

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**JESSIE RAMSEY, et al.,
Grievants,**

v.

Docket No. 2013-0377-CONS

**JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievants, Jessie Ramsey, Sue Carman, Maria Howar, James Russell, and Marcia Stengel, filed this on September 21, 2012, stating the following:

Grievants are all Advanced Placement teachers for Jefferson County Board of Education. Per recent changes in WVDE Policy 2510, Grievants are required to attend training (Advanced Placement Summer Institute) once every three years in order to continue teaching advanced placement courses. Said training occurs outside of the Grievants' contractual work period. Grievants assert that they should be compensated [sic] their regular daily rate for attending said required training.

For relief the Grievants seek the following:

To be compensated at their regular daily rate for attending required training; any and all applicable back pay including interest; to be made whole; and any other relief that the grievance evaluator deems appropriate.

A conference was held at level one on October 2, 2012, and a decision was issued on October 17, 2012, requesting a decision from the Grievance Board as the level one designee was without authority to overturn the Respondent's compensation rate of pay. A level two mediation session was conducted on February 1, 2013. Grievants perfected their appeal to level three on February 14, 2013. By agreement, on April 18, 2013, the parties submitted stipulations of facts and joint exhibits in lieu of a level three hearing. The

parties submitted fact/law proposals on April 22, 2013. Grievants appeared by their representative, Jill Jones, AFT-West Virginia/AFL-CIO. Respondent appeared by its counsel, Amy S. Brown, General Counsel, Jefferson County Schools.

Synopsis

The only issue in this grievance is whether the Grievants should be paid at a previously established per diem stipend or at their daily rate of pay for attendance at mandatory training outside of their contractual work periods. Grievants established by a preponderance of the evidence that Respondent erred in failing to compensate Advanced Placement teachers at their daily rate of pay. The record established that both the West Virginia Department of Education and the West Virginia Legislature agree that the daily rate of pay is the appropriate manner in which to compensate teachers for work outside their regular contractual period. In addition, the Grievance Board has held that required training is considered compensable work time and it is compensated at the regular rate of pay.

The following findings of fact have been stipulated to by the parties as undisputed.

Findings of Fact

1. Grievants are employed as teachers by the Jefferson County Board of Education. As part of their teaching responsibilities, they teach Advanced Placement courses at Jefferson High School.

2. For a number of years, Respondent has provided compensation to teachers for training which occur outside of their contractual work period. The compensation for such training is paid at a per diem stipend of \$125.00. In May 2012, Respondent updated

its Standard Operating Procedure to include flex time in addition to the per diem stipend as a way to compensate teachers for training occurring beyond the contractual work period.

3. In changes made to West Virginia Board of Education Policy 2510 in July 2011, it was required of all teachers who teach College Board Advanced Placement (AP) courses to attend an Advanced Placement Summer Institute conducted by the West Virginia Center for Professional Development. Teachers of AP courses must attend an Advanced Placement Summer Institute once every three years. This requirement became effective for the 2012-2013 school year.

4. Advanced Placement Summer Institute training occurs outside of the Grievants' contractual work period. The training takes place on June 18-21 at Capital High School in Charleston, West Virginia, July 9-12 at Capital High School in Charleston, West Virginia, or July 30-August 2 at University High School in Morgantown, West Virginia.

5. The West Virginia Department of Education (WVDE), on a weekly basis, sends all county superintendents a Superintendents' Update with pertinent information from the WVDE. In the July 20, 2012 update, compensation for teacher attendance at Advanced Placement Summer Institutes was addressed. Legal counsel provided the following advice:

“Because county boards of education are required to ensure that all secondary teachers who teach AP courses attend Advance[d] Placement Summer Institutes (APSI), it is highly likely that county boards of education will be responsible for paying teachers their daily rates of pay for attending the required APSIs. This opinion is based on a review of grievance opinions regarding mandatory attendance at specifically designated professional development sessions. As counties prepare for the start of a new school year, accommodation for this financial responsibility should be considered.”

6. Teacher Leadership Institute (TLI) is training for teachers in West Virginia counties. It occurs outside the normal teacher contractual work period during a week-long summer session. It is open to teachers who volunteer to represent their schools and focuses on improving student performance and professional development for other teachers within their schools.

7. All 2012 TLI participants received a memorandum from the WVDE wherein the participants were advised that county school systems had been requested by the WVDE to provide all TLI participants with a stipend equal to the daily rate of pay for five days.

8. Respondent compensated TLI participants by either allowing them to choose flex time or compensation at the \$125.00 per diem stipend.

9. Respondent compensated APSI attendees by either allowing them to choose flex time or compensation at the \$125.00 per diem stipend.

10. In October 2012, Respondent submitted a county waiver request to the West Virginia Board of Education on behalf of its AP teachers, who score at or above the national average, to exempt them from attending APSIs every three years. The West Virginia Board of Education denied Respondent's waiver request at its meeting held in February 2013.

11. West Virginia counties are compensating teachers for APSI in various ways. Some have paid per diem stipends of less than a teacher's daily contractual rate while others have paid the teacher's daily contractual rate. Joint Exhibit No. 6 - Survey of Counties and AP payments.

12. During the 2013 Regular Session of the West Virginia Legislature, Senate Bill 359 was passed. This bill made amendments to W. VA. CODE § 18-5A-5 and § 18A-4-7a, providing that a teacher must be compensated based on the appropriate daily rate of pay for periods beyond his or her individual contract.

13. A first year Jefferson County teacher with zero years of experience and a bachelor's degree makes \$33,260 for a contractual work period of 200 days. The daily rate of pay for such a teacher is \$166.30.

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 Public Employees Grievance Board 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). See also *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). "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).

Grievants argue that Respondent should set the compensation for attending APSI training at the teacher's appropriate daily rate of pay. Respondent believes that it has acted within its discretion in compensating teachers attending APSI at its established per diem stipend of \$125.00. For reasons more fully set out in the following discussion, the

undersigned finds that Grievants have met their burden and established that they should be compensated at their daily rate of pay when attending APSI.

Grievants' argument for the daily rate of pay is strengthened by the support of both the State Department of Education and the West Virginia Legislature. At the July 2012 State Board of Education meeting, discussion arose surrounding the revisions of Policy 2510. As a result of this discussion, the State Department of Education sent an advisory letter to all county superintendents encouraging all counties to pay at the daily rate for APSI. A number of counties changed their compensation to the daily rate of pay after this advisory letter was sent. Respondent chose to disregard the advisory letter and has continued to pay the per diem stipend.

The West Virginia Legislature made a collective determination that daily rate of pay is the fair way to compensate teachers for work that occurs outside their 200 day contract. During the 2013 Legislative session, Senate Bill 359, was enacted into law by Governor Tomblin. A portion of this bill pertains to the hiring process, and a revision was made in the hiring practice that now requires faculty senate input into each hiring decision. The faculty senate at each school must elect a hiring committee, and members of this hiring committee must be trained on interview techniques and protocol. This legislation amended W. VA. CODE § 18-5A-5 so that the appropriate daily rate of pay is offered to employees for attending the training outside their regular contractual period.

Since many vacancies and positions are posted during the summer months and interviews occur during these months, outside of a teacher's regular contractual period, Senate Bill 359 amended W. VA. CODE § 18A-4-7a. This amendment provided that the

appropriate daily rate of pay also be provided for any hiring decisions made outside of a teacher's regular contractual work period.

Finally, the Grievance Board has ruled that required training is considered compensable work time and it is compensated at the regular daily rate of pay.¹ Grievants' have demonstrated that Respondent's decision to continue to compensate Grievants by a per diem stipend, instead of by their appropriate daily rate of pay, was an abuse of discretion and clearly wrong.² This decision is supported by prior precedent of this Board, the clear intent of the legislature to pay teachers at their daily rate of pay for work done outside of their contracts, and the advisory letter issued by the West Virginia Department of Education.

The following conclusions of law support the decision reached.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan*

¹*Woodall v. Department of Education*, Docket No. 03-DOE-157 (Oct. 10, 2003).

²The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dept of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

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).

2. School personnel laws and regulations must be strictly construed and in favor of the employee(s) that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

3. Grievants have proven by a preponderance of the evidence that Respondent's decision to compensate Grievants by way of a per diem stipend, instead of by their daily rate of pay, was an abuse of discretion and clearly wrong.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to compensate Grievants at their regular daily rate of pay for attending courses at the Advanced Placement Summer Institute conducted by the West Virginia Center for Professional Development. The request for back pay is denied since this required training became effective for the 2012-2013 school year.

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: May 30, 2013

Ronald L. Reece
Administrative Law Judge