THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARILYN SCHRECKENGOST,

Grievant,

v. **Docket No. 2019-0758-WooED**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Marilyn Schreckengost, filed a level one grievance against her employer, Respondent, Wood County Board of Education, dated January 15, 2019, contesting the amount of her salary. Grievant argues Respondent counted the past experience of other school nurses but it did not do so for her. She asserts claims of discrimination, favoritism, and reprisal. It is noted that Grievant amended her statement of grievance at each level of the grievance process, but her claims appear to be unchanged overall. As relief sought, Grievant stated in her level one appeal as follows:

> Since realizing this practice of inflating years' experience to offer higher pay affects more than just one nurse, I am at a loss of what to write here. Personally, I feel that it would only be fair to backpay me $121,906.00. This is how much Ms. Creeger has been paid over the last 10 years when her salary should have been equal to mine. We were both hired August 2008.
>
> If backpay is not an option then please consider that Social Security and pension incomes are based on an average of one's highest years' earnings. I would like attention to this aspect of the grievance. This debacle will not end by merely lowering or raising years' experience to reflect the appropriate pay. Everyone involved will feel the impact through retirement.[1]

[1] *See*, attachment to Grievant's level one statement of grievance form.

A level one hearing was conducted on February 4, 2019. By decision dated March 15, 2019, the grievance was denied. Grievant appealed to level two on March 22, 2019. A level two mediation was conducted on May 31, 2019. Grievant perfected her appeal to level three on June 5, 2019. A level three hearing was conducted on October 9, 2019, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Richard S. Boothby, Bowles Rice, LLP. This matter became mature for decision on November 27, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a school nurse. Grievant learned that another school nurse hired on the same day as she was allowed experience credit for pay purposes for twenty years she worked before receiving her bachelor's degree, while Grievant was not allowed to receive such service credit. Grievant claimed discrimination, favoritism, and reprisal. Respondent denied Grievant's claims and asserted that it made changes to the other employee's salary and to Grievant's to correct mistakes. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At all times relevant herein, Grievant was employed by Respondent as a school nurse in Wood County, West Virginia. Grievant was first employed by Respondent

as a substitute school nurse in October 2005. She then worked as a long-term substitute nurse for three school years. Before her employment with the Board, Grievant worked as a nurse in non-school settings.

2. Grievant received her West Virginia Department of Education temporary certificate in 2005, and her Professional Student Support Certificate on June 24, 2007. Grievant received her bachelor's degree (BSN) on December 28, 2006, while she was employed by Respondent as a substitute school nurse.

3. At the times relevant herein, John Merritt was employed by Respondent as its Director of Personnel. Julie Bertram was employed by Respondent as its Health Service Coordinator. Teresa Morehead was employed by Respondent as its Human Resources Coordinator.

4. Respondent hired Grievant as a regular, full-time employee on August 21, 2008.

5. Respondent hired Tracy Creeger-Sanders as a school nurse on August 21, 2008, the same day as Grievant.

6. During the 2006-2007 school year, after she received her BSN, Grievant worked about 96 days. Grievant received her BSN before Ms. Creeger-Sanders.

7. Respondent grants school nurses experience credit for pay purposes, otherwise known as "ECPP," for prior work experience beyond what is required by West Virginia Code § 18A-4-1(1). Specifically, Respondent grants school nurses ECPP for each year during which they held an earned bachelor's degree and worked as a registered nurse, regardless of the type of nursing work they performed.

8. At the time they were hired, even though neither of them then held their BSN, Respondent credited both Grievant and Ms. Creeger-Sanders with some ECPP, which increased their pay.

9. In September 2018, Ms. Creeger-Sanders informed Grievant that, when she was hired, Respondent gave her 20 years of ECPP, and that she was earning $12,000.00 more per year than Grievant. Ms. Creeger-Sanders did not hold her BSN during those twenty years and did not then work as a school nurse.

10. Grievant brought the pay discrepancy to Respondent's attention on or about September 25, 2018. Grievant spoke to Teresa Morehead, Respondent's Human Resources Coordinator, to discuss the pay discrepancy matter.

11. Upon review of the issues raised by Grievant, Respondent determined that both Grievant and Ms. Creeger-Sanders had been improperly given ECPP when they were first hired. Grievant was given one year of ECPP for the school year 2006-2007, but she received her BSN in December 2006, and only worked 96 days as a school nurse thereafter. Respondent determined that it had erred when it had given Ms. Creeger-Sanders 20 years of ECPP for nursing experience earned before her employment with Respondent because she did not hold her BSN during any of that time.

12. After Grievant filed this grievance on January 15, 2019, on March 19, 2019, Mr. Merritt and Ms. Bertram met with Grievant to inform her that an adjustment would be made to her ECPP that would affect her salary because it had been a mistake to grant her the one-year ECPP credit for her work during the 2006-2007 school year. They explained to her that she should not have received the one-year ECPP credit when she was hired in August 2008.

13. Given the Respondent's mistake made in setting Ms. Creeger-Sanders's initial salary with the 20-years ECPP, it determined that her pay was to be reduced. Respondent reduced Ms. Creeger-Sanders's salary by removing the 20-year service credit at the beginning of the 2018-2019 school. Such reduced her pay by approximately $12,000.00.

14. Respondent corrected the mistake in Grievant's pay at the beginning of the 2018-2019 school year by paying her at the twelve-year rate two years in a row, instead of giving her the yearly service increase.

15. It appears from the evidence presented that Respondent reviewed the pay of other school nurse employees and made similar corrections as needed.

16. It is unknown why the person who hired Grievant and Ms. Creeger-Sanders on August 21, 2008, granted 20-years of ECPP for Ms. Creeger-Sanders and only one to Grievant.

17. Respondent ultimately determined that nine of its twenty-six school nurses, including Grievant, had been overpaid for years.

18. As of September 1, 2019, Respondent corrected the salaries of all affected school nurses, which was the first pay day of the 2019-2020 school year.

19. Grievant offered no evidence to establish that the pay discrepancies were anything more than human errors.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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*.

Grievant argues that she was treated differently than other school nurses as she was not given credit for her years of experience gained before coming to work at Wood County Schools. Grievant further alleges claims of favoritism and discrimination because Ms. Creeger-Sanders received credit for all of her private sector nursing experience. Grievant also asserts a claim of reprisal because Respondent only changed her salary after she filed this grievance. Respondent denies Grievant's claims and argues that errors were made in setting Grievant's and Ms. Creeger-Sanders's initial pay, and that neither should have received the ECPP in 2008 when they were hired. Respondent argues that such was merely a payroll error, and that such constitutes an *ultra vires* act that it is not bound to repeat. Therefore, Respondent argues that it was justified in adjusting Grievant's pay downward to the correct amount and seeking repayment from Grievant.

Pursuant to the West Virginia Code, "years of experience" is defined as,

> the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools, and service in the Armed Forces of the United States if the teacher was under contract to teach at the time of induction. For a registered professional nurse employed by county board, 'years of experience' means the number of years the nurse has been employed as a public school health nurse, including active work in a nursing position related to education, and service in the Armed Forces if the nurse was under contract with the county board at the time of induction. For the purpose of section two of this article, the experience of a teacher or a

> nurse shall be limited to that allowed under their training classification as found in the minimum salary scheduled.

W. VA. CODE § 18A-4-1(1). Further, "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.,* 174 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

"'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-277 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.,* Docket No. 98-HHR-228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).' *Buckland v. Division of Natural Res.,* Docket No. 2008-0095-DOC

(Oct. 6, 2008)." *Fields v. Mingo County Bd. of Educ.,* Docket No. 2013-1130-MinED (Feb. 4, 2014).

In another grievance addressing employee payment errors, the Grievance Board stated as follows:

> . . . [I]t is clear an error was made that resulted in Grievants being over paid . . . . While it is certainly understandable Grievants are displeased with the decrease in compensation, this does not make RCBOE's action wrong. Prior 'mistakes [do] not create an entitlement to future incorrect reimbursement. *See Stover v. Div. of Corr.,* Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.,* [Docket No.] 95-15-128 (June 5, 1995).' *Dillon v. Mingo County Bd. of Educ.,* Docket No. 05-29-413 (Apr. 28, 2006).
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> The mistake occurred because of an employee's failure to assess Grievants' experience properly and to apply the correct Code Section. This Grievance Board has previously held that a county board of education is not bound by an employee's mistake. *Samples v. Raleigh County Bd. of Educ.,* Docket No. 98-41-391 (Jan. 13, 1999); *Carr v. Monroe County Bd. of Educ.,* Docket No. 98-31-342 (Dec. 15, 1998); *Berry v. Boone County Bd. of Educ.*, Docket No. 97-03-305 (Apr. 13, 1998); *Chilton v. Kanawha County Bd. of Educ.,* Docket No. 89-20-114 (Aug. 7, 1989), *aff'd*, Kanawha County Cir. Ct., No. 89-AA-172 (Oct. 4, 1991). Accordingly, Grievants have not met their burden of proof and established a violation of any statute, policy, rule, or regulation that would entitle them to continue to receive compensation granted in error.

Bryant and Shields v. Raleigh County Bd. of Educ., Docket No. 05-41-236 (May 16, 2006). From the evidence presented, it appears that the actions of the payroll coordinator in setting Grievant's pay and that of Ms. Creeger-Sanders, were in error. Therefore, they constitute an *ultra vires* action to which the Respondent may not be bound, and Grievant cannot benefit as a result of the same.

Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families,* Docket No. 2010-0448-DHHR (Feb. 11, 2011). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor

in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013). "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h).

The evidence establishes that Grievant and Ms. Creeger-Sanders were similarly situated employees when this matter was filed, but they received different treatment from Respondent in setting their initial pay. They were also hired on the same day. Since this issue was raised by Grievant, Respondent has decreased her salary by keeping her at the twelve-year rate for two years in a row. Therefore, the evidence presented has demonstrated Grievant has made a *prima facie* case of discrimination and favoritism.

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory

motive." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

It is true that Respondent met with Grievant in March 2019 to inform her of the changes to her salary, soon after she had filed this grievance and had her level one hearing. However, Respondent has demonstrated that it needed to modify Grievant's pay to correct the error made in 2008 when she was initially hired and was improperly given one-year's service credit as she had not held her BSN for a full year. Respondent argues that it did the same for Ms. Creeger-Sanders. The evidence presented at the hearing demonstrates their salaries were altered in order to correct mistakes. The correction of errors constitutes a legitimate and nonretaliatory reason for decreasing Grievant's salary. Accordingly, Respondent has successfully rebutted the presumption of retaliation. Grievant has failed to prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.

Therefore, this grievance is DENIED.

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. 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. "'Years of experience' means the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools, and service in the Armed Forces of the United States if the teacher was under contract to teach at the time of induction. For a registered professional nurse employed by county board, 'years of experience' means the number of years the nurse has been employed as a public school health nurse, including active work in a nursing position related to education, and service in the Armed Forces if the nurse was under contract with the county board at the time of induction. For the purpose of section two of this article, the experience of a teacher or a nurse shall be limited to that allowed under their training classification as found in the minimum salary scheduled." W. VA. CODE § 18A-4-1(1).

3. "'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-277 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.,* Docket No. 98-HHR-228 (Nov. 30, 1998).

4. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).' *Buckland v. Division*

of Natural Res., Docket No. 2008-0095-DOC (Oct. 6, 2008)." *Fields v. Mingo County Bd. of Educ.,* Docket No. 2013-1130-MinED (Feb. 4, 2014).

5. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

6. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). "The filing of grievances and EEO complaints is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families,* Docket No. 2010-0448-DHHR (Feb. 11, 2011).

7. “[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

8. An inference can be drawn that Respondent’s actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep’t of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013). “No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.” W.VA. CODE § 6C-2-3(h).

9. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). “Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.” *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dep’t of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

10. Grievant failed to prove her claims of discrimination and favoritism by a preponderance of the evidence.

11. Grievant proved by a preponderance of the evidence a *prima facie* case of reprisal. However, Grievant has failed to prove by a preponderance of the evidence that the reason offered by the employer for modifying her salary was merely a pretext for a retaliatory motive.

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

DATE: January 30, 2020.

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Carrie H. LeFevre
Administrative Law Judge