JUDITH REED,

Grievant,

v. **DOCKET NO. 03-18-287**

JACKSON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Judith Reed filed this grievance against her employer, Jackson County Board of Education (Respondent) on July 7, 2003, claiming she should have a 260-day contract instead of a 240-day contract because she is a middle school principal, and high school principals have 260-day contracts. Grievant seeks the addition of 20 days to her contract and equitable benefits with principals employed on 260-day contracts.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on December 3, 2003. Grievant was represented by counsel, Joseph P. Albright, Jr., and Respondent was represented by counsel, Howard Seufer. This matter became mature for decision on February 1, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as Principal of Ravenswood Middle School. Grievant's contract is for 240 days. She has no paid vacation.

2. In Jackson County, high school principals are employed on 260-day contracts. Included in the 260 days is 19½ days of paid vacation.

3. Grievant is employed from July 9 to June 23, and high school principals work from July 1 to June 30.

4. Grievant's supervisor is the Director of Elementary and Middle Schools, while high school principals are supervised by the Director of High Schools.

5. The Duties and Responsibilities listed on the middle school principal job description are identical to those listed on the high school principal job description, with the exception of one additional duty added to the middle school principal description: “Supervise extracurricular events.” Level two Grievant's Exhibit No. 1.

6. Jackson County has two high schools and two middle schools. Both high school principals have 260-day contracts, and both middle school principals have 240-day contracts.

7. Ripley High School has about 965 students, 65 professional staff and 15 service employees. It has 23 athletic teams and approximately 45 coaches. Grievant's school has fewer students, and 15 athletic teams with 14 coaches. The number of her supervisees is not in evidence.

8. High school principals supervise 28-day summer school programs during alternating summers, but the middle schools have no summer school program supervised by their principals. 9. Grievant has one half-time assistant principal. Ripley high school has two full-time assistant principals, and Ravenswood high school has one.

10. The high schools have an advanced-placement program for students to take college-level courses; the middle schools do not.

11. High school principals supervise other 260-day employees, but middle school principals do not.

12. Both high school and middle school principals are responsible for providing enrollment verification for student driver's license applicants, but the volume of verifications for high school students is much greater. While Grievant may have approximately ten students per year applying for driver's licenses, almost all high school students do so.

13. High school principals supervise the preparation of student transcripts for college-bound seniors, while middle school principals prepare them for students advancing to high school.

14. Both high school and middle school principals supervise extra-curricular functions, such as

field trips and dances. High school principals also supervise graduation and related activities.

15. High school principals oversee a greater number of student activities and accounts than middle school principals.

16. The high schools in Jackson County have a greater number of revenue accounts that must be maintained by the principals than do the middle schools, although the middle schools generally have a greater proportion of students receiving reduced or free lunches. Jackson County high and middle schools have differing general fund and food service budgets:

School	General Fund	Food Service
Ravenswood High School	$463,370	$29,999
Ripley High School	$424,074	$39,016
Ravenswood Middle School	$89,475	$30,027
Ripley Middle School	$274,713	$52,603

Respondent's Exhibit No. 8.

17. Jackson County's lateral transfer policy, File GBKA, states that middle school principal positions are lateral only to other middle school principal positions, and likewise for high school principal positions. This policy is based on consideration of "rank of each position in terms of title, nature of responsibility, salary level, certification/licensure and days in the period of employment." Level two Administration Exhibit No. 1.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proving her claim by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant asserts the difference in contract length between middle school principals and high school principals violates the uniformity of pay requirement contained in W. Va. Code § 18A-4-5a and is discriminatory. Respondent avers that middle school and high school principals are not similarly situated and do not perform like assignments and duties, therefore, they need not be compensated in the same way.

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. The Supreme Court of Appeals of West Virginia 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 whenassignments and duties are "substantially similar," the uniformity requirement applies. 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).

Interpreting a similar uniformity provision in W. Va. Code § 18A-4-5b, (See footnote 2) the Grievance Board has found that, where 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).

Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. Locket v. Fayette County Bd. of Educ., Docket No. 01-10-477 (Dec. 28, 2001); Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-165 (Sept. 24, 1997). "'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*. In Airhart, *supra*, the Court interpreted the phrase "like assignments and duties" in W. Va. Code § 18A-4-5b to mean employees who perform "substantially similar work" and are therefore "similarly situated." There is no convenient three-part test to determine when two employees are similarly situated or are performing substantially similar work. However, the Supreme Court has advocated a "liberal measure of comparison to determine whether employees are similarly situated for purposes of § 18A-4-5b." Airhart, *supra.* In making that comparison, the court has also made it clear that "substantially" is a significantly operative word in the standard, but that "[d]uties of the compared personnel do not have to be identical." Id.

In Crookshanks, *supra*, the Administrative Law Judge found that assistant principals at different high schools performed substantially similar work, based on a comparison of their job assignments. However, there was little detailed in the Findings of Fact in that case to compare and contrast the positions in question, other than the fact the positions were classified the same, but were based at different work locations.

Respondent's argument that the positions in question are dissimilar relies in part on its own lateral

transfer policy, which considers rank, nature of responsibility, salary level, certification and days in the period of employment. Level 2 Administration Exhibit No. 1. However, this reliance is misplaced, as the logic required to make this policy support the argument is circular. One cannot say two positions are not lateral because they have different salaries and terms, and that they have different salaries and terms because they are not lateral.

In Copley v. Nicholas County Bd. of Educ., Docket No. 97-34-027 (Aug. 18, 1997), the grievant was an elementary principal seeking uniform compensation with secondary school principals in the same county. That grievance was denied based on the fact that, "Although elementary and secondary principals share similar working conditions, their duties and responsibilities differ in that secondary principals generally must manage morecomplex class schedules, oversee a significantly greater number of extracurricular activities, administer more complex student activities and accounts, and coordinate graduation activities." Such is the case with Jackson County's middle and high school principals. While they share qualities and basic assignments, their essential character is different. The positions are similar, but they are not *substantially* similar.

This finding also defeats Grievant's claim under basic discrimination analysis. "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). In order to establish a claim of discrimination, an employee must establish a *prima facie* *(See footnote 3)* case of discrimination by a preponderance of the evidence. In order to meet this burden, grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Since Grievant did not establish that she was similarly situated to high school principals in her county, she did not prove a *prima facie* discrimination claim.

The following conclusions of law support this discussion:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's 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 Resources, 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. 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.

3. 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. 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).

4. "'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*.

5. "[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 receivesimilar 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).

6. When two positions share similar working conditions but their duties and responsibilities

differ in that one must manage more complex class schedules, oversee a significantly greater number of extracurricular activities, administer more complex student activities and accounts, and coordinate graduation activities, they are not "substantially similar. *See* Copley v. Nicholas County Bd. of Educ., Docket No. 97-34-027 (Aug. 18, 1997).

6. "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).

7. 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 Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Grievant did not establish by a preponderance of the evidence that her position was substantially similar to that of highs school principals. For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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 Grievance Board with

the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: February 11, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant did not submit proposed findings.

Footnote: 2

West Virginia Code §§ 18A-4-5a and 18A-4-5b contain the uniformity of pay provisions for professional and service personnel, respectively. Their parallel language allows analysis applied to one section to elucidate the other.

Footnote: 3

Prima facie is a Latin term meaning, literally, "at first sight." A prima facie claim is one that will prevail until contradicted or overcome by other evidence. Black's Law Dictionary, 5th Ed., 1979.