# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DAVID PERRY et al.**

**Grievants,**

**v.** **Docket No. 07-10-070**

**FAYETTE COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Grievants[1] in these consolidated grievances, principals and vice-principals employed by Respondent Fayette County Board of Education (referred to in this Decision as "FCBOE," "Respondent," or "School Board"), challenge the School Board's method of computing their salaries. Grievants' salaries are comprised of both state- and county-funded components; the salary components are computed using formulas mandated by state law or county school board policy. Grievants contend that salary computation data supplied by the School Board do not track the mandated salary components and formulas, and therefore do not demonstrate that Grievants have been paid what the law entitles them to.

---

[1] The Grievants, in addition to Mr. Perry, are the following Fayette County principals and vice-principals: Jeanie Ayers, Bruce Williams, Anna Kincaid-Cline, Diane Blume, Ed McCall, Barry Crist, Sam Snead, Timothy Payton, David Keffer, Scott Vargo, Manuel Domingues, Steve Rhodes, Margaret Pennington, Andrew Tokarz, Fred McLain, Jr., David Cavalier, DeAnn Bennett, Joel Harris, Lee Jones, Thomas Niswander, Randall Rhodes, Victor Whitt, Ted Dixon, Gary Hough, Albert Mortine, Mary Ann Freeman, Christopher Pinnick, Timothy Mullens, Cheryl Mills, and Charles Smallwood.

Maintaining that they have been underpaid, the Grievants seek back pay and any associated fringe benefits. The School Board concedes that its salary data do not clearly identify all the mandated salary components or their method of calculation but maintains that the Grievants have nonetheless been paid what state law and county policy entitle them to — and in some cases, more than what they are entitled to.

## Procedural History

*Docket No. 07-10-070*

On November 6, 2006, Grievant Perry filed his initial grievance, stating:

> The principal salary calculation in Fayette County makes no sense. Only [5%] of state mandated [10 to 12.5%] principals' supplement is apparent. State Code dictates that principal's supplement must be in addition to any county supplement. WV § 18A-4-3 & Fayette County Board of Education Principals' Administrative Supplement.

Grievant Perry sought "[p]ayment of full state principals supplement and all back pay and benefits due."

Grievant Perry filed directly at Level II, to which the Respondent did not object, and a Level II hearing was convened on December 15, 2006. The additional Grievants listed above were joined at that time, and the parties agreed to continue the Level II hearing to January 2, 2007, which is when it took place. The decision denying this first grievance was issued on February 20, 2007, and Grievants' appeal to this Board at Level Four[2] was filed

---

[2] In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former

on March 1, 2007. Former Administrative Law Judge Campbell's Order entered April 27, 2007, allowed the parties until May 29, 2007, to file proposed findings of facts and conclusions of law, and No. 07-10-070 became mature for decision on May 30, 2007.

*Docket No. 07-10-133*

On January 4, 2007, two days after the hearing in No. 07-10-070, Grievant Perry and the other grievants named above filed a second grievance, stating:

> Salaries for employment beyond the minimum employment term shall be at the same daily rate as the salaries for the minimum employment term. & Fayette County Board of Education Principals' Administrative Supplement policy dictates that elementary, exceptional centers, middle school, and assistant principals shall have 210 days contracts and high school principals shall have a 220 day contract and payment for those days beyond the employment term are included in the supplement. County policy is, again, contrary to what state code dictates.

Grievants sought "[p]ayment in full plus interest for employment days beyond the minimum term at each individual principal and assistant principal grievants daily rate and all related benefits."[3]

Grievants filed directly at Level II, to which the Respondent did not object, and a Level II hearing was held on March 12, 2007. The decision denying the second grievance was issued on April 19, 2007, and Grievants' appeal to this Board at Level Four was filed on April 25, 2007. The Grievants requested a decision on the record developed below, to which the Respondent agreed. Former Chief A.L.J. Marteney's letter dated April 27, 2007, allowed the parties until May 11, 2007, to file proposed findings of facts and conclusions

---

statutes and rules, which continue to control the proceedings in this case.

[3] The second grievance apparently resulted from information or insight the Grievants obtained from litigating the first grievance.

of law. The complete record was not received by this Board until May 16, 2007. As a result, No. 07-10-133 became mature for decision on that date.

*Consolidation*

On August 31, 2007, Nos. 07-10-070 and 07-10-133 were transferred to the undersigned for administrative reasons. On September 25, 2007, the undersigned convened a telephone conference in which both parties' representatives participated: Ben Barkey for the Grievants (Grievant Perry present with Mr. Barkey), and Erwin L. Conrad, Esq., for the Respondent. During the telephone conference, the undersigned suggested that the two grievances shared the bulk of their facts in common and sought the same relief, differing primarily in the legal theory on which each was based. The parties agreed to the consolidation of the cases for decision at Level Four, and they were consolidated under No. 07-10-070 by the undersigned's order entered October 29, 2007.

**Summary of Decision**

Over the course of some twenty years, Respondent has used a component of the Grievants' salaries called the "county administrative supplement" as a repository for two distinct salary elements whose amount changed over the years, so that the administrative supplement became a kind of black box. All the Grievants could see was the total dollar amount it contained. The reports the Board gave them did not disclose how the contents of the black box got into it, or specifically what its contents were.

Grievants succeeded in proving that Respondent did not disclose to them the dollar amounts of the salary components and formulas mandated by state law and county policy, particularly as those mandates changed over the years. They also proved that it has

therefore been difficult or impossible for them — using the documentation supplied by the FCBOE — to determine whether they have been paid what the law entitles them to.

But proving that the School Board or its administrative staff failed to use transparent salary calculations, and even raising substantial doubt whether the Grievants have been paid according to law and county policy — both of which the Grievants have done — is not sufficient to entitle them to relief. To be entitled to relief, the Grievants must also prove that they were in fact short-changed as a result of Respondent's errors and omissions, and this they have failed to do. Through witnesses called by the Grievants but associated with the School Board, FCBOE offered plausible and credible explanations for the misleading format of its salary computation documents, as well as unchallenged evidence that Grievants suffered no loss of pay and, in some cases, were paid more than what the law and policy entitle them to.

Although the Grievants have demonstrated that Respondent's breakdown of the components of Grievants' salaries is less than satisfactory,[4] they have not met their burden of proving that Respondent's errors and omissions caused them to suffer any loss. The grievances must therefore be denied.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact:

---

[4] These grievances also brought to light the School Board's use of incorrect daily pay rates to calculate compensation for days worked beyond Grievants' contractual terms. In its submissions to this Board, FCBOE acknowledged this error and undertook to correct it going forward. Grievants were not underpaid despite this error, however, and it is therefore not material to these grievances.

## Findings of Fact

1. In the documents it supplies to the Grievants the School Board aggregates, together with other items, 7½% of the total increment increase percentage mandated by W. Va. Code § 18A-4-3 (currently 12½%) in a category which it calls the "county administrative supplement," rather than identifying that 7½% either separately, or as part of the total statutorily-mandated percentage.

2. The documents supplied to the Grievants also aggregate in the "county administrative supplement," together with other items, "[s]alaries for employment beyond the minimum employment term," as identified in W. Va. Code § 18A-4-3, rather than separately identifying compensation for such employment.

3. When the Fayette County Administrative Principals Salary Policy (now known as Policy B-10, Joint Exhibit 2 in the Record) took effect in 1989, the Principals Administrative Supplement ["PAS"] which it established included the then-maximum state-mandated increment increase of 7½%. The School Board thereafter kept that original 7½% in the PAS; in the documentation it supplies to the Grievants it lists separately only percentage increases which took effect *after* 1989. Level Three testimony of Ronald Wood, retired Fayette County Schools Treasurer.

4. As a result, the salary-related documentation supplied by the FCBOE to the Grievants does not on its face show whether their paychecks contain the increment increase, or the "compensation for employment beyond the minimum employment term" identified in W. Va. Code § 18A-4-3.

5. In addition, instead of using the number of teachers supervised to determine each principal or vice-principal's increment increase percentage, as W. Va. Code § 18A-4-3 requires, the School Board instead uses pupil enrollment numbers.

6. Although W. Va. Code § 18A-4-3 calls for the increment increase to be computed using only "basic" salaries, the increment increase calculations for all of the Grievants are based instead on their higher, "advanced" salaries.[5] Testimony of witnesses Hughart and Fridley.

7. All of the Grievants are being paid at the top of the increment increase percentage range, regardless of the number of teachers each supervises. Testimony of witnesses Wood, Hughart, and Fridley.

8. Although Respondent's method of calculating the Grievants' salaries created confusion, the Grievants have not lost pay or benefits as a result of the actions and inactions of the School Board which they alleged in their grievances.

## Discussion

### *Burden of Proof*

Because this grievance does not involve a disciplinary matter, the Grievants have the burden of proving their case by a preponderance of the evidence. Recognized in *State v. Miller*; 194 W.Va. 3, 459 S.E.2d 114 (1995) (Section II of opinion). Procedural Rules of the

---

[5] "[S]alaries shall be defined as: (a) 'Basic salaries' which shall mean the salaries paid to teachers with zero years of experience and in accordance with the classification of certification and of training of said teachers; and (b) 'advanced salaries' which shall mean the basic salary plus an experience increment based on the allowable years of experience of the respective teachers in accordance with the schedule established herein for the applicable classification of certification and of training of said teachers." W. Va. Code § 18A-4-1.

W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2004); *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).

***What the Grievants Claim***

In these cases the Grievants claim that the School Board has failed to comply with the statute governing the computation of principals' and vice-principals' pay, W. Va. Code § 18A-4-3, which is captioned "State minimum annual salary increments for principals and assistant principals."[6] Their first grievance claims that the School Board has failed to pay

---

[6] As pertinent to this case, the statute provides [key terms bolded and italicized]:

"In addition to any salary increments for principals and assistant principals, in effect on [January 1, 2002] and paid from local funds, and in addition to the county schedule in effect for teachers, the county board shall pay each principal, a principal's salary increment and each assistant principal an assistant principal's salary increment as prescribed by this section from state funds appropriated for the salary increments.

* * *

The salary increment in this section for each principal shall be determined by ***multiplying the basic salary for teachers*** in accordance with the classification of certification and of training of the principal as prescribed in this article, by the appropriate percentage rate prescribed in this section according to the number of teachers supervised.

* * *

STATE MINIMUM SALARY INCREMENT RATES FOR PRINCIPALS
EFFECTIVE ON AND AFTER JULY 1, 2002

No. of Teachers Supervised Rates

***1-7 10.0%***

them the minimum state-appropriated salary increment mandated by § 18A-4-3. *See* the bolded and italicized percentages listed in the statute quoted in the footnote. Their second grievance claims that the School Board has also failed to pay them for the days they worked beyond their minimum employment terms, or that it has failed to pay them for those days at the correct daily rates, as required by the same statutory section. *See* the bolded, italicized text in the statute quoted in the footnote. These claims constitute a grievance under W. Va. Code § 18-29-2(a) because they allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment . . . ." *Id*.

***The School Board's Salary Computation Method***

Both claims are predicated on what can only be described, based on the record in this case, as the idiosyncratic method the School Board has used to calculate the Grievants' salaries. That method, explained in the School Board employees' Level Three testimony

---

***8-14 10.5%***

***15-24 11.0%***

***25-38 11.5%***

***39-57 12.0%***

***58 and up 12.5%***

The salary increment in this section for each assistant principal shall be determined in the same manner as that for principals, utilizing the number of teachers supervised by the principal under whose direction the assistant principal works, except that the percentage rate shall be fifty percent of the rate prescribed for the principal.

***Salaries for employment beyond the minimum employment term shall be at the same daily rate as the salaries for the minimum employment terms.***" [Emphasis added.]

strictly on the basis of how it got to be that way, can be understood through a chart the Grievants prepared and submitted to this Board with their Proposed Findings of Fact and Conclusions of Law. The chart is reproduced below:

**Appendix A to Grievant's Proposed Findings of Fact & Conclusions of Law:**[7]

**Grievants' Proposed Calculation 2006-2007**

| | | | |
|---|---|---|---|
| MA +45 32 years experience | | | |
| Current Annual Teacher Salary | | | $49,051.00 |
| Increment Increase for Principals | | | |
| Monthly Salary | State Min. 18A-4-3 | Empl. Term | |
| **$4,435.2 (x)** | **12.5% (x)** | **10.5 =** | **5,821.20** |
| FY 2006 Admin. Pay Supp. | | | 2,000.00 |
| Admin Supplement (county) | | | 11,500.00 |
| Days Beyond Min. Empl. Term: | | | |
| Number of Days | Daily rate | | |
| **10 (x)** | **308.95 =** | | **3,089.50** |
| Total Annual Salary | | | $71,461.70 |

**FCBOE Calculation 2006-2007**

| | | | |
|---|---|---|---|
| MA+45 32 years experience | | | |
| Current Annual Teacher Salary | | | $49,051.00 |
| Increment Increase for Principals | | | |
| Monthly Salary | State Min. 18A-4-3 | Empl. Term | |
| **$4,435.2 (x)** | **5.5% (x)** | **10.5 =** | **2,328.48** |
| FY 2006 Admin. Pay Supp. | | | 2,000.00 |
| Admin Supplement (county) | | | 11,500.00 |
| Days Beyond Min. Empl. Term: | | | |
| **(included in county supp.)** | | | _____ |
| Total Annual Salary | | | $64,879.48 |

The bolded items in the left-hand box above correspond to the Grievants' claims in their two grievances. The first bolded line, concluding with the $5,821.20 figure, shows

[7] The Grievants' chart has been modified as it is presented in this Decision to correct a typographical error in the original. As presented here, the chart shows that the Board of Education uses 5% (not 5.5%) to calculate the principals' increment increase. In addition, the most pertinent language has been bolded.

what the Grievants claim the 2006-2007[8] increment increase should have been, and its method of calculation.[9] The bolded "Number of Days / Daily Rate" calculation shows what they claim the "extra days worked"[10] component of the salary should have been, as well as its method of calculation. The claims correspond to the first and second grievances, respectively.

The School Board's evidence at hearing was that the two items just described are aggregated with other items in the salary calculations and do not appear separately for that reason. The FCBOE's evidence was that the following two items, rather than being separately identified in the documents it supplies to the Grievants, are lumped in with the county administrative supplement (the $11,500 identified on the Grievant's chart as "Admin Supplement (county)"):

— first, a portion of the increment increase percentage mandated by § 18A-4-3; and

— second, the pay for "extra days worked."

As if that were not confusing enough, the evidence at hearing was that, instead of using the number of teachers supervised to determine each principal or vice-principal's increment increase percentage, as § 18A-4-3 requires, the School Board used pupil enrollment numbers.

The evidence presented at the Level 3 hearing established, as the chart above reflects, that it cannot be determined from the face of the salary calculations which the

---

[8] Grievants' claims were not limited to the 2006-2007 school year, but in view of this Decision's legal analysis, it is unnecessary to detail the entire time period covered by the grievances.

[9] Although the Grievants' chart does not specify from which grievant's salary the numbers are derived, they appear to correspond to those of Grievant Perry.

[10] "Salaries for employment beyond the minimum employment term," in the words of § 18A-4-3.

School Board produced whether the amounts claimed in the two grievances ($5,821.20 and $3,089.50, in the example in Grievants' chart) are included in the Grievants' salaries or not. This is evidenced by the documentation which the School Board created for Grievant Perry's salary calculations, reproduced on the following page. ***[The document is actually located on the last page of this document.]***

***What the Grievants Proved***

It is apparently the Grievants' position that the evidence that failure of the School Board's "pay stub" to show the inclusion or exclusion of the salary increment increase, or the pay for days worked beyond the contract term:

— is sufficient to establish that those amounts were not in fact included in Grievants' paychecks; and

— is sufficient to support an order by this Board directing the School Board to pay them the amounts they claim.

But proving that the School Board or its administrators were unable or unwilling to create understandable "pay stubs" is not the same as proving that Grievants were in fact short-changed. By a preponderance of the evidence, the Grievants have proved the former, but not the latter.

The Grievants' case at Level Three did not go beyond proving that the School Board's "pay stubs" lacked sufficient detail to permit the Grievants to determine whether their salaries had been computed according to law and county policy. The School Board, however, elicited testimony from witnesses which explained how the School Board's salary calculation method came about, and which demonstrated that the Grievants had been paid not only what the law and county policy required, but probably more.

The School Board's evidence essentially established that since there was no harm, there was no foul. The School Board's methodology made the salary calculation process murky, but the preponderant evidence in the Level Three record fails to establish that the Grievants lost any of the compensation they had coming to them. Although it is unnecessary for purposes of this Decision to determine whether the Grievants were overpaid, and the undersigned does not decide that issue, the evidence suggests that at least some of them probably were.

By a preponderance of the evidence, the Grievants have failed to prove their grievances, which must therefore be denied.

## Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, the Grievants have the burden of proving their case by a preponderance of the evidence. Recognized in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) (Section II of opinion). Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2004); *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).

2. The Grievants' claims each constitute a grievance under W. Va. Code § 18-29-2(a) because they allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees

work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment . . . ." *Id*.

3. Under W. Va. Code § 18A-4-3, the Respondent is required to include in the Grievants' pay the percentage increment increase and the "[s]alaries for employment beyond the minimum employment term" which that section mandates.

4. The Grievants have not proved by a preponderance of the evidence that the Respondent has failed to pay them either item named in the preceding paragraph.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (2006). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they 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 on the 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.

_____

**Thomas J. Gillooly**
**Administrative Law Judge**

Date: December 12, 2007

Fayette County Board of Education
2006-2007
Principal Salary

R #1

Respondent's Exh No 1
3-12-07 AB

Name: David Perry
Social Security #: [redacted]

Degree: MA45
Years of Experience: 32

Assigned School: CMS
Employment Term: 10.5
Prior Year Enrollment: 746 / 756
2006 / 1999

Current Annual Teacher Salary (less 600 for 20yrs & over): $ 49,051.00

State Increment Increase for Principals (5%):

| 4,435.20 | | 5.00% | | 10.50 | $ | 2,328.48 |
|---|---|---|---|---|---|---|
| Monthly Teacher Salary | x | 5% | x | Employment Term | | |

FY 2006 Administrative Pay Increase: $ 2,000.00

.ministrative Supplement: $ 11,500.00

TOTAL ANNUAL SALARY (before extra days): $ 64,879.48

Daily Rate 308.95

| (5 days possible) | |
|---|---|
| Extra days worked | 5 |
| Daily Rate as Teacher | 248.26 |

TOTAL EXTRA PAY 1,241.28

TOTAL SALARY FOR YEAR, REGULAR AND EXTRA $ 66,120.76

| accounting dept. use only | | | |
|---|---|---|---|
| Total - State increment - 06 raise | | 61,792.28 | |
| above /contract days | 210 | 294.25 | |
| ove * 200 | | 58,849.79 | |
| current ann.teacher sal.above | | 9,798.79 | Other Amount |
| State increment/contract days | | 11.09 | |
| above * 200 | | 2,217.60 | ZPRIN addenda |
| FY 2006 pay increase/contract days | | 9.52 | |
| above * 200 | | 1,904.76 | Z0506 addenda |

12/15/2006