WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HAZEL DAMRON,
Grievant,

v. **Docket No. 2016-0252-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Hazel Damron, Grievant, filed this grievance against Wayne County Board of Education ("WCBE"), Respondent, on September 1, 2015. Grievant contests her terms of employment. The statement of grievance provides "Grievant held a 261-day contract of employment. This seems to have been changed to a 240 day contract with no notice or written consent. Grievant alleges a violation of W. Va. Code 18A-2-12a, 18A-2-6 & 18A-4-8(m)." The relief sought states, "Grievant seeks reinstatement to a 261-day contract with compensation for all lost wages and benefits with interest."

A level one conference was held on November 10, 2015. By decision erroneously dated February 2, 2015,[1] the designee of the chief administrator denied the grievance. Grievant appealed to level two on February 16, 2016, and a mediation session was held on March 23, 2016. Grievant appealed to level three on March 30, 2016. A level three hearing was held before the undersigned Administrative Law Judge on July 11, 2016, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by counsel, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by counsel David A. Lycan, Esquire. This case became mature for decision on August 22, 2016, the established mailing date for

[1] The correct year was 2016.

the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant contests her terms of employment with Wayne County Board of Education. The parties differ regarding the status of Grievant's employment with Respondent as a secretary assigned to the WFGH radio station, specifically the proper amount of vacation pay due. The circumstances of this employment matter are convoluted. Both parties tend to be guarded, or less than overly forthcoming, with reliable information.

Respondent argues that an alteration of Grievant's 261-day employment contract was implemented, highlighting a notable community event (school consolidation in 1987-88) effecting all then employed personnel. Relevant Wayne County School Board action was implemented, employees of Grievant's classification/status were effected. However, it is not established that Grievant was duly noticed and/or presented with the relevant information as it pertained to her employment status. There is a difference between the benefits of a 261-day employee and that of a 240-day employee. It is hard to fathom that for over twenty-five years no event or conversation between employer and employee transpired, (e.g., payroll) which alerted one or the other that the two parties were governing their activities pursuant to different criteria. Nevertheless, pursuant to relevant school board policy, service personnel may accumulate unused vacation leave, but no such employee is allowed to carry more than 30 days over to each new fiscal year. Thus, this grievance is GRANTED in part.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Hazel Damron, Grievant, is employed by Respondent, Wayne County Board of Education, as a Secretary.

2. Grievant began working for Respondent as the secretary for the school system's radio station, WFGH, in 1979.

3. After three years of acceptable employment, each service person who enters into a new contract of employment with a county school board is granted continuing contract status. *See* W. VA. CODE § 18A-2-6 as amended.[2]

4. Grievant entered into a continuing contract with Respondent during the 1983-1984 school year, which provided that Grievant's employment term was 261 days. R Ex 1 There is no evidence of record that Grievant ***ever*** signed another contract with Respondent after the continuing contract for the 1983-1984 school year.

5. WFGH radio station was originally created as a part of former Fort Gay High School in the late 1970s. Fort Gay High School was thereafter closed, when it and Crum High School were consolidated into Tolsia High School.

[2] W. Va. Code §18A-2-6. Continuing contract status for service personnel; termination. After three years of acceptable employment, each service person who enters into a new contract of employment with the board shall be granted continuing contract status. … The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board. ... or by written resignation of the employee. The affected employee has the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

6. The process of consolidation is complicated and time consuming, it is not done in a vacuum. There is much community wide discussion. Employees whose livelihood could be impacted are especially concerned about the process and the potential ramification to their employment status.

7. Tolsia High School began operations midway through the 1987-1988 school year and the employees of Fort Gay High School and Crum High School, including any school board employees assigned to the WFGH radio station, were subject to reassignment, RIF or transfer.[3] Tolsia High School was constructed approximately half way between the two former high schools.

8. Grievant did not move to Tolsia High School during 1987-1988 school year. She remained at the Fort Gay location of the radio station's studio and offices for a significant time period before relocating with the radio station to Tolsia High School.

9. The WFGH radio station, due to building adjustments at Tolsia High School, was not moved to a studio in Tolsia High School until 1991.

10. For years, Grievant was employed and experienced a state of contentment. Grievant treated her position as the secretary for the school system's radio station, WFGH as a vocation rather than as an occupation.

11. A controversy arose in August 2015 with Respondent's payroll department and Grievant about the designation of a day off for Grievant as a vacation day.

[3] "RIF" refers to "reduction in force" as the term is used in W. VA. CODE § 18A-4-8b, when a school board reduces the number of personnel within a particular job classification. A reduction in force is a process effected and governed by numerous rules, regulations and various applicable. *See* W. VA. CODE §§ 18A-2-8a, 18A-2-6, 18A-4-8b and 18A-4-8g. With regard to service personnel assignments and transfers see W. VA. CODE § 18A-2-7.

12. Grievant was informed by Lisa Harper that she could not designate the identified day off as a vacation day because Grievant did not accumulate paid vacation days as a 240-day employee.

13. Lisa Harper is Respondent's current Payroll Accountant/Director of Support Services and Audits, whose duties include overseeing Respondent's payroll and auditing county funds. Ms. Harper testimony at L-3 hearing.

14. Grievant and Ms. Harper communicated regarding Grievant's employment status and the parameters of various school personnel employment. Grievant communicated her belief that she was receiving compensation as a 261-day employee and is entitled to vacation days. Ms. Harper indicated that Grievant, pursuant to Respondent's records, was a 240-day employee and did not accumulate paid vacation.

15. Grievant initiated a grievance contesting the apparent reduction of her employment term without her consent.

16. Respondent's current service personnel director, Loren Perry, as a result of this grievance, reviewed Grievant's personnel file.

17. Respondent's representatives provided Grievant with documents indicating that Grievant had been assigned to a 240-day Secretary position at Tolsia High School for the 1987-1988 school year and had not been a 261-day employee since that time.

18. A search of Respondent's records in response to a subpoena duces tecum, issued at the request of Grievant, "unearthed" the following documents:

a. A letter dated May 12, 1987 advising Grievant that she had been transferred to "Secretary at Tolsia High School, as per your bid". R Ex 2

b. BOE minutes from May 11, 1987 memorializing the transfer of "Hazel Damron, from Secretary at Fort Gay High School to Secretary at Tolsia High School".[4] R Ex 3
c. BOE minutes from June 29, 1987 indicating that Grievant was "Unassigned". R Ex 5
d. Posting for Secretary II at Tolsia High School for 240 days, with a posting period of July 1, 1987 through July 10, 1987. R Ex 8
e. BOE minutes from July 20, 1987 memorializing the transfer of "Hazel B. Damron, from Secretary III Unassigned to Secretary III at Tolsia High School, 240 day annual employment (transfer)". R Ex 7
f. A letter dated July 21, 1987 advising Grievant that she had been transferred from "Secretary III Unassigned to Secretary III at Tolsia High School, 240 days annual employment, as per your bid". R Ex 6

19. A search of Respondent's records at the request of Respondent's counsel and in response to a subpoena duces tecum issued at the request of Grievant, ***did not*** result in the discovery of any of the following items:

a. A contract executed between Grievant and Respondent subsequent to the 261-day contract of employment executed for the 1983-1984.
b. Documentation, such as a signature acknowledging receipt of certified mail, establishing that Grievant received documents indicating that she had been assigned to a 240-day Secretary position at Tolsia High School for the 1987-1988 school year and was not a 261-day employee.
c. An application signed by Grievant for either position referenced.
d. Any written agreement executed by Grievant consenting to the reduction of her employment term.
e. Documentation memorializing notice and compliance with due process requirements necessary for placing Grievant on the transfer list or for unilateral reduction of her employment term (W. VA. CODE § 18A-2-6).

20. Since 1983, Wayne County Board of Education, Respondent, has had nine different county superintendents as well as several changes in personnel directors.

[4] Under Board approved personnel matters, transfers and assignments, Grievant Hazel Damron was transferred from "Secretary at Fort Gay High School to Secretary at Tolsia High School". R Ex 3, pgs. 5 and 6

21. Director Perry located a posting for secretary positions at "Consolidated High School, Crum Middle School and Fort Gay Middle School", 205-day term of employment, with a posting period of April 9, 1987 through April 23, 1987 and the posting stated that each "assignment will be effective upon opening of consolidated high school, Crum Middle School and Fort Gay Middle School". This posting of secretary positions also stated that "secretaries who transfer will retain their Secretary III classification; new employees will be classified as Secretary II." R Ex 4

22. Respondent's Board meeting minutes and agenda revealed that during a regular Board meeting held on May 11, 1987, under Board approved personnel matters, transfers and assignments, Grievant was transferred from "Secretary at Fort Gay High School to Secretary at Tolsia High School". *See* R Ex 3, pgs. 5 and 6. There is no confirmation that a May 12, 1987 letter from former County Superintendent Michael E. Ferguson to Grievant confirming that Respondent's then board members met in regular session on Monday, May 11, 1987, transferred Grievant from Secretary at Fort Gay High School to Secretary at Tolsia High School, was ever received by Grievant. R Ex 2

23. Respondent's Board agenda records indicate that during a June 29, 1987, special Board meeting, the Board listed Grievant on its Professional Personnel List for the 1987-1988 school year as being one of four service personnel employees who were, as yet, unassigned. R Ex 5, pg. 14

24. Director Perry located a posting for a Secretary II position, 240-day term of employment at Tolsia High School, with a posting period of July 1, 1987 through July 10, 1987 and the posting further noted that the person awarded this posted position "Will

assist with the operation of WFGH Radio and must have knowledge of FCC regulations." R Ex 8

25. Respondent's Board agenda records indicate that during a regular Board meeting held on July 20, 1987, under board approved personnel matters, transfers and assignments, the Board approved the transfer of "Hazel B. Damron, from Secretary III Unassigned to Secretary III at Tolsia High School, 240 days annual employment (transfer)". R Ex 7, pgs. 4 and 5

26. Grievant's personnel file contained a signed letter from former county Superintendent Michael E. Ferguson addressed to Grievant, under date of July 21, 1987, which provides that Respondent's then board members, meeting in regular session on Monday, July 20, 1987, "transferred you from Secretary III Unassigned to Secretary III at Tolsia High School, 240 days annual employment, as per your bid." R Ex 6

27. There is no confirmation that the July 21, 1987 letter from former county Superintendent Michael E. Ferguson to Grievant, was ever mailed or received by Grievant.

28. Wayne County School Policy concerning vacation, among other provisions, limits vacation days to 261-day employees and allows such employees to accumulate unused vacation leave, but no such employee is allowed to carry more than 30 days over to each new fiscal year and upon termination of employment, accumulated vacation leave may be used to receive a lump sum payment based upon employee's daily rate of pay for up to a maximum of 30 days. *See* R Ex 9, Wayne County Policy 4433.

Discussion

Respondent first asserts that the instant grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4, and therefore this matter should be dismissed. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing…

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Emp. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). However, under the "discovery rule exception" to the statutory time lines, as addressed by the Supreme Court of Appeals of West Virginia in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance.

Respondent argues that the action(s) being challenged was adopted by Wayne County Board of Education in 1987-88, and this grievance was not filed until September 2015, more than 25 years later. Grievant asserts that she was not aware of the alteration of her employment until August 2015, shortly before the grievance was filed. Grievant argues it was the discovery that Respondent has determined she is ineligible for vacation pay and refusal to honor her request for vacation which triggered the tolling of the grievance window and not the unknown action of Respondent.

It has been found by the Grievance Board that when a Grievant makes inquiries to confirm the facts before filing a grievance, this falls within the discovery exception, and the date from which the grievance must be filed is the date the Grievant receives confirmation of the facts. *Kiger v. Monongalia County Bd. of Educ.*, Docket No. 05-30-062 (May 31, 2005). Thus, the undersigned is persuaded, in part, with Grievant's argument and is of the opinion that further analysis is warranted.[5] The discovery rule provision of

[5] While it is disturbing to this ALJ that Grievant's memory of events has a convenient lapse of specificity regarding dates in conspicuous places, the undersigned will refrain from opining

W. Va. Code § 6C-2-4 is deemed relevant in the circumstances of this matter. It is not established to any reliable degree that triggering information was known to Grievant prior to sometime in August 2015. This is to say, Respondent's Payroll Accountant/Director of Support Lisa Harper, over the course of several phone conversations with Grievant, indicated and sought verification that pursuant to Respondent's records Grievant was a 240-day employee and did not accumulate paid vacation. It is not established that prior to these phone conversations in August 2015 that Grievant had knowledge that she was anything other than a full-time school board employee. Grievant filed the instant grievance on September 1, 2015.

It is not established that, prior to August 2015, Grievant was aware of triggering information that would toll the grievance window. This grievance was timely filed because it was filed within fifteen working days of the date which Grievant was unequivocally informed or became aware of the instantly grieved issue(s). Respondent has not met its burden by a preponderance of the evidence to demonstrate an untimely filing.

MERITS

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought

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regarding this phenomenon in addressing the timeliness of the instant grievance.

to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant, with the assistance of legal counsel at level one and level three, contended that Grievant has been a 261-day employee of Respondent since July 1, 1983.[6] Respondent contended that Grievant has not been a 261-day employee of Respondent since 1987 when she bid upon and was awarded a 240-day Secretary III position at Tolsia High School, which she has retained up to the present date (employed as a 240-day employee and paid as such), for the past 29 years. A very relevant fact of this matter is actually the lack of fact certainty. Neither party introduced as evidence a recent employment contract or any contract specific to Grievant less than 30 years old. Grievant proffers a continuing contract of employment was established and that it is not properly demonstrated that Grievant's employment status was lawfully altered[7] while Respondent highlights the School Board actions of 1987-1988.[8] Grievant contends that Respondent's actions pursuant to the facts of the case are violations of W. VA. CODE § 18A-4-8(m).

[6] *See* findings of fact 1 through 4.

[7] Citing W. VA. CODE §§18A-2-12a(b)(6) & §18A-4-8(m).

[8] The Wayne County Board of Education may transfer and assign an employee in the manner provided by Section 7, Article 2, Chapter 18A of the Code of West Virginia, as amended.

Grievant's status of employment is of issue. All school personnel is entitled to due process in matters affecting their employment, transfer, demotion or promotion. W. Va. Code §18A-2-12a(b)(6) Several ancillary facts and issues tend to provide limited insight on the principle issues. Further, it is also recognized that pursuant to Wayne County School Bylaws and Policy, "An employee may accumulate unused vacation leave but may not carry more than thirty (30) days over to the new fiscal year." *See* Policy 4433, R Ex 9.

Several witnesses, including Grievant, indicate that Grievant is a dedicated worker, who worked far in excess of a normal day or a typical weekly schedule. Testimony indicated that Grievant is a notable force in the operations of the radio station, WFGH. Grievant's activities at the radio station were year round, not limited to a school calendar year. There were numerous times that Grievant worked seven days a week performing duties that were not limited to secretarial duties such as programing, on air personality, community service and other non-distinct responsibilities. The fact that Grievant worked diligently at the radio station is not in dispute. She did in fact donate untold hours to the operation of the radio station.[9] In dispute is the level of employment to which Grievant was contractually bound.

Policy grants paid vacation to 261-day employees. Employees with a 240-day contract do not receive a paid vacation, but receive 21 days off without pay each year. In contrast, employees with a 261-day contract are provided a paid vacation of up to 24

[9] Grievant treated her position at the radio station as a vocation rather than as an occupation. The excess time was provided, perhaps as community service, but done pursuant to Grievant's own volition, not as required employment duties or compensable overtime. See L3 testimony.

days per year, based on years of service. As discussed by the West Virginia Supreme Court, it is readily acknowledged and a matter of record that:

> Employees serving under a 261-day contract accrue paid vacation on a sliding scale… : employees having served seven years or fewer receive two weeks of paid vacation; employees with seven to fifteen years experience receive three weeks; employees with sixteen or more years experience receive four weeks. Employees serving under a 240-day contract do not receive paid vacation and must request twenty-one "non-calendar" unpaid days annually. Thus, a 261-day contract employee with sixteen or more years experience works only one more day per year than a 240-day contract employee, but the 261-day contract employee receives twenty-one more paid days of employment.

Durig v. Board of Education, 215 W. Va. 244, 599 S.E.2d 667 (2004).

There appears to be no question that the Grievant was a 261-day employee of Respondent from July 1, 1983, until at least the end of the 1986-1987 school year and probably up until the middle of the 1987-1988 school year, when Fort Gay High School was actually closed and the newly constructed Tolsia High School was opened. However, from that point Grievant and Respondent differ in that Grievant claims she has remained a 261-day employee of Respondent up to the present and Respondent is of the opinion that Grievant has been a 240-day employee of Respondent from that point to the present.

As previously stated, a very relevant point of this matter is the lack of factual certainty. Several points of pivotal importance are not definitively provided by either party. This is unsettling for this fact finder and more than a bit annoying. It is readily apparent that Respondent and Grievant have been co-participating with a wink and a nod regarding Grievant's employment for some time.[10]

[10] One of the unspoken elements of this grievance is the perverseness' of abnormal

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Grievant's testimony is difficult to depict in words alone. She is able to communicate without hesitation to the points she wants to convey without any reservation or confusion. Grievant is opinionated and not necessarily initially evasive, but she is also

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activities by both parties, beginning as far back as 1983 when Grievant, according to her level three testimony, was apparently given a 261-day employment contract as a Secretary III at WFGH, without the position having been posted. This information coupled with the lack of service documentation tends to demonstrate that Grievant's employment has been abnormal, throughout her tenure.

not above some petty wordsmanship. She is uniquely aware of select issues in contention and "some" of the pivotal points of the dialogue/discussion.

Grievant's responses to several questions asked were direct and on point; nevertheless there was also, from time to time, a stream of consciousness that tended to promulgate her posturing but did not provide useful information. There was more than one occasion where Grievant's declarations regarding her condition of employment sparked many more questions, in the mind of this ALJ, than relevant information being provided. Grievant is honorable with this there is no doubt. But Grievant's ability to recollect any information that she perceived detrimental to her cause was not readily going to happen. Grievant was not motivated to provide any information that might reflect negatively on her case. Grievant's ability to recall her activities and school board actions during the consolidation time period is perceived and thought to be less than forthcoming. Grievant's cannot have it both ways, either she was an employee of the school system and effected by the county board activity or independently employed by the radio station.[11] Grievant has testified that she was of the belief that she was receiving compensation as a 261-day employee.[12] This is plausible; however, it is difficult to get a truly accurate picture, when the parties do not fully divulge relevant facts.

[11] Grievant readily acknowledges her position is and was one provided by the county school board but then wants this finder of fact to accept that Grievant did not know, or did not conceive that, the consolidation of the local high schools, one of which her position was associated with, would have any effect on her employment status. School consolidation is a much publicized event in the community, one of the foremost concerns of any school employee at the time prior to, during and post consolidation is the effect of the consolidation on his or her employment.

12 Pursuant to both parties Grievant was present at the radio station in excess of her contractual status. Thus the amount of time Grievant spent at WFGH does not establish her as a 261 or 240-day employee. A 261-day contract employee with sixteen or more years' experience works only one more day per year than a 240-day contract employee, see *Durig, cited supra. pg. 14.* Further, note is made that it is not proper or timely for Grievant to seek or allege entitlement to back pay for the time she voluntary provided

The bulk of Grievant's testimony is plausible, but there are gaps in the reliability of the information provided. Specific examples include information exchanged between employer and employee, documentation for time worked and leave time reporting. It is possible that Grievant did not go on any extended vacations for several years, but it is hard to fathom that Grievant never took one vacation day in 26 years. It is understood that Grievant worked far in excess of a standard school year contract. It is also believed to be factually accurate that Grievant donated untold hours to her community and the success of the radio station, WFGH. Grievant voluntarily provided service to WFGH, far in excess of a traditional occupation; nevertheless, she cannot now present Respondent an invoice for her dedications beyond the parameters of statuary constraints.

Respondent's failure to present time records, past pay vouchers with relevant information, or other regularly maintained employment documentation is disturbing. Employers are responsible for maintaining employee records for numerous reasons including accuracy of information. Plenty of conjecture was presented, but very little factual data was entered into evidence.

It was presented that Wayne County Board of Education does not have an established schedule for 240-day employees. Grievant was given latitude to come and go, maintaining her employment with little to no direct supervision, allegedly no former payroll records were available, little to no reporting of time for years and now the parties want a definitive ruling, regarding benefits. This is problematic. Whether Grievant is entitled to vacation days as a 261-day employee or not, is debatable.[13]

in excess of her employment statute. Grievant was aware of the excess, this element is not newly discovered or activity that was demanded as a condition of employment.

[13] Reasonable minds may differ on this issue.

WEST VIRGINIA CODE § 18A-2-6, provides in part, as follows:

> After three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: *Provided,* That a service personnel employee holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before March 1 of the then current year, or by written resignation of the employee on or before that date, The affected employee has the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

Further, WEST VIRGINIA CODE § 18A-4-8(m) states, "[w]ithout his or her written consent, a service person may not be: (1) Reclassified by class title; or (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years."

All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion.[14] WEST VIRGINIA CODE §18A-2-12a(b)(6)

[14] The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ*., Docket No. 89-02-234 (Nov. 28, 1989).

Reduction of Grievant's employment term required due process or Grievant's written consent. *See* WEST VIRGINIA CODE § 18A-2-2 which states:

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

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). A very weighted question is whether adequate due process protections were extended to the instant Grievant.

The contention that Grievant was denied due process has some merit in the fact pattern of this case. Grievant has professed no recollection of being informed, orally or in writing, of the changes in her employment status. Respondent identifies the 1987-88 conduct of then County School Board; however, Respondent is unable to establish that Grievant was duly informed. The copy of correspondences, R Ex 2 and R Ex 6, located

in Grievant's personnel file do not provide confirmation that Grievant was properly notified of the School Board actions regarding her employment status. There is no certified mail confirmation receipt. Notice and an opportunity to respond is a pivotal area of concern. The undersigned is not truly convinced that either Respondent or Grievant have clean hands with regard to this employment status situation. It is more likely than not that Grievient and Respondent have been conducting the terms of Grievant's employment with a wink and a nod for many years.[15]

Coupled with the forgoing, analysis of this matter is not complete without acknowledging that school employees are not permitted to carry more than 30 vacation days over to each new fiscal year and upon termination of employment. *See* County Policy 4433 concerning vacation. Thus, notwithstanding whether Grievant is or is not a 261-day employee, Grievant would be capped at 30 days of vacation pay. A total of 30 days or less, NOT a composite or the sum total of unused vacations days for the last 25 years. This is rational and mathematically correct.[16] As previously inferred, Grievant cannot have her cake and eat it too. Grievant is not entitled to pick and choose the school laws she likes and disregard the limiting factors. Grievant voluntarily provided service to WFGH, far in excess of a traditional occupation; nevertheless, she cannot now present Respondent with an invoice for her dedications beyond the parameters of statuary constraints. Employees may accumulate unused vacation leave, but employee are not allowed to carry more than 30 days over to each new fiscal year and upon termination of

[15] While Grievant was listed as a school board employee, it is readily apparent that she worked independently without much accountability or constraint by the Wayne County Board of Education.

[16] Grievant is limited with regard to the number of vacation days she could claim, as well as back pay as set out in W. Va. Code §6C-2-3(c)(2).

employment, accumulated vacation leave may be used to receive a lump sum payment based upon employee's daily rate of pay for up to a maximum of 30 days. R Ex 9

It is hard to comprehend that Grievant had not requested a vacation day, not one, in a time span in excess of 25 years (1988-2015). This is difficult to fathom. Further, it is strange that Respondent has no employment (time) records for Grievant.[17] Nevertheless, the parties represent that this matter is a viable dispute (not a friendly suit).[18]

It is clear that as of the 1983-1984 school year, Grievant held a 261-day employment contract. It is also beyond dispute that as of 2015-2016 school year, she was no longer a 261-day employee. Grievant does not know when she ceased to be a 261-day employee. Respondent offered documentary evidence to indicate that the change occurred at the beginning of the 1987-1988 school year. Hence, ***it is more likely than not that Grievant ceased being a 261-day employee in the 1987-1988 school year. Nevertheless,*** there is no evidence in the record indicating that Grievant received notice that her contract of employment was terminated for the 1987-1988 school year. Grievant testified that she had never agreed to a reduction of her contract term and that she never bid on another job with the school system after she initially came to work as the secretary for WFGH in 1983. Respondent provided two letters indicating that Grievant had been assigned her job pursuant to her bid though it did not provide the

[17] Pursuant to information presented, Grievant appeared to be an abnormality within the Wayne County school system, who never seems to have come under the supervision of any immediate service personnel supervisor and has simply come and gone as she pleases for the past 25 years. This is not plausible, and lacks credibility.

[18] A suit pursed by the parties in a manner designed to eliminate or limit the parties' culpability and require an empowered body to judiciously determine a knotty-pine issue.

testimony of the signatory, former county superintendent Mike Fergusson. Respondent also did not provide copies of Grievant's bids and did not provide any proof that the two letters from the spring of 1987 were ever sent by Respondent or received by Grievant.[19] Reduction of Grievant's employment term required due process or Grievant's written consent. Neither has been established in the confines of this grievance. Accordingly, it is found that Grievant is entitled to paid vacation time (approximately 30 days).

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 (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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

[19] If it is true that Grievant was assigned to Tolsia High School as a Secretary pursuant to a bid in May 1987, it is not satisfactorily explained why she returned her to "unassigned status" on June 29, 1987. The same job from which Grievant was removed on June 29, 1987 was reposted two days later. It is not established that the documents from the spring and summer of 1987 represent what really happened. Both Grievant and Service Personnel Director, Loren Perry testified that Grievant did not work at Tolsia High School in the 1987-1988 school year. She stayed at Fort Gay that school year and did not move to Tolsia until several years later when the radio station's studio and office were relocated to Tolsia High School. Accordingly, ***it is more likely than not that Grievant did not give her consent to the reduction of her employment term by bidding on a 240-day position or in any other manner.***

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

3. West Virginia Code§ 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." West Virginia Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Emp. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). However, under the "discovery rule exception" to the statutory time lines, as addressed by the Supreme Court of Appeals of West Virginia in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance.

5. Respondent has not established by a preponderance of the evidence an untimely filing of this grievance.

6. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 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).

7. A service personnel employee "may not be: (1) Reclassified by class title; or (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and

classification held during that fiscal year and subsequent years," without his or her consent. W. VA. CODE § 18A-4-8(m).

8. It is not established Grievant was unequivocally notified of an alteration to her employment status, as a 261-day school employee. *See also Hardman, et al. v. Gilmer County Bd. of Educ*., Docket No. 2016-0059-CONS (Aug. 11, 2016).

9. School Policy concerning vacation, among other provisions, limits vacation days and allows employees to accumulate unused vacation leave, but no employee is allowed to carry more than 30 days over to each new fiscal year. Upon termination of employment, accumulated vacation leave may be used to receive a lump sum payment based upon employee's daily rate of pay for up to a maximum of 30 days. Wayne County Policy 4433.

10. Grievant is not entitled to collect back pay for time worked in excess of her disputed employment status. Any such request is untimely.

11. In accordance with the facts established, facts unknown, and applicable laws provided, Grievant is entitled to a maximum of 30 days of paid vacation time.

Accordingly, this grievance is **GRANTED in part.** Grievant is granted the equivalence of 30 days of paid vacation time, no back pay and no interest on the equivalent dollar amount of this employment benefit. This employment benefit should be reflected in Grievant employment records and available to Grievant at her lawful discretion.[20]

[20] Grievant may use the vacation days as would a 261-day employee might including upon retirement be used to receive a lump sum payment based upon her daily rate of pay up to a maximum of 30 days.

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: December 9, 2016

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Landon R. Brown
Administrative Law Judge