

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERESA BAKER,
Grievant,

v.

Docket No. 2018-1170-WayED

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Teresa Baker, filed a level one grievance against Respondent, Wayne County Board of Education ("Board") dated January 29, 2018. Ms. Baker alleges the following:

WCBOE Supplement to the SER. Personnel Salary Schedule 2017-2018. I received incentive of \$1500.00 with my March check. I was encouraged to send this request as others have received the supplement, primarily Supervisors, mechanics, maintenance employees. Personnel stated that secretaries before me had not. Can provide where a previous secretary had requested it Personnel stated the supplement was to encourage certain employees to stay in the departments listed. I was told by one of my supervisors, if I wanted the supplement, I needed to be here at 8:00 a.m. on two hours delays which I have been.

As relief, Grievant seeks to be paid the supplement, backpay, and an increase in wages.

A level one hearing was held and a level one decision denying the grievance was issued on May 4, 2018. Grievant appealed to level two on May 14, 2018 and a mediation was conducted on August 10, 2018. Grievant appealed to level three on August 15, 2018.

After a number of continuances were granted at the request of the parties, a level

three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on October 15, 2019. Grievant personally appeared and was represented by Ben Barkey, WVEA. Respondent was represented by Leslie K. Tyree, Esquire. This matter became mature for decision on January 23, 2020, upon receipt of the last of the parties' Proposed Findings of Facts and Conclusions of Law.

Synopsis

Grievant Baker asserts that she, as the Secretary for Transportation working out of the bus garage, is entitled to a Board pay supplement for "Bus Garage & Maintenance Personnel with 15+ years of experience." Respondent argues that the supplement does not apply to Grievant's position because her duties are clerical in nature and not specifically related to transportation or maintenance. In essence she is actually a Secretary 3 in the central office and the fact that her workspace is conveniently located in the bus garage does not entitle her to the supplement. There are differing interpretations of the policy but for the reasons more fully set out herein the policy must be strictly construed in favor of the employee and Grievant is entitled to the pay supplement she requests.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Teresa Baker, is employed by Respondent, Wayne County Board of Education, as a Secretary 3 assigned to the Transportation Department. She has been employed by the Board for more than fifteen years. She began working in her present position in February 2017.

2. Grievant's position is physically located in the bus garage which is a separate building from the central office where most of the administrative offices are located. The distance between the central office and the bus garage is approximately one mile. Her major duties involve keeping track of leave and financial issues with the department as well as a variety of clerical task.

3. Secretary 3 positions in Wayne County are posted as Secretary 3, Central Office, and the department the secretary will serve. In Grievant's case that was the Maintenance and Transportation department.¹

4. Respondent provides specific salary supplements to certain service personnel. Those salary supplements are spelled out in a document titled; Wayne County Board of Education Supplement to the Service Personnel Salary Schedule.² One of the salary supplements listed in that document is for "Bus Garage & Maintenance Personnel with 15+ years of experience." The supplement is an additional \$200 per month which adds \$10 to the daily rate of those employees. The Board had experienced difficulty keeping employees in this area and the purpose of the supplement was to attract and retain such employees.

5. William "Butch" Gibson was a Bus Operator for the Board for 35 years. Thereafter, he became a full-time Transportation Coordinator at the bus garage for a year and a half before he retired. During that one and a half year he received the \$200 per month supplement.

¹ Testimony of Todd Alexander, Superintendent of Wayne County Schools.

² Respondent Exhibit 2.

6. Howard Meddings is employed by the Board as a Transportation department inventory supervisor. He has held that position for nine years. He did not receive the supplement during his first two years. He requested to Loren Perry, then Director of Service Personnel, to be paid the supplement and for two years of back pay. His request was granted.

7. Mr. Meddings made Grievant aware of the salary supplement and encouraged her to apply for it. As a templet for the request, Grievant was provided with a copy of a similar request made to Loren Perry by Mark Queen dated June 9, 2015. (Grievant Exhibit 1)

8. Grievant prepared her own request for the supplement directed to the Board's present Director of Service Personnel, Mike Hart, dated November 15, 2017. She specifically requested to be granted the supplement "retroactive to [her] starting date in February 2017." The request was also signed and dated the same day by David Sammons, who was the Board's Transportation Director at that time. He is now retired. A hand-written notation at the bottom of the memo that states: "Given to Mr. Alexander 11/29/17." (Grievant's Exhibit 1)

9. Superintendent Alexander consulted with Director of Service Personnel Mike Hart about the issue and Director Hart advised him that the supplement did not apply to Grievant as a department secretary as opposed to someone actively engaged in providing transportation or maintenance activities.

10. Superintendent Alexander also reviewed payroll records to determine if other central office secretaries assigned to the bus garage and maintenance department have been paid the supplement and concluded that they had not.

11. Julia Ann White is now retired from employment with the Board. She was previously employed as the Secretary for Transportation for four years. She testified that while she was serving as the transportation secretary, she requested to receive the supplement after Howard Meddings was granted it. She testified that then Director Loren Perry signed off on the request and the Board approved her request at a regular meeting.³

12. Respondent produced a copy of Ms. White's pay records. (Respondent Exhibit 1) There is no obvious line item marked on the record entitled "supplement." Superintendent testified that supplements are generally listed under the heading "other amount" and nothing was listed in this heading on Ms. White's records. It was unclear if the supplement could have been included in Ms. White's regular salary, which reflected an unexplained increase,⁴ and Superintendent Alexander admitted that he was not familiar with all the account codes listed on the payroll document.⁵

13. There are about twelve Secretary 3s assigned to the various administrative departments in the Board's central office. No Secretary 3 for the other administrative departments receive this salary supplement nor do they work out of the bus garage.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard

³ By agreement of the parties, Julia White was permitted to testify telephonically.

⁴ The increase appeared to be more than would have been received for an additional year of experience, but it was not clear if it was definitively the result of her receiving the supplement.

⁵ Superintendent Alexander relied upon Kym Hale who is the Board's accountant in charge of payroll.

generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichtliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant works for the Board as the Secretary for the Transportation Department. She is in the Secretary 3 classification and her workplace is the county bus garage. Because she works at the bus garage and she has worked for the Board for more than fifteen years, she argues that she is entitled to a salary supplement provided by the Board to "Bus Garage and Maintenance Personnel with 15+ years of experience."⁶ Grievant proved that other bus garage employees have sent memorandums to the county personnel director requesting the supplement and have received it. A retired secretary who held the Transportation Department Secretary position for four years testified that she also requested the supplement and it was approved at a regular meeting of the Wayne County Board of Education. Additionally, Grievant points out that the Director of Transportation at the time, David Sammons, signed her request and expressed his belief that she was entitled to receive it.

Respondent argues that Grievant is not entitled to the supplement because she is not actively engaged in the work of transportation or maintenance. Rather she was hired as a Central Office Secretary 3 assigned to the Transportation Department. There are as many as twelve Secretary 3s who work for the various administrative departments and none of them receive the supplement. Respondent argues that Grievant does they

⁶ Respondent Exhibit 2.

same type of duties as the other Secretary 3s and should not receive the supplement merely because her worksite is conveniently located at the bus garage.

Superintendent Alexander interprets the policy purpose to help recruit and retain transportation and maintenance employees who might be lured to public sector jobs if not for the additional salary provided in the supplement. He testified that the Board does not have the same difficulty filling secretary positions. He also provided a copy of payroll record for retired secretary Ms. White provided to him by the Board's accountant in charge of payroll. That person told Mr. Alexander that Ms. White was not paid the salary supplement. Indeed, there was not specific line on the payroll form designating payment for a salary supplement and nothing listed in the section designated "other amount" which Mr. Alexander had been told the salary supplement would appear. Yet, neither Superintendent Alexander nor the payroll account worked for the Board when Ms. White's pay was processed and there is an anomaly in the regular salary which could indicate that the salary supplement might have been incorporated into that heading.

In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Both Ms. White and Mr. Alexander seemed to testify truthfully and recounted the facts the way they believed them to be. Ms. White was certain that she had requested the salary supplement with the support of the Transportation Director and the then Director of Service Personnel Loren Perry signed off on the request. She stated that the supplement was approved by the Board at a regular meeting. She was not hesitant on any of these details. She did not know if the supplement was incorporated into her regular salary or recorded separately and did not speculate about matters for which she was unsure.

Likewise, Mr. Alexander was very sincere in his belief that Ms. White had not received the salary supplement. He based his belief upon information and documentation provided to him by the Board's payroll accountant whom he had no reason to doubt. He was also forthright that his knowledge of the various coding numbers

on the payroll for but believe the proper place on the form for recording a salary supplement was the other “other amount” section which was did not contain a number for the supplement on Ms. White’s form.

Since both witnesses were credible the facts must be determined by other means. Ms. White’s version came in through direct testimony which was available for cross examination by Respondent’s counsel. While there is little doubt Mr. Alexander is very knowledgeable about the effective administration of public schools he must depend on the system’s director in specific areas for discrete information. His conclusions about the information and documentation given to him by the Board’s payroll accountant which constitutes hearsay.

Regarding the hearsay evidence, the issue is not admissibility but one of weight. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a proceeding. *Warner v. Dep’t of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep’t of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy. *Lunsford and Kelly v. Reg. Jail and Corr. Facility Auth.*, Docket No. 2016-1388-CONS (Sept. 28, 2016).

The administrative law judge applies the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants’ out of court statements were in writing, signed, or in affidavit form; 3) the agency’s explanation for failing to obtain signed or sworn

statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

“‘[T]he primary reason for the exclusion of hearsay is that there is no way for the trier of fact to judge the trustworthiness of the information.’ *Handbook on Evidence for West Virginia Lawyers*, Vol. 2, 4th Edition, Franklin D. Cleckley, © 1994. The evidence is inherently unreliable because; it denies the accused the opportunity for cross examination of the speaker at the time it is being made, it often lacks the sanction of being made under oath, and it facilitates the use of perjured evidence.” *Id. Lundsford and Kelly v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2016-1368-CONS (Sept. 28, 2016). *Clark v. Dep't of Health & Human Res.*, Docket No. 2017-2133-CONS (Nov. 1, 2017).

The person who had direct knowledge about the payroll records of Ms. White was the payroll account, Kym Hale. Mr. Alexander testified truthfully about what he was told by Ms. Hale, but she was not called as a witness. Ms. Hale was not called as a witness and there was not indication that she was unavailable. Her absence made it impossible for Grievant to effectively cross examine the reliability of the documentary evidence because Mr. Alexander, through no fault of his own, had limitations in his knowledge of the proper reading of the payroll records. The hearsay evidence indicating that Ms. White

did not receive the bus garage salary supplement must be given less weight than the direct and detailed testimony for Ms. White that she did. Based upon the evidence provided at the hearing, it is more likely than not that Julia White was paid the bus garage and maintenance supplement when she served as the Transportation Secretary.

There is another serious evidentiary problem in this case. Both the retired Transportation Director, David Sammons and the Retired Director of Service Personnel were subpoenaed to testify in this matter at the request of the Grievant. Both were contacted by a one or more party representative prior to the hearing and both stated that they would not attend. Neither appeared for the hearing and the matter was scheduled for a second day for their testimony. New subpoenas were served, and both made it known that they would not honor the subpoenas. The parties waived an offer to seek enforcement of the subpoenas.

Regarding retired Transportation Director Sammons, he signed off on the request for Grievant to receive the salary supplement. It can be inferred by that fact and his refusal to testify that his testimony would have been that he believed Grievant was entitled to the supplement. Likewise, Ms. White credibly testified that retired Director Service Personnel Perry approved her receiving the salary supplement. Based upon that fact, and his refusal to appear it can be inferred that he too would testify that he believed that Grievant was entitled to the supplement, a position he knew was counter to the present administration's views.

This gets us to the ultimate question: is Grievant entitled to the salary supplement for "Bus Garage & Maintenance Personnel with 15+ years." Certain facts are not in dispute; Grievant works in the Transportation Department, her worksite is in the bus

garage and she had worked for the Board for more than fifteen years when she requested the salary supplement.

Superintendent Alexander's interpretation of the policy set out above is well thought out, but he was not employed by the Board when the policy was adopted. Additionally, the evidence indicated that it is more likely than not that the prior Transportation Secretary received the supplement and it can be reasonably inferred that the prior administrators interpreted the policy to include Grievant's position in those which are entitled to the supplement.

There are rules of interpretation which help determine which view must prevail. First, "Where the language in question is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729; 356 S.E.2d 483 (1987). The wording of the Board's supplement clearly states that bus garage and maintenance personnel with more than fifteen years with the Board are entitled to the supplement. There are no limitations regarding the duties an employee must be performing to be eligible. This plain reading favors Grievant receiving the supplement.

Second, to the extent that the language is ambiguous and subject to interpretation, it is axiomatic that, if construction or interpretation is necessary, school personnel regulations and laws are to be strictly construed in favor of the employee. *Syllabus Point 1, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). Both of these rules in conjunction with the evidence lead to the conclusion that Grievant is entitled to the pay supplement she requests. Accordingly, the grievance is **GRANTED**.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. Regarding the hearsay evidence, the issue is not admissibility but one of weight. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent

susceptibility to being untrustworthy. *Lunsford and Kelly v. Reg. Jail and Corr. Facility Auth.*, Docket No. 2016-1388-CONS (Sept. 28, 2016).

4. The administrative law judge applies the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. See, *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

5. "[T]he primary reason for the exclusion of hearsay is that there is no way for the trier of fact to judge the trustworthiness of the information.' *Handbook on Evidence for West Virginia Lawyers*, Vol. 2, 4th Edition, Franklin D. Cleckley, © 1994. The evidence is inherently unreliable because; it denies the accused the opportunity for cross examination of the speaker at the time it is being made, it often lacks the sanction of being made under oath, and it facilitates the use of perjured evidence." *Id. Lunsford and Kelly v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2016-1368-CONS (Sept. 28, 2016). *Clark v. Dep't of Health & Human Res.*, Docket No. 2017-2133-CONS (Nov. 1, 2017).

6. "Where the language in question is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729; 356 S.E.2d 483 (1987).

7. If construction or interpretation is necessary, school personnel regulations and laws are to be strictly construed in favor of the employee. *Syllabus Point 1, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979).

8. Grievant proved by a preponderance of the evidence that she was entitled to the pay supplement she requested.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant the salary supplement for Bus Garage and Maintenance Personnel with back pay to the date she was employed as the Secretary for Transportation plus statutory interest and any additional benefits which she may have accrued.

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 (2018).

DATE: March 4, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE