

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTINA ADAMS ET AL,

Grievants,

v.

Docket No. 2021-1037-CONS

BOONE COUNTY SCHOOLS,

Respondent.

DECISION

Grievants¹ are or were employed by Respondent, Boone County Schools. On September 28, 2020 and various dates thereafter, Grievants filed this grievance against Respondent. The wording of the grievance statements and relief requested varied slightly and are incorporated fully by reference. A representative statement of grievance is as follows:

In August of 2016, members of the American Federation of Teachers West Virginia ("AFT-WV") who worked for Respondent Boone County Board of Education filed grievances, by and through AFT-WV and its counsel, contending in pertinent part that, Respondent had eliminated its salary supplement by withholding levy funds that were required to be paid as salary supplements. *Rouse, et al v. Boone County Board of Education*, Docket No. 2017-0308-CONS ("*Rouse*"). That matter was appealed to the Circuit Court of Kanawha County in *Rouse v. Boone County Board of Education*, Civil Action No. 19-AA-26. That matter was thereafter settled by the Grievants and Respondents in a global resolution of those claims. Since the resolution of that case, Respondent has unlawfully and arbitrarily and capriciously supplemented and increased the income of employees of Respondent who did not file a grievance in *Rouse* relating to the salary supplement. On behalf of its members, AFT-WV now timely appeals this unlawful act. The current act of Respondent in paying those who did not grieve

¹ There are three hundred six Grievants whose names are incorporated by reference.

in *Rouse* is unlawful in that it lacks a statutory or regulatory mechanism or requirement to make such payment; is a breach of contract and good faith bargaining that occurred during the prior case; is an abuse of power and discretion by Respondent; and is a breach of Respondent's fiduciary duty to maintain the Reserve Fund. Moreover, the current act of Respondent in paying non-grievants from *Rouse* discriminates against the *Rouse* Grievants who have not or will not receive payouts to be made starting on or about September 18, 2020; demonstrates bias against the *Rouse* Grievants and favoritism for the non-Grievant employees; may constitute nepotism in certain instances; and arises out of unlawful anti-union animus. Finally, Respondent's actions are barred by the doctrine of laches and or statute of limitations and Respondent's fiduciary duty to the citizens of Boone County, West Virginia.

A representative statement of relief requested is as follows: "Grievants should be made whole in every appropriate way including, but not limited to, proper payment of wages owed, plus interest, concomitant benefits, and all other appropriate relief."

On February 2, 2021, the parties waived the grievance to level three of the process by agreement. On December 27, 2021, Respondent, by counsel, filed a Motion to Dismiss. Administrative Law Judge William B. McGinley conducted a hearing on the motion on January 19, 2023. Judge McGinley denied the motion by order entered March 2, 2022, but expressly provided that "Respondent is not barred in any way from raising the same issues at the conclusion of the presentation of evidence." The matter was scheduled for hearing to be held on October 13 – 14, 2022. On October 4, 2022, in advance of his retirement, Judge McGinley conducted a pre-hearing conference, from which an order was entered on October 12, 2022. The parties agreed that the depositions of Jeffery Huffman, Samuel Pauley, and Dr. Lisa D. Beck would be made part of the record and the parties agreed that all releases by employees were properly signed and executed. Upon informing the parties of his impending retirement, which would require

another administrative law judge to review the recording of the hearing to render a decision, the parties further agreed for the hearing to be continued.²

A level three hearing was held on January 19, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievants Carena Rouse, Heather Hayes, and Jerry Pcholinsky appeared in person. Grievants who were members of the American Federation of Teachers were represented by Jeffrey G. Blaydes, Blaydes Law, PLLC. Grievants who were members of the West Virginia Education Association were represented by Andrew J. Katz, General Counsel. Rebecca A. Roush, General Counsel, West Virginia School Service Personnel Association failed to appear. Respondent appeared by counsel, Joshua Cottle, Bowles Rice, LLP. This matter became mature for decision on April 17, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL"). The West Virginia School Service Personnel Association elected not to file PFFCL.

Synopsis

Grievants received a settlement in a prior grievance. Respondent extended the same settlement payment to all employees, which Grievants assert was improper. Grievants seek compensation for the time spent pursuing the previous grievance, arguing they are entitled to compensation because of Respondent's alleged improper action in paying all employees the same payment. The relief Grievants seek from the Grievance Board is unavailable. Accordingly, the grievance is denied.

² This matter was first noticed for hearing on April 19, 2021, and was continued three times at Grievants' request without objection by Respondent.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. The instant grievance arose from a prior grievance, *Rouse v. Boone County Bd. of Educ.*, Docket No. 2017-0308-CONS (Feb. 7, 2019), which decision is incorporated by reference herein.

2. *Rouse*, in sum, involved the protest of Respondent's elimination of county salary supplements and optical and dental insurance by four hundred fifteen Boone County Schools employees, former employees, and retirees. These cuts were made because of an unprecedented loss of funding due to the bankruptcy of multiple coal companies.

3. The instant Grievants were all grievants in the *Rouse* grievance, which granted relief, in part, by ordering that Respondent calculate and pay any county salary supplement amount owed from excess levy funds. Both parties appealed to the Circuit Court of Kanawha County in *Carena Rouse, et al. v. Boone County Bd. of Educ.*, Civil Action No. 19-AA-26.

4. On appeal, the parties entered into a *Settlement Agreement and Release of All Claims* in which Respondent agreed to pay approximately 90% of the salary supplement amount owed to the *Rouse* Grievants – approximately \$3 million – in consideration for a full release of all claims. The *Rouse* Grievants received their settlement payment approximately four years after their grievance was filed.

5. Following the level three decision granting, in part, the *Rouse* grievance, a second group of approximately 100 employees filed a grievance, styled *Banks v. Boone*

County Bd. of Educ., Docket No. 2020-0920-CONS, also seeking payment of the salary supplement that had been granted to the *Rouse* Grievants.

6. Respondent denied the *Banks* grievance at level one, but at level two entered into a settlement agreement with the *Banks* Grievants to pay the same payment the *Rouse* Grievants received in return for a full release of claims.

7. At the same time, Respondent agreed to offer the same payment, in return for full releases, to all other employees whose salary supplements had been eliminated.

8. The total of the additional settlements was approximately \$1.5 million.

9. Carena Rouse, Heather Hayes, April Estep, and Jerry Pcholinsky took the lead in the *Rouse* grievance. Carena Rouse, Heather Hayes, and April Estep are members of AFT-WV. At the time of the events, Ms. Rouse was the President of AFT Boone County. Ms. Hayes is now the President of AFT Boone County and was an active member of the union at the time of the *Rouse* grievance. Jerry Pcholinsky is and was the President of WVEA Boone County.

10. Even by conservative estimates, all three lead Grievants spent a tremendous amount of time working on the grievance. From the first Board meetings regarding proposed cuts to the distribution of the checks following the settlement, each organized, planned, conducted outreach, conducted and attended meetings, prepared for and attended proceedings, and answered constant questions from other employees. Each actively encouraged all employees, whether a member of their unions or not, to join with them in the *Rouse* grievance.

11. Carena Rouse spent a total of 129 hours. Heather Hayes spent a total of 122 hours. Jerry Pcholinsky spent a total of 88.5 hours.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievants assert that the lead Grievants, Carena Rouse, Heather Hayes, and Jerry Pcholinsky, are entitled to equitable relief in the form of compensation for the “time, energy, and resources” they spent or services they rendered relating to the *Rouse* grievance. Each estimated the hours of work they performed relating to the *Rouse* grievance and claim a sum of money due based on their hourly rate as teachers. Grievants assert that the remaining Grievants are entitled to equitable relief of \$100 each for “the time, effort, stress, energy and value of fighting for the settlement in *Rouse*” and the risk of retaliation Grievants assert they faced in choosing to grieve. Grievants assert this entitlement on the theory that Respondent improperly paid all employees the same settlement amount as the *Rouse* Grievants. Respondent asserts Grievants failed to state a claim on which relief can be granted, that they lack standing, and that its decision to pay the same settlement amount to the employees who had not grieved in the *Rouse* grievance was proper.

Grievants assert the Grievance Board has the authority to award this compensation as “fair and equitable” relief. Although the prior grievance procedure for

education employees provided for “fair and equitable” relief in West Virginia Code § 18-29-5(b), that provision was repealed in 2007 when the Legislature abolished the West Virginia Education and State Employees Grievance Board and created the current West Virginia Public Employees Grievance Board. The current *West Virginia Public Employees Grievance Procedure* does not provide for “fair and equitable” relief.

The current grievance procedure specifically addresses compensation for an employee’s time spent preparing a grievance, which allows for four hours of work time without charge to annual leave. W. VA. CODE § 6C-2-3(p)(2). To award compensation beyond that amount would not comply with the statute and would be akin to awarding attorney’s fees, which are unavailable from the Grievance Board. Regarding allocation of expenses and attorney’s fees, the code states that “[a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.” W. VA. CODE § 6C-2-6(a) (2018).

Even if “fair and equitable” relief were available, such relief was interpreted to encompass only such issues as back pay, travel reimbursement, and overtime, and not to include punitive or tort-like damages for issues such as 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). “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep’t of Environmental*

Protection, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corr.*, Docket No. 2013-1084-MAPS (Mar. 26, 2014). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786, n. 11 (1995).

Grievants have cited no Grievance Board decision in which the Grievance Board has awarded the type of relief they seek. The cases cited provided only back pay, compensatory time for working on a State holiday, and pay for time worked beyond an eight-hour workday. *Herland v. Dep’t of Health and Human Res.*, Docket No. 92-HHR-416 (Aug. 9, 1993); *Perry et al. v. Div. of Juvenile Serv. And Div. of Pers.*, Docket No. 07-DJS-343 (Nov. 7, 2008); *Hussell, et al. v. Mason County Bd. of Educ.*, Docket No. 96-26-073 (Jul. 24, 1996). These cases all involved compensation for work performed in the course of the grievant’s employment. None of these grievances are comparable to the instant grievance in which Grievants ask to be paid for the work they performed in pursuing their grievance. A more comparable case is that in which a non-lawyer representative sought compensation for time spent working on a grievance, and the Grievance Board declined to award that relief. *Dewitt v. West Virginia University*, Docket No. 2013-2262-CONS. While Grievants’ anger and feelings of inequity are certainly understandable, Grievants are simply not entitled to payment for the time and effort they expended in pursuing the *Rouse* grievance.

The undersigned acknowledges the extensive arguments made by Grievants asserting that Respondent’s decision to pay all employees the settlement amount was improper. However, as the relief sought is unavailable, a decision on that issue would be

advisory. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). “This Grievance Board does not issue advisory opinions. *Dooley v. Dep’t of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991).” *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The current *West Virginia Public Employees Grievance Procedure* does not provide for “fair and equitable” relief.

3. “In addition to actual time spent attending grievance proceedings, the grievant and an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss

of pay and without charge to annual or compensatory leave credits.” W. VA. CODE § 6C-2-3(p)(2).

4. “A]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.” W. VA. CODE § 6C-2-6(a) (2018).

5. “Fair and equitable” relief has been interpreted to encompass only such issues as back pay, travel reimbursement, and overtime, and not to include punitive or tort-like damages for issues such as 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).

6. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corr.*, Docket No. 2013-1084-MAPS (Mar. 26, 2014). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786, n. 11 (1995).

7. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action

No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009).

8. “This Grievance Board does not issue advisory opinions. *Dooley v. Dep’t of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991).” *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

9. Compensation for the time spent pursuing a previous grievance is relief that is unavailable from the Grievance Board.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 6C-2-5. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal

³ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: May 31, 2023

Billie Thacker Catlett
Chief Administrative Law Judge