WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DONALD STRAIGHT, et al.,

Grievants,

v. Docket No. 2008-0832-CONS

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Pursuant to W. Va. Code §6C-2-1 (2007) the Grievants (See footnote 1) each initiated a grievance against the Kanawha County Board of Education ("KCBE"), Respondent, alleging they were not paid the rate of pay which they expected from their summer positions with Kanawha County Schools' maintenance department. (See footnote 2) Grievants maintain that they are entitled to a higher rate of pay for their services, as previously paid for the position, and seek to recover the difference (lost wages) plus interest.

A Level I conference was conducted on July 27, 2007. The grievance was denied at Level I by a decision issued on August 17, 2007, by Joseph T. Godish, Deputy Superintendent. Level II mediation was unsuccessful. A Level III hearing was convened in the Public Employees Grievance Board's Charleston office on April 14, 2008. Grievants were represented by John Everett Roush, Esquire, of the West Virginia School Service Personnel Association, and KCBE was represented by its General Counsel JamesWithrow. This case became mature for decision on or about May 20, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants were either offered or applied for General Maintenance positions with Respondent's summer maintenance program of 2007. The job posting for the summer jobs and contracts signed by Grievants identified the summer job classification as a General Maintenance position.

Grievants worked on summer crews that cleaned and repaired heating, ventilation and air conditioning equipment at a number of schools. In that some of the Grievants were compensated at a higher pay grade for the same or similar work in prior summers, it is contended that some or all of the Grievants were entitled to a pay grade higher than the pay grade attributed to the job classification. Respondent maintains that Grievants were properly compensated for the job classification for which they were hired. Further, Respondent avers that Grievants' application for the position or acceptance of the offer constituted Grievants' written consent to the terms and conditions of employment.

Previously, some Grievants were paid under the Heating and Air Conditioning Mechanic II pay scale which is higher than the General Maintenance pay scale. Respondent contends error. The classification for the work performed by Grievants is identified as General Maintenance. West Virginia Code, highlighted by Grievants, does not prohibit correction of error in wages or mandate the continuation of erroneous salary.

This grievance is DENIED.

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

Findings of Fact

1 1. There are six individual Grievants, who work for Respondent as school service personnel in various classifications during the regular school term. (See footnote 3)

2 2. Kanawha County Schools' “Pay Grade G” is a rate of pay greater than “Pay Grade C.” *See* W. Va. Code §18A-4-8a. Pay grade G2 (See footnote 4) is a derivative of pay grade G. Accordingly, pay grade G2 is a higher pay grade that pay grade C.

3 3. By letter dated February 19, 2007, three of the Grievants were offered the opportunity to work as a General Maintenance employee for Respondent in its summer maintenance program of

2007 (Grievants, Donald Straight, Lana Slate and Ira Jones). Each had previously worked in prior summer programs and had been assigned to work in the “Electrical” or “Heating Ventilation and Air Conditioning” (“HVAC”) shop. Each accepted the offer by signing and returning the summer employment contract, which did not specify the pay grade of the General Maintenance position.

4 4. Respondent posted a Notice of Vacancy dated March 16, 2007, advertising among other employment opportunities several positions of General Maintenance. The Notice of Vacancy stated that the General Maintenance positions were Pay Grade C. Resp. Ex. 1. 5 5. Subsequent to and as a result of the March 2007 posting, Grievants Pamela Ross and Dianna Roberts applied for General Maintenance positions with Respondent's summer maintenance program of 2007.

6 6. By letter dated April 16, 2007, Grievants Pamela Ross and Dianna Roberts were offered the opportunity to work during the summer of 2007 as General Maintenance employees. Each signed and returned the summer employment contract to Respondent.

7 7. Individually, Grievants were either offered or applied for a position as general maintenance for the summer of 2007. (See footnote 5) The job postings for the summer jobs and contracts signed by Grievants identified the summer job classification as a General Maintenance position.

8 8. In the summer of 2007, Grievants worked on summer crews that cleaned and repaired heating, ventilation and air conditioning equipment at a number of schools in Kanawha County. Each worked with a crew of two or three others and was overseen by a Kanawha County Schools' employee, who was a regularly employed Heating and Air Conditioning Mechanic II.

9 9. There was a range of sophistication in the duties performed by the various Grievants. Grievants were to defer to a Heating/Air Conditioning Mechanic II when dealing with the gas/fluid coolants utilized in the equipment because these tasks require special EPA licensure. (See footnote 6) Crews were assigned to clean and repair heating and air conditioningunits. In general, this consisted of taking the units apart and cleaning the various parts of the units. The more experienced members of the crew performed the more sophisticated tasks. (See footnote 7) Prior to the summer of 2007, individuals performing the same or similar duties were paid at Kanawha County Schools pay grade G2.

10 10. During the summer of 2007, the Maintenance Department was assigned a new payroll clerk. The payroll clerk entered each of the Grievants as the classification of General Maintenance,

with a pay grade of C. Accordingly, Grievants were paid at the pay grade of C.

11 11. Pay Grade C is the pay grade for the General Maintenance job classification. *See* W. Va. Code §18A-4-8a.

12 12. Kanawha County Schools' job description for General Maintenance contains a description of the job duties. The duties of the General Maintenance classification include, “Aid in maintenance, repair and construction of equipment and buildings. Aid in maintenance and care of grounds. May be called upon to drive a truck. Aid electricians, plumbers, carpenters, roofers, painters, welders and other maintenance workers as assigned.” Resp. Ex. 2.

13 13. In prior summers, Grievants Donald Straight, Ira Jones, and Lana Slate worked on crews which performed similar cleaning and repair duties and were compensated at pay grade G2.

14 14. Grievant, Paul Cochran, during the summer of 2006, was called out to substitute for a summer worker who was unable to continue the summer assignment. Grievant Cochran was paid at Kanawha County Schools pay grade G2 in the summer of 2006.

15 15. The summer of 2007 was the first summer that Grievants Dianna Robertson and Pamela Ross worked on the crew that cleaned and repaired heating, ventilation and air conditioning equipment. Both had applied for and accepted employment as General Maintenance subsequent to the March 16, 2007, Notice of Vacancy, which stated that the General Maintenance positions were Pay Grade C.

16 16. Respondent has a Heating and Air Conditioning Mechanic II job classification title. The pay grade established for the Heating and Air Conditioning Mechanic II classification title is G.

17 17. Kanawha County Schools' job description for Heating and Air Conditioning Mechanic II contains the following description of job duties: Make daily repairs and perform routine maintenance tasks associated with HVAC plants found within the school system. Maintain records on what parts were used and work performed on each particular job (time and material), make electrical repairs as related to specific craft and install new and repair heating/air conditioning equipment. Perform related tasks as assigned by supervisor. Repair refrigeration equipment and perform preventive maintenance on HVAC and refrigeration equipment, including cleaning, calibration greasing, oiling, etc.” Such job description also contains the following requisite: “Individual should have a high school education or equivalent, training through an approved apprenticeship program or relatedexperience and three to five years experience in heating and air conditioning. Needs all certification required for EPA safe

handling of refrigerants."

18 18. Kanawha County Schools does not have a job description for the job classification of Heating and Air Conditioning Mechanic I. (See footnote 8) For administrative reasons, Respondent does not utilize the Heating and Air Conditioning Mechanic I classification. (See footnote 9)

Discussion

Because this is not a disciplinary case, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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). "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 employees have not met their burden. *Id.* Grievants, by Counsel, contend there are basically two questions presented by thisgrievance. The first is whether Grievants are entitled to the pay grade G2 based solely on the duties of Grievant's employment activity during the summer of 2007. Secondly, does the receipt of pay grade G2 in prior summers give some or all of the Grievants the right to continue to receive pay grade G2 in the summer of 2007. The three Grievants who had worked in previous years and were paid the higher rate of pay argue that they should continue with the higher pay. (See footnote 10) The two Grievants with no relevant prior summer crew employment contend that if the other Grievants receive pay grade G2 for the summer of 2007, then they too are entitled to it pursuant to W. Va. Code §§18A-4-5b and 6C-2-2(g)(1) on a uniformity/discrimination/favoritism basis, i.e., same work equates to same pay. Grievant Cochran would also receive the G2 pay grade on the basis of W. Va. Code § 18A- 4-15(d).

Respondent maintains that Grievants were properly compensated for the job classification for which they were hired. Respondent further avers that Grievants' applications for the position or acceptances of the offer constituted Grievants' written consent to the terms and conditions of employment. And the non-relegation provision contained in W. Va. Code §18A-4-8(m) is not

applicable due to the fact that Grievants consented, in writing, to be employed in the classification of General Maintenance. The undersigned is not persuaded by the second and latter part of Respondents' contention, given that the summer contracts of three or more of the grievants, who had worked previous summers, did not specify a vital element of the employment (salary). The task of determining the proper classification title and pay grade for school service personnel holding summer jobs is the same as that for determining the proper classification title and pay grade for school service personnel holding regular positions, i.e., which classification title most closely fits the employee's duties. W. Va. Code §§ 18A-5-39, 18A-4-8. The work performed by Grievants during the summer of 2007, was identified by Respondent as that of General Maintenance. This means "personnel employed as helpers to skilled maintenance employees and to perform minor repair to equipment and buildings of a county school system." Kanawha County County Schools Job Description for "General Maintenance," Resp. Ex. 2. It was not established that the activities performed dictated that Grievants' job classification be that of a Heating and Air Conditioning Mechanic II. (See footnote 11) Grievants' skills, training and job duties do not qualify them to hold such a position. Further, it has not been established that the activities performed dictate that Grievants' job classification must be classified anything other than that of General Maintenance.

Grievants aver entitlement to the same or similar wage of a heating and air conditioning mechanic classification based upon past practice (and further contents that Respondent is barred from altering the pay grade). Grievant Straight testified that it was his belief that Grievants were previously paid at an apprentice type classification. This belief, while intriguing, does not constitute entitlement. Yet, the fact that in previous years Grievants were paid a higher rate of pay is a gateway to the argument that they shouldcontinue with the higher pay. Grievants cite W. Va. Code §§ 18A-5-39, 18A-4-8 and 18A-4-5b. (See footnote 12)

Grievants Straight, Slate and Jones possessed the expectation that their wages would be the same or similar to that of prior summers. The employment offer received by these three Grievants did not specify the pay grade of the General Maintenance position. Given the nature of their work, Grievants assert that no error has occurred in the prior calculation of their compensation. The job classification in 2007 was General Maintenance, the same as in prior summers. Thus, the identified classification offered no indication that the salary would be calculated on a lower pay grade.

Relying on W. Va. Code §18A-4-8(m), Grievants argued KCBE is obligated to continue to provide

the same pay grade as in previous summers. W. Va. Code §18A-4- 8(m) provides the following: Without his or her written consent, a service person may not be:

(1) Reclassified by class title; or

(2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years. Essentially, Grievants assert because they were compensated in the past at a particular pay rate, a custom or practice has been established, and it must be continued. This assertion is incorrect. This assertion is incorrect as it is clear an error was made that resulted in Grievants being over paid in violation of the applicable pay scale. While it is certainly understandable Grievants are displeased with the decrease in compensation, this does not make Respondent'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.,* 95-15-128 (June 5, 1995)." *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006).

Respondent did not offer an explanation as to how Grievants' compensation in prior summers had come to be calculated/labeled as pay grade G2. Pay Grade C is the pay grade for the General Maintenance job classification. *See* W. Va. Code §18A-4-8a. Respondent provided, in the summer of 2007, that the payroll clerk properly entered each of the Grievants as the classification of General Maintenance with a pay grade of C. Respondent reiterates that pay grade C is the proper pay grade for Grievants' classification and maintains that the prior compensation payments were erroneous, paramount to mistake. (See footnote 13) 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); *Dillion v. Mingo County Bd. of Educ*., Docket No. 05-29-413 (Apr. 28, 2006). 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. How Grievants' past compensation was initially labeled G2 is not clear. It

appears the mistake occurred because of an employee's failure to assess Grievants' job classification properly and to accurately apply the relevant pay grade. Grievants contend error of judgement is not the same as mistake. An error or mistake in computing a worker's wages does not give the worker an enforceable right to continue receiving erroneous wages. *See Chilton, supra.* Nevertheless, Grievants previously received compensation beyond the pay grade of their job classification in error. The undersigned in review of the record, *in toto*, determines with regret, that in the facts of this case Respondent's past error of judgement constituted a mistake. The work performed by Grievants during the summer of 2007, being more closely associated with that of General Maintenance, as opposed to Heating and Air Conditioning Mechanic II, does not entitle them to wages under pay grade G2. Accordingly, Respondent is not required to compound past mistakes by misapplication of recognized pay grades. Grievants Ross and Roberts, who had not worked in any previous year, and who specifically applied for the position of General Maintenance with a pay grade C certainly had no reasonable expectation of a higher rate of pay. In addition, Grievant Cochran, who just showed up at the maintenance warehouse and asked if there were any summer positions available, is not entitled to a higher rate of pay, for reasons similar to that ofGrievants Straight, Slate and Jones discussed above, but further in that Grievant Cochran was not guaranteed a particular job, had no idea if, or in what capacity, he would be employed. Respondent is not obligated to compensate Grievants in excess of the job classification that each lawfully worked in the summer of 2007.

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

Conclusions of Law

1 1. As this grievance does not involve a disciplinary matter, the Grievants have the burden of proving the grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2007); *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). "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 and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met the burden. *Id.*

2 2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

3 3. Mistakes in compensation do not create an entitlement to future incorrect reimbursement. *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28,2006). *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.*, 95-15-128 (June 5, 1995).

4 4. 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).

5 5. W. Va. Code §18A-4-8a provides that the pay grade for the General Maintenance job classification is Pay Grade C.

6 6. Respondent established by a preponderance of the evidence that Grievants, in the summer of 2007, were compensated in accordance with the job classification General Maintenance as provided for by applicable pay grade. See, e.g., W. Va. Code §18A-4-8a.

7 7. Grievants failed to establish by a preponderance of the evidence that Respondent, as their employer during the summer of 2007, improperly compensated them for work performed. Grievants failed to establish entitlement to compensation in excess of the designated pay grade for the job classification assigned to Grievants.

8 8. Grievants failed to establish by a preponderance of the evidence entitlement to compensation in excess of that designated the proper pay grade for the General Maintenance job classification. 9 9. Grievants failed to establish by a preponderance of the evidence that the amount of compensation provided by Respondent to the Grievants for duties performed during the summer of 2007, violated any statute, policy, rule, regulation or written agreement applicable to their employment situation.

10 10. Grievants failed to establish by a preponderance of the evidence that their

employer, the Kanawha County Board of Education, violated applicable provisions of W. Va. Code §§ 18A-4-8, 18A-5-39, or 18A-2-6.

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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date:___December 8, 2008

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Landon R. Brown

Administrative Law Judge

Footnote: 1

There are six individual Grievants: Donald Straight, Paul Cochran, Diana Robertson, Pamela Ross, Lana Slate and Ira Jones. The grievances were consolidated in that the issues in dispute concern the same subject matter.

Footnote: 2

All the grievances were filed on July 13, 2007, except for the grievance filed by Ira Jones, which was filed on July 17, 2007. The grievances were consolidated on or about July 27, 2007.

Footnote: 3

Grievant, Donald Straight, is employed by Respondent as a bus operator and has been so employed for approximately 12 years. Grievant, Dianna Robertson, is employed as an aide (19 years). Grievant, Lana Slate is employed as a cook (15 years). Grievant, Paul Cochran, is employed as a bus operator (8 years). Grievant, Ira Jones, is also employed as a bus operator (2½ years). Grievant, Pamela Ross, is employed as a cook.

Footnote: 4

"G2" is a local pay grade designation. It is not disputed or contested by the parties that Respondent has established a special pay grade, i.e. G2, for the Heating and Air Conditioning Mechanic classification title.

Footnote: 5

Grievant Cochran could be deemed an exception with minimal distinction. Grievant Cochran had worked as a

substitute during the summer of 2006. At the beginning of the summer term of 2007, Grievant Cochran went to the Crede warehouse and asked if there were any assignments available. Maintenance Administrator, Terry Hollandsworth chastised Grievant Cochran about just showing up, but permitted him to begin work.

Footnote: 6

None of the Grievants are certified to handle Freon.

Footnote: 7

Due to Grievant Jones' superior mechanical aptitude he would often perform more complex tasks such as changing pulleys, bearings and motors, blowing out drains and changing control units.

Footnote: 8

W. Va. Code §18A-4-8 describes a Heating and Air Conditioning Mechanic I as a person employed at the apprentice level to install, repair and maintain heating and air conditioning plants and related electrical equipment. Further, pursuant to W. Va. Code §18A-4-8a the assigned pay grade for the position of Heating and Air Conditioning Mechanic I is pay grade E.

Footnote: 9

Testimony of Maintenance Administrator, Terry Hollandsworth addressed the redaction of this job classification. The explanation and rationale provided was separate, distinct and unrelated to issue of this grievance. Grievants did not argue that they meet the qualification requirements or necessarily contend that they should be deemed classified as a Heating and Air Conditioning Mechanic I.

Footnote: 10

Grievant's Counsel cites Crock v. Harrison County Bd. of Education, 560 S.E.2d 515 (W.Va. 2002) and highlights that W. Va. Code § 18A-4-8(m) has been interpreted to mean that an employee may not have their salary reduced as long as he/she continues to work in the same job.

Footnote: 11

Whether any of Grievant could meet the prerequisite qualification of a Heating and Air Conditioning Mechanic I classification is not established by the record. Grievants do not establish a position advocating a particular job classification, per se, but argued entitlement to a particular pay grade.

Footnote: 12

W. Va. Code §18-5-39(f) provides; "Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in [§ 18A-4-8]. . . . An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to [§ 18A-4-8b]." Further the statute also states that "the salary of a summer employee shall be in

accordance with the salary schedule of persons regularly employed in the same position in the county where employed."

Footnote: 13

Respondent has not indicated any intention to attempt to recoup past wages, nor is it believed that such action would be a wise course of action.