NANCY McCALLISTER,

Grievant,

v. Docket No. 05-22-124

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Nancy McCallister, is employed by the Lincoln County Board of Education ("LCBOE") as a bus operator. She filed this grievance on September 20, 2004, asserting:

> **Grievant is currently a regular bus operator. She also serves as [a] student assistant at West Hamlin Elementary School under an extracurricular assignment contract. Grievant alleges that the Respondent reduced her compensation for the 2004-2005 school year from the previous hourly rate of 1/7 of her daily rate to an hourly rate on $7.00. Grievant contends that the board of education violated West Virginia Code §§ 18A-4-8 (m), 18A-4-16, and 18A-4-8b(c).**
>
> **Relief sought: Grievant seeks a return to her previous hourly rate of pay (1/7 of her daily rate) and back pay in the form of compensation for lost wages amounting to the difference between her previous rate of pay and the new rate ($7.00 per hour) with interest.**

The grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on April 14, 2005. A Level IV hearing was held on May 5, 2005. This case became mature for decision on May 16, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts she is entitled to be paid as a bus operator while she works as an aide because this is the compensation she received the prior school year. Grievant alleges LCBOE violated W. Va. Code §§ 18A-4-8 (m), 18A-4-16, and 18A-4-8b(c) when Respondent changed her compensation.

Respondent asserts there were no violations of W. Va. Code §§ 18A-4-8 (m), 18A- 4-16, and 18A-4-8b(c). Respondent contends that prior to the change there was non- uniformity of compensation because bus operators, like Grievant, were paid as bus operators when they worked in an extracurricular assignment as an aide. This error in compensation resulted in bus operators being paid higher wages while they performed the work of aides while other aides were paid at a lower rate. The adjustment in compensation was necessary to provide uniform levels of compensation for the performance of like duties by similarly situated employees as required by W. Va. Code § 18A-4-5b. (See footnote 2)

An issue not addressed by the parties is that Grievant was paid at 1/7 of her daily rate for this extracurricular assignment. Pursuant to W. Va. Code § 18A-4-8a(9) "the minimum hourly rate for extra-duty assignments . . . shall be no less than one seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment. . . ." (Emphasis added). W. Va. Code § 18A-4-8b(f) states extra-duty assignments are to be assigned on a rotating basis and defined extra-duty assignments as "irregular jobs that occur periodically or occasionally. . . ." It may well be that LCBOE routinely pays its bus operators the extra-duty rate for extracurricular assignments, but this point was not explained to the undersigned Administrative Law Judge. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is regularly employed as a bus operator, and she is paid full-time wages for this position.

2. For several years, Grievant has applied for and received an extracurricular position as an aide during the period between her morning and afternoon runs. (See footnote 3) **Several other bus operators also work as aides pursuant to extracurricular assignments.**

3. Up until the 2004-2005 school year, these bus operators were paid bus operator wages while they worked in extracurricular aide positions. They received 1/7 of their daily rate; what they would have received if they had been performing an extra-duty bus operator assignment.

4. Other employees, who were not bus operators, but who also worked as aides received

only $7.00 an hour.

5. LCBOE noted there was a problem which resulted in employees performing the same duties for different wages, and while Grievant was performing the work of an aide, she was receiving wages as a bus operator. **(See footnote 4)**

6. LCBOE attempted to correct this error during the 2003-2004 school year, but decided to wait when informed these changes could not be made during the school year. 7. On March 5, 2004, LCBOE notified all bus operators, including Grievant, who were being paid at the bus operator rate for aide duties that:

> **[y]our extracurricular assignment contract is being recommended for termination for the limited purpose of adjusting the level of compensation for the performance of such extracurricular assignment contract duties. This adjustment is necessary to provide uniform levels of compensation for the performance of like duties by similarly situated employees. If the termination of your contract is approved, such extracurricular assignment shall be posted and shall identify the adjusted level of compensation. Your application for the extracurricular assignment shall be considered your agreement to perform the extracurricular duties identified in such posting at the level of compensation indicated. If you elect to apply for the extracurricular assignment, a new written agreement shall be prepared in accordance with the requirements of W. Va. Code §18A-4-16.**

Resp. Exh. at Level II.

8. As with all affected bus operators, Grievant was offered an opportunity for a hearing on this issue. Grievant did not request a hearing.

9. In March 2004, LCBOE acted to terminate Grievant's aide contract at the end of the 2003 - 2004 school year. **(See footnote 5)**

10. On September 15, 2004, LCBOE posted the extracurricular aide positions, and noted the pay was now $7.00 an hour.

11. On September 16, 2004, Grievant applied for one of the posted extracurricular aide positions. This position was not the same position she had the prior year, and the number of hours worked was different. On September 27, 2004, LCBOE approved Grievant's hiring into an aide position for the 2004 - 2005 school year. 12. Four days after applying for the position, on September 20, 2004, Grievant filed this grievance.

13. On November 1, 2004, Grievant signed an extracurricular contract stating she agreed to the terms as states in the contract. The compensation was "$7.00 per hour x 3 hours per

day." Resp. Exh. at Level II.

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 § 4.21 (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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Uniformity

One of the issues raised by the parties is whether Grievant should be paid at the bus operator rate when she performs the duties of an aide. Respondent asserts this payment is a violation of W. Va. Code § 18A-4-5b. This Code Section discusses the requirement for uniformity of compensation and allows boards of education to establish salary schedules provided:

> **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 personsregularly employed and performing like assignments and duties within the county:**

(Emphasis added).

As clearly stated by the March 5, 2003 letter, LCBOE changed Grievant's compensation to conform to the directions of this Code Section. Prior to this change, Grievant, while "performing like assignments and duties" as other aides, was paid at a higher rate, as a bus operator. To pay Grievant at this rate while performing aide duties was incorrect and a violation of W. Va. Code § 18A-4-5b.

Mistakes by employers do not usually entitle a grievant to relief. Crosston v. W. Va. Dep't

of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997). See Goins v. Raleigh County Bd. of Educ., Docket No. 97-51-116 (Oct. 17, 1997); Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995). This Grievance Board has held that when an employee received a supplement to which he was not entitled, the board of education could cease to pay this additional income upon discovery of this error. Kisamore v. Monongalia County Bd. of Educ., Docket No. 03-30-059 (June 25, 2003). Further, in Crosston, the Grievance Board did not find discrimination when an employer refused to grant a benefit to an employee that was granted to another in error. Crosston, supra. See White v. Dep't of Transp., Docket No. 00-DOH-313D (Jan. 17, 2001).

As stated previously by this Grievance Board, acts "in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95-HHR-297. See Parker v. Summers County Bd. of Educ., Docket No. 185 W. Va. 313, 406 S.E.2d 744 (1991). Just because an error was made before, it does not constitute a violation to correct it. Parry v. Div. of Corrections, Docket No. 00-CORR-102 (June 11, 2001). A board ofeducation has the authority to correct monetary errors that result in inequities and overpayment. Hunting v. Lincoln County Bd. of Educ., Docket No. 99-22-208 (Sept. 30, 1999). See Belcher v. Lincoln County Bd. of Educ., Docket No. 95-29-024 (July 26, 1995). All that happened here is that Grievant is no longer receiving inappropriate compensation for the work she performs as an aide.

II. Statutory violations

Grievant has asserted a violation of W. Va. Code § 18A-4-8(m), which states:

> **No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of recompense, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.**

(Emphasis added).

Grievant also asserts that W. Va. Code § 18A-4-16, which discusses extracurricular assignments, was violated. This Code Section states in pertinent part:

> **(1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.**
>
> **. . .**
>
> **(6) An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retainingthe assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven, article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b of this article.**

(Emphasis added).

Grievant also contends that W. Va. Code § 18A-4-8b(c), which discusses seniority rights for school service personnel was violated. This Code Section states, "[t]he county board may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter."

Grievant has not demonstrated violations of these Code Sections. Grievant has not been reclassified. Grievant's salary has been reduced because she is no longer incorrectly receiving bus operator wages while she worked as an aide. Grievant is not entitled to be paid as a bus operator when she was not performing the duties of that position.

Grievant cites to Allif v. Jefferson County Board of Education, Docket No. 03-19-319 (May 19, 2004), for support of her assertions that there was a violation of W. Va. Code § 18A-4-16. In Aliff, the contracts of two bus operators were terminated, and they were then issued the exact same contract at reduced wages. The administrative law judge in Aliff found, "'Pursuant to the provisions of W. Va. Code § 18A-4-8(m), a board of education is prohibited from

terminating an employee's contract and reissuing the contract with altered compensation terms, if the employee is serving in exactly the same position as the previous school year.' See Crock v. Harrison County Bd. of Educ., 211 W. Va. 40, 560 S.E.2d 515 (2002)." (Emphasis added). This case is easily distinguished from Aliff. In Aliff, the employees were performing the exact same bus operator duties from the year before for less compensation. While Grievant was again hired in an aide position, it was not the same aide position she held the year before, and the number of hours were not the same. Accordingly, Grievant did not have the right to "retain" the position, as it was not a continuation from the prior year.

Here, Grievant was not working as a bus operator, but was working as an aide. Her prior payment as a bus operator for these duties was a windfall to which she was not entitled. All LCBOE has done here is correct an error and made the compensation uniform.

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, 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Mistakes by employers do not usually entitle a grievant to relief. Crosston v. W. Va. Dep't of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997). See Goins v. RaleighCounty Bd. of Educ., Docket No. 97-51-116 (Oct. 17, 1997); Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995).

3. When an employee has received compensation to which he was not entitled, a board of education can cease to pay this additional income upon discovery of this error. Kisamore v. Monongalia County Bd. of Educ., Docket No. 03-30-059 (June 25, 2003); Crosston, supra. See White v. Dep't of Transp., Docket No. 00-DOH-313D (Jan. 17, 2001).

4. Acts "in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts." Guthrie v. Dep't of Health and Human Serv., Docket No. 95-HHR-297. See Parker v. Summers County Bd. of Educ., Docket No. 185 W. Va. 313, 406 S.E.2d 744 (1991); Parry v. Div. of Corrections, Docket No. 00-CORR-102 (June 11, 2001).

5. A board of education has the authority to correct monetary errors that result in inequities and overpayment. Hunting v. Lincoln County Bd. of Educ., Docket No. 99-22- 208 (Sept. 30, 1999). See Belcher v. Lincoln County Bd. of Educ., Docket No. 95-29-024 (July 26, 1995).

6. Grievant did not meet her burden of proof and demonstrate LCBOE violated any statute, policy, rule, or regulation.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Lincoln 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 partyto 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: June 29, 2005

Footnote: 1

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by William Grizzell, LCBOE Superintendent.

Footnote: 2

The issue of late filing was not addressed at Level IV and is considered abandoned.

Footnote: 3

The parties did not address the issue that Grievant apparently received compensation for both her bus operator and aide duties while she performed her extracurricular assignment.

Footnote: 4

The exact amount of difference was not specified by the parties.

Footnote: 5

Although not clearly stated by the parties it appears that all extracurricular assignment are routinely terminated at the end of each school year.