

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DANA EVANS,
Grievant,**

v.

Docket No. 2022-0031-LogED

**LOGAN COUNTY BOARD OF EDUCATION and
DEPARTMENT OF EDUCATION,
Respondent.**

DECISION

Grievant, Dana Evans, is employed by Respondent, Logan County Board of Education. On July 19, 2021, Grievant filed this grievance against Respondent stating:

Logan County Schools has violated West Virginia Code §18A-4-5a – County salary supplements for teachers and WV State Board Policy 5902: Employee Code of Conduct regarding denying Ms. Evans the supplemental pay offered through the American Rescue Plan Elementary and Secondary School Emergency Relief II Funds (ESSERF). The ESSERF II Time Verification Form for Logan County was distributed for professional employees who worked up to thirty (30) hours beyond the workday for lesson planning, contact tracing, communication with families, or other duties necessary due to COVID-19. Ms. Evans, who has documentation of work beyond the normal school day, was denied payment because she is a counselor instead of a teacher although the federal regulations for distribution of this funding clearly include provisions for social and emotional support for students and families.

Susan Adkins, WV Professional Educators Grievance Manager, personally spoke with Superintendent Lucas the week of June 14-18, 2021, regarding counselors not being eligible for this payment. Ms. Lucas stated that it was a miscommunication and that if Ms. Evans worked the extra hours, had documentation, and submitted the appropriate form approved by her principal, she would be paid. But she did not receive this pay on the June 30, 2021, paycheck.

As relief, Grievant seeks as follows:

Since Ms. Evans met the requirements, received approval from her principal, and submitted her form by the due date, she respectfully requests that she be compensated for her time worked (up to 30 hours per the cap) after the traditional hours. She is due pay for the 30 hours from Logan County Schools.

Following the August 23, 2021 level one conference, a level one decision was rendered on September 8, 2021, denying the grievance. Grievant appealed to level two on September 16, 2021. Following mediation, Grievant appealed to level three of the grievance process on December 1, 2021. By order entered November 29, 2022, the West Virginia Department of Education was joined as a party due to the Department's intervention in Logan County Schools. A level three hearing was held on July 28, 2023¹, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared personally and was represented by Susan Lattimer Adkins, WV Professional Educators. Respondent Logan County Board of Education appeared by Superintendent Jeffrey Huffman and was represented by counsel, Donald C. Wandling, Wandling Law Office. Respondent Department of Education did not appear.²

³ This matter became mature for decision on September 12, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

¹ The level three hearing was rescheduled four times following requests to continue from both parties.

² On April 20, 2023, counsel for Respondent Department of Education stated that the Department of Education had determined its interest were adequately represented by Superintendent Huffman and the Board's counsel and would not appear or participate at level three.

³ As Respondent Department of Education did not appear, all references to Respondent hereafter refer to Respondent Logan County Board of Education.

Grievant is employed by Respondent as an itinerant school counselor. Grievant protest's Respondent's refusal to pay her alleged supplemental pay that was paid to regular classroom teachers. The pay at issue was a stipend rather than a county salary supplement and, therefore, the uniformity of pay requirement was not applicable. Grievant was not similarly situated to the regular classroom teachers who received the stipend so the refusal to pay the stipend was not discriminatory. Therefore, Grievant failed to prove she was entitled to payment of the stipend. 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

1. Grievant is employed by Respondent as an itinerant school counselor.
2. During the relevant 2020-2021 school year, Grievant served as a school counselor for three schools.
3. When schools reopened after being closed due to the pandemic, Respondent adopted a "blended" model of instruction. In the blending model, students had the option between attending classes in person or virtually.
4. Due to this blended model, teachers were required to teach students both in the classroom and virtually, including preparing separate lesson plans for each.
5. Respondent received federal funding from the American Rescue Plan Act, which funding is referred to as the Elementary and Secondary School Emergency Relief II Funds ("ESSERF II"). The funding was to be used for expenses related to the pandemic.

6. The West Virginia Department of Education approved the use of a portion of the ESSERF II funds to pay teachers a stipend for work performed outside of the normal workday due to the pandemic.

7. Grievant performed extensive work outside of the normal workday and applied for the stipend.

8. Respondent refused to pay the stipend as Grievant was a school counselor and not a regular teacher.

9. A regular classroom teacher is responsible for providing instruction for the entirety of the school day, assigning grades, and promoting students from one grade to the next. A school counselor primarily provides counseling and only provides limited classroom instruction as a portion of their duties, for a class that is not graded.

Discussion

As this grievance does not involve a disciplinary matter, 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.*

Grievant asserts she was entitled to the same supplemental pay from federal funds that was paid to teachers. Grievant argues she is entitled to the pay due to the statutory requirement of uniformity of pay. Grievant argues she is a “classroom teacher” pursuant to the statutory definition. Respondent asserts that the payment was a stipend

available only to nurses, teachers, assistant principals, and principals for which Grievant did not qualify because she is a school counselor.

A school counselor is a “classroom teacher” relating to the provisions applicable to school personnel in the West Virginia Code. “Classroom teacher’ means a professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his or her time in this capacity. . . .” W. VA. CODE § 18A-1-1(c)(1); See *Beine v. Bd. of Educ.*, 181 W. Va. 669, 383 S.E.2d 851 (1989). County boards of education are permitted to increase the salaries of teachers through salary supplements. Such supplements are governed by West Virginia Code § 18A-4-5a “County salary supplements for teachers,” which states:

County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements. . . .

W. VA. CODE § 18A-4-5a(a).⁴

Grievant argues the requirement of uniformity for county salary supplements entitles her to the same payment made to teachers from the ESSERF II funds. However, the payment at issue here is not a salary supplement; it was a stipend. The payment was a one-time occurrence to compensate teachers⁵ for time spent in the

⁴ Grievant incorrectly cited West Virginia Code § 18A-4-5b, which applies to school service personnel, not professional personnel.

⁵ The record is unclear whether principals, vice principals, and school nurses also received the stipend. All but one document referred only to teachers being eligible to receive the stipend. An email from Assistant Superintendent Dingess-Adkins on May 27, 2021, stated that nurses, teachers, assistant principals, and principals could apply

evenings and weekends to plan and digitize lessons because they were required to teach both in person and virtually. “Because there is no salary supplement at issue in this case, there is consequently no violation of the uniformity in pay provisions that pertain to such salary supplements.” *Lockett v. Fayette Cty. Bd. of Educ.*, 214 W. Va. 554, 561, 591 S.E.2d 112, 119 (2003).

Apart from the uniformity argument, Grievant is essentially arguing discrimination in that she was treated differently than those who received the stipend. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). Although the Code includes school counselors in the definition of “classroom teacher,” the job responsibilities of a school counselor and regular classroom teacher are different. A regular classroom teacher is responsible for providing instruction for the entirety of the school day, assigning grades, and promoting students from one grade to the next. A school counselor primarily provides counseling and only provides limited classroom instruction as a portion of their duties, for a class that is not graded. Therefore, Grievant is not similarly situated to the regular classroom teachers who were paid the stipend. For the same reason, even if the uniformity of pay provision applied to the stipend, because Grievant’s training, experience, responsibility as a school counselor were different from that of a regular teacher, uniformity would not require Grievant be paid the same stipend.

The following Conclusions of Law support the decision reached.

for the stipend but no evidence was presented whether their applications were ultimately paid or whether their applications were rejected like Grievant’s application.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, 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.*

2. “‘Classroom teacher’ means a professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his or her time in this capacity. . . .” W. VA. CODE § 18A-1-1(c)(1); *See Beine v. Bd. of Educ.*, 181 W. Va. 669, 383 S.E.2d 851 (1989).

3. The West Virginia Code provides for “county salary supplements” for teachers as follows:

County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements. . . .

W. VA. CODE § 18A-4-5a(a).

4. “Because there is no salary supplement at issue in this case, there is consequently no violation of the uniformity in pay provisions that pertain to such salary supplements.” *Lockett v. Fayette Cty. Bd. of Educ.*, 214 W. Va. 554, 561, 591 S.E.2d 112, 119 (2003).

5. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

6. The payment at issue in this grievance is not a county salary supplement but, rather, a stipend to which uniformity requirements do not apply.

7. Grievant was not similarly situated to the regular classroom teachers who received the stipend, so Respondent’s refusal to pay Grievant the stipend was not discriminatory.

8. Grievant failed to prove she was entitled to payment of the stipend.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.⁶ 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

⁶ 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.

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

DATE: October 25, 2023

Billie Thacker Catlett
Chief Administrative Law Judge