THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GABRIELE BISCHOF,
Grievant,

v. **Docket No. 2024-0499-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Gabriele Bischof, is employed by Respondent, Wood County Board of Education as a bus operator. On January 22, 2024, Grievant filed this grievance against Respondent stating:

> Ms. Bischof received a letter dated December 21, 2023, by certified mail that the Board had approved paid suspension for her. On January 16, 2024, she received another letter by certified mail that the letter [*sic*] stated the Board had approved an unpaid suspension.

For relief, Grievant states, "[S]he detrimentally relied on the letter from Christie Willis." Grievant proceeded directly to a level three grievance hearing in accordance with West Virginia Code § 6C-2-4(a)(4), waiving her right to proceedings at levels one and two.

A level three hearing was held on May 1, 2024, before Chief Administrative Law Judge Billie Thacker Catlett[1] at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and was represented by counsel, William O. Merriman, Jr., of Bill Merriman, PLLC. Respondent appeared by Superintendent Christie Willis and was represented by counsel, Richard S. Boothby of Bowles Rice LLP. This matter became

[1] The grievance was subsequently reassigned to the undersigned for administrative reasons.

mature for decision on June 17, 2024, upon receipt of both parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a bus operator. Following an incident in which Grievant failed to check her bus for students and, as a result, left a child unattended on the running bus while she went to the bathroom, Grievant was placed on a 30-day suspension without pay by the Superintendent of Schools. Her unpaid suspension was ratified by Respondent; however, a December 21, 2023, letter memorializing that decision inadvertently stated that the suspension would be a paid suspension. The mistake was corrected in a subsequent letter.

Grievant does not dispute the validity of her suspension. She merely asserts that she relied, to her detriment, on the letter—which she asserts created a contract—stating that her suspension would be paid. Grievant seeks to be paid for her suspension, at least through January 16, 2024, when the mistake was corrected. The December 21st letter was not a contract, however. Moreover, Grievant failed to prove by a preponderance of the evidence that she suffered any prejudice or other harm due to the error. Accordingly, the grievance is DENIED.

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

Findings of Fact[2]

1. Grievant is employed as a bus operator by Respondent.

[2] Grievant stipulated to Respondent's Exhibits 2 through 5, which were then admitted to evidence.

2. On November 17, 2023, after completing her morning bus route by dropping off students at Mineral Wells Elementary School, Grievant failed to conduct the required inspection of her bus to assure that no students remained on the bus and failed to use the "child find" system equipped on her bus, as required by both county and state policies.

3. Grievant then drove to the bus garage, parked her bus, and exited the still-running bus in order to use the bathroom.

4. Upon returning to her bus, Grievant found a student standing near the front of her bus.

5. Grievant does not dispute that her conduct on November 17, 2023, violated West Virginia Board of Education Policies 4336 and 5902.

6. On November 27, 2023, Grievant met with Superintendent Christie Willis, Assistant Superintendent John Merritt, and Director of Transportation Chad Bloss to discuss the incident.

7. At that time, Superintendent Willis informed Grievant that she would recommend to Respondent that Grievant be suspended for 30 days[3] without pay at the Board's December 19, 2023, meeting. A letter memorializing the discussion was hand-delivered to Grievant on the same day.

8. The letter further informed Grievant of her right to attend the Board meeting to protest the suspension without pay.

9. Grievant acknowledges that Superintendent Willis told Grievant that she would be recommending a suspension without pay.

[3] The effective dates of the suspension were November 27, 2023, through and including January 17, 2024.

10. Grievant further acknowledges that she did not attend the December 19, 2023, Board meeting.

11. At that meeting, Respondent ratified Superintendent Willis's recommendation of a 30-day suspension without pay.

12. On December 21, 2023, Superintendent Willis sent Grievant a letter by certified mail, which stated, simply, "At a meeting of the Wood County Board of Education held on December 19, 2023, the Board of Education approved the paid suspension for the reasons listed in the letter you received on November 27, 2023."

13. Based upon that single-sentence letter, Grievant "lived her life as she always had before"; whereas, she "would have changed her spending habits" had she known she was not going to be paid.

14. When Grievant did not receive a paycheck on the next regular pay day, she contacted the central office to inquire about the omission.

15. Assistant Superintendent Merritt drafted the December 21, 2023, letter and admitted that it contained a "typo" when it stated that the suspension was to be paid.

16. Superintendent Willis did not review the December 21, 2023, letter before it was sent to Grievant and, so, did not catch the error.

17. On January 16, 2024, Grievant was sent another letter by certified mail, acknowledging the error and clarifying that the suspension was without pay.

Discussion

This grievance involves a disciplinary matter, and, as such, the burden of proof would traditionally be on Respondent to demonstrate that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). However, in this case, Grievant does

not dispute the validity of the disciplinary action taken against her. Instead, her grievance is that she detrimentally relied on a typographical error in a letter which led her to believe that her suspension would be paid. Therefore, Grievant has the burden of proving her 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*.

Respondent, through its representatives, Superintendent Willis and Assistant Superintendent Merritt, freely admits that it made an error when Grievant was sent the letter on December 21, 2023, stating that her 30-day suspension would be paid. That error went unrecognized until January 2024, when Grievant did not receive her paycheck as expected. Grievant argues that, in the meantime, she relied upon that December 21st letter as a sort of contract and believed that she would be paid during her suspension. She asserts that Respondent should not benefit from its mistake. Her legal theory that the letter created a contract is misplaced, however.

First, there was no contract because "'[a] meeting of the minds of the parties is a *sine qua non* of all contracts.' *Syllabus Point 1, in part, Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 590 S.E.2d 641 (2003)." Syl. Pt. 4, *Donna S. v. Travis S.*, 246 W. Va. 634, 637, 874 S.E.2d 746 (2022). In the instant case, not only was there not a meeting of the minds that Grievant would be paid during her suspension, Grievant was told directly by Superintendent Willis—both orally and by hand-delivered letter on

November 27, 2023—that it was her intention that Grievant's suspension be without pay. Grievant admits that when she left that November 27th meeting with that letter in hand, she understood that her suspension would be unpaid.

The Board then voted, in a regularly scheduled public meeting, to ratify the unpaid suspension. Though Grievant did not avail herself of the opportunity to be present at the meeting, those who did attend the meeting were surely left with no other understanding but that Respondent intended for Grievant to be suspended *without* pay. It is unfortunate that the December 21, 2023, letter mistakenly indicated that Respondent approved a suspension *with* pay; but because that letter did not reflect the actual intention of Respondent, it did not represent a meeting of minds and did not create a contract.

Second, there was no contract because Respondent is not bound by the Assistant Superintendent's error in drafting the December 21st letter. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.,* 174 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

Even assuming the December 21st letter did create a contract, Grievant failed to demonstrate that she relied upon it to her detriment and is entitled to relief.

> To establish detrimental reliance in the employment context, [the Supreme Court of Appeals of West Virginia has] stated:
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> > Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice.
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> Syllabus Point 4, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

Hatfield v. Health Mgmt. Assocs. of W. Va., Inc., 223 W. Va. 259, 266, 672 S.E.2d 395, 402, 2008 (2008).

To be clear, the undersigned does not mean to suggest that Respondent made a "misleading statement" to Grievant. Grievant implies, though, that she was misled by Respondent's mistaken statement in the December 21st letter; so, it is in that context that this body will assess Grievant's claim against the *Barnett* test. In that case, while Respondent did not intend to mislead Grievant, it is reasonable to expect that Grievant would rely on the single-sentence letter stating that the suspension would be paid. It cannot be said, though, that Grievant is "without fault" in acting upon the December 21st letter "to [her] prejudice."

By all accounts, everyone—Grievant, Superintendent Willis, Assistant Superintendent Merritt, Transportation Director Bloss, and Respondent—understood and accepted that Grievant's suspension would be without pay up until that December 21, 2023, letter was received by Grievant. Only then did confusion arise. At that point, Grievant could have—and reasonably should have—reached out to Ms. Willis, Mr. Merritt, or Mr. Bloss to express her confusion as to the outcome of her suspension and to clarify

the situation. She did not. Rather, she drove on with her life until her next paycheck was not deposited. For that reason alone, Grievant has not met her burden of demonstrating detrimental reliance.

Furthermore, Grievant fails to demonstrate how she acted to her detriment based upon the mistaken assurance of the December 21st letter that her suspension would be paid. Certainly, one can assume that if a person does not receive one or more paychecks, he or she will find it difficult to meet his or her financial obligations. But the grievance system does not operate on assumption or presumption; rather, it is grounded in proof of a fact.

> A preponderance of the evidence means that the party with that burden must prove its case by "greater weight." 2 Louis J. Palmer, Jr., *Handbook on Evidence for West Virginia Lawyers* § 1301.03[2], at 640 (7th ed. 2021). "This means merely that the party who has the burden of proof must produce evidence tending to show the truth of such facts that is more convincing . . . as worthy of belief, than that which is offered in opposition." *Id.* In other words, proof by a preponderance of the evidence contemplates evidence that weighs more heavily in favor of one side than the other; thus, the evidentiary scale is not balanced, but rather, tips at least slightly in favor of the party who bears the burden of proof.

Frazier v. Gaither, 248 W. Va. 420, 425, 888 S.E.2d 920 (2023). To that end, Grievant provided nothing to demonstrate any harm to her—no overdraft notices, no returned checks, no declined transactions, no receipts for withdrawals from savings. Indeed, Grievant failed to produce any evidence at all, except for her testimony that she lived her life as she always had before and that she would have changed her spending habits had she known she was not going to be paid. But her testimony alone does not rise to the level of a preponderance of evidence that she detrimentally relied on the December 21, 2023, erroneously informing her that her suspension would be paid.

Grievant failed to establish that the December 21, 2023, letter created a contractual obligation on the part of Respondent to pay her through her suspension and, relatedly, failed to prove that she detrimentally relied on the contents of that letter. Accordingly, her grievance is DENIED. The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Because Grievant does not dispute the validity of the disciplinary action taken against her and, instead, argues that she detrimentally relied on a typographical error in a letter which led her to believe that her suspension would be paid, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018).

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. 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*.

3. Grievant's argument that the December 21, 2023, letter created a contract is misplaced because there was no meeting of the minds, and "'[a] meeting of the minds of the parties is a *sine qua non* of all contracts.' *Syllabus Point 1, in part, Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 590 S.E.2d 641 (2003)." Syl. Pt. 4, *Donna S. v. Travis S.*, 246 W. Va. 634, 637, 874 S.E.2d 746 (2022).

4. There was also no contract because Respondent is not bound by the December 21, 2023, letter. "A state or one of its political subdivisions is not bound by the

legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.,* 174 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

5. Additionally, Grievant is not entitled to relief under a theory of detrimental reliance because she is not blameless in this misunderstanding.

> To establish detrimental reliance in the employment context, [the Supreme Court of Appeals of West Virginia has] stated:
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> > Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice.
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> Syllabus Point 4, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

Hatfield v. Health Mgmt. Assocs. of W. Va., Inc., 223 W. Va. 259, 266, 672 S.E.2d 395, 402, 2008 (2008).

6. Moreover, Grievant failed to produce any evidence to support her argument of detrimental reliance. Again,

> [a] preponderance of the evidence means that the party with that burden must prove its case by "greater weight." 2 Louis J. Palmer, Jr., *Handbook*

> *on Evidence for West Virginia Lawyers* § 1301.03[2], at 640 (7th ed. 2021). "This means merely that the party who has the burden of proof must produce evidence tending to show the truth of such facts that is more convincing . . . as worthy of belief, than that which is offered in opposition." *Id.* In other words, proof by a preponderance of the evidence contemplates evidence that weighs more heavily in favor of one side than the other; thus, the evidentiary scale is not balanced, but rather, tips at least slightly in favor of the party who bears the burden of proof.

Frazier v. Gaither, 248 W. Va. 420, 425, 888 S.E.2d 920 (2023).

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: July 17, 2024

Lara K. Bissett
Administrative Law Judge