

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

MARGIE APESOS,
Grievant,

v.

Docket No. 2019-0735-HanED

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Margie Apesos, employed by the Hancock County Board of Education as a bus operator, filed this action at Level One on or about January 8, 2019, alleging, "Violation of WV Code 2-2-1(13) and 18A-4-8(a). The Board failed to pay grievant one and a half times her hourly rate on a week that contained a holiday. According to state code, the general election day on November 6, 2018 is considered a legal holiday. Grievant seeks, "Compensation for hours worked at one and a half times her hourly rate, plus, interest."

This grievance was denied at Level One by Decision issued by Superintendent Timothy L. Woodward. A Level Two mediation session was conducted on July 11, 2019. A Level Three evidentiary hearing was conducted before the undersigned on December 9, 2019, at the Westover office of the Grievance Board. Respondent appeared by its counsel, Denise M. Spatafore, Dinsmore & Shohl LLP. Grievant appeared in person and by her representative, Jeremy B. Radabaugh, West Virginia Education Association. This

matter became mature for consideration upon the receipt of the last of the parties' fact/law proposals on January 29, 2020.

Synopsis

Grievant is a bus operator employed by the Hancock County Board of Education. Grievant seeks extra pay for work she performed in excess of her normal working day during a week in which the school was closed for Election Day. Grievant makes this argument based upon statutory construction and the position that Election Day should be recognized as a school holiday. WEST VIRGINIA CODE § 18A-4-8a(i) clearly references weeks of school holidays as the occasions when extra pay is provided, not the weeks of state holidays as defined elsewhere. In addition, there is a specific definition of school holidays contained in WEST VIRGINIA CODE § 18A-5-2, which is the applicable provision when determining the requirement of extra pay for school employees.

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

Findings of Fact

1. Grievant is employed as a bus operator by the Hancock County Board of Education.
2. November 6, 2018, was Election Day, and schools were closed.
3. There were no holidays that occurred during the week of November 5, 2018.
4. During the week of November 5, 2018, Grievant drove an extra duty or extracurricular bus trip.

5. Grievant received no extra pay for the week of November 5, 2018, aside from her regular salary attributed to the extra duty trip.

6. Respondent has never paid employees extra for assignments performed during the week of an election, unless another school holiday occurred during the same week.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *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 issue in the instant case is one of statutory interpretation. The parties disagree regarding the interpretation of statutes which address extra pay during the weeks of "school holidays." WEST VIRGINIA CODE § 18A-4-8a(i) provides: "Any full-time service personnel required to work in excess of their normal working day during any week which

contains a school holiday for which they are paid is paid for additional hours or fraction of the additional hours at a rate of one and one-half times their usual hourly rate and paid entirely from county board funds.”

WEST VIRGINIA CODE § 18A-5-2 defines school holidays as follows:

(a) School shall be closed on Saturdays and on the following days which are designated as legal school holidays: Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, New Year’s Day, Martin Luther King’s birthday, Memorial Day and West Virginia Day. School also shall be closed on any day on which a primary election, general election or special election is held throughout the state or school district and on any day appointed and set apart by the president or the Governor as a holiday of special observation by the people of the state.

It is undisputed that Grievant drove either an extracurricular or extra duty trip the week of November 6, 2018, which was an Election Day. Respondent does dispute whether or not Election Days are defined as a “school holiday.” Grievant goes on to argue that the above statute should be read together with the general state holiday statute, which is not specifically defined in reference to school employees in the case at issue. In other words, Respondent should treat Election Days as a school holiday the same as it does all school holidays specifically set out in WEST VIRGINIA CODE § 18A-5-2.

It appears that after defining what are to be considered “school holidays,” the Legislature then proceeded to state that schools would “also be closed” on days when elections are held. Election Day was not included in the preceding sentence defining school holidays, but was added as an additional holiday during which schools are closed. Superintendent Woodward acknowledges in the Level One Decision that some counties pay a rate of one and one-half times their usual hourly rate for legal and school holidays,

but there is no code that requires this payment. Based upon statutory construction, the undersigned agrees.

Under the *in pari materia* rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the statute. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved looking at another statute on the same subject. *Farley v. Zapato Coal Corp.*, 167 W.Va. 630, 281 S.E.2d 238 (1981); *Eastham v. Cabell County Bd. of Educ.*, Docket No. 92-06-397 (Apr. 16, 1993); *Wroblewski v. Wayne County Bd. of Educ.*, Docket No. 2018-0464-WayED (Sept. 13, 2018).

In the instant case, there appears no actual conflict between the two provisions, in that WEST VIRGINIA CODE § 18A-5-2 is the specific, unambiguous statute which applies to the situation presented. WEST VIRGINIA CODE § 18A-4-8a(i) clearly references weeks of school holidays as the occasions when extra pay is provided, not the weeks of state holidays as defined elsewhere. In addition, there is a specific definition of school holidays contained in WEST VIRGINIA CODE § 18A-5-2, which is the applicable provision when determining the requirement of extra pay for school employees. Under this circumstance, there would be no need to turn to WEST VIRGINIA CODE § 2-2-1(a)(13) which provides that “[a]ny day on which a general, primary or special election is held is a holiday throughout the state[.]” “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984).

The applicable statute clearly and unambiguously applies to school holidays under WEST VIRGINIA CODE § 18A-4-8a(i), which provides for extra pay. There is no conflict with another Code provision which requires the two to be interpreted. The West Virginia Supreme Court of Appeals has consistently held:

“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *Syl. pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968); *Syl. pt. 1, Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989); *Syl. pt. 3, Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995); *Syl. pt. 2, Mallamo v. Town of Rivesville*, 197 W.Va. 616, 477 S.E.2d 525 (1996), *Maikotter v. University of W. Va. Bd. of Trustees/West Va. Univ.*, 206 W. Va. 691; 527 S.E.2d 802 (1999).

Finally, the record supports a finding that Respondent has never recognized Election Day as a school holiday, nor provided the extra pay for assignments during the week of an election. Respondent’s Finance Director opined that employees could be mistaken in believing that they received extra pay during election week, simply because Veteran’s Day also falls in early November. The record reflects that Respondent has consistently followed the statutory directive to provide the extra pay during school holiday weeks. Grievant was unable to demonstrate that this interpretation was clearly erroneous by the Respondent.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules

of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Under the *in pari materia* rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the statute. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved looking at another statute on the same subject. *Farley v. Zapato Coal Corp.*, 167 W.Va. 630, 281 S.E.2d 238 (1981); *Eastham v. Cabell County Bd. of Educ.*, Docket No. 92-06-397 (Apr. 16, 1993); *Wroblewski v. Wayne County Bd. of Educ.*, Docket No. 2018-0464-WayED (Sept. 13, 2018).

3. The West Virginia Supreme Court of Appeals has consistently held that, "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968); *Syl. pt. 1, Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989); *Syl. pt. 3, Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995); *Syl. pt. 2, Mallamo v. Town of Rivesville*, 197 W.Va. 616, 477 S.E.2d 525 (1996), *Maikotter v. University of W. Va. Bd. of Trustees/West Va. Univ.*, 206 W. Va. 691; 527 S.E.2d 802 (1999).

4. Grievant was unable to demonstrate by a preponderance of the evidence that Respondent's interpretation of WEST VIRGINIA CODE §§ 18A-5-2 and 18A-4-8a(i) was clearly erroneous.

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, 2018).

Date: February 21, 2020

Ronald L. Reece
Administrative Law Judge