

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BRENDA HALL and ANTONIA VAUGHN,
Grievants,**

v.

Docket No. 2020-0897-CONS

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

DECISION

Grievants, Brenda Hall and Antonia Vaughn, are employed by Respondent, Kanawha County Board of Education, as Educational Sign Language Interpreters who work with students with hearing impairments. This matter is a consolidated grievance.¹ The original grievances were filed on August 29, 2019, and the grievance statements were virtually identical alleging, "WV 18A-4-2; WV 18A-1-1(c)(1). Professional Interpreters are fully certified to work with Special Needs students in teaching/counseling relationship for the majority of their workday and should receive the 3 year pay bonus awarded to special needs teachers. They are teachers by statutory definition in 18A-1-1." For relief, Grievants have requested "[b]ackpay plus interest and all related benefits."

A grievance conference was held at level one on October 8, 2019, and the grievance was denied at that level by written decision dated October 15, 2019. Grievants appealed to level two on November 4, 2019, and a mediation session was held on March 2, 2020. Grievants appealed to level three on March 6, 2020. A level three hearing was held before the undersigned Administrative Law Judge on September 16, 2020, at the

¹ On January 31, 2020 Grievants, individually, by representative requested docket numbers 2020-0259-KanED and 2020-0260-KanED be consolidated. Subsequently, pursuant to an Order dated February 20, 2020, the instant matter was consolidated for litigation purposes.

Grievance Board's Charleston office. Grievants appeared in person and with Representative, Allen Stump, WVEA Organizational Development Specialist. Respondent appeared by its counsel, Lindsey D.C. McIntosh, Esquire, General Counsel. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about October 13, 2020, on receipt of the last of these proposals.

Synopsis

Effective July 1, 2019, the West Virginia Legislature enacted House Bill 206, which established, among other things, WEST VIRGINIA CODE § 18A-4-2(e), providing that "each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule . . ." WEST VIRGINIA CODE § 18A-4-2. Respondent, a county school board, grants the pay-increase to licensed classroom teachers with a special education endorsement. Grievants are of the opinion they too are entitled to the three-step salary increase. Grievants are Educational Sign Language Interpreters who work with students who are hearing impaired at Capital High School. Both Grievants hold paraprofessional licenses as Educational Sign Language Interpreters. Neither Grievant is a licensed teacher.

The salary increase is paid by the West Virginia Department of Education ("WVDE") through a reimbursement to the county. Respondent relying on two separate guidance documents from the WVDE in order to determine who is approved for the three-

step pay increase. WVDE has made it clear through its guidance documents, which explains the specific licenses a teacher must have, and corresponding endorsement codes that must be attached to those licenses in order to qualify for the three-step pay increase. Neither Grievant has a recognized teaching license with qualifying special education endorsement. Neither Grievant is on the certified list for an employee certified in special education. In accordance with the guidance of the agency charged with the payment of the three-step pay increase Respondent determined Grievants were ineligible for the pay increase.

Grievants have not shown Respondent is clearly wrong in its implementation of the Department of Education's interpretation of W.Va. Code § 18A-4-2(e). Grievants have not proven that they are entitled to the three-step pay increase by a preponderance of the evidence. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant Brenda Hall is an Educational Sign Language Interpreter who works with students who are hearing impaired at Capital High School, where she has been employed for twenty-five of the twenty-six years she has been employed with Kanawha County schools. Grievant Hall is licensed as an associate member of Registry of Interpreters for the Deaf (RID), which meets the requirements of West Virginia Commission for the Deaf and Hard of Hearing (WVCDHH).

2. Grievant Antonia Vaughn is an Educational Sign Language Interpreter who works with students who are hearing impaired at Capital High School, where she has been employed for seven of the twenty-seven years she has been employed with Kanawha County schools. Grievant Vaughn has both state and national licensure. Her state licensure includes an associate member of RID. She also has her national certification RID ED: K-12.

3. Grievants have been assigned the Professional Position Code of 330 by the West Virginia Department of Education ("WVDE").

4. Professional employees are defined by WEST VIRGINIA CODE § 18A-1-1(b) as "those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee."

5. Other professional employee is defined as "a person from another profession who is properly licensed and who is employed to serve the public schools." WEST VIRGINIA CODE § 18A-1-1(c)(4).

6. A "class room teacher" is defined as "a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in that capacity." W. VA. CODE § 18A-1-1(c)(1).

7. Grievants hold a paraprofessional license as Interpreters. Neither Grievant has a teaching certificate.

8. Grievants' base salary is calculated pursuant to WEST VIRGINIA CODE § 18A-4-2, which provides the state minimum salary schedule for all professional employees.

9. Effective July 1, 2019, the West Virginia Legislature enacted House Bill 206, which established, among other things, West Virginia Code § 18A-4-2(e), providing that "each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule...." West Virginia Code § 18A-4-2. This salary increase is often referenced as a "three-step salary increase."

10. The three-step salary increase is paid through a reimbursement to a county by the West Virginia Department of Education ("WVDE").

11. The WVDE issued guidance on who would be eligible for the three-step salary increase. As a part of the guidance, the WVDE issued a document titled "HB 206 – Frequently Asked Questions – July 30, 2019," where it is clearly indicated that "classroom teachers" for the purposes of the three-step increase means educators who hold actual teaching certificates. Respondent's Exhibit (R Ex) 2

12. Questions arose as to who would be eligible for pay pursuant to the new provisions to WEST VIRGINIA CODE § 18A-4-2. The "Frequently Asked Questions" document was designed to answer questions and provide clarification.

13. In a later guidance document titled "Instructions for Preparing and Submitting the Professional Personnel Employment Reports for the 2019-2020 School

Year,” the WVDE modified some of the endorsement field codes.² See R Ex 1. This document provided specific “endorsement codes” for special education teachers who the State Department recognized as being eligible for the three-step salary increase. This document states, “The endorsement code provided should be the endorsement code that verifies the employee is fully-certified in the content area in which they are providing instruction. The endorsement code can only be associated with a certificate of 21, 22, 23, or 65.” *Id* at 16. All four of the certificates are licenses for classroom teachers.

14. Neither of the WVDE guidance documents provided to Respondent identified and/or addressed education interpreters specifically.

15. Kimberly Olsen, the Human Resources Specialist for Professional Employees in Kanawha County Schools, testified at the instant level three hearing.

16. Grievants were not included in the list of eligible employees because they do not hold a teaching certificate or a special education endorsement with WVDE, as deemed required to get the pay increase. Olsen L3 Testimony

17. Human Resources Specialist Olsen credibly testified that once an individual has a teaching certificate, he or she can add endorsements by going back to school and completing coursework required for the endorsement or taking a PRAXIS exam in that field, and then applying for the endorsement with the WVDE.³

² In the email that the guidance document was attached to, Amy Willard, the Executive Director in the WVDE Office of School Finance, states “Modifications were made on pages 15-17 related to the three-step increase and endorsement code fields.” The two added types of certificates are a 23 (provisional professional non-transferrable teaching license with the WVDE) and a 65 (a teaching license for a non-U.S. citizen).

³ Ms. Olsen testified that an individual cannot get an endorsement without a teaching certificate.

18. WVDE has, through its interpretation and payment of this three-step increase, definitively stated that “classroom teachers” who do not hold a WVDE recognized certification do not get the pay increase.

19. If Respondent were to permit someone to get the pay increase who is not approved to get it, in accordance with the WVDE interpretation of the law, the county would not be reimbursed for that person’s increase.

20. Pursuant to WVDE guidelines a special education teacher must have a teaching certificate with special education endorsement and be employed as a special education teacher in order to receive the additional three-step salary increase.

21. Grievants spend the majority of their day in the classroom setting interpreting the classroom teacher’s material and content for their hearing impaired students. Grievants are not duly recognized by Respondent as being employed as certified teachers.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claim by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Effective July 1, 2019, each classroom teacher certified in special education and employed as a full-time special education teacher is considered to have three additional years of experience for the purposes of the salary schedule set forth in subsection (b) of W.Va. Code §18A-4-2. Grievants are licensed as paraprofessionals with an educational interpreter endorsement. Prior litigation resulted in them being paid pursuant to the teacher pay schedule as opposed to the service personnel schedule. *Hall and Vaughn v. Kanawha County Bd. of Educ.*, Docket No. 2014-0282-CONS (August 7, 2014). Respondent has granted the identified pay-increase to licensed classroom teachers with a special education endorsement in accordance with the directives of the West Virginia Department of Education (“WVDE”). Grievants were deemed ineligible for the pay increase.

Grievants Hall and Vaughn are Educational Sign Language Interpreters who work with students who are hearing impaired at Capital High School. Grievants are not necessarily assigned to a special education classroom. Both Grievants hold paraprofessional licenses as educational sign language interpreters. Neither Grievant is a licensed teacher. Nevertheless, Grievants are of the opinion they are entitled to the three-step salary increase. Grievants assert that in according with a grievance from *Bright v. Tucker County Bd. of Educ.*, 184 W. Va. 33, 399 S.E.2d 176 (1990), “It is not the degree or certification of the employee that is dispositive on the question of experience

credit in the salary schedule for teachers, but rather the duties performed.” Grievants argue:

That their duties include more than simply conveying what words and grammar the teacher and other students say. Duties include monitoring comprehension, checking for understanding, and often times teaching and re-teaching. Implementing the Individualized Education Programs by making sure the goals of the lesson are clear fall within their duties. Their duties include teaching new content and vocabulary. At times they work one on one with students. They are required to expand on concepts that are not clearly explained by the regular classroom teacher. They also can be required to counsel students.

Grievants maintain they have a direct instructional relationship with their students (serve essential instructional purposes) inside and outside the classroom. Thus, they too are entitled to the three-step experience credit for special education teachers. Respondent disagrees with this assertion. Respondent maintains its application of the three-step salary increase established by West Virginia Code § 18A-4-2(e) is properly administrated.

Respondent persuasively emphasizes that the three-step salary increase is paid by the State’s Department of Education through a reimbursement to the county. Accordingly, the West Virginia Department of Education, in large part, construes who receives the three-step pay increase. Respondent relied on two separate guidance documents from WVDE in order to determine who is approved for the pay increase. The WVDE issued a document titled “HB 206 – Frequently Asked Questions – July 30, 2019.” In this document, it is clearly stated in several different places “classroom teachers” for the purposes of the three-step increase means educators who are fully certificated to teach special education. R Ex 2. Specifically, in Frequently Asked Question 11 and the corresponding answer, it states:

Q11. Can a math or special education teacher who is working on a permit, out of field authorization or alternative certification be eligible for the three-step salary increase?

A11. No, in order to receive the three-step salary increase, a classroom teacher must be fully certified in the content area. They must therefore hold a Certificate Code of 21 (Initial Professional Teaching Certificate) or 22 (Professional Teaching Certificate).

R Ex 2

Respondent was also provided an additional guidance document from WVDE sent out after the Frequently Asked Questions document. This document is titled “Instructions for Preparing and Submitting the Professional Personnel Employment Reports for the 2019-2020 School Year,” and was sent out as an attachment to an email sent by Amy Willard, the Executive Director in the WVDE Office of School Finance (the individual at WVDE who maintains county certified lists). In the WVDE e-mail with the attached guidance document, Ms. Willard stated that there were some modifications on pages 15-17 “related to the three-step increase and the endorsement field codes.”⁴ R Ex 1. This document provided specific “endorsement codes” for special education teachers who the State Department recognized as being eligible for the three-step salary increase. This document states, “The endorsement code provided should be the endorsement code that verifies the employee is fully-certified in the content area in which they are providing instruction. The endorsement code can only be associated with a certificate of 21, 22, 23, or 65.” *Id.* p16. All four of these certificates are licenses for classroom teachers.

⁴ The two added types of certificates are a 23 (provisional professional non-transferrable teaching license with the WVDE) and a 65 (a teaching license for a non-U.S. citizen).

The crux of this issue is due to the West Virginia Department of Education's interpretation of W.Va. Code § 18A-4-2 where it states, "classroom teacher certified in special education" to mean "licensed classroom teacher certified in special education."

Kimberly Olsen, the Human Resources Specialist for Professional Employees in Kanawha County Schools testified at the instant level three hearing. Ms. Olsen testified to the process for determining who received the three-step pay increase. Ms. Olsen testified that Respondent's Human Resources Department works with West Virginia Department of Education to make sure the certified list for special educators is up-to date with everyone who is "certified in special education." Ms. Olsen testified that in order to be included on the certified list as being "certified in special education," a teacher had to have a special education endorsement on their teaching license. Thus, to have a special education endorsement, the teacher had to first have a teaching license and then a specific special education endorsement. If the employee does not have a certificate 21, 22, 23, or 65, which are all teaching licenses and then a special education endorsement, which are also outlined in the "Instructions for Preparing and Submitting the Professional Personnel Employment Reports for the 2019-2020 School Year," the employee is not eligible for the three-step pay increase.⁵

Grievants argue that they are "classroom teachers" under the definition of W.Va. Code § 18A-1-1, which states that "classroom teacher" means "a professional educator who has a direct instructional or counseling relationship with students and who spends a

⁵ If a county school board were to permit someone to get the pay increase who is not approved to get it, in accordance with the WVDE interpretation of the law, Respondent would not be reimbursed for that person's increase.

majority of his or her time in this capacity....” Grievants contend that they meet this definition. Grievants also state that they are “certified in special education” due to their paraprofessional certificate that they have in educational interpretation. The WVDE has interpreted W.Va. Code § 18A-4-2(e) to mean that the employee holds a certification in special education, which is also known as an endorsement. Grievants admit that they do not hold a certification with the WVDE in special education.

In order to hold an endorsement, a teacher first must have a license to teach, then take additional coursework through an approved program or PRAXIS exam to qualify for a special education endorsement. Once the teacher applies for and is granted that endorsement, they are considered by WVDE as “certified in special education.” Teachers who are “certified in special education” then are included in the certified list, which is maintained by the WVDE. WVDE interpretation is that “classroom teacher” means “licensed classroom teacher” because to be “certified in special education” the classroom teacher must first have a license to teach. WVDE has made this clear through the guidance documents, which explains the specific licenses a teacher must have, and corresponding endorsement codes that must be attached to those licenses in order to qualify for the three-step pay increase.⁶ Neither Grievant has a teaching license and thus no special education endorsement. Neither Grievant is on the certified list for an employee certified in special education. Grievants are therefore, perceived and deemed

⁶ Grievants contend their duties include more than simply conveying what words and grammar the teacher and other students say. Grievants profess their duties include monitoring comprehension, checking for understanding, (aka teaching). They are required to expand on concepts that are not clearly explained by the regular classroom teacher and from time to time are required to counsel students.

by Respondent as not “certified in special education” (ineligible for the pay increase).

The West Virginia Supreme Court of Appeals has routinely held, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Grievants have the burden of proving their grievance by a preponderance of the evidence. Grievants are not charged with just supplying an equitable alternative interpretation of a statute. Where the evidence equally supports both sides, a party has not met its burden of proof. An alternative interpretation or alternate plausible application in contrast to an employer’s implementation of a rule or law isn’t sufficient grounds for the undersigned to overrule Respondent’s actions. Respondent has complied with W.Va. Code § 18A-4-2(e) and the Department of Education by only granting the pay-increase to licensed classroom teachers with a special education endorsement. Respondent’s actions are not necessarily unreasonable. There is a requirement that the teacher be “certified in special education.” W.Va. Code § 18A-4-2(e). The individuals who are “certified in special education” and included on the certified list maintained by WVDE, must have a special education endorsement to be on that list, which requires a teaching

license. Grievants are Educational Sign Language Interpreters who work with students who are hearing impaired, both Grievants hold paraprofessional licenses as educational sign language interpreters. Neither Grievant has a recognized teaching license with qualifying special education endorsement.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bears the burden of proof. Grievants have the burden of proving their grievance by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. WEST VIRGINIA CODE § 18A-4-2(e), providing that "each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule set forth in subsection (b) of this section." W.Va. Code § 18 A-4-2.

3. The West Virginia Department of Education has set out guidance for how they will reimburse county Boards of Education for the three-step salary increase, which

is reasonable and not clearly erroneous or outside the confines of the language of W.Va. Code § 18A-4-2(e).

4. The West Virginia Supreme Court of Appeals has routinely held, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983).

5. Grievants have not established that Respondent is clearly wrong in its application of W.Va. Code § 18A-4-2(e) language and the implementation of the guidance from the West Virginia Department of Education.

6. Grievants have not established by a preponderance of the evidence that they are entitled to the three-step pay increase authorized by W.Va. Code § 18A-4-2(e).

7. Respondent has complied with W.Va. Code § 18A-4-2(e) and the West Virginia Department of Education guidelines by only granting the pay-increase to licensed classroom teachers with special education endorsement.

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 (2018).

Date: November 24, 2020

Landon R. Brown
Administrative Law Judge