

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BEVERLY BAILEY, et al.,
Grievants,**

v.

Docket No. 2015-1551-CONS

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

DECISION

Grievants, Beverly Cheryl Bailey, Teresa Jones, Marcella Charles and Dr. Ted Kinder, are employed by Respondent, Mingo County Board of Education (“Board”), as the Principal and Assistant Principals at Mingo Central High School.¹ They all filed grievances dated May 12, 2015, with the following statement of grievance:

W. VA. CODE §§ 18A-4-7a; 18A-2-7; 18A-2-2; 18A-4-5a. Past Practice. BOE changed terms of contract without prior notice. Principal pay calculation system has been in place since the formation of Mingo Central High School and system was approved by WV Dept. of Educ. officials under state takeover. No RIF notice, no transfer notice. Arbitrary and capricious. Pay reduction not due to loss of levy.²

As relief, Grievants seek for the “Payment formula to remain, back pay, interest and any related benefits.”

Pursuant to WEST VIRGINIA CODE § 6C-2-4(a)(4) the parties agreed to waive the lower levels and jointly moved that the grievances be consolidated for hearing at level three. By Order dated June 18, 2015, the grievances were consolidated. A level three

¹ Teresa Jones is the Principal and Ms. Bailey, Ms. Charles and Dr. Kinder are Assistant Principals.

² Grievants amended their original grievance statements. This statement reflects all of their allegations as set out on the grievance forms.

hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on September 15, 2015. All Grievants personally appeared and were represented by Ben Barkey, West Virginia Education Association. Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore and Shohl, LLP. This matter became mature for decision on October 22, 2015 when the last of the parties' Proposed Findings of Fact and Conclusions of Law were received by the West Virginia Public Employees Grievance Board.

Synopsis

Respondent reduced Grievants' salaries after discovering that the initial calculation used to determine the total annual pay for each Grievant was incorrect. Grievants argue that the unique calculation was done intentionally to compensate them for the additional duties involved in administering a "comprehensive" high school. The calculation used to arrive at the salaries for Grievants was never used previously in Mingo County Schools and there is no record or independent evidence that it was utilized intentionally in this instance. Grievants did not meet their burden of proof and the consolidated grievance must be DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Mingo Central High School is a comprehensive high school created by closing and consolidating four high schools in Mingo County.³ It was opened at the

³ Gilbert, Burch, Matewan, and Williamson High Schools were closed and consolidated to create Mingo Central.

beginning of the 2011-2012 school year. When Mingo Central was opened and hiring initial staffing decisions were made, the Mingo County school system was operating under the direction and control of the State Board of Education through the State Department of Education.

2. Mingo Central is called a comprehensive high school because it offers a variety of educational programs in addition to the basic high school curriculum including career and technical education, as well as summer education programs, on a year-round basis.

3. Teresa Jones is employed as the Principal of Mingo Central High School. Beverly Cheryl Bailey, Marcella Charles and Dr. Ted Kinder are employed there as Assistant Principals.

4. Each of the Assistant Principals is assigned a particular area of focus and supervision in the comprehensive program. Ms. Bailey is the Assistant Principal and Curriculum Director, Dr. Kinder is the AP/Athletic Director and Assistant Principal, and Mr. Charles is Assistant Principal and Director of Career and Technical Education.

5. Because Mingo Central is a comprehensive high school with varied additional programs, the administrators were given longer extended contract terms than those held by administrators assigned to the remaining Mingo County schools. The Mingo Central Principal works a 261-day contract term as opposed to a 240 or 230-day contract term for other Principals. The Mingo Central Assistant Principals work 240-day contract terms as opposed to a 215-day contract term for the other Assistant Principals. (Grievants' Exhibits 4 & 5).

6. All of the Principals and Assistant Principals receive a salary supplement based upon an index applied to their base salaries.

7. The index for high school Principals at the time Mingo Central was opened was 1.30. The Principal of Mingo Central High School was given a higher index of 1.45 to compensate for the additional duties and responsibilities incident to the operation of the comprehensive high school.

8. Assistant Principals received an index of 1.22. Assistant Principals at Mingo Central received more days in their extended contract than other secondary Assistant Principals, but there is no evidence that their index was any different.

9. In early spring 2015, a group of school administrators filed a grievance alleging that the calculation for pay for Principals and Assistant Principals in all other schools in Mingo County was not uniform with the calculation used to pay the administrators at Mingo Central. While investigating this allegation, the Director of Human Resources for Mingo County found that there was a significant difference in the calculation of the pay for the Mingo Central administrators.

10. The calculation for Principal and Assistant Principals salaries until the opening of Mingo Central High School was consistent and followed the following formula. $(\text{Teacher Base Salary}^4 + \text{Statutory Principal Increment}^5) \div 200 \text{ days} = \text{Daily Rate}$

⁴ See W. VA. CODE § 18A-4-2 for Basic Teacher Salary based upon degree level and years of experience.

⁵ See W. VA. CODE § 18A-4-3(c) for the State Salary Increment of Principals and Assistant Principals based upon the number of teachers supervised.

X Contract Term, e.g., 240 days = Total Base Salary x County Index, e.g., 1.20 = Administrator Salary.

11. A mistake was made by an employee in the payroll department in the initial calculation of the salaries for the Principal and Assistant Principals at Mingo Central High School. The salaries were apparently calculated using the following formula.

(Teacher Base Salary + Statutory Principal Increment + *Annual Amount Paid for Extended Contract Days*) ÷ 200 days = Daily Rate X Contract Term e.g. 240 days + Total Base Salary x County Index, e.g., 1.45 = Administrator Salary. (Emphasis added).

This formula improperly inflates the daily rate by adding the extended term days into the base salary but only dividing by the minimum contract term of 200 days.⁶

12. When the initial calculations were made for the salary for the Administrator's at Mingo Central High School, the employee who had made all such calculations in the past had retired and the person who made the calculations had never calculated salaries for professional board employees.⁷ To exacerbate this issue, the retired employee would not offer any assistance in this process and the new employee did not request such

⁶ For example:

Formula 1. Assuming an annual base salary of \$20,000: $\$20,000 \div 200 \text{ days}$ gives a daily rate of \$100 X 240 days = \$24,000 annual salary X Index of 1.20 = \$28,800 administrative salary.

Formula 2. Assuming an annual base of \$20,000: $(\$20,000 + \$4,000 \text{ for the extended days}) \div 200 \text{ days}$ gives a daily rate of \$120 X 240 days = \$28,800 X Index of 1.20 = \$34,500

⁷ This employee had previously made calculations for the Board's service personnel which is apparently done differently than the calculation for professional personnel.

assistance.⁸ No one reviewed these calculations for accuracy or compliance with the relevant statutes and policies.

13. Randy Keatley, who was the Superintendent of Mingo County Schools at the time, did not authorize a different calculation for the salaries of the Mingo Central Administrators than was used for all other principals and assistant principals and was not aware of any authorization for such being approved by the State Board of Education.⁹

14. It is more likely than not that the calculation used to arrive at the higher salaries for the Mingo Central High School Principal and Assistant Principals were the result of a mistake rather than used intentionally.¹⁰

15. Grievants were each sent an email dated March 2, 2015, from Director Duncan with an attached verification of their salary calculated by the method used for all another Principals and Assistant Principals and explaining that the difference in the calculations was due to an error in the calculations which was “carried over from previous years.” (Grievant’s Exhibit 2).

16. In July 2015, the policy establishing the supplementary salary schedule was amended by the Board of Education. All high school Principals and Assistant Principals salaries are calculated by the same formula as set out in Finding of Fact 10, *supra*. All high school principals receive an index increase of 1.42. This is an increase for one high school principal from 1.30, but a decrease for Principal Jones from 1.45. All high school

⁸ The reasons for this communication gap was not revealed at the hearing and the responsible employees are now dead.

⁹ Level three testimony of Randy Keatley. Mr. Keatley’s testimony was taken telephonically upon agreement of the parties because he now lives in South Carolina.

¹⁰ Grievants presented a reasonable theory to explain possible intentional use of a more favorable formula for calculating their salaries, but were unable to provide supportive evidence, at least in part, due to the death of the employee who made the calculations.

assistant principals receive an index of 1.28. This appears to be an increase in the index for Grievants Bailey, Charles and Kinder from 1.27 set out in the original policy. (See Grievants' Exhibit 4, page 2).

17. Even with the increase of the index for three of the Grievants, their salaries dropped because of the change in calculation which corrected the long-standing mistake made in the original calculation of their salaries.¹¹

18. No notice or opportunity to be heard was specifically given to Grievants before the pay policy was amended.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the consolidated grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 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). 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 argue that their salaries were cut and their contracts altered without their consent or the requisite notice and opportunity to be heard. Respondent does not deny that Grievants' salaries have been reduced, but contends that the salaries have been mistakenly inflated by an erroneous calculation for a number of years and the Board is

¹¹ The Board alleges that Grievants have been mistakenly paid more than they were supposed to be paid as a result of the miscalculation of their salaries. However, the Board does not seek to recover any overpayment from Grievants.

authorized, if not obligated, to correct that mistake. If their initial salary calculation was a mistake, the three Grievants who are Assistant Principals did not suffer a salary decrease as a result of the amendment of the salary policy since their extended contract days remain the same and their index was slightly increased.

The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997). *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008). Additionally, it has been established that prior mistakes do not create an entitlement to continuing incorrect compensation. 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. 96-7-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995). *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006).” *Mullins v. McDowell County Bd. of Educ.*, Docket No. 07-33-076 (Oct. 20, 2008); *Dinger v. Mercer County Bd. of Educ.*, Docket No. 2013-1047-MerED (Sept. 19, 2013).

In this matter the initial salary calculation for Grievants included the extended contract days in the annual salary and then dividing by 200 days to reach the daily rate. 200 days is the minimum contract term. This calculation inflated the daily rate in a way that was not used in calculating any other administrative salaries in Mingo County. Grievants assert that this inflation was intentional to compensate them for the additional duties involved in the administration of a comprehensive high school. However, no evidence was presented to support that assertion.

Ex-Superintendent Keatley noted that the Principal and Assistant Principals received additional days in their contract term to compensate for the additional duties they were required to perform. He also noted that the State Board agreed to increase the index for the Principal to 1.45, but no other compensation or calculation was contemplated. Grievants did not present any evidence to indicate that the unusual calculation was intentional.¹² Given the totality of the evidence, it is more likely than not that the distinctly unique method of calculating the Mingo Central High School administrative salaries was a mistake which the Board is entitled to correct. Grievants were unable to prove that the implementation of this unusual calculation was intentional and have therefore, not met their burden of proof. See *Straight, et al. v. Kanawha Bd. of Educ., supra.*¹³

Because Respondent was correcting a mistake and not altering the true nature of Grievants' continuing contracts it was not under the obligation for notice and hearings required by WEST VIRGINIA CODE § 18A-2-2.¹⁴ Accordingly, the consolidated grievance is DENIED.

¹² Clearly, Grievants were significantly hampered in that endeavor by the fact that the person who made the calculation is dead, and is not available to explain why the clearly unique calculation was utilized.

¹³ It is noteworthy that Respondent cannot definitively prove why the errant calculation was used either. However, Respondent benefits by not having the burden of proof in this instance.

¹⁴ The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated, subject to the following:

(1) A continuing contract may not be terminated except:

(A) By a majority vote of the full membership of the county board on or before March 1 of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes and an opportunity to be heard at a meeting of the board prior to the board's action on the termination issue . . .

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the consolidated grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 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). 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. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997). *Toney v. Lincoln County Bd. of Educ.*, Docket No., 2008-0533-LinED (Oct. 31, 2008).

3. It is well established that prior mistakes do not create an entitlement to continuing incorrect compensation. 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. 96-7-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995). *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006). *Mullins v. McDowell*

W. VA. CODE § 18A-2-2 (C).

County Bd. of Educ., Docket No. 07-33-076 (Oct. 20, 2008); *Dinger v. Mercer County Bd. of Educ.*, Docket No. 2013-1047-MerED (Sept. 19, 2013).

4. Grievants were unable to prove that the implementation of the unusual calculation to initially establish their salaries was intentional and have therefore, not met their burden of proof. *See Straight, et al. v. Kanawha Bd. of Educ., supra.*

5. Because Respondent was correcting a mistake and not altering the true nature of Grievants' continuing contracts it was not under the obligation for notice and hearings required by WEST VIRGINIA CODE § 18A-2-2.

Accordingly, the Grievance is DENIED.

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 156 C.S.R. 1 § 6.20 (2008).*

DATE: JANUARY 8, 2016.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**