LINDA M. PERKINS,

Grievant,

v. **Docket No. 99-31-071**

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Linda M. Perkins (Grievant) is a kindergarten teacher currently employed by Respondent Monroe County Board of Education (MCBE). Grievant filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging a violation of W. Va. Code § 18-5- 18a, regarding class size. Although a violation of this statute was found, her immediate supervisor Danny G. Lively, Principal of Peterstown Elementary School, was without authority to grant relief at Level I on January 25, 1999. The grievance was denied at Level II, on February 10, 1999, by Grievance Evaluator Lyn Guy, Superintendent of Monroe County Schools. As authorized by W. Va. Code § 18-29-4(c), MCBE waived participation at Level III. The parties agreed that the grievance could be submitted at Level IV based upon the record developed at the lower levels, where Grievant was represented by Anita R. Maxwell of the W. Va. Education Association and MCBE was represented by Superintendent Guy. The parties were given until May 14, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision on thatdate. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a kindergarten teacher currently employed by MCBE at Peterstown Elementary School.
2. On December 7, 1998, MCBE added a 24th student to Grievant's class.
3. Grievant is paid the requisite 1/20 of her daily rate for each student in her class over the number of 20.

4. Two students in Grievant's classroom are “mild mentally impaired”(MMI) students, whose instruction is provided by a special needs teacher, who also instructs several other mentally impaired students. The Individual Education Plans of these two students mandate that they be included in Grievant's class for the purpose of socialization.

5. MCBE has operated with a deficit since the 1994 - 1995 school year. By the 1997 - 1998 school year, MCBE had reduced its deficit by 54%.

6. In December, 1998, MCBE was allocated $1,000,000.00 by the School Building Authority for the construction of an eight classroom addition to Peterstown Elementary School, provided that Monroe County voters approve a $2,100,000.00 bond issue. This was approved by voters on February 27, 1999, and MCBE is in the process of planning the addition to Peterstown Elementary School.

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 § 4.19 (1996); 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. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant alleges a violation of W. Va. Code § 18-5-18a, regarding class size, because she has 24 students in her kindergarten class. She requests as relief that MCBE either hire an additional kindergarten teacher and reallocate the students to create an additional kindergarten classroom, or hire an additional kindergarten teacher to work with the four existing kindergarten teachers as a team teacher. (See footnote 1)

W. Va. Code § 18-5-18a provides that “[c]ounty boards of education. . . . shall not have more than twenty pupils for each kindergarten teacher per session, unless the state superintendent has

excepted a specific classroom upon application therefor by a countyboard." (See footnote 2) This section further provides that "in no event shall the superintendent except classrooms having more than three pupils above the pupil teacher ratio as set forth in this section."

MCBE's argument is twofold. First, MCBE argues that class size, as used in W. Va. Code § 18-5-18a, refers to class size "for the purpose of instruction," and that the fact that the two MMI students in Grievant's class receive some instruction from a special needs teacher means that Grievant "instructs," and therefore has, only 22 students in her class. Second, MCBE argues that it cannot afford the relief sought by Grievant. These two arguments will be addressed in turn.

MCBE's argument that class size, as used in W. Va. Code § 18-5-18a, refers to class size "for the purpose of instruction," is based upon the following statutory language: "[n]o provision of this section is intended to limit the number of pupils per teacher in a classroom for the purpose of instruction in choral, band or orchestra music." MCBE also points out that the statute, with respect to grades four through six, excepts instruction in physical education from class size limits.

To accept this reasoning would be to torture the statute. It is plain that the phrase "for the purpose of instruction" applies only to classes in choral, band or orchestra music, and not to kindergarten classes, and, even with respect to classes in choral, band or orchestra music, does not carry the meaning urged by MCBE. This is because the phrase"for the purpose of instruction" clearly refers to the words that follow it: "in choral, band or orchestra music," and not to the words that precede it: "the number of pupils per teacher in a classroom." Furthermore, the statute's discussion of kindergarten class size, set forth above, contains no such language. It is also noted that, in music instruction, bigger can be better, because a larger chorus, band, or orchestra, is as desirable or more desirable than a smaller one. That is not the case with student/teacher ratios in a regular classroom setting, and the plain intent of the statute was to limit the number of students in such a setting. (See footnote 3) MCBE's contention that because the statute, with respect to grades four through six, excepts instruction in physical education from class size limits, kindergarten classes should similarly be exempt, is similarly without merit. Accordingly, Grievant's class size is not reduced to 22 students by having the two MMI students in her classroom, (See footnote 4) and Grievant's having 24 students in her classroom violates W. Va. Code § 18-5-18a.

MCBE's second argument, that it cannot afford the relief sought by Grievant, must also be rejected. Although MCBE has operated with a deficit since the 1994 - 1995 school year, it has cited

no authority for the proposition that its deficit excuses it from the requirements of W. Va. Code § 18-5-18a, and the statute does not contain exceptions forfiscal hardship.

Accordingly, requiring Grievant to teach more than 23 students in her kindergarten class remains a violation of W. Va. Code § 18-5-18a. All overages greater than 23 students must cease. Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996).

It is fortunate that, by the 1997 - 1998 school year, MCBE had reduced its deficit by 54%, and that in December, 1998, MCBE was allocated $1,000,000.00 by the School Building Authority, which was supplemented by a $2,100,000.00 bond issue approved by Monroe County voters on February 27, 1999, for the construction of an eight classroom addition to Peterstown Elementary School. MCBE's contention, that reorganizing the kindergarten classes at Peterstown Elementary School at this time would be disruptive, has merit. Therefore, MCBE will be ordered to cease its violation of W. Va. Code § 18-5-18a at the end of the current school year.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, 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 § 4.19 (1996); 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. Any kindergarten teacher who has more than twenty students enrolled in her class must be paid additional compensation based upon the teacher's average daily salary divided by twenty for every day times the number of additional pupils enrolled. W. Va. Code § 18-5-18a; Morgan v. Putnam County Bd. of Educ., Docket No. 99-40-057 (Mar. 29, 1999).

3. Requiring Grievant to teach more than 23 students in her kindergarten class is a violation of W. Va. Code § 18-5-18a. All overages greater than 23 must cease. Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996).

4. Grievant proved, by a preponderance of the evidence, that Respondent violated W. Va. Code § 18-5-18a by placing 24 students in her kindergarten class.

Accordingly this Grievance is hereby **GRANTED**. Respondent Monroe County Board of Education is **ORDERED** to cease its placement of more than 23 students in Grievant's kindergarten classroom, effective at the end of the current school year.

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

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 26, 1999

. .

Footnote: 1

Grievant does not contest the monetary compensation she receives for her overage, or the way this pay is calculated. See Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996); Morgan v. Putnam County Bd. of Educ., Docket No. 99-40-057 (Mar. 29, 1999).

Footnote: 2 *Although neither party presented evidence that such an exception has been granted by the Superintendent, it will be assumed for the purposes of this decision that an exception has been granted.*

Footnote: 3 *MCBE's argument on this point is also undermined by its statement, made twice in its proposed findings of fact and conclusions of law, that "it is clearly mandated that when regular instruction (other than music) is going on with kindergarten students, there shall be no more than 23 students in the classroom."*

Footnote: 4 *MCBE's proposed findings of fact and conclusions of law state that the Individual Education Plans for these two students "stipulate that the students be included with the regular class for the purpose of socialization[,]" supporting the conclusion that they should be counted as students in Grievant's classroom.*