THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MATTHEW MILLER,

Grievant,

v.

DOCKET NO. 07-54-120

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed on January 29, 2007, by Grievant, Matthew Miller, contesting the reduction of his rate of pay in October 2006, by Respondent, Wood County Board of Education. This action was taken by Respondent to comply with a level two grievance decision in a grievance filed by Mr. Miller's co-workers. Mr. Miller was not a party to that grievance. The relief sought by Grievant is "the original terms of his contract be reinstated and all monies reimbursed." (See footnote 1)

Grievant's supervisor responded at level one on January 31, 2007, that he was without authority to grant the relief requested. Grievant proceeded to level two, where a hearing was held on March 5, 2007. A level two decision denying the grievance was issued on April 3, 2007. Grievant bypassed level three, appealing to level four on April 5, 2007. A level four hearing was held before Acting Chief

Administrative Law Judge Janis I. Reynolds on January 25, 2008, in the Grievance Board's Charleston office. Grievant represented himself, and Respondent was represented by Dean A. Furner, Esquire. This grievance became mature for decision on February 8, 2008. It was subsequently transferred to the undersigned for decision on March 13, 2008, upon the announcement of the retirement of Acting Chief Administrative Law Judge Reynolds.

Synopsis

Grievant was hired by the Wood County Board of Education ("WBOE") in December 2005, at a rate of pay which gave him credit on the salary schedule for five years of work experience. Several of Grievant's co-workers filed a grievance alleging this violated the statutory uniformity provisions. That grievance was granted at level two in October 2006, and directed WBOE to remove the five years of experience credit from the Grievant here, Mr. Miller, resulting in a reduction in his rate of pay. Mr. Miller was not a party to that grievance, and the level two decision was not appealed. WBOE apparently implemented this decision in December 2006, or January 2007, retroactive to the date in October 2006,when the level two decision was issued, thus, Grievant was "overpaid" for November, December, and a portion of October 2006, and was required to reimburse WBOE for this overpayment.

Grievant argued he had negotiated his rate of pay, and would not have accepted employment with WBOE had he not been given credit for five years of experience on the salary schedule, and that it was morally wrong to reduce his rate of pay. He also argued WBOE was precluded by the statutory "non-relegation" clause from changing the rate of pay in his contract. Finally, he argued that another WBOE employee had, in the past, been awarded credit for his private sector experience, which is essentially a discrimination argument. Respondent argued it removed the experience credit from Grievant and reduced his salary to correct an error which had resulted in a violation of the statutory uniformity provision. Grievant did not demonstrate that Respondent's compliance with a prior level two grievance decision was improper or contrary to any law, policy or regulation. *Fiorini v. Div. of Highways*, Docket No. 98-DOH-001 (Aug. 17, 1998).

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

Findings of Fact

1. Grievant was employed by the Wood County Board of Education ("WBOE") as an Electrician II, from December 5, 2005, through late May, 2007. Grievant resigned his employment with WBOE in late May 2007.

2. Grievant had worked in the private sector for several years prior to his employment with WBOE. Grievant negotiated his rate of pay with Rex Prescher, Directorof Maintenance for WBOE, prior to accepting employment with WBOE. As a result of this negotiation process, Grievant was credited with five years of experience on the salary schedule for an Electrician II, which is a pay grade G. Grievant would not have agreed to work for WBOE at a lower rate of pay. WBOE approved hiring Grievant at this rate of pay, and he was paid the agreed upon rate for about a year.

3. Several of Grievant's co-workers filed a grievance which alleged the differences between Grievant's rate of pay/experience credit and their own violated the statutory uniformity provisions. Their grievance was granted at level two of the grievance procedure on October 6, 2006. *Rote, et al., v. Wood County Bd. of Educ.*, Grievance Control No. 06-07-01 ("*Rote*"). Mr. Miller was not a party to that grievance.

4. In December 2006, or January 2007, WBOE implemented the level two decision by removing the five years of experience Grievant had been credited with, effective October 2006. This resulted in a reduced rate of pay for Grievant in the amount of $7.75 per day on the salary schedule. Because this action was retroactive, WBOE began attaching Grievant's wages at the rate of $50.00 per pay period to collect the difference between the rate of pay Grievant agreed to and received from October 2006 to December 2006, and the rate he would have received had he not been credited with five years of experience.

5. Harry Buckley retired several years ago from his employment with WBOE. He had been employed by WBOE for a number of years, and had been given experience credit when he was employed by WBOE, for private sector work experience. The record does not reflect Mr. Buckley's classification or pay grade, the date he was first employed by WBOE, or how many years of experience he was credited with.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *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. (See footnote 2) "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). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

The first issue which must be addressed is whether an employee can file his own grievance challenging the implementation of a level two decision issued in another grievance to which he was not a party. As a consequence of a level two decision in a grievance to which the Grievant here was not a party, Grievant's salary was reduced. The Grievance Board has determined that such a collateral attack is allowed through the grievance procedure.

> Although this Grievance Board has historically refused to allow employees to attack a prior grievance decision through the grievance process, *Toney v. Lincoln County Bd. of Educ.*, Docket No. 95-22-118 (June 30, 1995), this practice was recently deemed by the West Virginia Supreme Court ofAppeals to be improper. In [*State ex rel.] Monk v. Knight*, [201 W. Va. 535, 499 S.E.2d 35] (Nov. 24, 1997), the Court held that an employee affected by an alleged misinterpretation or misapplication of the law has no duty to file a grievance until the alleged misinterpretation or misapplication of the law occurs. Thus, as in the instant case, Grievant had no duty to intervene in Mr. Swanger's grievance, because Grievant's job situation was not adversely affected until that decision was implemented.

Fiorini v. Div. of Highways, Docket No. 98-DOH-001 (Aug. 17, 1998). The Grievant in *Fiorini* had experienced a salary reduction as the result of the implementation by his employer of a level four decision, which specifically ordered his salary reduced. Mr. Fiorini had not been a party to that grievance, *Swanger v. West Virginia Division. of Highways*, Docket No. 95-DOH-063 (November 19, 1997). Likewise, in *Robinett v. Office of Miners' Health Safety and Training*, Docket No.02-MHS&T-253 (October 17, 2002), although this issue was not specifically addressed in the decision, the Grievant was allowed to pursue his own grievance contesting the reduction of his salary as a result of the implementation of a level two decision in a grievance to which he had not been a party. (See footnote 3) Accordingly, the Grievant may pursue this grievance challenging the implementation of the level two decision in *Rote*. To the extent that any other Grievance Board decisions have found that a Grievant in a situation like this may not pursue his own grievance, those decisions are expressly overruled.

Grievant did not argue that the holding of the level two decision in *Rote*, that the statutory uniformity provisions were violated when WBOE awarded Grievant credit forprivate sector experience on the salary schedule, was wrong, nor was any new evidence presented on this issue. The issue presented by Grievant was whether it was unlawful to remove the experience credit from Grievant, resulting in a reduction in Grievant's salary. As a general rule, "[a]n employee's salary may be reduced for non-punitive reasons such as business necessity or to comply with a ruling in a grievance to which the employee was not a party. *See Manning v. W. Va. Div. of Rehabilitation Services*, Docket No. 89-RS-282 (Mar. 29, 1990); *Fiorini [supra]*." *Robinett, supra.* However, Grievant pointed to the statutory "non-relegation clause," which precludes a county board of education from acting in a manner which results in a school service employee being "[r]elegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years," without the employee's written consent. *W. Va. Code §* 18A- 4-8(m)(2).

The Supreme Court of Appeals of West Virginia, in a *per curiam* opinion, found that the "non-relegation clause" precluded a county board of education from issuing a new contract for a school service employee, where the only change in the contract was the removal of the experience credit, for experience earned prior to the employee's employment with the county board of education, and which resulted in a salary reduction. *Crock v. Harrison County Bd. of Educ.*, 211 W. Va. 40, 560 S.E.2d 515 (2002). This opinion contains no syllabus points which are applicable here, but it reversed a Grievance Board decision which had found that "the termination of Grievants' contracts, and theirreplacement with modified contracts without prior experience credit, did not violate any law, policy, rule, regulation, or written agreement." *Crock and Washingtion v. Harrison County Bd. of Educ.*, Docket No. 99-17-431 (Feb. 10, 2000); *aff'd* Cir. Ct. of Harrison County, Appeal No. 00-C-154-1 (Oct. 17, 2000).

The facts in *Crock* differ from the facts here. One of the grievants in Crock had received her experience credit many years before, and before the uniformity statute was enacted, and was entitled to the benefits of the "grandfather" clause of that statute. The other grievant had received her experience credit through a Grievance Board decision, in a grievance challenging the experience credit awarded to her co-grievant in *Crock*. While the Court specifically stated, "[b]y altering the

contracts of Appellants in the manner undertaken in this case, the Board clearly violated the provisions of the non-relegation clause," it went on to "observe that, barring the unique circumstances of Mrs. Washington and Mrs. Crock's cases, the uniformity clause contained in *West Virginia Code § 18A-4-5b* might stand as an impediment to allowing these aides to receive the benefit of the experience credits granted to them."

In this case, Grievant's contract was altered because the level two decision in *Rote* found a violation of the uniformity provisions. Thus, Grievant's contract was altered to correct a violation of law. The "non-relegation" clause cannot be read or applied to preclude an employer from correcting a violation of law. Grievant did not demonstrate that Respondent's compliance with a prior level two grievance decision was improper or contrary to any law, policy or regulation. *Fiorini, supra*. Finally, Grievant argued that he should have been allowed to retain his experience credit, because another employee, Harry Buckley, had been given credit by WBOE on the salary schedule for his private sector experience. This amounts to a discrimination claim. *W. Va. Code §* 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., 655 S.E.2d 52, __ W. Va. __ (2007); *Wiley v. Dep't of Health and Human Resources*, Docket No. 04-HHR-149(N) (Jan. 16, 2008); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Mr. Buckley and Grievant were not similarly situated. The record does not reflect whether Mr. Buckley was an Electrician II, Mr. Buckley and Grievant were not employed by WBOE during the

same time period, and there is no evidence that any other employee ever filed a grievance contending that Mr. Buckley's experience credit was in violation of the uniformity provisions. Grievant has not proven his claim of discrimination.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *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. A grievant may utilize the grievance procedure to challenge the implementation of a decision issued in another grievance to which he was not a party, when, as a consequence of that decision, the grievant's salary was reduced. *State ex rel. Monk v. Knight*, 201 W. Va. 535, 499 S.E.2d 35 (1997); *Robinett v. Office of Miners' Health Safety and Training*, Docket No.02-MHS&T-253 (October 17, 2002); *Fiorini v. Div. of Highways*, Docket No. 98-DOH-001 (Aug. 17, 1998).

3. WBOE's compliance with the level two decision issued in *Rote, et al., v. Wood County Board of Education*, Grievance Control No. 06-07-01 (October 6, 2006), was not improper or contrary to any law, policy or regulation. *Fiorini v. Div. of Highways*, Docket No. 98-DOH-001 (Aug. 17, 1998).

4. *W. Va. Code §* 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

5. The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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6. Grievant was not similarly situated to any employee who received credit from WBOE for private sector work experience.

Accordingly, this grievance is **DENIED**.

Any party may appeal this dismissal order to the Circuit Court of Kanawha County, or to the Circuit Court of Wood County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *W. Va. Code §* 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: April 17, 2008

Footnote: 1

At the level four hearing, Grievant also requested damages for anguish caused by Respondent's action, and compensation for lost wages for the day he attended the level four hearing, as he is no longer employed by the Wood County Board of Education, and mileage for the drive to Charleston for the level four hearing. The Grievance Board has never awarded punitive or tort-like damages in making an employee whole.

> *W. Va. Code § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort- like damages for pain and suffering. Spangler v. Cabell County Bd. of Educ., Docket No. 03-06-375 (Mar. 15, 2004); Walls v. Kanawha County Bd. of Educ., Docket No. 98-20-325 (Dec. 30, 1998); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept.*

12, 1997); Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997).

Miker v. W. Va. Univ., Docket No. 06-HE-133 (July 18, 2006). Further, no evidence was presented to substantiate Grievant's claim. As to the request for mileage reimbursement and lost wages, Grievant was not required to attend this hearing. He chose to pursue this grievance and he choseto have a level four hearing. The undersigned is not aware of any statute or case law which would require a respondent to pay the grievant mileage and lost wages, when he is no longer employed by the respondent, for attending his own hearing. Also, no evidence was presented that Grievant in fact lost any wages for the day, nor was there evidence presented regarding Grievant's travel to the hearing.

Footnote: 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 statutes, which continue to control the proceedings in this case.

Footnote: 3

The Grievance Board has specifically found that, when no appeal is taken from a lower level decision, it becomes a final decision. Webster v. Wayne County Bd. of Educ., Docket No. 96- 50-119 (Nov. 27, 1996). But see, Fisher v. Dep't of Admin., Docket No. 98-DOA-492 (Oct. 28, 1999), (a lower level decision is not a final decision if the grievance evaluator is not vested with the authority to grant the relief).