

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

PAULA TOWNSEND,
Grievant,

v.

Docket No. 2020-0238-BarED

BARBOUR COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Paula Townsend, a speech-language pathologist employed by the Barbour County Board of Education, alleges that Respondent violated WEST VIRGINIA CODE § 18A-4-2(c) because, as instructed by the West Virginia State Department of Education and its Superintendent, Respondent did not grant her three additional years experience credit for salary calculation services.

Grievant filed a Level One grievance dated August 26, 2019. By email dated September 3, 2019, the parties provided that they agreed to waive this case directly to Level Three. An evidentiary hearing was conducted before the undersigned on January 14, 2020, at the Randolph County Development Authority in Elkins, West Virginia. Grievant appeared in person, and by her counsel, Andrew J. Katz, The Katz Working Families' Law Firm, LC. Respondent appeared by its counsel, Kimberly S. Croyle, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 20, 2020.

Synopsis

Grievant is a speech-language pathologist employed by Respondent at Belington Elementary School. Respondent did not grant her three additional years' experience credit for salary calculation purposes. Grievant demonstrated by a preponderance of the evidence that she is a "classroom teacher," "certified in special education," and, therefore, is among the groups of employees meant to be given the pay enhancement set forth in recently enacted legislation. School laws must be strictly construed in favor of the employee, and such analysis of the relevant code sections as a whole and related caselaw mandate that Grievant be granted three additional years experience credit for salary calculation services. Accordingly, the grievance is granted.

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

Findings of Fact

1. Grievant was employed by the Barbour County Board of Education on June 22, 2002, as a speech-language pathologist and continues to be employed as such today.
2. Grievant is licensed as a speech-language pathologist by the West Virginia Board of Education of Speech-Language Pathology & Audiology. Grievant holds a Professional Student Support Certificate in the area of Speech-Language Pathologist (birth to adult) issued by the West Virginia Board of Education. Grievant is nationally certified by the American Speech-Language-Hearing Association.
3. 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.”

4. “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).

5. 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).

6. Grievant’s base salary is calculated pursuant to WEST VIRGINIA CODE § 18A-4-2, which provides the state minimum salary schedule for all professional employees.

7. Because Grievant possesses national professional certification by the American Speech-Language-Hearing Association, she receives an annual salary supplement of \$2,500 pursuant to WEST VIRGINIA CODE § 18A-4-2b.

8. 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.

9. During the summer of 2019, questions arose as to who would be eligible for pay pursuant to the new provisions to WEST VIRGINIA CODE § 18A-4-2 created by HB 206. The State Superintendent of Schools issued a series of “Frequently Asked Questions” documents, designed to answer questions and provide clarification.

10. This document raised the question of whether speech pathologists would be eligible for a three-step salary increase for special education teachers. The answer was no. Unlike virtually all of the other answers, there is no explanation addressing why this response was given.

11. Lee Ann Brammer, Coordinator of Speech-Language Services for the West Virginia Board of Education, provided by way of an out-of-court statement the following, “We are not classroom teachers certified in special education nor are we full-time special education teachers. We are speech-language pathologists certified in speech-language pathology. Because we are not classroom teachers, we cannot be placed in classrooms to substitute. We don’t want to be used as substitutes. If that possibility happened again, we could be pulled constantly from doing therapy. That’s the way things used to be done. I feel that trying to fight to be considered as ‘classroom teachers certified in special education’ is not a battle that we can or would want to win. It opens us up to a lot of unanticipated consequences that does not utilize our expertise as speech language pathologists.” Respondent’s Exhibit No. 3.

12. On January 16, 2020, House Bill 4367 was introduced in the West Virginia Legislature. HB 4367 states that “Effective July 1, 2019, each classroom teacher certified in special education or speech pathology and employed as a full-time special education teacher or speech pathologist shall be considered to have three additional years of experience only for the purpose of the salary schedule set forth in subsection (b) of this section: *Provided*, That for any classroom teacher or speech pathologist who satisfies these requirements and whose years of experience plus the three additional years due to them exceeds the years of experience provided on the salary schedule shall be paid the

additional amount equivalent to three additional years of experience notwithstanding the maximum experience provided on the salary schedule.”

13. Grievant spends the majority of her time providing speech-language therapy to special needs students at Belington Elementary. In addition to providing therapy to students, she also administers evaluations and screenings to determine whether students need speech-language therapy.

14. Grievant has a direct instructional relationship with her students. Grievant instructs her students regarding their voice fluency, understanding language, word recognition, pronouncing sounds correctly, works on their oral language skills, as well as teaching learning skills, particularly relating to reading and what are the different parts of stories.

15. Grievant works with students in the classroom or she pulls them out of class. Once a week, Grievant works with teachers in a classroom as a team teacher with kindergarten and first grade teachers. Speech pathology is considered part of special education in West Virginia.

16. Grievant is Chairperson of the Belington Student Assistant Team. Parents and teachers meet about any students that have problems.

17. Grievant is the Belington Special Education Designee. As such, Grievant works as the liaison between the school and the Barbour County Board of Education. Grievant is the conduit for sending and receiving information between the Board of Education and the school. This work is performed by a teacher and is typically given to the most senior special education teacher at Belington.

18. To be a Special Education Designee for Barbour County, the employee had to be certified in Special Education.

19. Grievant is responsible for participating in the Individualized Education Program for her students. The IEP is created through a team of the child's parent and school personnel who are knowledgeable about the child.

20. The record indicates that some of the Belington students only have speech pathology instruction. Grievant is solely responsible for creating IEPs for these students. While some of the Belington students have other services besides speech pathology and Grievant does the portion of these students' IEP that pertain to speech pathology instruction.

21. The record supported a finding that those teachers who work with hearing impaired, those with physical special needs as well as vision impaired receive the pay increment. Concerning all the special needs teachers, only Speech Pathologists are omitted. Grievant's Exhibit No. 2; Respondent's Exhibit No. 8.

22. David Neff is, among other things, Respondent's Human Resources Director. Mr. Neff acknowledges that Grievant provides instruction to her students.

23. Respondent funds certain positions outside of the State Aide Formula, and the costs of these positions are borne by Respondent.

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).

Grievant begins her argument by pointing out that 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 set forth in subsection (b) of this section." A classroom teacher is defined at WEST VIRGINIA CODE § 18A-1-1(c)(1) 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 this capacity."

Grievant goes on to argue, with supporting authority, that the word "classroom teacher" is a bit of a misnomer as a "classroom teacher" does not have to teach in a classroom. This is demonstrated by the definition cited above, which focuses on the work being done – "having an instructional or counseling relationship with students." The

Grievance Board has noted, “the code defines a ‘teacher’ as any number of things that are not the common usage of the word.” Citing *Hall and Vaughan v. Kanawha County Bd. of Educ.*, Docket No. 2014-0282-CONS (Aug. 7, 2014), ruling that sign language interpreters meet the definition of “teachers” for the purpose of the state teacher salary schedule and that their work as support personnel in sign language interpretation counted for experience credit as the number of years the teacher has been employed in the teaching profession. Grievant also cites to *Breza v. Ohio County Board of Education*, 497 S.E.2d 548 (W. Va. 1997) upholding the counting of prior work as a speech pathologist as years of service credit in the teaching profession.

In addition, as a Speech Pathologist, such as Grievant, that teaches students to understand the different parts of stories, how to correctly pronounce letters and words, who teaches learning skills, and teaches voice fluency is engaged in instructional activities. Grievant points in support of this contention the fact that Mr. Neff agrees that Grievant provides instruction. Grievant indicated, without contradiction, that she engages in these instructional activities with students for more than half her workday. This would further support her contention that she meets the definition of a “professional educator” and a “classroom teacher.” Because Grievant can be viewed as a classroom teacher that has a certification in a field that is recognized as a part of special education, she holds a “certification in special education” and works as a “special education teacher.” Accordingly, Grievant as demonstrated that as a Speech Pathologist she is among the groups of employees meant to be given the pay enhancement set forth in WEST VIRGINIA CODE § 18A-4-2(e).

As counsel for Respondent aptly points out, the West Virginia Department of Education's interpretation of State Code provisions within its purview are entitled to great weight unless clearly erroneous. *Dillon v. Mingo County Board of Education*, 171 W. Va. 631, 301 S.E.2d 588 (1983). Respondent claims that its failure to provide the wage enhancement to Grievant is in accord of the opinion of the West Virginia Department of Education. Respondent also relies on an email from the Speech Pathologist for the West Virginia Department of Education, who opines that speech pathologists are not classroom teachers. The undersigned agrees with counsel for the Grievant that this reliance is misplaced. This interpretation can be viewed as clearly erroneous as Grievant appears to meet the statutory definition of "classroom teacher" and is certified in special education and working as a special education teacher.

In support of this clearly erroneous finding, the undersigned notes that Respondent relies on a response to a "Frequently Asked Question" from the West Virginia Department of Education which gives no explanation as to why speech pathologists are not covered. Both parties' exhibits demonstrate that those teachers who work with hearing impaired, those with physical special needs as well as vision impaired receive the pay increment. In regard to all the special needs teachers, only speech pathologists are omitted. The undersigned agrees with counsel for Grievant that this arbitrary and capricious, as well as erroneous.

Turning to the email statement from Ms. Brammer, this is hearsay evidence. Regarding this 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).

The person who had direct knowledge about the basis for the finding that speech pathologists should not be considered classroom teachers certified in special education was represented to the undersigned as Lee Ann Brammer, Speech-Language Services for the West Virginia Board of Education. Respondent's Exhibit No. 3 indicates that Ms. Brammer's opinion was communicated to David Neff, Respondent's Human Resources

Director, in response to whether or not Grievant be given the pay enhancement. Ms. Brammer sent this email after receiving emails and phone calls regarding the raise referenced in House Bill 206 for special education teachers. Her absence made it impossible for Grievant to effectively cross examine the basis for this opinion that Grievant should not be viewed as a classroom teacher certified in special education. It would appear from the limited record that this witness could have been available to testify at the evidentiary hearing. This statement was in the form of an email, not in affidavit form. This statement is not consistent with other evidence provided to the undersigned at the evidentiary hearing. For the above reasons, the undersigned gives this hearsay evidence little or no weight.

In the instant case, Respondent treats Grievant as a classroom teacher. Grievant is part of the Faculty Senate of Belington. A member of the Faculty Senate has to be a “professional educator” in order to be part of this body. W. VA. CODE § 18A-5A-5(a). By acknowledging that Grievant is a professional educator/teacher, and since it is undisputed that Grievant provides instruction directly to students more than half the workday, Respondent is recognizing Grievant as a “classroom teacher.” The record also supports a finding that Respondent treats Grievant as a classroom teacher in that she is the sole drafter of IEPs for students who only have speech pathology services and drafts part of the IEPs for students who receive speech instruction as well as other services. Grievant chairs her school’s SAT teams. The undisputed fact that Grievant is Belington Elementary School’s Special Education Designee provides Grievant the status of a classroom teacher.

Finally, Respondent argues that had the legislature intended to with HB 206 in 2019 to include speech-language pathologists in the class of employees entitled to the three additional years of experience, it would have not introduced in 2020 HB 4367, which adds speech pathologists to that class. The undersigned disagrees. A reading of the bill provided by Respondent's counsel indicates that the effective date, adding speech pathologists, is July 1, 2019. This is the same effective date of HB 206 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(e). While a certain amount of speculation exists in almost all circumstances gleaning legislative intent, it would appear from the record of this case that the more recent bill is an attempt to clarify the original class of employees entitled to the three additional years of experience. 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). In addition, 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. *Bright v. Tucker County Bd. of Educ.*, 184 W. Va. 33, 399 S.E.2d 176 (1990).

Accordingly, Grievant has proven that she meets the statutory requirements to be among the classes of employees that were meant to be given the pay enhancement under WEST VIRGINIA CODE § 18A-4-2. Grievant prevails in this case.

The following Conclusions of Law support the decision reached.

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. 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).

3. 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).

4. 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.

5. A classroom teacher is defined at WEST VIRGINIA CODE § 18A-1-1(c)(1) 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 this capacity.”

6. 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).

7. 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. *Bright v. Tucker County Bd. of Educ.*, 184 W. Va. 33, 399 S.E.2d 176 (1990).

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

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to recalculate Grievant's pay taking into consideration three additional years experience credit. Respondent shall also pay Grievant back pay, plus interest, back to the effective date of the amendments to WEST VIRGINIA CODE § 18A-4-2, and to pay her such enhancement in the future.

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: March 17, 2020

Ronald L. Reece
Administrative Law Judge