THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ANN NESTER,

Grievant,

v. Docket No. 07-18-375

JACKSON COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Ann Nester, employed as a speech-language pathologist by the Respondent, the Jackson County Board of Education ("Respondent" or "School Board"), filed this grievance against the Respondent on April 23, 2007. The School Board pays a salary supplement from local funds to its professional employees who obtain national speech-language pathologist certification. Grievant grieves the School Board's failure to make her supplement retroactive to the beginning of the 2006-2007 school year. The School Board maintains it owes the salary supplement only from the date it voted to pay such supplements. Grievant seeks payment for the full school year.

The Statement of Grievance is:

> **Violation of WV Code 18A-4-5a and local county policies and procedures for payment for National Certification salary at the beginning of the 2006-2007 school year. Jackson County Schools pays an additional $2000 to National Board Certified personnel. I requested payment at the beginning of the school year. The board began payment in March of 2007.**

The grievance was denied at Level One on the same date it was filed. Grievant appealed,

and after the parties agreed to enlarge the time period for doing so, an evidentiary hearing was conducted on June 25, 2007, at Level Two. The County SchoolSuperintendent's Designee's undated decision denying the grievance at Level Two was mailed to the parties on July 30, 2007. Grievant's representative, Bruce W. Boston of the West Virginia Education Association, appealed to this Board by letter received on August 3, 2007, and requested that the case be decided on the lower-level record. Acting Chief Administrative Law Judge Reynolds set September 7, 2007, as the date for submission of proposed findings and conclusions. Respondent mailed proposed Level Four findings and conclusions on September 7, 2007, which were received by this Board on September 10, 2007. Grievant did not file separate proposed findings and conclusions at this level. Her proposal for the Level Two decision is part of the record.

The grievance was initially assigned to ALJ Brown and was transferred to the undersigned for administrative reasons on December 14, 2007. It became mature for decision on September 7, 2007, the due date for the parties' proposed findings of fact and conclusions of law.

Summary

After Grievant obtained national certification as a speech-language pathologist, the State Department of Education awarded her a statutory state salary supplement intended for professional personnel so certified, effective July 1, 2006. In March 2007 the Jackson County Board of Education voted to award a counterpart local (county) salary supplement in recognition of the same national certification, effective "beginning with the 2006-2007 school year." School Board Minutes, Respondent's Exhibit 4 below. After the School Board vote, its staff prorated the Grievant's bonus to pay her only the portion attributable to the balance of the school year after the School Board's vote, contending that a section of the State Constitution prohibited retroactive payment. The Grievant challenges the proration on the basis that it violates the School Board's March 2007 authorizing resolution, and that it constitutes non-uniform treatment of Grievant in comparison with Jackson County classroom teachers, whose national- certification-based bonuses were not prorated. The School Board defends the proration, contending that the authorizing resolution was not a school board

"policy," and that it therefore cannot be the basis of a grievance. The School Board also contends that uniform treatment of teachers and speech-language pathologists is not required, or in the alternative, that both teachers and speech-language pathologists have been paid only from the date of the School Board's authorization, and therefore uniformly. Finally, the School Board, while urging this Board not to rule on the question, argues that the constitutional provision which the School Board staff relied on to prorate the Grievant's bonus justifies its action.

This Decision concludes that the School Board is bound to follow its resolution authorizing the payment for the full school year, and that this Board may require it to do so under the grievance statutes. The Decision also concludes that the interpretation of the State Constitution on which School Board Staff relied was incorrect as a matter of law. The grievance is therefore granted.

After thorough review of the record, the undersigned makes the following Findings of Fact:

Findings of Fact

1 1. On June 28, 2001, the School Board established a local (county-funded) annual salary supplement of $2,000 for Jackson County classroom teachers who possess National Board of Professional Teaching Standards certification; the supplement has beenpaid to qualifying teachers ever since.

2 2. The local teachers supplement became effective at the commencement of the 2001-2002 school year.

3 3. The effective date for national board certification supplement payments to teachers who qualify is their certification date, which in some cases results in payments being made for work already performed.

4 4. Respondent's employees who receive salary increases based on completion of academic course work are also paid, at least in some cases, for work already performed.

5 5. On November 1, 2006, the Grievant was notified by the West Virginia Department of Education that she had been awarded a state-funded "speech-language pathologist, audiologist, and school counselor salary supplement," effective July 1, 2006. Grievant's Exhibit 2 below.

6 6. The November 1, 2006, award was based on Grievant's having been nationally certified as a speech-language pathologist by the American Speech-Language-Hearing Association (ASHA).

7 7. On March 1, 2007, the School Board established an annual local salary supplement of $2,000 for Jackson County speech-language pathologists who had received the counterpart State Department of Education bonus. The School Board directed that the local salary supplement be paid "beginning with the 2006-07 school year," for the duration of each speech-language pathologist's national certification (but not to exceed ten years). School Board Minutes, Respondent's Exhibit 4 below.

8 8. Notwithstanding the language of the School Board resolution quoted immediately above, following its March 1, 2007, action, the School Board, apparentlythrough actions of the Superintendent, decided not to pay Grievant the full speech- language pathologist supplement for the 2006-2007 school year, but instead to pay it *pro rata*, based on the March 1, 2007, date of its adoption of the authorizing resolution.

Discussion

Burden of Proof

Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); (See footnote 1) ***Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). Recognized in *State v. Miller*; 194 W.Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "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).**

The following facts are not in dispute:

* **The School Board adopted a local salary supplement for speech-language pathologists like Grievant, effective for the 2006-2007 school year;**

* the Grievant was eligible for it; and

* the School Board staff decided to pay only a prorated portion of the supplement.

This Decision must determine whether the undisputed facts amount to a violation by the School Board of its resolution authorizing payment of the local bonus for the full school year, or a failure by the School Board to treat Grievant uniformly as compared with nationally certified teachers, and whether the grievance statutes provide a remedy. (See footnote 2)

The School Board "Policy" Issue

W. Va. Code § 18-29-2(a) (2006) defines grievable issues in the broadest terms, to include among other things:

> any claim alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which . . . employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status . . . .

[Emphasis added.]

Respondent argues that the School Board resolution in this case was not a school board "policy" and that its refusal to pay the bonus retroactively therefore could not have violated a "policy." It is apparently Respondent's position that instead of claiming that the School Board violated a "policy," the Grievant should have claimed that the School Boardviolated its "resolution," or the "decision reflected in its minutes," or some other such term. Because she used the word "policy," according to the School Board, she must lose on that issue.

For this argument the School Board relies on *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977), in which the West Virginia Supreme Court of Appeals held that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *Id*., Syllabus Point 1. (See footnote 3) Respondent contends that because the School Board did not elevate its March 1, 2007, resolution to a "policy," the Grievant cannot enforce it. But neither *Powell* nor the long line of cases which have followed it supports the distinction Respondent draws between a policy on the one hand, and a

resolution reflected in a school board's minutes on the other.

The *Powell* cases deal almost exclusively with a public body's failure to adhere to its own due process procedures, an issue not presented by this case. The *Powell* decisions do not confer special status for all purposes on county board of education "policies." More specifically, because the *Powell* cases do not construe the term "policy" as it is used in the grievance statutes, §18-29-2(a), they are inapplicable to the question raised in this case. **(See footnote 4)** **The language of subsection (a) of §18-29-2, read in its entirety andin context, as the rules of statutory construction require, easily encompasses the School Board resolution involved in this case ("any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment"). Failure of the School Board to live up to its resolution is a "violation, misapplication or misinterpretation" for which the grievance statutes provide a remedy.**

Article VI, § 38 of the State Constitution

The record establishes that the School Board followed its Superintendent's recommendation when it enacted the March 1, 2007, resolution, which plainly calls for the bonus to be paid for the entire school year. **(See footnote 5)** **After the resolution had been passed, the School Board's staff apparently received an email from a State Board of Education employee advising it that Article VI, Section 38, of the State Constitution prohibited payment for any work which the Grievant had already performed, i.e., for any period prior to March 1, 2007. Respondent's Exhibit 6 below. The record suggests that the bonus was then apparently prorated without further action by the School Board itself.**

The record does not establish the professional or educational credentials of the State Department of Education staff person who advised the School Board staff regarding the State Constitution, but the School Board did not obtain an opinion from its legal counsel until two months later, when its counsel in this case sent an email to the Superintendent. Respondent's Exhibit 7 below. Counsel's opinion was not a ringing endorsement of the state constitutional argument, describing the retroactive payment as "arguably . . . an illegalbonus or gift," and "arguably . . . a gratuitous expenditure of public funds [emphasis added]." The *New Shorter Oxford English Dictionary* defines "arguable" as "able to be argued, debatable, open to

disagreement."

Whether the Constitutional Issue Should be Decided

Perhaps because reliance on the State Constitution was not the strongest basis from which to defend the School Board's action, the Respondent now argues that this grievance should not be decided on constitutional grounds, but strictly on the basis of Grievant's claim of non-uniform treatment, or her claim of a violation of school board policy. An obvious problem with the School Board's argument that this Board should avoid deciding the constitutional issue is that the State Constitution was apparently the sole basis for the Superintendent's decision to withhold part of the bonus.

Respondent argues that "[t]he Supreme Court of Appeals has frequently invoked the 'longstanding rule' that when it is not necessary in the decision of a case to determine a constitutional question, the constitutional question should not be considered or determined [citations omitted]." (See footnote 6) **But rejection of the School Board's "policy" defense to the grievance leads inevitably to the state constitutional provision which the School Board's staff relied on for not paying the full salary supplement. When it withheld part of Grievant's bonus, the staff invoked the State Constitution _ no doubt in good faith, at the behest of "higher" (State Department of Education) authority.**

In any event, Respondent told Grievant the State Constitution required it to withholdpart of her bonus. This case therefore necessarily presents the constitutional issue, particularly in light of the rejection of the School Board's alternative argument that its resolution is not a "policy."

Whether the State Constitution Prohibits Retroactive Payment of the Bonus

Article VI, § 38 of the West Virginia Constitution provides:

> **§ 38. Salaries of Officials Cannot Be Increased During Official Term**
>
> **No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made; nor shall any legislature authorize the payment of any claim or part thereof, hereafter created against the State, under any agreement or contract made, without express authority of law; and all such unauthorized agreements**

> **shall be null and void. Nor shall the salary of any public officer be increased or diminished during his term of office, nor shall any such officer, or his or their sureties be released from any debt or liability due to the State: Provided, the legislature may make appropriations for expenditures hereafter incurred in suppressing insurrection, or repelling invasion.**

[Emphasis added.]

Much has been written about this provision. For purposes of this Decision, the most relevant authority is represented by *Campbell v. Kelly*, 157 W. Va. 453, 202 S.E.2d 369 (1974), a case in which West Virginia's then-new pension plan for state employees was challenged under § 38. The petitioner in *Campbell* argued that crediting past service of public employees in calculating their pensions amounted to extra compensation . . . 'after the services shall have been rendered,'" in violation of § 38. The court disagreed, citing its prior decisions holding that "membership in a retirement system does not constitute extra compensation within the meaning of Section 38." Under the Supreme Court's decisions, the compensation involved in *Campbell* was not the sort which the constitutionalprohibition was intended to protect against. This was so, the court explained, because

> **there is a public purpose which over-rides any ancillary private gain to an individual and, therefore, the public purpose removes pension programs from the proscription of Article VI, Section 38, as <u>such pension programs are designed primarily to attract to government service able and competent people</u> who will remain in the active employ of the government for an extended period. As <u>the development of competence</u> through experience <u>is a legitimate State objective</u>, pensions are not proscribed by constitutional provisions similar to Article VI, Section 38.**

***Campbell v. Kelly*, 202 S.E.2d at 380-381 [emphasis added].**

The legislatively declared purpose of the state salary supplement for speech- language therapists (to which the county supplement is analogous) is strikingly similar to the pension benefits' purpose which the *Campbell* court found removed those payments from the coverage of Section 38:

> **Individuals who attain the national professional certification by [ASHA] provide needed and essential services to the school students of this State and, consequently, should be encouraged to achieve and maintain the national board certification through reimbursement of expenses and a salary bonus which reflects their additional certification.**

W. Va. Code § 18A-4-2b (2007).

The private gain involved in the local salary supplement, like the state supplement, is only "ancillary," to use *Campbell*'s terminology. The significant purpose is public, not private, and the prohibition of Article VI, § 38, therefore does not apply. Because the constitutional interpretation on which Respondent relied in refusing to pay a portion of Grievant's 2006-2007 bonus was legally incorrect, its action cannot stand on that basis. The School Board's withholding of part of Grievant's bonus was therefore "a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which . . . employees work," or a "violation, misapplication ormisinterpretation regarding compensation, hours, terms and conditions of employment . . . . ," within the meaning of W. Va. Code § 18-29-2(a) (2006). It is therefore subject to correction through the state grievance process.

The Uniformity Issue

The Grievant's uniformity of treatment argument is based on the following counterpart state statutes, which declare the public policies which support state-level salary supplements for classroom teachers and speech-language pathologists who obtain national certification:

Teachers	Speech-language Pathologists
The Legislature hereby finds and declares that the rigorous standards and processes for certification by the National Board for Professional Teaching Standards (NBPTS) helps to promote the quality of teaching and learning. Therefore, classroom teachers in the public schools of West Virginia should be encouraged to achieve national board certification through a reimbursement of expenses and an additional salary bonus which reflects their additional certification, to be paid in accordance with the provisions of this section. W. Va. Code § 18A-4-2a (2007)	The Legislature finds that achieving a nationally recognized professional certification in speech-language pathology or audiology involves a rigorous process of demonstrating both knowledge and skills and results in highly trained and capable employees. Individuals who attain the national professional certification by the American Speech-Language-Hearing Association (ASHA) provide needed and essential services to the school students of this State and, consequently, should be encouraged to achieve and maintain the national board certification through reimbursement of expenses and a salary bonus which reflects their additional certification, to be paid in accordance with subsection (b) of this section. W. Va. Code § 18A-4-2b (2007)

Because the local salary supplements for teachers and speech-language pathologists are based on their counterpart state salary supplements, and because of therole of the State Department of Education in certifying candidates for both state and local supplements, Grievant argues, logically, that the local supplements serve the same public policies declared for the state-level supplements.

The problem with Grievant's uniformity argument is its interpretation of W. Va. Code § 18A-4-5a (2007), entitled "County salary supplements for teachers." After reciting that "county [salary] schedules [shall] be uniform throughout the county," § 18A-4-5a declares that "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county [emphasis added] . . . ." Grievant comments in her proposed findings and conclusions that "all persons" means "not just classroom teachers." Grievant's interpretation is incorrect. Section 18A-4-5a deals exclusively with classroom teachers, including the "all persons" language. The West Virginia Supreme Court of Appeals has so interpreted the section. *Robbins v. McDowell County Board of Education*, 186 W. Va. 141, 411 S.E.2d 466 (1991).

Grievant is not a "classroom teacher." She is an "[o]ther professional employee." Compare W. Va. Code §§ 18A-1-1(c)(1) and 18A-1-1(d) (2007). As a result, Grievant's uniformity argument is not tenable. Grievant would presumably have prevailed on a discrimination claim had she framed her grievance in those terms, rather than in terms of uniformity of treatment. Based on this record, the difference in treatment between nationally-certified speech-language pathologists and nationally-certified teachers (one group having its bonus prorated, the other receiving the full school year's bonus) does not appear "related to the actual job responsibilities of the employees," in the words of the grievance statute on discrimination. W. Va. Code § 18-29-2(m) (2006).

Although the statement of the grievance in this case was not cast explicitly in termsof discrimination, that does not necessarily preclude its interpretation as a discrimination claim. It is unnecessary to pass on that question, however, because the grievance is granted based on the School Board's failure to comply with its resolution authorizing payment of the bonus for the full school year.

Conclusions of Law

1 1. Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va.

Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). Recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "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).

2 2. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977), and its line of cases do not confer a special status on county board of education "policies" for all purposes. Because *Powell* and its line of cases do not construe the term "policy" as it is used in W. Va. Code § 18-29-2(a) (206), they are inapposite to this grievance.

3 3. The legislative purpose of the state salary supplement for speech-language therapists declared in W. Va. Code § 18A-4-2b (2007) is analogous to the purpose of the pension benefits which *Campbell v. Kelly*, 157 W. Va. 453, 202 S.E.2d 369 (1974)determined were not subject to the prohibition of Article VI, § 38, of the West Virginia Constitution. The private gain involved in the local salary supplement, like the state supplement, is only "ancillary," in the words of *Campbell*. The significant purpose is public, not private, and the prohibition of Article VI, § 38, therefore does not apply.

4 4. Because the stated constitutional reason for Respondent's decision to prorate Grievant's 2006-2007 bonus was legally incorrect, the decision cannot stand on that basis. Since there is no constitutional impediment to implementation of the Jackson County School Board's resolution authorizing payment of Grievant's salary supplement for the full 2006-2007 school year, the withholding of part of Grievant's bonus was "a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which . . . employees work," or a "violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment . . . . ," within the meaning of W. Va. Code § 18-29-2(a) (2006).

5 5. Jackson County local salary supplements for teachers and speech-language pathologists are based on the counterpart state salary supplements awarded pursuant to W. Va. Code §§ 18A-4-2a and 18A-4-2b (2007). The local supplements serve the same public policies declared for the state-level supplements, and the public policies are substantially similar.

6 6. W. Va. Code § 18A-4-5a (2007), entitled "County salary supplements for teachers," provides that "county [salary] schedules [shall] be uniform throughout the county," and that "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county [emphasis added] . . . ." Section 18A-4-5a, including the "all persons" language, dealsexclusively with classroom t teachers, *Robbins v. McDowell County Board of Education*, 186 W. Va. 141, 411 S.E.2d 466 (1991), and Grievant is not a "classroom teacher." She is an "[o]ther professional employee." Compare W. Va. Code §§ 18A-1-1(c)(1) and 18A-1- 1(d) (2007). As a result, the comparison of Grievant's treatment to that of classroom teachers cannot be the basis of a uniformity claim.

Accordingly, the grievance is **GRANTED**. The Respondent is **DIRECTED** to pay the Grievant the withheld portion of her county-funded speech-language pathologist, audiologist, and school counselor salary supplement, so that she receives the full amount of the supplement for the 2006-2007 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (2006) (repealed, *see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they 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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Thomas J. Gillooly

Administrative Law Judge

Date: January 25, 2008

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va.

Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case. The Grievance Board's 2007 Procedural Rules took effect on December 27, 2007, and apply to all proceedings pending then or commenced on or after that date.

Footnote: 2

In order to determine whether the School Board's violation of its resolution entitles the Grievant to relief, the applicability of the state constitutional provision on which the School Board staff relied to withhold part of Grievant's bonus must be decided. See the discussion below.

Footnote: 3

The Supreme Court concluded in Powell that it was improper for a school superintendent to refuse to give a probationary teacher a due process hearing which the School Board's own grievance procedures required.

Footnote: 4

The logical extension of Respondent's argument that it is not bound by its March 1, 2007, action would be that a school board is not bound by a resolution formally adopted (in this case unanimously) and reflected in its minutes, unless it denominates the resolution a "policy." The expenditure of public funds which is occurring pursuant to the resolution (as opposed to "policy") involved in this case belies such an argument.

Footnote: 5

The language "beginning with the 2006-07 school year" was adopted while the school year in question was well underway. Had the School Board intended a bonus for less than the full school year, it could easily have said so.

Footnote: 6

The decisional rule the School Board cites is primarily invoked when a statutory enactment or other government action is challenged as violating the Constitution. The purpose of the rule is to assure that the Constitution is not resorted to lightly in order to decide a legal question, and to protect the Constitution from unnecessary tinkering.