WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DOLORES MULLINS,

Intervenor,

v.

Docket No. 07-33-076

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On October 18, 2006, Debbie Null and several other service personnel filed a grievance contesting a salary supplement given to Intervenor Dolores Mullins. This grievance also challenged Intervenor Dolores Mullins' classification as a Payroll Supervisor. Grievants were awarded partial relief at level one on October 30, 2006; notwithstanding, Grievants appealed to level two on October 31, 2006. On November 17, 2006, Dolores Mullins intervened in the grievance. Intervenor's unedited Statement of Grievance and Relief Sought reads as follows:

> Grievant/Intervenor is employed as a Payroll Supervisor. She received this classification in January 2006. Grievant/Intervenor also began receiving a county supplement as a supervisor in July 2006. On October 2 and 24, 2006, respectively, Respondent removed the county supervisor supplement and the Payroll Supervisor classification. These actions were taken in response to a grievance in which Grievant/Intervenor intervened. (The employees who originally filed the grievance have withdrawn from the proceeding and are no longer parties.) Grievant/Intervenor alleges that in granting the original grievants the partial relief described above, the Respondent violated local county policy and practice, West Virginia Code §§ 18A-4-8(l)(66) & (m), 18A-4-8a & 18A-4-8b. Grievant also contends that the Respondent acted in an arbitrary and capricious manner in failing to assert the defenses of timeliness and standing against the original grievants. (Grievant/Intervenor wishes to assert those defenses.)

Intervenor's Relief Sought is as follows:

> Grievant seeks: (a) reinstatement of the county supervisor supplement andcompensation for wages lost as a result of the removal of said supplement and (b) compensation for lost wages for the temporary loss of the Payroll Supervisor classification and pay. (Respondent reclassified Grievant/Intervenor to Payroll supervisor in December 2006. Grievant seeks interest on all sums to which they are entitled.

On December 15, 2006, the original Grievants withdrew from their grievance pursuant to a settlement agreement. Intervenor Dolores Mullins was denied her relief sought at level two. Intervenor Dolores Mullins bypassed level three and appealed to level four on March 7, 2007. Administrative Law Judge Landon R. Brown conducted a supplemental evidentiary hearing at level four on December 4, 2007. Intervenor Dolores Mullins appeared in person and by her attorney, John Everett Roush, WVSSPA. Respondent McDowell County Board of Education appeared by Kathryn Reed Bayless, Esq. The case became mature for decision on January 7, 2008, the date the proposed findings of fact and conclusions of law were received. The case was reassigned to the undersigned Administrative Law Judge on September 15, 2008, for administrative reasons.

SYNOPSIS

Intervenor Dolores Mullins ("Intervenor") began her employment with the McDowell County Board of Education ("BOE") on September 28, 1998, as a Secretary Two. Later that same year, Intervenor transferred to the central office in a temporary position in the business office. She bid for a regular position, was hired as an Accountant Three on March 2, 1999, and essentially continued to perform the same duties she had performed in the temporary position. In January 2006, Intervenor was reclassified to Payroll Supervisor. In July 2006, Intervenor was paid the county supplement received by other employees classified as supervisors. As a consequence of the grievance filed by Debbie Null and other employees working at the BOE's central office, Intervenor lost the salary supplement and the Payroll Supervisor classification in October 2006. Intervenor regained the classification of Payroll Supervisor in December 2006. Intervenor asserts that the reclassification to Payroll Supervisor was proper in January 2006, and she should have retained this classification in October 2006. She seeks back pay for the time she was not classified as Payroll Supervisor. In addition, Intervenor asserts that she should be paid a $1,400.00 per month supplement which is paid to the

supervisors of transportation and maintenance. There exists an affirmative duty to correct an error in classification when a superintendent becomes aware of the error. The action of the superintendent to reclassify the Intervenor as an Accountant Three until she had obtained the minimum qualifications of a Payroll Supervisor was required by law. No policy was presented which would support Intervenor's claim that she is entitled to the $1,400.00 monthly salary supplement. The Intervenor's requests for relief are DENIED.

After a review of the entire record of this matter, the undersigned makes the following findings of fact.

Findings of Fact

1. Intervenor has been employed as a regular service employee by the BOE since September 28, 1998, when she was hired as a Secretary Two and assigned to Jolo Elementary.

2. On December 14, 1998, she transferred to the BOE'S central office in a temporary position in the business office. She bid for a regular position, and was hired as an Accountant Three on March 2, 1999. 3. Intervenor continued in this classification of Accountant Three up through December 2005. On December 14, 2005, she was recommended by the superintendent for reclassification to Payroll Supervisor and that recommendation was approved. Intervenor was also paid a $1,400.00 salary supplement with her new supervisor classification beginning in July 2006.

4. At the time Intervenor was recommended for reclassification, she did not have the necessary “eight years of experience performing progressively difficult accounting tasks.”

5. On October 18, 2006, Debbie Null and several other service personnel working in the BOE'S central office filed a grievance contesting Intervenor's classification and salary supplement. On November 17, 2006, Dolores Mullins intervened in the grievance.

6. As a consequence of the grievance initiated by Debbie Null and others, the Payroll Supervisor classification and the supervisor supplement both were retracted. On December 15, 2006, Grievants withdrew from the grievance stating they believed the corrective actions taken by the BOE had legally satisfied their relief sought.

7. Intervenor was then reclassified to Payroll Supervisor in December 2006, upon accumulating eight years of service in the BOE's business office. Intervenor was not paid a salary supplement at that time. Intervenor was not made to pay back the salary supplement she received for the period of July through December 2006.

Discussion

In non-disciplinary matters, an employee (Intervenor) bears the burden of proving her allegations by a preponderance of the evidence. 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Intervenor makes two primary arguments. (See footnote 2) First, she asserts that it was correct to reclassify her as a Payroll Supervisor effective January 2006, and she is entitled to back pay for the time she was not so classified. Second, Intervenor asserts she should continue to be paid a $1,400.00 per month supplement which is paid to the supervisors of transportation and maintenance. In addition, Intervenor seeks to assert the defenses of timeliness and standing against the original Grievants. This assertion provides the undersigned a true conundrum.

This case is fraught with procedural errors which have made a mess of a grievance which could have easily been averted with a proper reading of the statutory classificationguidelines and BOE policy. The undersigned agrees with Intervenor that the original Grievants had absolutely no standing to attack Intervenor's classification or receipt of the salary supplement. (See footnote 3) Furthermore, the undersigned agrees with Intervenor that the filing of this grievance was well outside the time limit for initiation of a grievance. It is undisputed that the grievance was filed at level one some nine months after Intervenor was reclassified to Payroll Supervisor. Interesting, but not surprising, the BOE now joins in the argument that the underlying grievance should have been dismissed for lack of standing and, likewise, Intervenor's claims should be dismissed as well.

Not all of the multiple procedural errors need to be addressed. The undersigned finds that Intervenor's interests were not adequately represented by the BOE as it chose to remove both the classification and salary supplement from her. Consequently, she falls directly within the definition of an intervenor as set out in W. Va. Code § 18-29-3(u). (See footnote 4) As a result of proper intervention, an examination of the merits of the grievance should be provided by the undersigned. As previously noted, the underlying grievance was resolvedby settlement agreement. There exists no need to revisit procedural errors committed at the lower level because the original Grievants are no longer parties to this action.

Nevertheless, having survived any procedural mistakes and pitfalls, Intervenor is not entitled to

the relief she seeks. Intervenor did not meet the statutory definition of the class title of Payroll Supervisor prior to the time she had gained eight years of accounting experience. Even though the original Grievants lacked standing to pursue their claim, once the mistake was brought to the BOE's attention, the superintendent was under an obligation to correct the mistake. Accordingly, Intervenor's reclassification at the beginning of 2006 was improper. W. Va. Code § 18A-4-8(I)(67) contain the class definition as follows:

> Payroll supervisor means a person employed in the county board office who has primary responsibility for the payroll function and who either has completed twelve college hours of accounting from an accredited institution of higher education or has at least eight years of experience performing progressively difficult accounting tasks. Responsibilities of this class title may include supervision of other personnel[.]

Intervenor has no college course credits. At the time she was initially recommended for reclassification she had not gained the necessary accounting experience. A thorough review of the record leads the undersigned to conclude that Intervenor did not have “eight years of experience performing progressively difficult accounting tasks.” Intervenor argues that the requirement of “at least eight years of experience performing progressively difficult accounting tasks” is not limited to experience with the county board of education. Prior experience with another employer may be utilized to meet the requirement. *See Toney v. Raleigh County Bd. of Educ.*, Docket No. 01-41-501 (Jan. 16, 2002). Intervenor points to experience earned with a car dealership and small trucking company counting toward theeight years necessary to qualify as a Payroll Supervisor. However, unlike *Toney*, *supra.*, Intervenor testified at the lower level that, while she did keep daily receipts and tracked expenses, wages, and taxes, the car dealership and trucking company hired another individual at the end of the year to perform the actual bookkeeping.

While it is certainly understandable that Intervenor was displeased with the temporary loss of the Payroll Supervisor classification, this does not make the BOE's action wrong. There exists an affirmative duty to correct an error in classification when a superintendent becomes aware of sufficient information to make him aware that such an error has occurred. The action to reclassify the Intervenor as an Accountant Three until she had acquired eight years of accounting experience, was not arbitrary and capricious. That action was required. *See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006); *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999).

Intervenor also asserts that she should continue to be paid a $1,400.00 per month supplement which is paid to the supervisors of transportation and maintenance. On this point, the record is not fully developed. Intervenor holds a classification title with the term supervisor. The BOE points to McDowell County School Policy 8-016A (Respondent's level four exhibit one), and the subsequent memo issued by the superintendent addressing salary computations (Respondent's level four exhibit two). These documents seem to make it clear that only two school service supervisors, transportation and maintenance, are entitled to the salary supplement. Intervenor is correct to counter that the particular classification of Payroll Supervisor did not exist at that time, so of course no supervisor in the county held that particular classification at that time. However, the policy in question has been revised on at least three occasions. It could be revised again to include Payroll Supervisor to be among those classifications entitled to the salary supplement. While Intervenor makes a strong argument by inference that she is entitled to a salary supplement, insufficient evidence exists in the record to support her claimed entitlement to that supplement. (See footnote 5)

Finally, Intervenor asserts that the non-relegation clause found in West Virginia Code § 18A-4-8(m), at the very least, prohibits the BOE from reclassifying Intervenor and eliminating her supervisory salary supplement in the middle of the year. Intervenor cites the West Virginia Supreme Court of Appeals decision in *Crock v. Harrison County Board of Education*, 560 S.E.2d 515, 211 W. Va. 40 (2002). In a *per curiam* opinion, the Court 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*, *supra.* 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 their replacement 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). In this case, Intervenor's contract was altered because the superintendent recognized Intervenor's reclassification was in error, and in violation of W. Va. Code § 18A- 4-8(i)(67). In addition, the salary supplement to Intervenor was rescinded because no clear policy existed which would authorize that payment. Thus, Intervenor's contract was altered to correct a violation of law,

and the absence of any policy authoring this supplement. The non-relegation clause cannot be read or applied to preclude an employer from correcting a violation of law.

In addition, prior "mistakes [do] not create an entitlement to future incorrect reimbursement. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995)." *Dillon*, *supra.* Accordingly, Intervenor did not meet her burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle her to continue to receive compensation granted in error.

The following conclusions of law support the decision reached.

Conclusion of Law

1. In non-disciplinary matters, an employee (Intervenor) bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. An intervenor in a grievance proceeding under this article [§ 18-29-3] may make affirmative claims for relief as well as assert defensive claims. *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 35 (1997). 3. The requirement of "at least eight years of experience performing progressively difficult accounting tasks" is not limited to experience with the county board of education. Prior relevant experience with another employer may be utilized to meet the requirement. *Toney v. Raleigh County Bd. of Educ.*, Docket No. 01-41-501 (Jan. 16, 2002).

4. There exists an affirmative duty to correct an error in classification when a superintendent becomes aware of sufficient information to make him aware that such an error has occurred. The action to reclassify the Intervenor as an Accountant Three until she had acquired eight years of accounting experience was not arbitrary and capricious. That action was required. *See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006); *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999).

6. Intervenor did not demonstrate that the BOE's action was improper or contrary to any law, policy or regulation. In addition, prior "mistakes [do] not create an entitlement to future incorrect reimbursement. *See Stover v. Div. of Corr.*, Docket No. 04- CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96- HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995)." *Dillon, supra*.

7. Intervenor failed to prove by a preponderance of the evidence that she was entitled to be

reclassified as a Payroll Supervisor on any date prior to December 14, 2006. 8. Intervenor offered no policy or statutory provision to support her claim that she is entitled to the salary supplement paid to supervisors of transportation and maintenance.

Accordingly, Intervenor's requests for relief are **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 § 18-29-7 (*See Footnote 1, supra)*. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 20, 2008

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Ronald L. Reece

Administrative Law Judge

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

An intervenor in a grievance proceeding under this article [§ 18-29-3] may make affirmative claims for relief as well as assert defensive claims. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 35 (1997).

Footnote: 3

The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95- 16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8,

1996). When an individual is not personally harmed, there is no cognizable grievance. Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Cremeans v. Board of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992).

Footnote: 4

"Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties." W. Va. Code § 18-29- 3(u).

Footnote: 5

Level four testimony of Treasurer Carla Horn indicates that the BOE's business office acknowledges this inequity, and provides an alternative source of additional compensation for Intervenor with the use of overtime pay.