

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CARENA ROUSE, et al.,  
Grievants,**

**v.**

**Docket No. 2017-0308-CONS**

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

**DECISION**

Grievants<sup>1</sup> are employed by or retired from Respondent, Boone County Board of Education, and are or were employed in various positions. Between August 2, 2016, and August 24, 2016, the Grievance Board received numerous grievance forms filed by representatives or counsel for members of three different unions and some *pro se* Grievants. A representative grievance statement, which addresses the allegations made by Grievants in total stated as follows:

“Pursuant to West Virginia Code § 6C-2-3(e)(2)<sup>2</sup>, Grievant grieves on behalf of herself and similarly situated employees (including both professional personnel/teachers and service personnel) the unlawful elimination and/or reduction of the county salary supplement and optical and dental insurance for current and/or retired employees by Respondent Boone County Board of Education which violates, *inter alia*, Grievant’s rights pursuant to the Excess Levy passed on November 4, 2014 and which is still in effect; the federal and state constitution due process provisions regarding property rights; as well as the constitutional provisions of the requiring Respondent to provide a thorough and efficient education; and the statutory and regulatory scheme governing education law in general and teacher and service personnel constitutional and statutory rights specifically. Moreover,

---

<sup>1</sup> There are four hundred fifteen Grievants whose names are incorporated herein by reference.

<sup>2</sup> “Class actions are not permitted. However, a grievance may be filed by one or more employees on behalf of a group of similarly situated employees. Any similarly situated employee shall complete a grievance form stating his or her intent to join the group of similarly situated employees.”

Grievant contends that Respondent's actions in unlawfully eliminating the salary supplement and optical and dental insurance are not authorized by West Virginia Code §§ 18A-4-5a and 5b.

The representative statement sought the following as relief: "To have the salary supplement and dental and optical insurance restored; to receive any back pay with interest or reimbursement with interest due to loss of ensuing coverage; and any other appropriate relief."

By email dated August 23, 2016, Respondent, by counsel, announced its intention to identify and dismiss at level one those grievances filed by retirees, although no such order was ever received by the Grievance Board. On August 26, 2016 and August 31, 2016, the parties submitted agreed motions to waive the matter to level three of the grievance process. Throughout the next three months, the Grievance Board had numerous communications with the parties in an attempt to determine the status of all Grievants, as some filing information was incomplete, a number of duplicative grievances had been received, including some in which the same Grievants were purported to be represented by two different unions, and the retiree dismissal orders were not received. A scheduling conference was held by telephone on December 21, 2016, in which the parties agreed to submit stipulations of fact and it was determined that no *pro se* Grievants remained. On January 6, 2017, a *Consolidation and Scheduling Order* was entered, consolidating all existing grievances, ordering the agreed finalized stipulations be filed by close of business February 13, 2017, informing parties of the ability to request a second conference if further procedural issues occurred, and stating that a date would be selected for level three hearing via conference call following the submission of the stipulated facts.

By email dated February 7, 2017, the parties requested, by agreement, to extend the deadline to submit the finalized stipulations by two weeks. This request was granted and parties were given until February 27, 2017, to submit the finalized stipulations. The parties failed to submit the agreed stipulations. Between March 2017 and October 2017, Grievance Board staff requested numerous status updates from the parties regarding the failure to submit the agreed stipulations and the undersigned granted the parties' requests to extend the deadline to submit agreed stipulations. The unsigned *Parties' Joint Stipulation of Fact* was filed on December 5, 2017, nine months after the initial deadline for filing set in the Grievance Board's January 6, 2017 order.

Following review of the *Parties' Joint Stipulation of Fact*, the undersigned determined a second scheduling conference would be necessary. Due to scheduling conflicts among the parties, the conference could not be held until February 21, 2018. During the conference, the parties asserted that a level three evidentiary hearing would still be required in addition to the joint stipulated facts and that they were uncertain how many Grievants intended to appear in person at the hearing. As the Grievance Board's facilities could only accommodate approximately fifty people for a hearing, counsel for Grievants were directed to confer with Grievants to determine the number of people who would participate in the hearing. In addition, counsel for Grievants agreed that, except for the final decision, Grievants agreed to receive communications from the Grievance Board electronically rather than by mail. After being informed that the number of Grievants who intended to appear personally at the hearing could not be accommodated by the Grievance Board facility, by letter dated March 16, 2018, the undersigned requested the agreement of the parties to conduct the hearing in an auditorium or similar

room in one of Respondent's facilities. The parties were directed to confer and provide an answer by April 6, 2018. The parties agreed that the hearing could be held at Respondent's Operations Complex but could not agree to dates upon which the hearing could be scheduled despite numerous communications over the course of several months. The undersigned convened a third scheduling conference on July 2, 2018, during which the undersigned determined, given the number of Grievants counsel had previously informed would be in attendance, that the hearing must be held before the beginning of the school term or it would seriously impair or completely prevent the operation of the Boone County school system for the two days of hearing. With that consideration, the undersigned scheduled the level three hearing for two of the original proposed dates over the objection of certain counsel.

The level three hearing was held on August 2, 2018 and August 3, 2018, before the undersigned at the Boone County Schools Operations Complex in Foster, West Virginia. Thirty-five Grievants appeared in person on day one of the hearing and eighteen Grievants appeared in person on day two of the hearing. Grievants were represented by Jeffrey G. Blaydes, Carbone & Blaydes, Andrew J. Katz, General Counsel, WV Education Association, and George B. Morrone III, WV School Service Personnel Association<sup>3</sup>. Respondent appeared by Superintendent Jeffrey Huffman. Respondent was represented by counsel, Howard E. Seufer, Jr. and Canon B. Hill, Bowles Rice LLP.<sup>4</sup> Due to the unusual nature of the grievance and to ensure that all questions of law were addressed as thoroughly as possible, in addition to the statutorily-allowed submission of written

---

<sup>3</sup> Mr. Morrone substituted as counsel for Joe Spradling, Esq., who substituted as counsel for John Roush, Esq.

<sup>4</sup> Mr. Seufer substituted as counsel for Richard Boothby, Esq.

Proposed Findings of Fact and Conclusions of Law (“PFFCL”), the parties were permitted, by agreement, to file briefs in reply to the PFFCL. Therefore, this matter became mature for decision on December 20, 2018, upon final receipt of the parties’ PFFCL and reply briefs.

### **Synopsis**

Grievants are or were employed by Respondent in various positions, both professional and service. An unspecified number of Grievants are retirees of Respondent. The Grievance Board lacks jurisdiction to hear the claims of the retirees in this matter. Grievants proved Respondent failed to spend all excess levy funds for the purposes they were raised. Grievants failed to prove Respondent was not permitted to reduce the county salary supplement to below the 1990 level if it did not have enough excess levy collections to fund the county salary supplement. Grievants failed to prove Respondent was required to provide them notice and opportunity to be heard before termination of their vision and dental insurance when Respondent was acting on the order of the State Superintendent or that they were otherwise entitled to continuation of their vision and dental insurance. Accordingly, the grievance is granted, in part, and denied, in part.

### **Findings of Fact**

The following are a combination of agreed findings of fact as submitted by the parties in the *Parties Joint Stipulation of Fact*<sup>5</sup> and findings of fact made by the

---

<sup>5</sup> The parties confirmed the unsigned *Parties’ Joint Stipulation of Fact* represented the agreement of the parties. The findings have been revised to remove references to attachments, to correct errors, to provide clarity and brevity, and to remove reference to evidence the parties stated in the *Parties’ Joint Stipulation of Fact* would be moved into evidence at the level three hearing that was not so moved.

administrative law judge based upon a complete and thorough review of the record created in this grievance

1. Grievants are or were employed by Respondent in various positions, both professional and service. An unspecified number of Grievants are retirees of Respondent.

2. The American Federation of Teachers – West Virginia, AFL-CIO represents the interests of approximately 200 public school teachers as well as service personnel in Boone County, and as such, has standing to represent these teachers and service personnel. Christine J. Campbell is the duly elected president of the American Federation of Teachers – West Virginia, AFL-CIO.

3. West Virginia Education Association (WVEA) is an employee association. For the relevant purposes here, the membership of the WVEA is made up of public school teachers, service personnel and administrators. The WVEA has a very large group of members in Boone County, virtually all of whom have been affected by the legal issues set forth below.

4. The West Virginia School Service Personnel Association (WVSSPA) is an employee association. For the relevant purposes here, membership of the WVSSPA is made up of public school service personnel. The WVSSPA has a large group of members in Boone County, virtually all of whom have been affected by the legal issues set forth below. These members belong to the Boone County School Service Personnel Association, which is the county affiliate of the WVSSPA.

5. The Boone County Board of Education is a county board of education and exists by virtue of West Virginia Code § 18-5-1 *et seq.* and is required to perform its duties

in compliance therewith and with other statutory provisions.

6. John Hudson served as the Superintendent of Boone County Schools from July 1, 2009 through June 30, 2016. Superintendent Hudson left the employment of Respondent when he accepted employment from the Putnam County Board of Education to serve as its superintendent.

7. Jeffrey Huffman became Superintendent of Boone County Schools effective July 1, 2016, and continues to serve as its superintendent.

8. Mark E. Sumpter, at all relevant times, was the President of the Boone County Board of Education.

9. Charles Chapman served as the Treasurer of Boone County Schools from October 1993 through January 2018.

10. Samuel Pauley became the Treasurer of Boone County Schools in March 2018 and continues to serve as its treasurer. Prior to his employment as Treasurer, Mr. Pauley was employed by the State Department of Education within the Office of School Finance where he performed budget reviews of county boards of education, including the Boone County Board of Education.

11. County boards of education are required to provide students with 180 days of instruction and to provide employees with 200 days of employment.

12. Respondent is funded, in part, by the regular levy of taxes and an excess levy of taxes.

13. Consecutive excess levies have been in place in Boone County since at least 1984.

14. The voters of Boone County were presented with the opportunity to renew

the excess levy for education on November 4, 2014. The official Ballot stated as follows:

**OFFICIAL BALLOT**

*The Board of Education of the County of Boone  
Election to Authorize Renewal  
of Additional Levies*

***Special election to authorize additional levies for the fiscal years beginning July 1, 2015, July 1, 2016, July 1, 2017, July 1, 2018, and July 1, 2019, in the total amount of \$11,656,290.00 annually for the purpose of the payment of the general current expenses of the Board of Education of the County of Boone, (hereinafter “the Board”) including, but not limited to, payment of salaries of teachers and other employees who are paid exclusively from local Board funds, fixed employee costs, and supplemental salaries and benefits; provision of optical/dental insurance for retirees of the Board; the repair, maintenance, and operation of school buildings and equipment; the purchase of textbooks, library books, and instructional supplies and equipment; the provision of capital improvements of existing schools and /or athletic facilities; the purchase of new technology, replacement of dated technology, as well as the expansion of technology infrastructure in the schools; support of the provision of free meals for all students; the provision of three (3) School Resource Officers/school security improvements; and the provision of school buses and the transportation of pupils including transport to extra-curricular activities all according to the order of The Board entered on the 4<sup>th</sup> day of August, 2014.***

*The approximate annual amount considered necessary for each purpose is as follows:*

<i>Employee salaries that are paid exclusively from local funds,</i>	<i>\$7,500,000.00</i>
<i>Fixed employee costs and benefits, including county salary supplements</i>	<i>\$1,606,290.00</i>
<i>Support the provision of free meals for all students</i>	<i>\$125,000.00</i>
<i>Instructional supplies and equipment</i>	<i>\$400,000.00</i>
<i>Textbooks</i>	<i>\$200,000.00</i>



<i>Optical/dental insurance for retirees</i>	<i>\$75,000.00</i>
<i>Support the purchase of school buses and transportation of students</i>	<i>\$100,000.00</i>
<i>Transport of teams to athletic contests and other extra-curricular activities</i>	<i>\$75,000.00</i>
<i>Provision of three (3) School Resource Officers/school security improvements</i>	<i>\$125,000.00</i>
<i>Building operation, repair and maintenance</i>	<i>\$650,000.00</i>
<i>Capital Improvements to existing schools and/or athletic facilities</i>	<i>\$375,000.00</i>
<i>New Technology, replacement of dated technology, and expansion of technology infrastructure</i>	<i>\$400,000.00</i>
<b>TOTAL</b>	<b>\$11,656,290.00<sup>6</sup></b>

15. The excess school levy was renewed by the voters of Boone County, West Virginia on November 4, 2014.

16. The Official Ballot for the excess school levy does not indicate that Respondent shall have discretion to determine which of the above-listed items on the levy call will be funded. Instead, the Official Ballot indicates that twelve line items will be funded in the approximate amounts as listed above.

17. The total amount for the items listed in the levy language is \$11,656,290.00.

18. Two line items, line item one and line item two, are at issue in this grievance.

19. The total amount earmarked for line item one, "Employee salaries that are paid exclusively from local funds," is \$7,500,000.00, or 64.3% of the levy funds.

20. The total amount earmarked for line item two, "Fixed employee costs and

---

<sup>6</sup> Stipulated Ex. 1 at 69-73.

benefits including salary supplements,” is \$1,606,290, or 13.7% of the levy funds.

21. No amount was earmarked for optical and dental insurance for current employees.

22. Respondent’s total tax collections began to decline in 2014 and 2015, resulting in a decrease of total tax collections for fiscal year end 2015, although excess levy collections were still above what would be required to support the excess levy at issue in this case that began with fiscal year beginning 2015.

23. On February 26, 2015, the Board made numerous cuts to regular and extracurricular professional and service personnel contracts in order to address its decreasing financial resources.

24. On April 6, 2015, five coal companies with operations in Boone County declared bankruptcy.

25. On August 3, 2015, two more coal companies with operations in Boone County, including Alpha Natural Resources, LLC, which wholly owns eight coal companies with operations in Boone County, declared bankruptcy.

26. As a result of the bankruptcies, tax collections for the fall of 2015 were \$4 million short of projections.

27. On December 1, 2015, the Board voted to close three schools at the end of the 2015-2016 school year: Wharton Elementary School, Nellis Elementary School, and Jeffrey-Spencer Elementary School.

28. On February 26, 2016, the Board made numerous cuts to regular and extracurricular professional and service personnel contracts for the following school year in order to address its decreasing financial resources.

29. By the spring of 2016, Respondent could not meet its payroll obligations and was forced to seek a special legislative appropriation of \$2.1 million to continue operations, which required Respondent to repay the appropriation once the delinquent tax collections were received.

30. For fiscal year end 2016, of the budgeted excess levy amount of \$11,656,290.00, the Sheriff of Boone County collected net taxes of only \$8,029,574.24, had total revenues and receipts of \$8,059,060.99, and disbursed \$7,481,920.99.<sup>1</sup>

31. Each year county boards of education are required to submit its proposed budget for the next year for review by the Office of School Finance. The budget of a county board of education must be approved by the State Board of Finance.

32. After thorough review of Respondent's proposed budget for fiscal year ending 2017, Dr. Michael J. Martirano, the State Superintendent of Schools, in a letter dated June 29, 2016, citing Respondent's suddenly-reduced financial resources and apparent inability to fully fund its operations for the 2016-2017 school year ordered Respondent to enact certain cuts to most of its employees' salaries, certain employee benefits, and a few employees' contract days.

33. On June 30, 2016, Respondent voted unanimously not to comply with the June 29, 2016 order.

34. In a letter dated July 1, 2016, the State Superintendent of Schools again

---

<sup>1</sup>G. Ex. 2 at 13, line number 374, "School Levy Fund," *Sheriff's Settlement* for fiscal year 2016. Treasurer Pauley's later accounting of the excess levy budget showed the excess levy collection for fiscal year 2016 was \$7,700,597.00. No evidence was offered interpreting the settlement statement and no party appeared to question why Respondent's excess levy budget showed a different amount than the *Sheriff's Settlement*.

ordered the Respondent to make certain cuts to most of its employees' salaries, certain employee benefits, and a few employees' contract days. and gave the Respondent a deadline of July 8, 2016, to comply.

35. On July 7, 2016, Respondent again voted unanimously not to comply with the order of the State Superintendent of Schools dated July 1, 2016.

36. In a letter dated July 7, 2016, the State Superintendent of Schools, for the third time, ordered the Respondent to enact certain cuts to most of its employees' salaries, certain employee benefits, and a few employees' contract days. These cuts were slightly different from the cuts previously ordered by the State Superintendent of Schools. Those cuts eliminated the salary supplement for teachers and school service personnel for the 2016-2017 school year and the provision of dental and optical insurance for all employees.

37. On July 14, 2016, the State Board of Education voted to intervene in and take control of the operation of the school system in Boone County unless the Respondent voted by July 18, 2016, to comply with the written order of the State Superintendent of Schools dated July 7, 2016.

38. On July 18, 2016, Respondent voted to comply with the July 7, 2016 order of the State Superintendent of Schools.

39. On or about July 26, 2016, Superintendent Huffman sent notice to all employees regarding the impact of the budget revisions required by the State Superintendent of Schools, specifically the cuts being made to employees' salaries and benefits. Specifically, on or about July 26, 2016, Respondent mailed to its employees notice that it was reducing the "county pay supplement" that it has for many years paid to

its employees by virtue of West Virginia Code Section 18A-4-5a. The cuts eliminated the salary supplement for teachers and school service personnel for the 2016-2017 school year and the provision of dental and optical insurance to all employees effective August 31, 2016.

40. Between July 1, 2016 and July 22, 2016, employees with a 240-day or 261-day contract received the salary supplement collected for the 2016-2017 school year. Other than these employees, none of the excess levy money collected for the 2016-17 school year was utilized for county salary supplements as set forth in the language of the excess levy.

41. On or about August 3, 2016, Superintendent Huffman sent notice to all retirees of the Board that the Board would no longer be able to pay for their optical and dental insurance after August 31, 2016.

42. Optical and dental insurance for retirees was paid for through August 31, 2016 using excess levy money collected for the 2015-2016<sup>7</sup> school year.

43. Employees were not afforded notice and opportunity to be heard regarding these changes to their pay and benefits.

44. Boone County Schools' total tax collections for the relevant time period were as follows:<sup>8</sup>

---

<sup>7</sup> The *Parties Joint Stipulation of Fact* Stated the 2016-2017 school year but that appears to have been a typographical error.

<sup>8</sup> The *Parties Joint Stipulation of Fact* included the following: "The projected excess gross tax collections for Boone County has declined as follows: FYE 6/30/14 \$13,992,718, FYE 6/30/15 \$12,520,182, FYE 6/30/16 \$11,090,686." As it is unclear from where this information originated and it is unclear why the projected excess gross tax collections would be relevant when the actual tax collection information was entered into evidence, this information has not been included in the findings of fact. The tax collection information appears in Stipulated Ex. 1 at 242.

	Regular Levy	Excess Levy	Total
FY '13	11,327,449.92	13,660,485.22	24,987,935.14
FY '14	11,412,657.79	13,772,691.42	25,185,349.21
FY '15	10,103,424.95	12,226,069.36	22,329,494.31
FY '16	6,606,913.50	8,059,0606.99	14,665,974.49
FY '17	3,020,696.64	3,624,940.39	6,645,637.03

45. Between fiscal years 2013 and 2014 the Board's tax revenue from regular and excess levies increased \$197,414.07 or 0.08%.

46. Between fiscal years 2014 and 2015 the Board's tax revenue from regular and excess levies decreased \$2,855,854.90 or 11.33%.

47. Between fiscal years 2015 and 2016 the Board's tax revenue from regular and excess levies decreased \$7,663,519.82 or 34.32%.

48. Between fiscal years 2016 and 2017 the Board's tax revenue from regular and excess levies decreased \$8,020,337.46 or 45.31%.

49. Respondent's unrestricted fund balance<sup>9</sup> without OPEB liability<sup>10</sup> or encumbrances ("fund balance") peaked on or about fiscal year ending (FYE) June 30, 2010. It began declining the following year, and declined every year at least since 2012.

The fund balance has declined as follows:

FYE 6/30/12: \$8,510,759

---

<sup>9</sup> The unrestricted fund balance is the carryover balance after all obligations are paid from the previous budget year, essentially, a surplus.

<sup>10</sup> "Other Post Employment Benefits," the liability associated with providing health insurance to retirees.

FYE	6/30/13	\$5,163.142
FYE	6/30/14	\$4,036.028
FYE	6/30/15	\$1,631,512 <sup>11</sup>

50. The state Office of Finance recommends a county board of education have an unrestricted fund balance of between three and five percent of its budget. Some national organizations recommend maintaining an unrestricted fund balance of sixteen to twenty percent.

51. If a county falls below the state recommended amount, they are considered at risk and are put on a watch list. Although Respondent began to spend down its unrestricted fund balance in 2012, it was not considered at risk until after the crisis in 2015.

52. Throughout the pertinent time period, Respondent maintained a large number of positions that were not eligible for state funding as follows: FYE 2012, 115; FYE 2013, 130; FYE 2014, 131; FYE 2015, 138; and FYE 2016, 110.<sup>12</sup>

53. Sometime in 2018, Treasurer Pauley prepared a document entitled *Excess Levy Budget* which purports to account for the excess levy funds, including projected amounts for the years remaining in the five-year levy.<sup>13</sup>

54. Treasurer Pauley's *Excess Levy Budget* is an accounting not of the expenditure of the excess levy collections, as it should be, but is an accounting of the total spending on the categories that were included in the excess levy, regardless of their funding source.

---

<sup>11</sup> G. Ex. 4.

<sup>12</sup> G. Ex. 3.

<sup>13</sup> R. Ex. 4.

55. The *Excess Levy Budget* reads in pertinent part as follows:

Levy Line	2016	
Revenue	\$7,700,597.00	
	Budget to Stay at Proportions Per Levy Call	Actual Excess Levy Expenditures
1. Employee salaries paid exclusively from local funds	\$4,954,790.72	\$10,510,066.00
2. Fixed employee costs and benefits, including county salary supplements	\$1,061,177.44	\$2,337,7122.90

Levy Line	2017	
Revenue	\$8,565,997.00	
	Budget to Stay at Proportions Per Levy Call	Actual Excess Levy Expenditures
1. Employee salaries paid exclusively from local funds	\$5,511,614.54	\$4,161,812.00
2. Fixed employee costs and benefits, including county salary supplements	\$1,180,433.51	\$888,783.11

Levy Line	2018	
Revenue	\$8,565,997.00	
	Budget to Stay at Proportions Per Levy Call	Actual Excess Levy Expenditures YTD plus encumbrances 4/30/18
1. Employee salaries paid exclusively from local funds	\$5,719,026.59	\$4,200,000.00
2. Fixed employee costs and benefits, including county salary supplements	\$1,224,855.36	\$850,000.00

56. There are two types of supplements for school employees: the state supplement and the county supplement. These supplements are not the same; they are addressed in separate statutes with distinct purposes and are funded differently. County



supplements are optional and are funded wholly by the county. The state supplement is mandatory and is funded by the State unless certain circumstances are present which require the county to fund all or a portion of the state supplement.

57. Respondent is a county that is required to fund all or part of the state supplement amount. Respondent paid its share of the state supplement amount under line one of the excess levy, "Employee salaries paid exclusively from local funds." Under line two, "Fixed employee costs and benefits, including county salary supplements," Respondent paid fixed costs and benefits such as Social Security, Medicare, retirement, and workers' compensation.

58. Respondent paid no county supplement amount from the levy.

59. From fiscal year 2016 through fiscal year 2018, Respondent collected \$25.1 million in excess levy funds but only spent an alleged \$19.6 million of that money for the excess levy purposes. Respondent actually spent less than that amount for proper excess levy purposes.<sup>14</sup>

60. Respondent spent the full excess levy amount collected in fiscal year ending 2016.<sup>15</sup>

61. The full excess levy collections were not spent on the levy call in fiscal years ending 2017 and 2018. Respondent failed to spend more than \$5.5 million excess levy funds on excess levy purposes in those years. As some of the funds spent were not for proper excess levy purposes, the number is greater than the \$5.5 million shown in Respondent's accounting.<sup>16</sup>

---

<sup>14</sup> R. Ex. 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

62. Under West Virginia Code Sections 18A-2-2 and 18A-2-6, virtually all full-time and half-time regular public school employees who have been employed by Respondent for more than three consecutive years with a 200-day contract have obtained “continuing contract” status.<sup>17</sup>

63. School employee contracts typically run from July 1<sup>st</sup> through June 30<sup>th</sup> of the following year.

64. School employees have contracts with county boards of education that include a certain number of days in an employment term; a certain rate of pay (that may include a salary supplement); and other benefits that are funded by a special levy or other sources.

65. Regular service employees experienced a loss of income as a result of the elimination of the county supplement.<sup>18</sup>

66. Teachers and other professional personnel employed by the Board experienced a loss of income as a result of the elimination of the county salary supplement. The loss of income for each employee would be the product of their employment term multiplied by the difference in their pay rate for their particular pay grade and years of service from the pay scale for the 2015-2016 school year and their pay rate

---

<sup>17</sup> The *Parties’ Joint Stipulation of Fact* stated: “Evidence regarding those grievants who did not, at the relevant time, hold a continuing contract will be submitted by the parties. All grievants other than those referenced in the last sentence will be presumed by the parties to have held a continuing contract at the relevant time.” No such evidence was presented at the level three hearing.

<sup>18</sup> The *Parties’ Joint Stipulation of Fact* stated: “Pay scales for the relevant school years will be appended as Attachments and are hereby incorporated by reference as if fully and textually setout herein.” No such pay scales were attached or presented as evidence at the level three hearing.

for their particular pay grade and years of service from the pay scale for the 2016-2017 and 2017-2018 school years.<sup>19</sup>

67. To the extent that they performed substitute work for the Board after the elimination of the county salary supplement, substitute teachers and other substitute professional personnel experienced a reduction in pay. The reduced pay experienced by each professional substitute would be the product of the days that the professional worked as a substitute after the elimination of the county salary supplement multiplied by the difference in his/her pay rate (which rate is based on the relevant pay grade and his/her years of experience) for the 2015-2016 school year and his/her pay rate for the 2016-2017 and 2017-2018 school years.

68. As a result of the budget revisions ordered by the State Superintendent of Schools, all Boone County school employees had a reduction for the 2016-2017 school year.

69. In April 2018, Respondent received delinquent tax proceeds from Alpha Natural Resources, LLC and repaid the 2016 special legislative appropriation.

70. On July 1, 2018, Respondent reinstated a county supplement for professional and service personnel of \$1,150.

71. At the time of the level three hearing, Respondent had an approximate \$7 million unrestricted fund balance.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. §

---

<sup>19</sup> *Id.*

156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

As a preliminary matter, an unspecified number of Grievants are retirees of Respondent. Although Respondent did not specifically move to dismiss those Grievants, the Grievance Board cannot render a decision on a matter for which it lacks jurisdiction. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). “‘Employer’ means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-

2-2(g).

The grievance process is not available to the retirees in this matter. Although it could be argued that the retirees meet the definition of “employee” in that they were previously hired by Respondent, Respondent is clearly not now their “employer” under the statute as Respondent is not “using the services” of the retirees. Therefore, arguments presented by Grievants regarding Respondent’s elimination of vision and dental benefits for retirees will not be further addressed.

The West Virginia constitution mandates a “thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1. To that end, county boards of education are required to provide students with 180 days of instruction and to provide employees with 200 days of employment. W. VA. CODE § 18-5-45(c) (2018). County boards accomplish this mandate primarily using a combination of state and county, also referred to as local, funding, although county boards also receive some limited federal funding. “Our State school aid formula is composed of four basic components: (1) an amount raised from local levy on real and personal property; (2) the State foundation aid, which is money the State pays out of general revenue funds to the counties based on a formula composed of seven components; (3) State supplemental benefits; and (4) amounts raised locally by special levies by vote of the people in the county.” *Pauley v. Kelly*, 162 W. Va. 672, 708-09, 255 S.E.2d 859, 878-79 (1979). Funding for county boards is dynamic as it relies on factors that vary year to year such as the number of students enrolled, the assessed value of property, and the actual amount collected of taxes due.

In this case, Respondent receives local funding from both the general and a special, or excess, levy of taxes. For fiscal year ending 2016, an unprecedented shortfall

in tax collections occurred in Boone County due to the closure or bankruptcy of numerous coal companies. For the 2016 – 17 school year, Respondent's budget was based on only 70% of the general and excess levy of taxes that had been projected. Respondent did not have enough money in reserve to make up the shortfall, leaving Respondent with a four-million-dollar deficit. As a result, Respondent did not formulate a budget that satisfied its mandate to provide the specified number of instructional and employment days. The State Board of School Finance determined in its review of the budget submitted by Respondent that Respondent would run out of money by the spring and not be able to pay its employees or operate its schools. To correct this failure of the budget, the State Superintendent ordered Respondent to make certain cuts to the budget on three separate occasions, which Respondent refused to do. Only when the state board declared it would take over the county did Respondent make the cuts previously ordered by the State Superintendent.

At issue in this case are two actions Respondent took in complying with the orders of the State Superintendent: the elimination or reduction of the county salary supplement and vision and dental benefits for Respondent's regular employees. Grievants argue that Respondent was required to continue to pay the salary supplement under the terms of the special levy and the requirements of state code. Grievants argue no authority that the Respondent was required to provide vision and dental insurance for active employees but argues that Respondent failed to observe the notice and opportunity to be heard provisions of statute before removing those benefits. Respondent asserts it was required to comply with the State Superintendent's orders and that it did not violate the levy terms or any state code provision.

## State Superintendent Orders

Respondent first argues that, as the changes to the budget were ordered by the State Superintendent, the changes were beyond Respondent's control and, seemingly argues, therefore, not Respondent's responsibility. County boards of education are required to prepare and submit yearly budgets for review and approval by the State Board of Finance<sup>20</sup>. W.VA. CODE § 18-9B-6.

If the board of finance finds that the proposed budget for a county will not maintain the proposed educational program as well as other financial obligations of their county board of education, it may require that the budget be revised, but in no case shall permit the reduction of the instructional term pursuant to the provisions contained in section fifteen [§ 18-5-15], article five of this chapter nor the employment term below two hundred days. Any required revision in the budget for this purpose may be made in the following order:

- (1) Postpone expenditures for permanent improvements and capital outlays except from the permanent improvement fund;
- (2) Reduce the amount budgeted for maintenance exclusive of service personnel so as to guarantee the payment of salaries for the employment term; or
- (3) Adjust amounts budgeted in any other way so as to assure the required employment term of two hundred days and the required instructional term of one hundred eighty days under the applicable provisions of law.

W. VA. CODE § 18-9B-8 (2018). In this case, the State Superintendent found Respondent's budget did not comply as above and ordered certain cuts be made to the

---

<sup>20</sup> The State Board of School Finance "consist[s] of the State Superintendent of Free Schools [State Superintendent of Schools], as chairman, the state Tax Commissioner, and the Director of the Budget as secretary." W. VA. CODE § 18-9B-3 (2018). However, [n]otwithstanding any and all references to the Board of School Finance as found in article nine-b [ §§ 18-9B-1 et seq.] of this chapter, the West Virginia Board of Education, through its chief executive officer, shall direct and carry out all provisions of said article nine-b." W. VA. CODE § 18-9A-17 (2018). Thus, essentially, the State Superintendent may act as the Board of Finance, which he did in this instance.

budget. “A county board of education and a county superintendent shall comply with the instructions of the State Board of School Finance and shall perform the duties required of them in accordance with the provisions of this article.” W. VA. CODE § 18-9B-17 (2018). “The board may issue orders to county boards of education requiring specific compliance with its instructions. If a county board fails or refuses to comply, the board may proceed to enforce its order by any appropriate remedy in any court of competent jurisdiction.” W. VA. CODE § 18-9B-18 (2018). “The board of finance may withhold payment of state aid from a county board that fails or refuses to comply with the provisions of this article or the requirements of the state board made in accordance therewith.” W. VA. CODE § 18-9B-19 (2018). The state board of education may also intervene in the operation of a county school system. W. VA. CODE § 18-2E-5n (2018).

In support of its argument that it had no choice but to comply with the State Superintendent’s orders<sup>21</sup>, Respondent further cites a case in which the State Superintendent ordered a county school board to cut contract days without complying with the notice and opportunity for hearing provided for by statute. *See Yatauro, et al. v. Calhoun Cty. Bd. of Educ. and Calhoun Cty. Bd. of Educ. v. Hickman*, Nos. 15-0650, 15-0651, 15-0652, 15-0653, 15-0654, 15-0922, and 15-0903, 6 (W.Va. Supreme Court, Sept. 16, 2016) (memorandum decision). In *Yatauro*, the West Virginia Supreme Court of Appeals determined “the Legislature intended to confer broad fiscal powers to the State Board of Education” and “the Legislature did not intend to limit the State Board of

---

<sup>21</sup> Notwithstanding that Respondent did, in fact, refuse to comply with the State Superintendent’s order not once but twice and only voted to comply with the State Superintendent’s order after the state board of education issued its *Declaration of Intervention* announcing its intention to take over the operation of Boone County Schools unless Respondent complied with the State Superintendent’s order.



Education's authority under West Virginia Code §§ 18-9B-1 through -21." *Yatauro, et al. v. Calhoun Cty. Bd. of Educ. and Calhoun Cty. Bd. of Educ. v. Hickman*, Nos. 15-0650, 15-0651, 15-0652, 15-0653, 15-0654, 15-0922, and 15-0903, 6 (W.Va. Supreme Court, Sept. 16, 2016) (memorandum decision).

Although *Yatauro* recognized the State Superintendent's broad fiscal powers, *Yatauro* is a memorandum opinion that only specifically discusses the notice and opportunity to be heard provisions of chapter 18A.<sup>22</sup> Further, chapter 18 also contains the following provision that was not specifically discussed in *Yatauro*:

If . . . a county board fails or refuses to provide for the support of the standard school term, to adhere to the budget and the expenditure schedule, or to comply with other provisions of this article, the board of finance may require such action on the part of the county board, *not in violation of law*, as the board of finance may find to be best calculated to restore the financial affairs of the county board to a proper and lawful basis. [emphasis added].

W. VA. CODE § 18-9B-4 (2018). Thus, while the State Superintendent has broad authority, that authority is limited to ordering actions "not in violation of law." The Code specifically prohibits a county board of education from reducing the county salary supplement below the 1990 level unless one of three specific circumstances exist. W. VA. CODE §§ 18-4-5a-5b (2018). If one of those circumstances does not exist, the State Superintendent cannot order a county board to reduce the supplement because that would be in violation of law. Excess levy funds must be used for their stated purpose, under pain of both civil and criminal penalty for misappropriation of funds. W. VA. CODE §§ 11-8-25, 29, 31 (2018).

---

<sup>22</sup> "While memorandum decisions may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited. . . ." Syl. Pt. 5, *State v. McKinley*, 234 W. Va. 143, 146, 764 S.E.2d 303, 306 (2014). Memorandum decisions are used when the is "no substantial question of law. . ." W. VA. R. APP. P. 21(c).

The State Superintendent cannot order those funds to be used for another purpose because that would be in violation of law. When the State Board of Education directed a county board to apply excess levy funds improperly, the county board was not absolved of liability. See *Thomas v. Bd. of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979); *Thomas v. Bd. of Educ.*, 167 W. Va. 911, 280 S.E.2d 816 (1981). Therefore, that these actions were ordered by the State Superintendent does not insulate Respondent from review of its actions or liability if the State Superintendent's order was not lawful.

### **The Excess Levy**

Grievants argue Respondent did not comply with the levy call because it did not pay the county supplement. Respondent asserts it did comply with the levy call because it will have spent all of the levy money by the end of the five-year levy term ending in 2020 and that it had discretion to apply the levy moneys as it did.

“Except as otherwise provided in this article, boards or officers expending funds derived from the levying of taxes shall expend the funds only for the purposes for which they were raised.” W. VA. CODE § 11-8-25 (2018). “Funds derived from a special levy may be expended only for the purpose for which they are approved. W. Va. Code §§ 11-8-25-26.” Syl. Pt. 2, *Thomas v. Bd. of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979); *Byrd v. Bd. of Educ.*, Syl. Pt. 2, 196 W. Va. 1, 467 S.E.2d 142 (1995).

There is no power or authority in the county court or any other tribunal to apply a fund to a purpose other than that for which it was ordained and created by a vote of the people. As to the application of such a fund the will of the electors is supreme. Without their consent no debt can be imposed upon them, no liability assumed and no money raised or appropriated by the county tax levying bodies beyond the limitation prescribed by law. With the levies when made in a lawful manner, for ordinary and legitimate purposes, the taxpayer can not interfere. But when he has consented to be taxed beyond that

limit, and empowered his public agent to collect and expend a fund for the accomplishment of an object not within the power of such agency without his express authorization, the fund, when raised, can not be appropriated and expended otherwise than as ordained by him. . . .

*Jarrell v. Bd. of Educ.*, 131 W. Va. 702, 708, 50 S.E.2d 442, 445 (1948).

In support of its assertion that it will have complied with the excess levy call by the end of the five-year levy term Respondent offered the *Excess Levy Budget*<sup>23</sup> prepared by current Treasurer Pauley. This document, combined with Treasurer Pauley's testimony, reveals how Respondent viewed the excess levy funds, at least in hindsight, as the document was prepared two years after the beginning of the levy and after the tax shortfall had occurred.

For many years, Respondent was in the enviable position to have enjoyed generous funding. As a result, Respondent was able to pay its obligations without regard to the source of the funding. Because of this, the line items in the excess levy, from the beginning of the levy term, cost more than what the excess levy would fund. Clearly, Respondent had planned to use other funding to fully fund those items beyond what the excess levy would pay. Further, Respondent, as multiple witnesses testified, did not account for the excess levy funds separately from its other revenue.

Then, in 2015, the bottom dropped out. Respondent's fall tax collection for the excess levy was \$4 million dollars short of expectations. For fiscal year ending 2016, Respondent had budgeted for \$11 million of excess levy money and the collection received was only \$7.7 million<sup>24</sup>. However, even though the budget for the excess levy

---

<sup>23</sup> R. Ex. 4.

<sup>24</sup> As stated above, the actual amount of excess levy funds received is unclear considering the sheriff's settlement statement.

was \$11 million and collections were \$4 million less than expected, Respondent still spent \$14.9 million on all levy categories combined, twice as much as the actual excess levy collection. Thus, Respondent spent the entirety of the excess levy funds, plus \$7.2 million of other unspecified funds on the excess levy categories. In terms of Respondent's total budget, Respondent had overspent on those categories, but in terms of the excess levy budget, Respondent had simply spent all the excess levy funds.

For fiscal year ending 2017, the excess levy collection was \$8.6 million. Respondent spent only \$5.9 million of the excess levy collection on the levy categories, \$2.6 million less than was collected. Again, for fiscal year ending 2018<sup>25</sup>, Respondent failed to spend all the excess levy money on the excess levy categories. Respondent collected \$8.8 million from the excess levy and spent only \$6 million on the excess levy categories, \$2.8 less than was collected.

Respondent's *Excess Levy Budget* was prepared by Treasurer Pauley in 2018, two years after the crisis, and presents a fundamental misunderstanding of the requirements of excess levy expenditure. By his testimony, Treasurer Pauley clearly did not understand the restraints placed on Respondent by law regarding the expenditure of excess levy funds and the reduction of county salary supplements. Thus, Treasurer Pauley's *Excess Levy Budget* is an accounting not of the expenditure of the excess levy collections, as it should be, but is an accounting of the total spending on the categories that were included in the excess levy, regardless of their funding source.

The excess levy budget should have had a zero balance going into fiscal year ending 2017, because all the excess levy funds were spent in 2016. Instead, Treasurer

---

<sup>25</sup> Based on expenditures through April 30, 2018.

Pauley included in the budget the amount of money spent on the excess levy categories from other funding sources, creating an illusory deficit in the balance of the excess levy funding. This is, frankly, as Grievants aptly stated, a shell game. Whether intentional or not, it conceals that the full excess levy collections were not spent on the levy call in 2017 and 2018. When the improper inclusion of the \$7.2 million dollars of other funding that was spent on the excess levy categories is removed, it reveals that over those three years, Respondent collected \$25.1 million in excess levy funds but only spent \$19.6 million of that money for alleged excess levy purposes.<sup>26</sup> In 2017 and 2018 Respondent failed to spend more than \$5.5 million excess levy funds on excess levy purposes.<sup>27</sup>

As to the specific levy call at issue in this grievance, the county salary supplement, Respondent asserts it did pay a reduced amount of the county supplement, the 1984 county supplement level, out of line 1 of the excess levy. To analyze whether this action complied with the levy call, one must first determine what is meant by “the 1984 county supplement level.”

County boards of education must pay school employees a minimum salary that is calculated using a formula mandated by statute. W.VA. CODE §§ 18A-4-2, 8a (2018). School employees also receive a State supplement amount designed to provide equity among salaries around the state. W.VA. CODE §18A-4-5. If a county chooses to adopt a

---

<sup>26</sup> As will be more fully discussed below, some of the funds Respondent alleges were spent for excess levy purposes were not spent for excess levy purposes, so the amount of excess levy funds Respondent spent on excess levy purposes is actually less than Respondent’s accounting shows. Additionally, the numbers are based on Respondent’s assertion that the levy collections received for fiscal year ending 2016 were \$7.7 million.

<sup>27</sup> Again, because Respondent spent some excess levy funds on improper purposes, the actual amount Respondent failed to spend on levy purposes cannot be calculated from the accounting provided.

salary schedule higher than the minimum salary schedule, then those employees also receive a county supplement. W.VA. CODE §18A-4-5a-5b. The funding scheme for these three types of pay is complicated. The State provides funding for schools, including for the provision of minimum salaries, using a complex formula that considers the relative contribution of the county and the state.<sup>28</sup> The State will only pay for a certain number of employee positions as prescribed by the formula. W.VA. CODE §18-9A-4-5 (2018). If a county wishes to employ more positions, commonly referred to as “over formula,” the county must pay for those positions fully through local funds. In addition, although one may think that the state supplement would be paid for by state funds given its name, the State’s obligation to pay the state supplement for a county is reduced by the amount of

---

<sup>28</sup>The West Virginia Supreme Court of Appeals explained as follows:

Very broadly, the operation of the formula may be described as follows. First, a county's estimated level of need, or "basic foundation program," is determined. The basic foundation program is the total sum required for each of seven categories of need. viz., professional educators, service personnel, fixed costs, transportation costs, administrative costs, other current expenses and substitute employees, and improvement of instructional programs. W.Va. Code, 18-9A-12.

Second, the county's "local share" must be computed. W.Va. Code, 18-9A-11(a). Local share is the amount of tax revenue which will be produced by levies, at specified rates, on all real property situate in the county. Local share thus represents the county's contribution to education costs on the basis of the value of its real property. State funding is provided to the county in an amount equal to the difference between the basic foundation program and the local share. W.Va. Code, 18-9A-12.

*Bd. of Educ. of the Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 804, 639 S.E.2d 893, 896 (2006) (citing *State ex rel. Boards of Educ. v. Chafin*, 180 W.Va. 219, 221-222, 376 S.E.2d 113, 115-116 (1988) (footnote omitted)).

any county salary supplement that was in place on January 1, 1984, in that county. W.VA. CODE §18A-4-5(d) (2018).

In this case, “the 1984 supplement level” refers to the county offset amount of the state supplement as Boone County had an excess levy in place in 1984 to pay a county salary supplement.<sup>29</sup> Therefore, the 1984 supplement level is simply the portion of the state supplement that Respondent is required to pay. While the requirement to fund the state supplement through local funds was based on the existence of a county supplement provided for by an excess levy, Respondent’s payment of its portion of the state supplement is not payment of the county supplement as those supplements are separate by statute. See W.VA. CODE §18A-4-5-5b (2018). The legislature’s apportionment of funding for the state supplement amount does not change the requirement to spend levy funds for the purposes they are raised. (See *Thomas v. Bd. of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979) (County school board could not use excess levy funds raised for supplemental payments to pay state minimum salary even when the Board of School Finance included excess levy funds in computing the county’s local share of financing.)

Respondent argues it has discretion to pay the supplement for all employees under line one stating:

Where the voters by their approval of a special levy do not require that each employee of the county board of education is to receive a designated amount of supplemental salary, the board of education may annually exercise sound discretion in allocating the special levy funds as salary supplements among its employees. A court may not interfere with such exercise of discretion, unless there is a clear showing of fraud, collusion or palpable abuse of discretion, or unless there is a clear showing of a violation of W. Va. Code, 18A-4-8, as amended, or its current statutory replacement, with respect to

---

<sup>29</sup> Hearing Transcript Vol. 1 at 76, lines 4-1; at 115, lines 22-24; at 116, lines 1-20.

its uniformity provisions or its provisions on the nonreduction of local funds in the aggregate.

*Bane v. Bd. of Educ.*, 178 W. Va. 749, 751, 364 S.E.2d 540, 542 (1987). Respondent argues that, because the voters approved only approximate annual amounts and not specific dollar amounts that it had discretion under *Bane* to allocate the funds however it chooses.

Respondent's interpretation is not supported by the language of the levy. "The true interpretation of the language of a special levy proposal is the meaning given to it by the voters of the county, who, by their approval of the special levy, consent to be taxed more heavily to provide the necessary funds." Syl. Pt. 1, *Thomas v. Board of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979); Syl. Pt. 1, *Byrd v. Bd. of Educ.*, 196 W. Va. 1, 467 S.E.2d 142, (1995). Unlike *Bane*, in which there was only a general statement of levy purpose, this levy lists specific separate categories and an approximate amount to be spent on each category. Unlike the statutory language regarding the state supplement that defines it as part of the minimum salary, which allows Respondent to use levy money under line one for over-formula employees, no such language was added to the code sections regarding the county supplement, which still states that the county supplement supplements the state minimum salary. W.VA. CODE §18A-4-5a-5b. The county supplement was specifically listed in line item two. Obviously, that is the line from which a voter would expect the county supplement to be paid, and that is from where it must be paid.

Having determined that some use of the excess levy funds was improper and that there were, in fact, excess levy funds that were not spent that must be spent, the



determination now turns to how Respondent may spend the excess levy funds in compliance with this decision.

Regardless of Respondent's dire financial situation, the excess levy funds must be spent only on the purposes stated in the excess levy. As the West Virginia Supreme Court of Appeals has noted, "That the board is faced with a difficult problem, due to a condition created by causes beyond its control, is of course unfortunate, but that regrettable situation can not justify the expenditure of the fund in a manner which the law does not authorize or permit." *Jarrell v. Bd. of Educ.*, 131 W. Va. 702, 711, 50 S.E.2d 442, 447 (1948). Under line one of the excess levy Respondent was to pay "employee salaries paid exclusively from local funds" and under line two Respondent was to pay "employee fixed costs and benefits including the county supplement." As discussed above, what Respondent termed to be the county supplement was actually the state supplement and it was paid out of line one. Ordinarily, salary would mean salary and supplement would mean supplement, which is what the West Virginia Supreme Court of Appeals found in *Smith v. Bd. of Educ.*, 192 W. Va. 321, 325, 452 S.E.2d 412, 416 (1994). However, in 2012, the legislature revised the Code to state that the state supplement amount is considered part of the state minimum salary. W.VA. CODE §18A-4-2(d), 8a(f) (2018). Thus, Respondent did properly pay the state supplement amount for over formula employees under line one as the state supplement is now considered part of the basic salary by statute and line one of the levy provides for "employee salaries paid exclusively from local funds." However, Respondent is not permitted to pay for its portion of the state supplement for formula-funded employees with the excess levy money out of line one because line one applies only to over-formula employees. Respondent cannot pay any

of the state supplement amount under line two because line two includes only the county supplement.

*Bane* does allow Respondent the discretion to allocate funds for the purposes listed within each line item as it sees fit, in accordance with the limitations stated in *Bane*. As line two is for “employee fixed costs and benefits including the county supplement” Respondent can pay all the other fixed costs and benefits first, before paying the county supplement but if there is excess levy money available from the payment of the other fixed costs and benefits, the remainder must be paid as a county supplement.

**W.VA. CODE 18A-4-5a-5b**

A county board of education operates under two constraints when it has adopted a county supplement level funded in any part through an excess levy: if it collects enough money through the excess levy it must pay the county supplement and if it does not collect enough money through the excess levy to pay the county supplement and if it had a county supplement in place on January 1, 1990 it cannot reduce that supplement level unless faced with one of three specific listed circumstances per under West Virginia Code 18A-4-5a-5b.

[N]o county shall reduce local funds allocated for salaries in effect on January 1, 1990, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

W. VA. CODE §§ 18A-4-5a-5b (2018).

Neither party provided as evidence the amount of the January 1, 1990 county supplement. Nevertheless, as the parties have continued to pursue this issue, it must be

assumed that the reduction of the supplement down to the 1984 level did reduce the county supplement below the 1990 level.<sup>30</sup> Respondent argues it was justified in reducing the county supplement due to “events over which it has no control” due to the unprecedented tax collection shortfall. Grievants argue Respondent knew, or should have known, years before that time that its budget could not be supported, as evidenced by the yearly decline of Respondent unrestricted fund balance.

In 2012 and prior, Respondent had a healthy funding surplus. Consequently, Respondent was able to maintain one of the highest over-formula employee and county supplement amounts in the state. Beginning in 2012, Respondent’s regular budget began to run at a deficit and each year it used money from its unrestricted fund balance to pay its obligations. Each year, Respondent spent down its unrestricted fund balance while continuing to maintain a large number of over-formula positions, despite a decline in enrollment and state funding. At fiscal year end 2012, Respondent’s unrestricted fund balance was \$8,510,759. By fiscal year end 2015, Respondent’s unrestricted fund balance was only \$1,631,512. Thus, when the crisis occurred in the fall of 2015, Respondent was caught flat-footed. It is clear that, after the failure of the tax collection in 2015, Respondent had no choice but to cut everything it could because it did not have enough money to meet payroll and, in fact, had to seek a special legislative appropriation to meet payroll. The question is: was this circumstance truly not under Respondent’s control given Respondent’s choice to spend down its unrestricted fund balance rather

---

<sup>30</sup> If Respondent collected enough excess levy funds to fund the county supplement above the 1990 level, this issue is moot. However, since Respondent’s accounting of the excess levy funds was improper, it is not possible to tell from the evidence presented what amount of county supplement should have been paid.

than make cuts to its budget beginning in 2012, which would have preserved its unrestricted fund balance allowing Respondent to weather the crisis without making such draconian cuts?

As Justice Neely noted,

“Events over which it has no control” is indeed a nebulous phrase which has received little attention in the case law. Appellants contend that it applies only to “acts of God,” although they point to no authority for this assertion. In reality, it seems that this clause was included to allow for any unforeseeable event which may destroy a rational budget.

*Newcome v. Bd. of Educ.*, 164 W. Va. 1, 4, 260 S.E.2d 462, 464 (1979). In that case, the Court determined,

Where a county has a property tax base which does not increase in assessed value at a rate commensurate with inflation so that there is a decline in revenue relative to expenses and a local school board is forced to choose between eliminating a local pay supplement for teachers or curtailing its educational programs for children, the local board is confronted, in that event, with "events over which it has no control" within the contemplation of *W. Va. Code*, 18A-4-5 [1969] and may cancel the teacher supplement.

*Syl. Newcome v. Bd. of Educ.*, 164 W. Va. 1, 2, 260 S.E.2d 462, 462 (1979). In construing a statute that allows a county superintendent to “act in case of emergency,” the Court found that an “emergency” is a condition that is “unforeseen or unanticipated.” *Syl. Pt. 3, Randolph Cty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989). The Court further found:

A fiscal emergency may arise because adequate provision was not made in a budget, even though the purpose for which the funds are needed was foreseeable when the budget was adopted. In such a case, before an emergency can be found, it must be shown that the amount placed in the budget was reasonable in light of all of the attendant circumstances, including prior budgetary experience.

*Randolph Cty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 290, 387 S.E.2d 524, 526 (1989). In applying this standard, the Court determined the county board of education's budget was not reasonable because it had consistently underestimated expenses and, therefore, there was no emergency justifying action.

Faced with a similar elimination of the county salary supplement as this grievance, the Grievance Board, in light of the above cases, determined that a county board of education that had operated at a deficit for multiple years without any significant effort to reduce the deficit was not faced with events outside its control that would justify the elimination of a county salary supplement. *Goff, et al. v. Calhoun County Bd. of Educ.*, Docket No. 2015-0049-CONS (Mar. 10, 2015), *aff'd, Yatauro, et al. v. Calhoun Cty. Bd. of Educ. and Calhoun Cty. Bd. of Educ. v. Hickman*, Nos. 15-0650, 15-0651, 15-0652, 15-0653, 15-0654, 15-0922, and 15-0903, 6 (W.Va. Supreme Court, Sept. 16, 2016) (memorandum decision).

This grievance is factually different than *Goff* in that Respondent was not operating at an actual deficit but had spent down its unrestricted fund balance such that it was unable to balance its budget after an unprecedented and sudden shortfall of tax collections. In layman's terms, the unrestricted fund balance is a surplus: the money left over after all expenses are paid. The State Board of Finance recommends a county have an unrestricted fund balance of between three and five percent of its budget. Some national organizations recommend maintaining an unrestricted fund balance of sixteen to twenty percent. If a county falls below the state recommended amount, they are considered at risk and are put on a watch list. In 2012, Respondent had an unrestricted fund balance much higher than the recommended three to five percent. Therefore,

although it continued to spend down the unrestricted fund balance, it was not considered at risk until after the crisis in 2015.

The failure to collect \$4 million of taxes in the fall of 2015 was certainly unforeseen. Although Grievants appear to argue that this should have been anticipated based on the general decline of the coal industry and the economy, that decline was not enough for anyone to anticipate the sudden \$4 million shortfall of taxes at once due to the bankruptcy of numerous coal companies within a five-month span.

Once the crisis occurred, Respondent cut all non-personnel costs that could be cut, but, as personnel costs accounted for eighty to eighty-five percent of the budget, personnel costs had to be cut drastically. Respondent's only choice was whether to eliminate positions or reduce the supplement.<sup>31</sup> In hindsight, it is easy to say that Respondent should have cut its over-formula positions years before it did. However, one must consider the information Respondent had at the time and the required timing for reduction in force. Respondent does not know its total tax collections until the end of the fiscal year, June 30. Respondent must make personnel decisions for the following year in March. Thus, the positions it had over formula for fiscal year 2013 are based on the personnel decisions made in 2012, which were based on the financial information from fiscal year 2011 and projections about the 2012 fiscal year end collections. Therefore, Respondent's higher over-formula number in 2015 looks less unreasonable when one considers that the tax collection numbers were good in fiscal years ending 2013 and 2014

---

<sup>31</sup> As discussed above, Respondent could only cut the county supplement if it had not collected enough funds from the excess levy, which is unknown given the nature of Respondent's accounting.

and had actually increased between 2013 and 2014. Tax collections only decreased in 2015 and no drastic problem with tax collections occurred until fiscal year ending 2016.

This situation is further distinguished from *Goff* in that Respondent did take steps to correct the situation. In February 2015, considering the lesser projected tax collections, Respondent did reduce the number of over-formula positions for fiscal year 2016 from 138 to 110. After the crisis in the fall of 2015, Respondent closed three schools in December 2015 and further reduced over-formula positions in February 2016. However, this was simply not enough to make up the difference. Between 2015 and 2016, Respondent lost \$7.7 million in total tax revenue between the general and excess levies. Respondent had also experienced a \$269,867,240 or 18.4 percent loss of assessed value from fiscal year 2015 to fiscal year 2017. That could not have been anticipated. While Respondent had a large number of over formula positions, counties typically do employ personnel in excess of the formula. In fact, there are certain positions that are required that are not funded by the formula, such as the treasurer and physical therapists, so a school system must employ a certain number of employees over formula. No testimony was offered to explain how far from the average Respondent was for employing personnel over formula. Given this lack of evidence regarding the over formula positions and considering the information available to Respondent at the time the personnel decisions were made, it is not clear that the decision to retain the positions over formula was fiscally irresponsible at the time.

While it is true that Respondent continued to spend down its unrestricted fund balance, it did not go below the recommended three and five percent until after the crisis. Respondent did take steps to reduce its costs once information about its tax collections

become known. The dramatic shortfall in the fall of 2015 was unforeseen. Respondent did experience a loss of assessed value. Therefore, looking at the situation in total, Respondent met the circumstances required by West Virginia Code 18A-4-5a-5b and was permitted to reduce the county salary supplement to below the 1990 level if it did not have enough excess levy collections to fund the county salary supplement.

### **Vision and Dental Insurance**

Grievants primarily argued that the elimination of vision and dental insurance was in violation of the excess levy terms, which is not applicable to the remaining active employee Grievants as the excess levy only provided vision and dental insurance for retirees, who cannot be addressed in this grievance as discussed above. Grievants cited no authority that required Respondent to provide vision and dental insurance for active employees.

Grievants argue only additionally that Respondent failed to provide notice and opportunity to be heard under West Virginia Code §§ 18A-2-2, 18A-2-2, and 18A-4-8(m). This issue was specifically addressed by the West Virginia Supreme Court of Appeals in *Yatauro*, in which the Court rejected the argument stating, “West Virginia Code §§ 18-9B-1 through -21 is broad and there is no indication that its application is limited to only those situations where the appropriate notice and hearing opportunities are provided to aggrieved employees.” *Id.* at 5

### **Conclusion**

The Grievance Board lacks jurisdiction to hear the claims of the retirees in this matter. An order of the State Superintendent does not insulate Respondent from review of its actions or liability if the actions taken were not lawful. Respondent spent some



excess levy funds improperly when it paid its portion of the state supplement amount for formula employees from the portion of the excess levy for over-formula employees. Respondent further failed to spend all excess levy funds collected for excess levy purposes. Respondent was permitted to reduce the county salary supplement to below the 1990 level if it did not have enough excess levy collections to fund the county salary supplement. Respondent was not required to continue to provide Grievants vision and dental insurance or to provide Grievants notice and opportunity to be heard as Respondent was acting on the order of the State Superintendent.

As a result of Respondent's accounting practices, it is impossible to tell from the evidence presented in this case how much Respondent paid in actual county supplements each year, as opposed to its share of the State supplement amount, or how much excess levy money would have been available to pay as determined above. The specifics of how much Grievants are entitled to be paid as a county supplement must be determined through accounting performed in accordance with the findings in this decision.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

3. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a).

4. “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). “‘Employer’ means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-2-2(g).

5. The Grievance Board lacks jurisdiction to hear the claims of the retirees in this matter.

6. The West Virginia constitution mandates a “thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1. To that end, county boards of education are required to provide students with 180 days of instruction and to provide employees with 200 days of employment. W. Va. Code § 18-5-45(c) (2018).

7. “Our State school aid formula is composed of four basic components: (1) an amount raised from local levy on real and personal property; (2) the State foundation aid, which is money the State pays out of general revenue funds to the counties based on a formula composed of seven components; (3) State supplemental benefits; and (4) amounts raised locally by special levies by vote of the people in the county.” *Pauley v. Kelly*, 162 W. Va. 672, 708-09, 255 S.E.2d 859, 878-79 (1979).

8. County boards of education are required to prepare and submit yearly budgets for review and approval by the State Board of Finance. W.VA. CODE § 18-9B-6.

9. Upon review of the budget,

[i]f the board of finance finds that the proposed budget for a county will not maintain the proposed educational program as well as other financial obligations of their county board of education, it may require that the budget be revised, but in no case shall permit the reduction of the instructional term pursuant to the provisions contained in section fifteen [§ 18-5-15], article five of this chapter nor the employment term below two hundred days. Any required revision in the budget for this purpose may be made in the following order:

- (1) Postpone expenditures for permanent improvements and capital outlays except from the permanent improvement fund;
- (2) Reduce the amount budgeted for maintenance exclusive of service personnel so as to guarantee the payment of salaries for the employment term; or
- (3) Adjust amounts budgeted in any other way so as to assure the required employment term of two hundred days and the required instructional term of one hundred eighty days under the applicable provisions of law.

W. VA. CODE § 18-9B-8 (2018).

10. “A county board of education and a county superintendent shall comply with the instructions of the State Board of School Finance and shall perform the duties required of them in accordance with the provisions of this article.” W. VA. CODE § 18-9B-17 (2018).

11. “The board may issue orders to county boards of education requiring specific compliance with its instructions. If a county board fails or refuses to comply, the board may proceed to enforce its order by any appropriate remedy in any court of competent jurisdiction.” W. VA. CODE § 18-9B-18 (2018). “The board of finance may withhold payment of state aid from a county board that fails or refuses to comply with the provisions of this article or the requirements of the state board made in accordance therewith.” W. VA. CODE § 18-9B-19 (2018). The state board of education may also intervene in the operation of a county school system. W. VA. CODE § 18-2E-5n (2018).

12. The West Virginia Supreme Court of Appeals has determined “the Legislature intended to confer broad fiscal powers to the State Board of Education” and “the Legislature did not intend to limit the State Board of Education’s authority under West Virginia Code §§ 18-9B-1 through -21.” *Yatauro, et al. v. Calhoun Cty. Bd. of Educ. and Calhoun Cty. Bd. of Educ. v. Hickman*, Nos. 15-0650, 15-0651, 15-0652, 15-0653, 15-0654, 15-0922, and 15-0903, 6 (W.Va. Supreme Court, Sept. 16, 2016) (memorandum decision).

13. Chapter 18 contains the following provision that was not specifically discussed in *Yatauro*:

If . . . a county board fails or refuses to provide for the support of the standard school term, to adhere to the budget and the expenditure schedule, or to comply with other provisions of this article, the board of finance may require such action on the part of the county board, *not in violation of law*, as the board of finance may find to be best calculated to restore the financial affairs of the county board to a proper and lawful basis. [emphasis added].

W. VA. CODE § 18-9B-4 (2018).

14. When the State Board of Education directed a county board to apply excess levy funds improperly, the county board was not absolved of liability. See *Thomas v. Bd. of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979); *Thomas v. Bd. of Educ.*, 167 W. Va. 911, 280 S.E.2d 816 (1981).

15. “Except as otherwise provided in this article, boards or officers expending funds derived from the levying of taxes shall expend the funds only for the purposes for which they were raised.” W. VA. CODE § 11-8-25 (2018).

16. “Funds derived from a special levy may be expended only for the purpose for which they are approved. W. Va. Code §§ 11-8-25-26.” Syl. Pt. 2, *Thomas v. Bd. of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979); *Byrd v. Bd. of Educ.*, Syl. Pt. 2, 196 W. Va. 1, 467 S.E.2d 142 (1995).

There is no power or authority in the county court or any other tribunal to apply a fund to a purpose other than that for which it was ordained and created by a vote of the people. As to the application of such a fund the will of the electors is supreme. Without their consent no debt can be imposed upon them, no liability assumed and no money raised or appropriated by the county tax levying bodies beyond the limitation prescribed by law. With the levies when made in a lawful manner, for ordinary and legitimate purposes, the taxpayer can not interfere. But when he has consented to be taxed beyond that limit, and empowered his public agent to collect and expend a fund for the accomplishment of an object not within the power of such agency without his express authorization, the fund, when raised, can not be appropriated and expended otherwise than as ordained by him. . . .

*Jarrell v. Bd. of Educ.*, 131 W. Va. 702, 708, 50 S.E.2d 442, 445 (1948).

17. County boards of education must pay school employees a minimum salary that is calculated using a formula mandated by statute. W.VA. CODE §§ 18A-4-2, 8a (2018). School employees also receive a State supplement amount designed to provide

equity among salaries around the state. W.VA. CODE §18A-4-5. If a county chooses to adopt a salary schedule higher than the minimum salary schedule, then those employees also receive a county supplement. W.VA. CODE §18A-4-5a-5b.

18. The State will only pay for a certain number of employee positions as prescribed by the formula. W.VA. CODE §18-9A-4-5 (2018).

19. The State obligation to pay the State supplement for a county is reduced by the amount of any county salary supplement that was in place on January 1, 1984, in that county. W.VA. CODE §18A-4-5(d) (2018).

20. Respondent's payment of its portion of the State supplement is not payment of the county supplement as those supplements are separate by statute. See W.VA. CODE §18A-4-5-5b (2018).

21. The legislature's apportionment of funding for the State supplement amount does not change the requirement to spend levy funds for the purposes they are raised. (See *Thomas v. Bd. of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979) (County school board could not use excess levy funds raised for supplemental payments to pay state minimum salary even when the Board of School Finance included excess levy funds in computing the county's local share of financing.)

22. County boards of education are permitted discretion only:

Where the voters by their approval of a special levy do not require that each employee of the county board of education is to receive a designated amount of supplemental salary, the board of education may annually exercise sound discretion in allocating the special levy funds as salary supplements among its employees. A court may not interfere with such exercise of discretion, unless there is a clear showing of fraud, collusion or palpable abuse of discretion, or unless there is a clear showing of a violation of W. Va. Code, 18A-4-8, as amended, or its current statutory replacement, with respect to

its uniformity provisions or its provisions on the nonreduction of local funds in the aggregate.

*Bane v. Bd. of Educ.*, 178 W. Va. 749, 751, 364 S.E.2d 540, 542 (1987).

23. “The true interpretation of the language of a special levy proposal is the meaning given to it by the voters of the county, who, by their approval of the special levy, consent to be taxed more heavily to provide the necessary funds.” Syl. Pt. 1, *Thomas v. Board of Educ.*, 164 W. Va. 84, 261 S.E.2d 66 (1979); Syl. Pt. 1, *Byrd v. Bd. of Educ.*, 196 W. Va. 1, 467 S.E.2d 142, (1995).

24. As the West Virginia Supreme Court of Appeals has noted, “That the board is faced with a difficult problem, due to a condition created by causes beyond its control, is of course unfortunate, but that regrettable situation can not justify the expenditure of the fund in a manner which the law does not authorize or permit.” *Jarrell v. Bd. of Educ.*, 131 W. Va. 702, 711, 50 S.E.2d 442, 447 (1948).

25. The state supplement amount is considered part of the state minimum salary. W.VA. CODE §18A-4-2(d), 8a(f) (2018).

26. Grievants proved Respondent failed to spend all excess levy funds for the purposes they were raised.

27. County boards of education are restrained from reducing county salary supplements as follows:

[N]o county shall reduce local funds allocated for salaries in effect on January 1, 1990, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

W. VA. CODE §§ 18A-4-5a-5b (2018).

28. As Justice Neely noted,

“Events over which it has no control” is indeed a nebulous phrase which has received little attention in the case law. Appellants contend that it applies only to “acts of God,” although they point to no authority for this assertion. In reality, it seems that this clause was included to allow for any unforeseeable event which may destroy a rational budget.

*Newcome v. Bd. of Educ.*, 164 W. Va. 1, 4, 260 S.E.2d 462, 464 (1979). In that case, the

Court determined,

Where a county has a property tax base which does not increase in assessed value at a rate commensurate with inflation so that there is a decline in revenue relative to expenses and a local school board is forced to choose between eliminating a local pay supplement for teachers or curtailing its educational programs for children, the local board is confronted, in that event, with "events over which it has no control" within the contemplation of *W. Va. Code*, 18A-4-5 [1969] and may cancel the teacher supplement.

*Syl. Newcome v. Bd. of Educ.*, 164 W. Va. 1, 2, 260 S.E.2d 462, 462 (1979).

29. In construing a statute that allows a county superintendent to “act in case of emergency,” the Court found that an “emergency” is a condition that is “unforeseen or unanticipated.” *Syl. Pt. 3, Randolph Cty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989). The Court found:

A fiscal emergency may arise because adequate provision was not made in a budget, even though the purpose for which the funds are needed was foreseeable when the budget was adopted. In such a case, before an emergency can be found, it must be shown that the amount placed in the budget was reasonable in light of all of the attendant circumstances, including prior budgetary experience.

*Randolph Cty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 290, 387 S.E.2d 524, 526 (1989).

30. A county board of education that had operated at a deficit for multiple years without any significant effort to reduce the deficit was not faced with events outside its



control that would justify the elimination of a county salary supplement. *Goff, et al. v. Calhoun County Bd. of Educ.*, Docket No. 2015-0049-CONS (Mar. 10, 2015), *aff'd*, *Yatauro, et al. v. Calhoun Cty. Bd. of Educ. and Calhoun Cty. Bd. of Educ. v. Hickman*, Nos. 15-0650, 15-0651, 15-0652, 15-0653, 15-0654, 15-0922, and 15-0903, 6 (W.Va. Supreme Court, Sept. 16, 2016) (memorandum decision).

31. Grievants failed to prove Respondent was not permitted to reduce the county salary supplement to below the 1990 level if it did not have enough excess levy collections to fund the county salary supplement.

32. “West Virginia Code §§ 18-9B-1 through -21 is broad and there is no indication that its application is limited to only those situations where the appropriate notice and hearing opportunities are provided to aggrieved employees.” *Yatauro, et al. v. Calhoun Cty. Bd. of Educ. and Calhoun Cty. Bd. of Educ. v. Hickman*, Nos. 15-0650, 15-0651, 15-0652, 15-0653, 15-0654, 15-0922, and 15-0903, 5 (W.Va. Supreme Court, Sept. 16, 2016) (memorandum decision).

33. Grievants failed to prove Respondent was required to provide them notice and opportunity to be heard before termination of their vision and dental insurance when Respondent was acting on the order of the State Superintendent or that they were otherwise entitled to continuation of their vision and dental insurance.

Accordingly, the grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to account for the excess levy funds in accordance with this decision and pay Grievants any county salary supplement amount owed accordingly, plus interest.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: February 7, 2019**

---

**Billie Thacker Catlett**  
**Chief Administrative Law Judge**