

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BRENDA HALL AND ANTONIA VAUGHAN,  
Grievant,**

**v.**

**Docket No. 2014-0282-CONS**

**KANAWHA COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

Grievants, Brenda Hall and Antonia Vaughan, are employed by Respondent, Kanawha County Board of Education. On September 6, 2013, Grievants filed this grievance against Respondent stating,

Violation of WV § 18-4-1 and 18-4-1a; Due to the nature of grievants positions, education and certification the West Virginia Department of Education made their positions optional to be professional the summer of 2013. Kanawha County Board of Education then, through board action, made them professional status. They were placed at step 0 on the professional scale. They are performing the same duties as before and should be granted experience credit for previous year of experience (AV 15yr & BH 20yr).

For relief, Grievants seek “[e]xperience increment pay, back pay and related benefits.”

Following a level one conference, a level one decision was rendered on October 11, 2013, denying the grievance. Grievants appealed to level two on October 22, 2013. Grievants perfected the appeal to level three of the grievance process on January 30, 2014. A level three hearing was held on May 28, 2014, before the undersigned at the Grievance Board’s Charleston, West Virginia office. Grievants were represented by Ben Barkey, West Virginia Education Association. Respondent was represented by counsel, James W. Withrow, General Counsel Kanawha County Board of Education.

This matter became mature for decision on July 3, 2014, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievants are long-time sign language interpreters for Respondent, who were promoted to a new professional classification for interpreters. Grievants were paid the basic salary, without experience increment pay, under the statutory salary schedule, because Respondent did not consider Grievants to be teachers, and experience is defined by the code as teaching experience. School laws must be strictly construed in favor of the employee, and such analysis of the relevant code sections as a whole and related caselaw mandate that Grievants be paid experience increment pay for their experience as sign language interpreters. Accordingly, the grievance is granted.

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

### **Findings of Fact**

1. Grievants are employed by Respondent as professional educational interpreters and are both assigned to Capital High School.
2. Grievants were previously employed by Respondent as sign language specialists, a service personnel position. Grievant Hall had been so employed for twenty years and Grievant Vaught had been so employed for fifteen years.
3. Beginning with the 2013 – 14 school year, Grievants' classifications were changed from service personnel to professional personnel pursuant to the Department of Education's clarification of county boards of education responsibilities under new legislation.

4. House Bill 2470, which was effective July 1, 2013, strengthened the requirements for educational sign language interpreters and changed the previous related service personnel class title into two separate class titles. House Bill 2470 did not make provision for educational sign language interpreters to be classified as professional employees.

5. To offer guidance on the effect of the bill, the Department of Education issued a memorandum on June 21, 2013. Boards of education were given the option to employ educational sign language interpreters as professionals, rather than service personnel. A new position of professional educational interpreter was created with the following requirements:

- Meets the definition of professional personnel in WV Code § 18A-1-1.
- Possesses at least a bachelor's degree from an accredited institution of higher learning.
- A minimum score of 3.6 on the Educational Interpreter Performance Assessment.
- A passing score on the Educational Interpreter Performance Assessment – Written Test (EIPA-WT).

6. Grievant Hall received her bachelor's degree on May 13, 2012. She obtained the required score on the Educational Interpreter Performance Assessment on December 27, 2009 and passed the Educational Interpreter Performance Assessment – Written Test on October 1, 2007.

7. Grievant Vaughn received her bachelor's degree on December 16, 2008. She obtained the required score on the Educational Interpreter Performance Assessment on December 9, 2006 and passed the Educational Interpreter Performance Assessment – Written Test on July 16, 2008.

8. Respondent opted to promote Grievants to professional employees under the new classification of professional educational interpreter. Upon promotion, Grievants were paid under the salary schedule for teachers and received increment pay for their education, but received no increment pay for their experience as sign language interpreters.

9. Grievants have been performing the same duties for the entire time they have served as sign language interpreters for Respondent. The change in classification did not change Grievants' duties in any way.

### **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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

Grievants contend that they are entitled to advanced salary pay based on their years of experience as sign language interpreters gained with Respondent as service personnel prior to the decision to change their positions to professional personnel. Respondent asserts it had discretion whether or not to promote Grievants from service

personnel to professional personnel and discretion to determine if their prior experience qualifies as “teaching experience” under the specific language of the applicable statute.

It is undisputed that Grievants were paid the basic salary, including credit for education but excluding credit for years of experience, under the State Minimum Salary Schedule in West Virginia Code section two, article four, chapter eighteen A. This code section is entitled “State minimum salaries for teachers.” The statute states, “each teacher shall be paid an equity increment amount as applicable for his or her classification of certification or classification of training and years of experience. . .” W. VA. CODE § 18A-4-2(c). The article defines salaries as,

(a) “Basic salaries” which shall mean the salaries paid to teachers with zero years of experience and in accordance with the classification of certification and of training of said teachers; and (b) “advanced salaries” which shall mean the basic salary plus and experience increment based on the allowable years of experience of the respective teachers in accordance with the schedule established herein for the applicable classification of certification and of training of said teachers.

W. VA. CODE § 18A-4-1. “Years of experience,” as used in the State Minimum Salary Schedule in section two of the statute, is defined as:

[T]he number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools, and service in the armed forces of the United States if the teacher was under contract to teach at the time of induction. For a registered professional nurse employed by a county board, "years of experience" means the number of years the nurse has been employed as a public school health nurse, including active work in a nursing position related to education, and service in the armed forces if the nurse was under contract with the county board at the time of induction. For the purpose of section two of this article, the experience of a teacher or a nurse shall be limited to that allowed under their training classification as found in the minimum salary schedule.

W. VA. CODE § 18A-4-1(a)(1).

In addition, the chapter provides further applicable definitions as follows:

The definitions contained in section one, article one, chapter eighteen of this code apply to this chapter. In addition, the following words used in this chapter and in any proceedings pursuant to this chapter have the meanings ascribed to them unless the context clearly indicates a different meaning:

(a) "School personnel" means all personnel employed by a county board whether employed on a regular full-time basis, an hourly basis or otherwise. "School personnel" is comprised of two categories: Professional personnel and service personnel;

(b) "Professional person" or "professional personnel" means those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee;

(c) "Professional educator" has the same meaning as "teacher" as defined in section one, article one, chapter eighteen of this code. are classified as follows:

(1) "Classroom teacher" means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity. . .

W. VA. CODE § 18A-1-1. The section then defines the four types of professional educators: classroom teacher, principal, supervisor, and central office administrator.

Grievants do not appear to argue that they are professional educators, so the remaining category of professional personnel applies:

"Other professional employee" means a person from another profession who is properly licensed and who is employed to serve the public schools. This definition includes a registered professional nurse, licensed by the West Virginia Board of Examiners for Registered Professional Nurses, who is employed by a county board and has completed either a two-year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program. . . .

W. VA. CODE §18A-1-1(d).

The above section also applies the definitions of section one, article one, chapter eighteen to chapter eighteen A. The relevant definition found in chapter eighteen is: "Teacher' means a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state. . . ." W. VA. CODE §18-1-1(g). "Instructional purposes" is not defined in either chapter.

While Respondent asserts, essentially, that a teacher means a teacher, and, thus the salary schedule does not apply to Grievants, the proposition is obviously not so simple. First, the code defines a "teacher" as any number of things that are not the common usage of the word. As "Instructional purposes" is not defined in either chapter, it could certainly be said that Grievants are employed for "instructional purposes" as they are directly conveying the instruction of the classroom teacher to their assigned students through sign language interpretation. They would, therefore, meet the definition of "teacher" in chapter eighteen and the salary schedule would directly apply.

"School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1, *Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176, 475 S.E.2d 176 (1996). There are only two salary schedules for school personnel, the schedule at issue and a schedule for service personnel. Compare W. VA. CODE § 18A-4-2 with W. VA. CODE § 18A-4-8a. As professional employees, Grievants cannot be paid under the service personnel schedule, which leaves only the "teacher" schedule. If the "teacher" schedule

was construed to exclude Grievants because they do not meet the definition of “teacher,” they, and the handful of like “other professional” positions, would be the only school personnel positions not paid under a legislative salary schedule guaranteeing certain minimum payment. Indeed, Respondent did, in fact, pay Grievants the basic salary under the “teacher” schedule. Respondent concentrates its argument on the contention that the experience provisions of the “teacher” schedule do not apply because “years of experience” is specifically defined as in the “teaching profession.”

The only interpretation that fits within the definitions of the two chapters read as a whole, is that the “teacher” salary schedule is meant to be applied to Grievants as professional personnel, and that the experience increment is also meant to apply to their relevant experience. Support for this interpretation comes from both the two chapters themselves, and a persuasive West Virginia Supreme Court of Appeals authority.

The preambles to the definition sections of both chapter eighteen and chapter eighteen A contain the following statement: “the following words used in this chapter and in any proceedings pursuant to this chapter have the meanings ascribed to them *unless the context clearly indicates a different meaning. . . .*” (emphasis added). Within the context of these chapters is the already-described problem of “other professionals” being excluded from the legislatively-mandated salary schedule if they are not included in the “teacher” schedule and also several instructive other code sections. Public school health nurses are included in the “other professionals” category in the definitions of chapter eighteen A. W. VA. CODE § 18A-1-1(d). Yet, the chapter specifically states that the “teacher” minimum salary schedule applies to public school health nurses and



that they receive experience credit. W. VA. CODE § 18A-4-1(a)(1). Also, in creating an additional salary increment for certain certified “other professional” professional personnel, the section states that the increment is to be “[i]n addition to any amount prescribed in the applicable State Minimum Salary Schedule” and that the payment is “a part of the state minimum salaries for teachers.” W. VA. CODE § 18A-4-2b(b). Therefore, the context of the statutes clearly demonstrates that “other professional” personnel are to be paid under the “teacher” schedule.

As it is clear that “other professional” professional personnel must be paid under the “teacher” schedule, despite not being teachers in the common use of the word, it naturally follows that experience credit must be granted for “other professional” professional personnel even though it is not “teaching” experience, *per se*. Respondent correctly points out that “years of experience” in the “teacher” schedule is specifically defined as “the number of years the teacher has been employed in the teaching profession.” W. VA. CODE § 18A-4-1(a)(1). However, the same section also defines the “years of experience” for the “other professional” position of school nurse as “the number of years the nurse has been employed as a public school health nurse, including active work in a nursing position related to education. . . .” The definition of “years of experience” is silent as to any other position that would be defined as “other professional.” While not binding precedent, it is instructive that the West Virginia Supreme Court of Appeals has previously found that it was not error for a speech pathologist to be given experience credit for her work as a speech pathologist under the “teacher” salary schedule. *Breza v. Ohio County Bd. of Educ.*, 201 W. Va. 398, 401,

497 S.E.2d 548, 551 (1997) (*per curiam*).<sup>1</sup> Further, it would simply make no sense to pay “other professional” professionals who are not teachers under the “teacher” schedule, yet deny them the experience increment pay because they are not teachers.

The remaining question is whether Grievants should receive experience credit for all the years they worked as service personnel sign language specialists, or only receive experience credit for the years they worked after completing the requirements of the new professional educational interpreter position. In support of their position, Grievants cite a Supreme Court of Appeals case in which newly-hired teachers who had previously served as Head Start teachers without the required education or certification, were found to be entitled to the experience increment pay for their experience as Head Start teachers. *Bright v. Tucker County Bd. of Educ.*, 184 W. Va. 33, 399 S.E.2d 176 (1990). Respondent argues that *Bright* does not apply because it specifically deals with teachers and teaching experience. However, as it is clear that, as “other professional” professionals are to be paid according to the “teacher” salary schedule and given credit for experience, the *Bright* case is helpful to determine how that experience should be calculated. The *Bright* Court found that it was not the degree or certification of the employee that was dispositive on the question of experience credit, but rather the duties performed. *Id.* at 36-7, 399 S.E.2d at 179-80. In this case, it is undisputed that Grievants have been performing the same duties for the entire time they have served as sign language interpreters for Respondent. The only thing that changed was the creation of the new professional classification. Therefore, Grievants are entitled to

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<sup>1</sup> Although, in a footnote, *Breza* states that *per curiam* opinions are not legal precedent and cannot be cited, a later decision of the Court clarifies that *per curiam* opinions do have limited precedential value and may be cited. Syl. Pts. 3 and 4, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).

experience credit for their prior service from the time they were hired by Respondent as sign language interpreters

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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

2. "'School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1, *Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176, 475 S.E.2d 176 (1996).

3. There are only two salary schedules for school employees. Compare W. VA. CODE § 18A-4-2 with W. VA. CODE § 18A-4-8a.

4. Grievants, as professional educational interpreters, must be paid under the salary schedule found in West Virginia Code section two, article four, chapter eighteen A.

5. "Years of experience" for purposes of experience increment pay, is defined as:

[T]he number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools, and service in the armed forces of the United States if the teacher was under contract to teach at the time of induction. For a registered professional nurse employed by a county board, "years of experience" means the number of years the nurse has been employed as a public school health nurse, including active work in a nursing position related to education, and service in the armed forces if the nurse was under contract with the county board at the time of induction. For the purpose of section two of this article, the experience of a teacher or a nurse shall be limited to that allowed under their training classification as found in the minimum salary schedule.

W. VA. CODE § 18A-4-1(a)(1).

6. It is not the degree or certification of the employee that is dispositive on the question of experience credit in the salary schedule for teachers, but rather the duties performed. *Bright v. Tucker County Bd. of Educ.*, 184 W. Va. 33, 36-7, 399 S.E.2d 176, 179-80 (1990).

7. Grievants are entitled to experience increment pay from the time they were hired by Respondent as sign language interpreters.

Accordingly, this grievance is **GRANTED**. Respondent is hereby **ORDERED** to recalculate Grievants' experience under W. VA. CODE § 18A-4-2(c), giving each credit for her previous experience as a sign language specialist. Grievants' pay as professional educational interpreters shall include the experience increment as above, and Respondent shall also pay to each Grievant back pay, plus interest, for the amount of the experience credit for the 2013-14 school year.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See 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 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: August 7, 2014**

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**Billie Thacker Catlett**  
**Administrative Law Judge**