

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SHERRIE F. LAKE,**

**Grievant,**

**v.**

**Docket No. 2016-0377-CabED**

**CABELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Sherrie F. Lake (“Grievant”) filed this grievance at Level One of the grievance procedure on September 16, 2015, alleging that her employer, the Cabell County Board of Education (“CCBOE” or “Respondent”), was in violation of W. Va. Code § 18A-4-1 by failing to properly credit her teaching experience for pay purposes since March 3, 2002. For her relief sought, Grievant requested “to be made whole from the date of the request which was March 3, 2002 including back pay, retirement contributions and Social Security contributions. Grievant is not asking for interest lost on the money she did not receive since March 3, 2002 had she been paid at the appropriate experience level from that time forward.”

Following a Level One hearing conducted by Superintendent William A. Smith on September 28, 2015, the grievance was denied in correspondence dated October 19, 2015. Grievant attempted to appeal Respondent’s decision directly to Level Three, but the grievance was remanded to mediation at Level Two in an order issued by Chief Administrative Law Judge Billie Thacker Catlett on October 27, 2015. Grievant proceeded to mediation at Level Two on January 21, 2016. Following mediation, the

grievance was placed in abeyance until February 11, 2016, at the joint request of the parties. This deadline was subsequently extended to March 11, 2016. The parties were unable to resolve the grievance, and Grievant appealed to Level Three on April 4, 2016.

A Level Three hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on June 7, 2016. Grievant was represented by her spouse, Leo G. Lake, and Respondent was represented by Leslie K. Tyree, Esquire. The parties waived filing post-hearing arguments, and this matter became mature for decision at the conclusion of the Level Three hearing.

### **Synopsis**

Grievant is employed by Respondent Cabell County Board of Education ("CCBOE") as a multi subject homebound teacher. Grievant homeschooled her children from 1989 to 1998. In 2002, she became employed by CCBOE. In March 2002, Grievant sought experience credit as a teacher for the years spent homeschooling her children, as authorized by W. Va. Code § 18A-4-1(1). CCBOE twice sought guidance from the State Superintendent of Schools, but received no response. Grievant repeatedly inquired about the status of her request but did not file a grievance until September 16, 2015. CCBOE ultimately awarded Grievant the experience credit she requested and correctly adjusted her current salary. However, CCBOE limited Grievant's back pay to one year, as provided by W. Va. Code § 6C-2-3(c)(2). Grievant failed to demonstrate that CCBOE acted in bad faith in concealing the facts giving rise to the grievance, so as to warrant an extension of her entitlement to back pay for an additional six months. There is no other legal authority for awarding back pay to

Grievant beyond the limitations period contained in the statute. Accordingly, this grievance must be DENIED.

The following Findings of Fact are made based upon the record developed through the hearing conducted at Level Three.

### **Findings of Fact**

1. Grievant is employed by Respondent Cabell County Board of Education (“Respondent” or “CCBOE”) as a multi subject homebound teacher. See J Ex 1 at ¶ 16.

2. Grievant has been employed by Respondent since 2002. See J Ex 1 at ¶ 17.

3. Grievant homeschooled her children from school year 1989 to 1998. See J Ex 1 at ¶ 18.

4. Grievant was not employed by CCBOE or any other school system during the years she homeschooled her children. See J Ex 1 at ¶ 20.

5. Grievant was a certified teacher during the years she homeschooled her children. See J Ex 1 at ¶ 21.

6. On March 3, 2002, upon becoming employed by CCBOE, Grievant submitted a letter to Linda Curtiss, CCBOE’s Director of Professional Personnel, requesting that she receive an additional nine years of experience for pay purposes, based upon the time she spent homeschooling her children. J Ex 1 at ¶ 22. See G Ex 1 at Level One. This letter was accompanied by correspondence from Bennie Thomas, CCBOE’s Coordinator of Homeschooling, dated February 14, 2002, verifying that Grievant homeschooled her children for nine years. See G Ex 2 at Level One.

7. On October 6, 1992, State Superintendent of Schools Henry Marockie issued a Superintendent's Opinion stating that home school instruction by a certified teacher should be counted as "teaching experience" when such teacher returns to the public schools in accordance with the definition in W. Va. Code § 18A-4-1(1). See G Ex 3 at Level One.

8. On March 29, 2002, CCBOE Superintendent David Roach wrote to then State Superintendent of Schools David Stewart seeking clarification of whether Grievant was entitled to experience for pay purposes for the years she spent homeschooling her children. J Ex 1 at ¶ 24.

9. State Superintendent Stewart never responded to this inquiry. J Ex 1 at ¶ 25.

10. On September 18, 2002, Superintendent Roach sent a follow-up letter to State Superintendent Stewart seeking a response to his earlier request for clarification. J Ex 1 at ¶ 26; G Ex 6 at Level One.

11. State Superintendent Stewart never responded to CCBOE Superintendent Roach's follow-up inquiry. J Ex 1 at ¶ 27.

12. Subsequent to 2002, Grievant requested "several times" that her homeschooling experience be credited to her salary schedule. J Ex 1 at ¶ 28.

13. Grievant was never advised by the Superintendent or the Personnel Director that her request for experience credit was being denied. J Ex 1 at ¶ 30.

14. During 2015, Grievant again asked CCBOE that the years of experience she attained while homeschooling her children be credited for pay purposes. J Ex 1 at ¶ 31; G Ex 5 at Level One.

15. CCBOE granted Grievant's August 2015 request, awarding her the full experience credit she sought, but limited back pay to a time period of one year. See J Ex 1 at ¶ 32. Grievant received one year of back pay in the amount of \$3,608.00. J Ex 1 at ¶ 33.

16. Grievant is now receiving credit for 24 years of teaching experience on her salary schedule, and is being paid in accordance with that experience level going forward. J Ex 1 at ¶ 34.

17. Former CCBOE Superintendent Roach avows that he would have awarded Grievant the experience credit she was requesting in 2002, absent a contrary ruling from State Superintendent Stewart. See G Ex A at Level Three.

18. Grievant filed this grievance seeking experience credit from 2002 onward for time spent homeschooling her children from 1989 to 1998 on September 16, 2015. See J Ex 1 at ¶ 1 & 18.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). See *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997). "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 to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

In *Buffey v. Harrison County Board of Education*, Docket No. 00-17-398 (May 3, 2001), this Grievance Board awarded “back pay from the effective date of her employment” to a teacher who was wrongly denied experience credit under W. Va. Code § 18A-4-1 for teaching in a parochial school. Similarly, in *Bright v. Tucker County Board of Education*, Docket No. 47-86-097 (Sept. 18, 1987), grievants were awarded back pay covering a period starting with their hire date seven years earlier, after it was determined that the employer failed to follow a State Superintendent of Schools’ opinion and award teaching credit for service as Head Start teachers. In *Barnett v. Putnam County Board of Education*, Docket No. 02-40-122 (June 21, 2002), this Grievance Board awarded back pay covering the 1998-1999 school year to a grievant alleging wrongful denial of experience credit for the 1997-1998 school year that was not filed until 2002. However, each of these decisions upon which Grievant relies were decided prior to the enactment of W. Va. Code §6C-2-3(c)(2) in 2007, which, as amended in 2008, states the following:

When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

CCBOE arguably acted in bad faith when it failed or refused to grant experience credit to Grievant for the years she spent homeschooling her children. There was a clear and unequivocal opinion from the State Superintendent of Schools on record since 1992 holding that such experience was to be counted in accordance with the definition contained in W. Va. Code §18A-4-1(1). There is no evidence in the record to indicate that the language in the Code had been modified prior to Grievant’s request for

guidance from the successor State Superintendent of Schools, nor was there any evidence to suggest that the successor State Superintendent would read the Code any differently. However, CCBOE's conduct represents nothing less than classic bureaucratic stonewalling. Grievant has not established by a preponderance of the evidence that CCBOE ever concealed any "facts giving rise to the claim for back pay," the legal standard which the undersigned Administrative Law Judge is required to follow before awarding Grievant so much as six months of additional back pay. While this result may reasonably be viewed as inequitable, an Administrative Law Judge is constrained to operate within the parameters established by the Legislature for resolving employee grievances. There is simply no legal authority to grant the remedy requested.

The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. In a non-disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). See *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ.*, Docket No. 93-29-481 (Apr. 4, 1994).

2. "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 to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). See

*Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

3. W. Va. Code § 18A-4-1(1) provides:

“Years of experience” means the 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.

4. In accordance with W. Va. Code § 18A-4-1(1), Grievant was entitled to credit for teaching experience for the time she spent homeschooling her children, upon being employed by CCBOE in 2002. See *Buffey v. Harrison County Bd. of Educ.*, Docket No. 00-17-398 (May 3, 2001).

5. W. Va. Code § 6C-2-3(c)(2) provides:

When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

6. Grievant failed to demonstrate by a preponderance of the evidence that Respondent acted in bad faith by concealing the facts giving rise to the claim for back pay.

7. Grievant failed to identify any legal theory which would support the award of back pay for the entire time Grievant was underpaid by CCBOE.



Therefore, this 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

**Date: June 28, 2016**

---

**LEWIS G. BREWER**  
**Administrative Law Judge**