

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**JUDY MULLINS, et al.,
Grievants,**

v.

Docket No. 2016-1323-CONS

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

DECISION

Grievants are employed by the Hancock County Board of Education as full time bus operators. The issue presented to the undersigned is whether the Grievants should be paid for two hours of time on days when the county experiences a two-hour delay for school because of inclement weather. This grievance was denied at Level One by decision dated March 21, 2016. A Level Two mediation session was conducted on June 15, 2016. Grievants perfected their appeal to Level Three on June 22, 2016. A Level Three hearing was scheduled to be conducted on February 9, 2017, but the undersigned was notified by the parties that they wished to submit the matter on stipulations and proposals. This request was granted and the parties were given time to discuss stipulations and submit proposals. Respondent appeared by its counsel, David F. Cross. Grievants appeared by their representative, Jeremy Radabaugh, West Virginia Education Association. This matter became mature for consideration on the postmark date of May 19, 2017, for the submission of the parties' proposals.

Synopsis

The record of this case established that Respondent interpreted a previous policy to mean that bus operators would be paid from their regular start time on occasions when school was delayed for inclement weather even though the bus operators were not working during these hours. The Respondent modified its overtime policy and removed the provision for the payment of these additional hours. A board of education may change a policy by presentation to its members and an affirmative vote to change the same as occurred in this case. In addition, a board of education has the responsibility to correct an employee's pay when they are being paid improperly.

The following Findings of Fact are based on the record and stipulations of the parties.

Findings of Fact

1. Grievants are employed by the Hancock County Board of Education as bus operators.
2. Grievant, along with fellow bus operators, filed a grievance alleging violations of the law related to their employment. Grievants request payment of two hour delayed times plus interest and all related benefits, plus that Respondent honor the prior agreement between the Board of Education and the bus operators.
3. The Hancock County Board of Education was approached by bus operators during the 2004-2005 school year and requested that they receive pay for the two hours that they do not work on occasions when there is a two hour delay for the county based upon inclement weather. The example was provided in the instance a bus operator works from 8:00 a.m. to 3:00 p.m. when there is a two hour delay the bus operator does not

report until 10:00 a.m. to 3:00 p.m. The bus operators were then approved to be paid in this example for the time period of 8:00 a.m. to 10:00 a.m. even though they were not at the school, working, or driving a bus.

4. The Board of Education had a policy statement concerning overtime which was made effective January 1, 2006. The policy provides, in pertinent part, as follows:

Non-exempt employees who must report to work on days when school is delayed for two hours or on days when there has been late call to delay school two hours and the employee has already reported to work, will be paid for the two hours as additional hours worked. The two additional hours will be paid at the employees' regular hourly rate unless the employee has exceeded the forty (40) hour workweek, then the hours will be paid at the employees' overtime rate for the week in which work occurred. Non-exempt employees scheduled to work the afternoon or night shift will work their hours as scheduled.

5. The previous superintendent interpreted the policy to mean that the bus operators would be paid from their regular start time on occasions when school was delayed for inclement weather even though the bus drivers were not working during these hours.

6. Respondent authorized the payment of bus operators as described above and payments were made in this manner during the time period of July 2005 through June 29, 2015.

7. The Superintendent of Schools, Dr. Kathy Kidder, recommended to the Board of Education that the overtime policy, which was previously in effect, be modified. The Board of Education modified the overtime policy which resulted in employees, including the bus operators, no longer being paid for two hours when they were not working. The request of the Superintendent was based largely upon the financial condition of the Hancock County Board of Education.

8. Respondent modified its overtime policy and removed the provision for the payment of the two additional hours on June 29, 2015.

9. Superintendent Dr. Kidder, had a Faculty Senate Chairs/Employee Organization Representatives meeting on October 8, 2015.

10. Dr. Kidder advised those in attendance, including the Grievant, Judy Mullins, as the representative of the bus drivers, that bus operators would no longer be paid for two hour delays and that the policy had been modified.

Discussion

Concerning the issue in this grievance, the allegation does not involve discipline, and as a result, Grievants bear the burden of proving their 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).

The Level One record and the stipulated facts establish that as of October 8, 2015, Grievant, Judy Mullins, in her individual capacity and serving as a representative of all bus operators, was informed that Respondent had changed its policy with respect to the payment of bus operators related to a two hour delay for inclement weather. The record also established that Respondent interpreted a previous policy to mean that bus operators would be paid from their regular start time on occasions when school was delayed for inclement weather even though the bus operators were not working during these hours. As Respondent's counsel aptly points out, applicable law does not require an employer to pay an employee when he or she is not working. In addition, a board of education may change a policy by presentation to a board and an affirmative vote to change a policy. Boards of education have the responsibility to correct an employee's pay when they are being paid improperly.

Grievants argue that Respondent has historically brought any policy changes to the bus drivers' attention before introducing policy adjustment. In addition, without any supporting development of the record, Grievants assert a violation of what is referred to as the non-relegation clause. WEST VIRGINIA CODE § 18A-4-8(m) provides as follows:

Without 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.

The cases decided by this Board relating to the non-relegation clause, frame the non-relegation clause in terms of a factual analysis involving a change in terms of

employment for a current fiscal year, and an alteration of the terms of a contract for the subsequent year resulting in a compensation change.¹ In fact, most of the Grievance Board's cases involve a relegation of a condition of employment that has existed not only for a single year, but existed over the course of numerous years.

In any event, 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); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008); *Bailey v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan. 8, 2016). In addition, it has been established that prior mistakes do not create an entitlement to continuing incorrect compensation. *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); *Bailey v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan. 8, 2016).

The record and stipulations established that Respondent did not pay the bus operators for the two hour delay time to correct the perceived error made by the previous superintendent. It did not result in a violation of the non-relegation clause. An adjustment of pay by Respondent for an employee that is improperly being paid is permitted and did not constitute a violation of any applicable law related to the Grievants in this case. As noted above, it is well established that prior mistakes do not create an entitlement to continuing incorrect compensation. Accordingly, the consolidated grievance is denied.

¹See *Bessie, et al., v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Concerning the issue in this grievance, the allegation does not involve discipline, and as a result, Grievants bear the burden of proving their 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).

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); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008); *Bailey v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan. 8, 2016).

3. It is well established that prior mistakes do not create an entitlement to continuing incorrect compensation. *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); *Bailey v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan. 8, 2016).

4. Because Respondent was correcting a mistake, Grievants were not entitled to continuing incorrect compensation.

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: June 27, 2017

Ronald L. Reece
Administrative Law Judge