JUDITH WOOD,

Grievant,

v. **Docket No. 99-31-181** (See footnote 1)

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Judith Wood (Grievant) is a kindergarten teacher employed by Respondent Monroe County Board of Education (MCBE). (See footnote 2) Grievant filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging a violation of W. Va. Code § 18-5-18a, regarding class size. Although a violation of this statute was found, her immediate supervisor Danny G. Lively, Principal of Peterstown Elementary School, was without authority to grant relief at Level I on April 12, 1999. The grievance was denied at Level II, on May 3, 1999, byGrievance Evaluator Lyn Guy, Superintendent of Monroe County Schools. As authorized by W. Va. Code § 18-29-4(c), MCBE waived participation at Level III. The parties agreed that the grievance could be submitted at Level IV based upon the record developed at the lower levels, where Grievant was represented by Anita R. Maxwell of the W. Va. Education Association and MCBE was represented by Superintendent Guy. The parties were given until June 16, 1999, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision on that date. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a kindergarten teacher currently employed by MCBE at Peterstown Elementary School.
2. On February 21, 1999, MCBE added a 24th student to Grievant's class.
3. Grievant is paid the requisite 1/20 of her daily rate for each student in her class over the number of 20.

4. One student in Grievant's classroom is a “mild mentally impaired”(MMI) student. Some of this student's instruction is provided by a special needs teacher. This student is enrolled in Grievant's class, and Grievant is responsible for supervising and providing the majority of this student's education.

5. MCBE has operated with a deficit since the 1994 - 1995 school year. By the 1997 - 1998 school year, MCBE had reduced its deficit by 54%.

6. MCBE's deficit situation was studied by the West Virginia Office of EducationPerformance Audits, which concluded that MCBE might be able to eliminate its deficit if additional personnel were not required by increased enrollment.

7. Unfortunately for MCBE's deficit situation, kindergarten enrollment increased during the 1998 - 1999 school year.

8. In December, 1998, MCBE was allocated $1,000,000.00 by the School Building Authority for the construction of an eight classroom addition to Peterstown Elementary School, provided that Monroe County voters approved a $2,100,000.00 bond issue. This was approved by voters on February 27, 1999, and MCBE is in the process of planning the addition to Peterstown Elementary School.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6. A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, 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.

Grievant alleges a violation of W. Va. Code § 18-5-18a, regarding class size,because she has 24 students in her kindergarten class. She requests as relief that MCBE either hire an additional

kindergarten teacher and reallocate the students to create an additional kindergarten classroom, or hire an additional kindergarten teacher to work with the four existing kindergarten teachers as a team teacher. (See footnote 3)

W. Va. Code § 18-5-18a provides that "[c]ounty boards of education. . . . shall not have more than twenty pupils for each kindergarten teacher per session, unless the state superintendent has excepted a specific classroom upon application therefor by a county board." (See footnote 4) This section further provides that "in no event shall the superintendent except classrooms having more than three pupils above the pupil teacher ratio as set forth in this section."

MCBE's argument is twofold. First, MCBE argues that class size, as used in W. Va. Code § 18-5-18a, refers to class size "for the purpose of instruction," and that the fact that the MMI student in Grievant's class receives some instruction from a special needs teacher means that Grievant "instructs," and therefore has, only 23 students in her class. (See footnote 5) Second,MCBE argues that it cannot afford the relief sought by Grievant. These two arguments will be addressed in turn.

MCBE's argument that class size, as used in W. Va. Code § 18-5-18a, refers to class size "for the purpose of instruction," is based upon the following statutory language: "[n]o provision of this section is intended to limit the number of pupils per teacher in a classroom for the purpose of instruction in choral, band or orchestra music." MCBE also points out that the statute, with respect to grades four through six, excepts instruction in physical education from class size limits.

To accept this reasoning would be to torture the statute. It is plain that the phrase "for the purpose of instruction" applies only to classes in choral, band or orchestra music, and not to kindergarten classes, and, even with respect to classes in choral, band or orchestra music, does not carry the meaning urged by MCBE. This is because the phrase "for the purpose of instruction" clearly refers to the words that follow it: "in choral, band or orchestra music," and not to the words that precede it: "the number of pupils per teacher in a classroom." Furthermore, the statute's discussion of kindergarten class size, set forth above, contains no such language. It is also noted that, in music instruction, bigger can be better, because a larger chorus, band, or orchestra, is as desirable or more desirable than a smaller one. That is not the case with student/teacher ratios in a regular classroom setting, and the plain intent of the statute was to limit the number of students in such a setting. (See footnote 6) MCBE's contention that because the statute, with respect to grades four throughsix, excepts instruction in physical education from class size limits, kindergarten classes should similarly be

exempt, is similarly without merit. Accordingly, Grievant's class size is not reduced to 23 students by having the MMI student in her classroom, (See footnote 7) and Grievant's having 24 students in her classroom violates W. Va. Code § 18-5-18a.

MCBE's second argument, that it cannot afford the relief sought by Grievant, must also be rejected. Although MCBE has operated with a deficit since the 1994 - 1995 school year, it has cited no authority for the proposition that its deficit excuses it from the requirements of W. Va. Code § 18-5-18a, and the statute does not contain exceptions for fiscal hardship.

Accordingly, requiring Grievant to teach more than 23 students in her kindergarten class remains a violation of W. Va. Code § 18-5-18a. All overages greater than 23 students must cease. Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996).

It is fortunate that, by the 1997 - 1998 school year, MCBE had reduced its deficit by 54%, and that in December, 1998, MCBE was allocated $1,000,000.00 by the School Building Authority, which was supplemented by a $2,100,000.00 bond issue approved by Monroe County voters on February 27, 1999, for the construction of an eight classroomaddition to Peterstown Elementary School. The 1998 - 1999 school year having ended, MCBE will be ordered to cease its violation of W. Va. Code § 18-5-18a effective at the beginning of the 1999 - 2000 school year.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. Any kindergarten teacher who has more than twenty students enrolled in her class must be paid additional compensation based upon the teacher's average daily salary divided by twenty for every day times the number of additional pupils enrolled. W. Va. Code § 18-5-18a; Morgan v. Putnam County Bd. of Educ., Docket No. 99-40-057 (Mar. 29, 1999).

3. Requiring Grievant to teach more than 23 students in her kindergarten class is a violation of

W. Va. Code § 18-5-18a. All overages greater than 23 must cease. Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996).

4. Grievant proved, by a preponderance of the evidence, that Respondent violated W. Va. Code § 18-5-18a by placing 24 students in her kindergarten class.

Accordingly this Grievance is hereby **GRANTED**. Respondent Monroe CountyBoard of Education is **ORDERED** to cease its placement of more than 23 students in Grievant's kindergarten classroom, effective at the beginning of the 1999 - 2000 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated June 28, 1999

Footnote: 1

On May 6, 1999, Grievant moved that this grievance be consolidated with Linda M. Perkins v. Monroe County Bd. of Educ., Docket No. 99-31-071 (May 26, 1999). By Order of June 3, 1999, this Motion was denied, as the Perkins grievance was substantially more advanced procedurally than the instant grievance (being mature for decision one day after Grievant's Motion to Consolidate was received by this office), the Level II transcript in the instant grievance had not been received, and consolidation would have resulted in undue delay to the Perkins parties.

Footnote: 2

This grievance originally also encompassed the overage claims of two additional kindergarten teachers at Peterstown Elementary School. However, these overages were apparently resolved by decreased enrollment, and the parties have requested that only Grievant's overage be considered at Level IV.

Footnote: 3 *Grievant does not contest the monetary compensation she receives for her overage, or the way this pay is calculated. See Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996); Morgan v. Putnam County Bd. of Educ., Docket No. 99-40-057 (Mar. 29, 1999).*

Footnote: 4 *Although neither party presented evidence that such an exception has been granted by the Superintendent, it will be assumed for the purposes of this decision that an exception has been granted.*

Footnote: 5 *At Grievant's Level II hearing, MCBE alleged that at least one student had been absent from her classroom on each day after the 24th student was added. As MCBE presented no documentary evidence of this, and because Grievant denied it, this allegation was not supported by a preponderance of the evidence.*

Footnote: 6 *MCBE's argument on this point is also undermined by its statement, made twice in its proposed findings of fact and conclusions of law, that "it is clearly mandatedthat when regular instruction (other than music) is going on with kindergarten students, there shall be no more than 23 students in the classroom."*

Footnote: 7 *MCBE's proposed findings of fact and conclusions of law state that the Individual Education Plans for such students "stipulate that the students be included with the regular class for the purpose of socialization[,]" supporting the conclusion that this student should be counted as a student in Grievant's classroom.*