THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JENNIFER ROSS, et al.,

Grievants,

v v.

Docket No. 06-50-157

Janis I. Reynolds

Senior Administrative Law Judge

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Jennifer Ross, Kimberly Woods, Ann Morrison, Darlena Ferguson, and Veva Prichard, are employed by the Wayne County Board of Education ("WCBOE" or "Board") as Speech Language Pathologists ("SPL's"). They filed this grievance on February 28, 2006, and the Statement of Grievance reads:

> Violation of WV Code 18A-4-5a with regard to uniformity of salary for speech pathologists and speech pathologists assistants that include language and speech. Salary larger for contracting-out of same services.
>
> Relief Sought: Relief Sought is to be compensated in uniform manner and any back wages and benefits due.

This grievance was waived at Levels I and III, and denied at Level II. Grievants appealed to Level IV on May 17, 2006, and a Level IV hearing was held July 24, 2006. This case became mature for decision on August 25, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievants were represented by Susan Hubbard, from the West Virginia Education Association, and the Board was represented by Attorney David Lycan.

Synopsis

Grievants assert WCBOE is required to pay them the same hourly rate that the contract employees are paid.

Respondent asserts Grievants are attempting to compare apples to oranges when they compare their salaried pay, plus benefits, to the hourly compensation of as-needed, contract employees who receive no benefits, and who are not guaranteed any set number of hours or compensation.

Grievants have failed to meet their burden of proof and demonstrate the required uniformity provision of W. Va. Code § 18A-4-5a applies to this set of facts.

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

Findings of Fact

1. Grievants are employed as SLP's by WCBOE as salaried employees. They all receive the salary designated by statute for their educational level and years of service. They also receive a $25.00 a month supplement.

2. There is a statewide shortage of SLP's, and WCBOE has had difficulty filling these professional positions.

3. On July 2005, before the start of the school year, WCBOE posted four SLP positions. This posting was based on the expected need for speech services for the coming school year. Only one certified SLP applied, and she was hired. Four SpeechAssistants ("SPA's") applied, and the three most qualified SPA's were given temporary, one year contracts. (See footnote 1)

4. Shortly after the start of the school year, WCBOE needed more speech services and because there had been such a poor response to the prior posting, it did not repost, but hired one SPA and several SLP's on a contractual, as-needed, basis. WCBOE also hired the one SPA who had

previously applied on a contractual, as-needed, basis.

5. The contract employees are paid on an hourly or half-hourly basis. Pursuant to contract, some of these employees get milage from their office to their work site in Wayne County and some do not. All employees get mileage from one site to another site while at work. The compensation of the contract SLP's ranges from $50.00 for an hour to $35.00 for a half hour. The pay of the SPA is $35.00 an hour.

6. The contract employees only work if school is in session and only work as- needed. They do not receive the benefits of the salaried SLP's, such as paid holidays, sick days, and personal leave days; paid faculty senate days, snow days, and OSE days; paid lunch and planning periods; $25.00 monthly supplement; and/or a health care and retirement plan.

7. One of the contract SLP's from the 2005 - 2006 school year is applying for full-time work for the 2006 - 2007 school year because her health insurance costs her more than $6,600 a year. Test. Spoor, Level IV.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. "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).

Grievants assert a violation of W. Va. Code § 18A-4-5a, which deals with county salary supplements for teachers. This Code Section states in pertinent part:

> County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.
>
> . . .
>
> Uniformity also shall apply to such additional salary increments or compensation for all

persons performing like assignments and duties within the county: . . . .

(Emphasis added).

Grievants agreed the basic requirements of this Code Section have been met as they are paid the proper amount within their salary schedule, and all are paid the same supplement.

The key word in this Code Section to examine, in assessing a pay violation of Grievants vis à vis contract employees, is the term "salaried." A salaried employee is onewho receives a fixed compensation paid at regular intervals. Clearly, this term does not apply to contract employees. While many of the contract employees do work a set schedule, they do not receive compensation if there is no longer a need for their services. If the number of students needing services decreases, the number of hours they will work will decrease. If these employees are sick or need a personal day, they are not paid. If there is a snow, faculty senate, or OSE day, they are not paid. Grievants receive all these benefits because they are salaried, regular employees.

For uniformity purposes, the requirement is to compare: salaried employees who are performing similar duties, and who have similar "classification of training, experience, responsibility and other requirements." See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1998). The uniformity clause does not require or contemplate the comparison of apples to oranges, or the comparison of contracted, as-needed employees to salaried employees.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. "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 employer has not met its burden. Id.

2. W. Va. Code § 18A-4-5a requires uniformity in the compensation of salaried employees who are similar in training, experience, responsibility, and other requirements. 3. Grievants are salaried employees and are paid uniformly and correctly pursuant to W. Va. Code § 18A-4-5a.

4. Grievants have not met their burden of proof and established a violation of W. Va. Code § 18A-4-5a, as the employees to whom they compare themselves are not salaried employees.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Wayne or Kanawha County. Any 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.

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JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: November 30, 2006

Footnote: 1

Because of the shortage of SLP's the West Virginia Department of Education allows the use of SPA's on a temporary basis. These individuals have only a bachelors' degree, cannot perform certain tasks, and must work under the supervision of an SLP.