SANDEE KIGER,

Grievant,

v. Docket No. 05-30-062

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

SanDee Kiger ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a Sign Language Interpreter, filed a level one grievance on November 1, 2004, in which she alleged violation of W. Va. Code §§ 18A-4-5b and 18-29-2, and county policy when she was not paid the full county supplement from 1999-2004, and was compensated at a lower pay grade than another Interpreter. For relief, Grievant requested back pay with interest and benefits. Grievant's immediate supervisor lacked authority to grant the relief at level one. Following an evidentiary hearing, the grievance was denied at level two, and MCBE waived consideration at level three. Appeal was made to level four on February 24, 2005. A hearing to supplement the level two record was conducted on April 21, 2005. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq. and Harry M. Rubenstein, Esq. of Kay Casto and Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on May 18, 2005.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level two and level four.

Findings of Fact

1. Grievant has been employed by MCBE as a Sign Language Interpreter since 1999. From 1999 through 2004, Grievant was employed on a half-time basis. Beginning in 2004-2005, she has been a full-time employee.

2. During the time in question, from 1999-2004, Grievant was compensated at pay grade "E". Grievant also received a statutory supplement for her Associates degree and additional college hours earned, and a county supplement of $1500 per annum for her Level III

certification awarded by the National Association for the Deaf.

3. MCBE county policy grants Sign Language Interpreters an annual supplement of $1000 for each level of certification held by the employee. Because Grievant worked half-time, the supplement was pro-rated. The statutory supplement was awarded in full.

4. During the same period of time, MCBE compensated a male Interpreter at pay grade "F". This individual is no longer employed by MCBE.

5. Grievant discovered in mid-August 2004 that she may not have been paid the full supplement for her Level III certification. After making two informal requests as to whether her supplement was correct, Grievant was notified in the first or second week of October that her compensation was correct. Neither party was sure of the exact date.

6. Grievant filed at level one grievance on November 1, 2004.

7. At level two, MCBE raised the issue of whether the grievance was timely filed.

Discussion

Initially, MCBE contends that Grievant's claim that she was not properly compensated is untimely. The burden of proof is on the respondent asserting that agrievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. West Virginia Code § 18-29-4(a) provides, in pertinent part:

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is

unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), addressed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievant's undisputed testimony was that she began making inquiries in early August to confirm with the Human Resources department whether she was receiving thefull amount of the supplement, but that she did not receive a response until sometime in early to mid-October. The evidence supports Grievant's claim that she falls within the discovery exception to the statutory time lines. Since neither party could recall the date in question, it is determined that MCBE failed to prove that the grievance was not timely filed.

Addressing the merits of the case, 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 § 4.21 (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 Resources, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that MCBE violated W. Va. Code § 18A-4-5b, when it did not pay her the full supplement awarded to other Interpreters. That provision states in pertinent part:

The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.

These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county . . . .

In Robertson, et al. v. Mineral County Board of Education, Docket No. 97-28-547 (Apr.30, 1998), the Grievance Board held that statutory salary supplements for educational levels of achievement could be pro-rated for half-time employees. However, Grievant relies upon the Kanawha County Circuit Court order reversing Robertson, Civil Action No. 98-AA-74 (Feb. 7, 2001), which held that statutory supplements were not based on hours worked, but on the educational level attained, and were not to be limited.

As a general rule, this Grievance Board adheres to the doctrine of stare decisis in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp.,157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20- 085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94- DOH-341 (Apr. 27, 1995). A decision from a circuit court reversing a Grievance Board Decision, while instructive, does not mandate that the circuit court's reasoning be followed by the Grievance Board in future cases dealing with the same issue. Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-176 (Aug. 29, 2002). A review of Robertson, convinces the undersigned that the decision was a reasonable interpretation of the applicable statute which addresses the salary of full-time employees. More importantly, the supplement in question is not mandated by statute, but is awarded by MCBE, and is not an element of Grievant's continuing contract of employment. While MCBE has incorporated the supplement into its pay scale, neither party submitted any policy or regulation mandating its application. Therefore, MCBE did not violate the uniformity provision of Code § 18A-4-5b, when it pro-rated the county supplement.

Discrimination is defined by 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." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

MCBE concedes that a male Interpreter was compensated at one pay grade higher than Grievant, but asserts that it was due to simple error, rather than any ill intent. W. Va.Code § 18A-4-8a provides that Braille or Sign Language Specialist is to be compensated at pay grade E. MCBE made a serious error in compensating another Interpreter at a higher pay grade than that to which he was entitled, but has not engaged in discrimination under this set of facts. An error made in regard to one employee does not entitle another employee to the benefits of the same mistake. Woolridge v. McDowell County Bd. of Educ., Docket No. 04-33-004 (July 9, 2004); Walker v. Dep't of Transp./Div. of Highways, Docket No. 01-DOH-450 (Sept. 19, 2001). Finally, the Grievance Board will not grant relief that would require a public employer to take an action that is contrary to law. Awarding such relief would constitute grounds for reversal under W. Va. Code § 29-6A-7. Granting Grievant the higher compensation erroneously awarded to another individual would be in violation of the statutory pay scale for service personnel.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusion of Law

1. 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 § 4.21 (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 Resources, Docket No. 92-HHR-486 (May 17, 1993). 2. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines.

3. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

___4. An exception to the statutory time lines is the discovery rule, which provides that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990),

5. MCBE failed to prove that the grievance was not timely filed after Grievant learned of the facts giving rise to the grievance.

6. The decision to pro-rate a county supplement for an employee who worked half-time does not violate the uniformity provisions of W. Va. Code § 18A-4-5b.

7. Discrimination is defined by 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." 8. An employee attempting to prove discrimination under the education statute need only establish that he/she was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant. Bd. of Educ. v. White, 605 S.E.2d 814 (W. Va. 2004).

9. MCBE has not engaged in discrimination under the facts of this case.

10. An error made in regard to one employee does not entitle another employee to the

benefits of the same mistake. Woolridge v. McDowell County Bd. of Educ., Docket No. 04-33-004 (July 9, 2004); Walker v. Dep't of Transp./Div. of Highways, Docket No. 01- DOH-450 (Sept. 19, 2001).

11. The Grievance Board will not grant relief that would require a public employer to take an action that is contrary to law. Awarding such relief would constitute grounds for reversal under W. Va. Code § 29-6A-7.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 Judgesis 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.

DATE: MAY 31, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE