and the nerve center for the distance learning lab. The high school computer teacher at Van High School has 115 computers, a distance learning lab, and is the Technology Coordinator for Van Elementary. Of course, Mr. Smith has not turned in a request for planning period payment.**

**It is clear that while Grievants perform some similar duties, their job as Technology**

**Coordinators are not as complex, their responsibilities are not as extensive, and the equipment and programs are not as sizable and complicated. Uniformity in contract terms is not required when the prerequisite similarly is not present.**

**In addition, Grievants also assert they are the victims of discrimination prohibited by W. Va. Code § 18-29-2(m). W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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." In order to establish a prima facie case of discrimination under W. Va. Code §§ 18-29-2(m), a grievant must demonstrate the following:**

> **(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,**
>
> **(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.**

**Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).**

**Once a grievant establishes a prima facie case of discrimination under W. Va. Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non- discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26- 106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).**

**In response to the assertions of discrimination, Grievants have not shown they are similarly situated to the employees who are treated differently. Grievants do not have the**

**same level of complexity and degree of responsibilities as the high school computers teachers. Additionally, Grievants are treated the same as all other Technology Coordinators.**

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

## CONCLUSIONS OF LAW

**1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2000); 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-4-14 requires all teachers to have a planning period unless they reach a mutual agreement to give up this planning period for additional compensation.**

**3. W. Va. Code § 18A-4-14 also requires teachers within the same school, be treated in a similar fashion in terms of their planning period.**

**4. No violation of W. Va. Code § 18A-4-14has been demonstrated by Grievants.**

**5. 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 shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county."**

**6. The West Virginia Supreme Court of Appeals 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; when the assignments and duties are "substantially similar," the uniformity requirement applies. Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988). See Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).**

**7. Grievants do not perform "substantially similar" duties as the high school computer teachers. 8. Discrimination is 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."**

**9. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:**

> **(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,**
>
> **(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.**

**Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).**

**10. Once a grievant establishes a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). 11. Grievants have not proven a case of discrimination, as they have not demonstrated they are similarly situated to the high school computer teachers, and they are being treated the same as other Technology Coordinators.**

**Accordingly, this grievance is DENIED.**

**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 16, 2004**

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***Footnote: 1***

***Grievants were represented by Gary Archer of the West Virginia Education Association, and Respondent was represented by counsel, Tim Conaway, Esq.***

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***Footnote: 2***

***Both groups of teachers can call BCBOE's computer technician if the problem is beyond their ability.***