THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SAMUEL BROOKOVER,

Grievant,

v.

DOCKET NO. 07-54-231

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed on January 29, 2007, by Grievant, Samuel Brookover, contesting the reduction of his rate of pay in October 2006, by his employer, 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. Brookover's co-workers. Mr. Brookover was not a party to that grievance. The relief sought by Grievant is to have his rate of pay returned to what it was prior to the reduction in October 2006, retroactive to that date.

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 9, 2007. Grievant bypassed

level three, appealing to level four on April12, 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, with some assistance from a fellow employee, Chuck Rote, and Respondent was represented by Dean A. Furner, Esquire. This grievance became maturefor 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

Either when Grievant was hired by the Wood County Board of Education ("WBOE"), or shortly thereafter, he was credited with five years of work experience on the salary schedule, and paid at the rate of pay for that level 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. Brookover, resulting in a reduction in his rate of pay. Mr. Brookover was not a party to that grievance, and the level two decision was not appealed. WBOE apparently implemented this decision sometime between October 2006, and January 2007, retroactive to the date in October 2006, when the level two decision was issued. This resulted in a reduction in Grievant's salary, and Grievant was "overpaid" for some period of time, and he was required to reimburse WBOE for this overpayment.

Grievant argued WBOE was precluded by the statutory "non-relegation" clause from changing the rate of pay in his contract. Grievant also challenged whether the differences between his rate of pay and those of his co-workers violated the statutory uniformity provisions; however, he did not further articulate his argument on this issue, nor did he introduce any new evidence to support his 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 demonstratethat Respondent's compliance with a prior level two grievance decision was improper or contrary to any law, policy or regulation.

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 is employed by the Wood County Board of Education ("WBOE") as an Electrician/Heating and Air Conditioning Mechanic.

2. Grievant had worked in the private sector for several years prior to his employment with WBOE. Grievant was offered a rate of pay by WBOE which was based upon crediting him with five years of experience on the salary schedule for an Electrician/Heating and Air Conditioning Mechanic.

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. Brookover was not a party to that grievance.

4. Sometime between October 2006 and January 2007, WBOE implemented the level two decision in *Rote* 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. Because this action was retroactive, Grievant incurred a liability to WBOE in the amount of the difference between the rate of pay Grievant agreed to and received from October2006 to December 2006, and the rate he would have received had he not been credited with five years of experience.

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 1) "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. This same issue was recently addressed by the Grievance Board in a companion case to this one, *Miller v. Wood County Board of Education*, Docket No. 07-54-120 (April 17, 2008),where it was decided that the Grievant could pursue this grievance challenging the implementation of the level two decision in *Rote*, which affected his salary. *Id.; 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 (Oct. 17, 2002); *Fiorini v. Div. of Highways*, Docket No. 98-DOH-001 (Aug. 17, 1998). (See footnote 2)

Grievant argued it was unlawful to remove his experience credit, 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). “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*.” *Miller, supra. But see Crock v. Harrison County Bd. of Educ.*, *per curiam,* 211 W. Va. 40, 560 S.E.2d 515 (2002).

Grievant also asserted that the holding of the level two decision in *Rote* - that the statutory uniformity provisions were violated when WBOE awarded Grievant credit for private sector experience on the salary schedule - was wrong. However, Grievant did not explain how the *Rote* decision was in error, nor did he present any new evidence on this issue, “so the undersigned has absolutely no basis upon which to address this issue.” *Fiorini, supra.* The grievants in *Rote* met their burden of proof at level two in their grievance, that decision was not appealed, and it became final.

Webster v. Wayne County Bd. of Educ., Docket No. 96-50-119 (Nov. 27, 1996). What Grievant is seeking is a reversal of the level two decision in *Rote*, based upon the record in that case, which amounts to an appeal of the final decision. "[T]he undersigned has no authority or basis upon which to disturb that [final decision]." *Id.*

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)." *Miller v. Wood County Bd. of Educ.*, Docket No. 07-54-120 (April 17, 2008).

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. *Miller v. Wood County Bd. of Educ.*, Docket No. 07-54-120 (April 17, 2008); *Fiorini v. Div. of Highways*, Docket No. 98- DOH-001 (Aug. 17, 1998).

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.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: April 29, 2008

Footnote: 1

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: 2

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).