

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**APRIL ESTEP,
Grievant,**

v.

Docket No. 2017-1094-BooED

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

DECISION

Grievant, April Estep, filed this action at Level One, on October 14, 2016, alleging that “[o]n or about September 23, 2016, grievant was informally notified that the rate of pay for her extra curricular contract as majorette sponsor was changed via a policy revision effective August 1, 2016 [in] [v]iolation of 18A-4-16.” For relief, she is seeking “compensation at her daily rate of pay for hours incurred in performing her duties of her extra curricular position. Alternatively, grievant seeks daily rate for all worked [sic] performed before August 1, 2016; to be made whole; and any other relief the grievant [sic] evaluator deems appropriate.”

A Level One conference was held on October 31, 2016, and the grievance was denied by decision dated November 23, 2016. A Level Two mediation session was held on February 15, 2017. A Level Three evidentiary hearing was held before Administrative Law Judge Carrie H. LeFevre on August 24, 2017. This case was reassigned on November 13, 2017, for administrative reasons. Grievant appeared in person and was represented by John Everett Roush, Esquire, and Leah Hale, representative, of the AFT-

WV/AFL-CIO. Respondent appeared by its superintendent, Jeff Huffman, and by Rebecca Tinder, Esquire, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 10, 2017.

Synopsis

Grievant was employed by Respondent as a Majorette Sponsor under an extracurricular contract. In previous years, the superintendent approved a supplement pay without the knowledge and consent of the Board of Education. This error was corrected by the current superintendent and Grievant was paid pursuant to the language of her contract. Grievant did not meet her burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle her to continue to receive supplemental pay awarded in error.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed by Respondent as a teacher and Majorette Sponsor at Sherman High School.
2. Grievant was paid as a teacher and paid \$550 for her Majorette Sponsor assignment. Grievant is required to attend summer band practices, away games, competitions, and after-school practices, as well as to make certain the participants are doing the routines, and have uniforms and equipment.
3. Grievant and Respondent entered into a contract on or about May 31, 2011, in which Respondent hired Grievant to perform the duties of Majorette Sponsor for the sum

of \$550 per year, following the Board of Education approval of the contract on April 5, 2011.

4. Grievant's extra-curricular contract states that "[t]he term of Employment will be for the 2010-2011 School year - plus days according to WVSSAC regulations."

5. Grievant claims that the phrase "plus days according to WVSSAC Regulations" entitled her to extra compensation, above the sum of \$550 per year. Grievant seeks 18 half days by submitting an actual timesheet to the secretary for submission and payment for the summers of 2015 and 2016.

6. There was no mention in the contract of additional pay, beyond the \$550 amount, and the reference to "days according to WVSSAC Regulations" was to modify, if at all, the term of employment, not the compensation. Additionally, Grievant acknowledged that majorettes are not a regulated WVSSAC sanctioned sport.

7. Grievant had been paid for days worked in the summer as a Majorette Sponsor, both before and after August 1 of the years 2013-2015 above the \$550 contract amount.

8. Superintendent Huffman indicated that when Grievant, and others, were paid for summer half-days above the amount approved by the Board of Education and evidenced in the contracts, that was in error. In addition, Mr. Huffman was directed by the State Department of Education to examine all contracts, extended days beyond contracts, and make appropriate cuts to reduce county expenditures.

9. Superintendent Huffman explained that the former superintendent received and approved requests for pay for additional days, in excess of the contracted amounts,

in prior years, and caused the same to be paid by the Board of Education without the knowledge and consent of the Board of Education.

10. Directives from then State Superintendent Martirano, to make cuts, were approved by the Board of Education on July 18, 2016.

11. Superintendent Huffman presented to the Board of Education the first extracurricular salary schedule to be approved by the Board. No such salary schedule had ever been approved by the Board prior to July of 2016. A salary schedule was approved by Respondent, effective August 1, 2016, in which the Majorette Sponsor was to receive compensation in the amount of \$550.

12. Grievant indicated that her school principal gave a copy of the policy to the band director, and the band director shared it with Grievant after August 1, 2016. Prior to that, the salary of the coaches and sponsors was individually approved when Respondent approved the hiring of the coaches and sponsors and signed the contracts.

13. Grievant expected to receive compensation for a total of 18 half days for the summer of 2016, following her submission of her days worked over the summer.

14. Grievant received compensation in the amount of \$550 for her duties as Majorette Sponsor, and not any additional for days worked in the summer of 2016.

15. Respondent used the same extracurricular contract form for athletic coaches as it did for Grievant and the phrase “plus days according to WVSSAC Regulations” did not entitle Grievant to any additional compensation beyond the \$550 approved by Respondent.

Discussion

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "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 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).

WEST VIRGINIA CODE § 18A-4-16 provides, in pertinent part, the following:

- (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designed representative, subject to board approval.
- (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.

The written terms of the extracurricular contract, which contract was signed by both parties, limited the board-approved compensation of \$550, which was paid. A reading of Grievant's contract would support Respondent's argument that the reference to "days

according to WVSSAC Regulations” was to modify, if at all, the term of employment.¹

In any event, it is undisputed that Grievant had been paid sums in addition to the \$550 amount provided for by the extracurricular contract. The Grievance Board has long recognized that boards of education should be encouraged to correct any errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Petrovich v. Hancock County Bd. of Educ.*, Docket No. 98-15-074 (July 13, 1998). The record supports a finding that the actions of the prior superintendent in approving compensation in addition to that provided in Grievant’s contract were *ultra vires* and unenforceable, since the actions were without the knowledge and approval of the Board of Education. *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991).² When Mr. Huffman was in a position to rectify the error, the Board of Education began paying Grievant the advertised rate in the posting and that which was listed in the contract.

¹The contract, in pertinent part, reads as follows:

The parties to this contract mutually agree to the following terms and conditions:

1) The term of Employment will be for the 2010-2011 School year - plus days according to WVSSAC Regulations.

4) The parties of this contract further acknowledge that the Employee’s duty assignment shall be as: Majorette Sponsor with compensation of \$550.00 per year

²*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep’t of Health and Human Serv.*, Docket No. 95-HHR-277 (Jan. 31, 1996). See, *Parker, supra.*; *Franz v. Dep’t of Health and Human Res.*, Docket No. 98-HHR-228 (Nov. 30, 1998).

Finally, as counsel for Respondent aptly points out, even if Grievant was correct in her previous entitlement to supplemental pay for days worked in the summer as a Majorette Sponsor, which is contested, she was not entitled to such pay in the summer of 2016. All supplemental pay was eliminated by order of the State Superintendent in July 2016, and no employee has been paid in excess of the compensation outlined in the employee's contract, no extra paid days are approved.

The following Conclusions of Law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95-HHR-277 (Jan. 31, 1996). See, *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 98-HHR-228 (Nov. 30, 1998).

3. Grievant did not meet her burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle her to continue to receive supplemental pay awarded in error.

Accordingly 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 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 (eff. July 7, 2008).

Date: December 1, 2017

Ronald L. Reece
Administrative Law Judge