THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DALLAS PLUMLEY and CRAIG ADKINS,

Grievants,

v. **DOCKET NO. 2013-0160-CONS**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On August 6, 2012, Dallas Plumley and Craig Adkins ("Grievants") filed a grievance with their employer, the Lincoln County Board of Education ("Respondent" or "LCBE") alleging the following:

> Grievants were unlawfully denied eleven (11) months pay, Minimum Instructor Pay, for the 2011-12 school year pursuant to the Lincoln County Board of Education's vote on May 16, 2011; signed contract by the Superintendent, and money paid to the school system by the Army for the school year 2011-12 and upcoming 2012-13 academic year, which requires "JROTC Instructor Annual Certification of Pay Agreement with the Army that provides an eleven (11) month 220 day employment term for JROTC Instructors LTC Dallas Plumley and SGM Adkins effective July 1, 2011."

Following a Level One hearing on August 30, 2012, Jeff Midkiff, the Superintendent's designee, issued a decision on October 22, 2012 denying the grievance. On November 15, 2012, Grievants requested mediation at Level Two. Respondent filed a Motion to Dismiss asserting that Grievants' appeal to Level Two was untimely. This Motion to Dismiss was denied by Administrative Law Judge Ronald L. Reece on February 8, 2013. In the interim, a Level Two mediation session was held on

January 22, 2013. Following mediation, Grievants appealed to Level Three on January 22, 2013.

A Level Three hearing was held before the undersigned Administrative Law Judge on June 3, 2013, at the Grievance Board's Charleston, West Virginia office. Grievants were represented by Jeffrey G. Blaydes, Esquire, of Carbone and Blaydes, and Sidney Fragale, Staff Representative for AFT-West Virginia. Respondent was represented by Rebecca Tinder, Esquire, of Bowles Rice, LLP. This matter became mature for decision on July 22, 2013, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants, Dallas Plumley and Craig Adkins, are retired from active service in the United States Army. Grievant Plumley holds the retired rank of Lieutenant Colonel and Grievant Adkins holds the retired rank of Sergeant Major. Grievants have been conducting an Army Junior Reserve Officer Training Corps ("JROTC") program in Lincoln County for several years. The JROTC program presently operates out of the recently consolidated Lincoln County High School as a "vocational program." Grievants are employed as teachers by Respondent LCBE.

Grievants are unique among the school faculty in their county in that their compensation is subsidized by the federal government in an apparent effort by the Department of Defense to promote the JROTC program in secondary education. The terms of employment for JROTC Instructors in Lincoln County have previously been litigated before this Grievance Board by Grievant Adkins on at least two occasions

without success. *See Adkins v. Lincoln County Bd. of Educ*., Docket No. 05-22-331D (May 31, 2006), *aff'd* Cir. Ct. of Kanawha County No. 06-AA-97 (Jan. 24, 2007) ("*Adkins I*"); *Adkins v. Lincoln County Bd. of Educ*., Docket No. 06-22-368 (Feb. 5, 2008), *aff'd* Cir. Ct. of Kanawha County No. 08-AA-23 (June 8, 2010) ("*Adkins II*").

LCBE initially contends that Grievants did not file their grievances within the statutory time limits established in W. Va. Code § 6C-2-4(a)(1). However, there was some confusion over the Board's intent in approving an 11-month, 220-day contract, and there were continuing discussions wherein the Superintendent indicated that she was "looking into it." Communications between the Board's Treasurer and Army officials over why the Army provided LCBE with 11 months of pay for Grievants, rather than the 10 months' pay the Board had previously received, continued even after these grievances were filed. In these circumstances, LCBE failed to demonstrate that Grievants were unequivocally notified that their pay would not be adjusted to match the Army's Minimum Instructor Pay ("MIP") amounts. *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Whalen v. Mason County Bd. of Educ*., Docket No. 97-26-234 (Feb. 27, 1998).

LCBE also contends that the present grievance is barred under the legal doctrine of *res judicata* based upon the rulings of this Grievance Board, as affirmed by the Circuit Court, in *Adkins I* and *Adkins II*. However, the Grievants contend that the present grievance involves the meaning and application of a new 220-day teaching contract which involves a different employment term than the contracts which were at

issue in *Adkins I* and *II*. Further, Grievants contend that they are not being paid at their established MIP level in accordance with the Board's contract with the Army for hosting a JROTC Unit. There was no reference to this MIP in *Adkins I* or *II*. The undersigned finds the Grievants' position persuasive and agrees that the present grievance is not barred by *res judicata* because it does not involve the identical cause of action which was litigated in *Adkins I* and *II*.

LCBE entered into an agreement with the U.S. Army to host a JROTC Unit at one of its schools. Under that agreement, the Board agreed to employ qualified instructors authorized and approved by the Army and to pay such retired Army personnel "in accordance with federal law and regulations." *See* G Ex 4. Consistent with this authority, the Army has determined the MIP which LCBE is required to pay each JROTC Instructor.

LCBE pays all teachers based upon a daily rate. For classroom teachers, this rate is calculated by dividing their minimum annual pay, as set by statute, by 200, the minimum number of days in a regular teaching contract. This same daily rate is used to pay those teachers who hold 220-day or 240-day contracts for each day they work over the 200-day minimum.

However, LCBE calculates a daily rate for Grievants by dividing their annual MIP by 261, the maximum number of days any employee can work during the school year. LCBE's Superintendent is the only LCBE employee holding a 261-day contract. Because the MIP represents the **minimum** pay required by federal law, LCBE's current formula results in Grievants being underpaid. To comply with its agreement with the

Army, LCBE shall calculate Grievant's daily rate by dividing their MIP, as established by the Army, by 220. Grievants' grievance will therefore be granted and Grievants are entitled to back pay with statutory interest.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievants are employed by the Lincoln County Board of Education ("LCBE") as Junior Reserve Officer Training Corps ("JROTC") Instructors.

2. Grievant Adkins has been employed in that capacity since approximately 2002 while Grievant Plumley has been so employed since 2006.

3. On December 21, 2001, LCBE and the Second ROTC Region at Fort Knox, Kentucky, entered into a contract to establish a JROTC Unit at Hamlin High School. *See* G Ex 4.

4. As part of the contract described in Finding of Fact Number 3, above, LCBE agreed:

> To employ qualified instructors authorized and approved by the Army to administer the military courses. *(a minimum of one officer and one noncommissioned officer per unit).* Contract periods will be negotiated to permit year round management of the program and control of Government property. School authorities agree to pay retired Army JROTC instructors in accordance with applicable federal law and regulations. Schools are encouraged to reimburse the JROTC instructors on a comparable scale as other teachers employed at the school. Ensure that instructors are under contract and therefore provided liability insurance *(and proof thereof)* through the school and school sponsored activities or duties *(including extra curricular activities, i.e., summer camp, adventure training, drill competition, marksmanship competitions, etc.)*.

G Ex 4 (emphasis in original).

5. As a result of school consolidation, the JROTC Unit referenced in Finding of Fact Number 3, above, is presently located at Lincoln County High School.

6. The Army calculates a Minimum Instructor Pay ("MIP") amount for each JROTC Instructor based upon the Instructor's retired rank, years of service, and teaching location. This MIP is intended to represent not more than the difference between the Instructor's retired pay and the amount the Instructor would receive if he or she were recalled to active military service. *See* 10 U.S.C. § 2031(d)(1) (2013). *See also Lyle v. Comm'r of Internal Revenue*, 76 T.C. 668 (1981).

7. On May 16, 2011, LCBE voted to award an eleven (11) month, 220-day employment contract to Grievants. *See* G Ex 1, 2 & 3 at L I.

8. LCBE also voted to employ Grievants for eight additional days over and above this 220-day employment term, with the expectation that the Army would likewise reimburse LCBE for 50% of the wages (excluding benefits) LCBE expended upon Grievants to work these additional days. *See* G Ex 1 at L I. Although some confusion has developed over whether the Army will now reimburse LCBE for these expenses, the outcome of that dispute has no bearing on the merits of this grievance.

9. All LCBE employees are paid on the basis of a calculated daily pay rate.

10. The annual minimum pay rates for teachers are set by statute in W. Va. Code § 18A-4-2. *See* R Ex 4. Classroom teachers ordinarily hold 200-day employment contracts in accordance with the mandate in W. Va. Code § 18-5-45(c)(1) that the employment term for teachers be no less than 200 days. *See* R Ex 5.

11. The Board's Treasurer, Ms. Gandy, calculates the daily rate for a 200-day classroom teacher by dividing their minimum annual salary established in the statute (which includes their educational level and years of experience) by 200. This daily rate is used to calculate the pay a teacher who is awarded a 210- or 220-day contract will be paid for each additional day, as well as the daily and monthly pay amounts for 200-day teachers.

12. Ms. Gandy calculated the daily rate for Grievants by dividing the Army-provided MIP amount by 261, the maximum number of employment days for a school employee. LCBE Superintendent Patricia Lucas is the only LCBE employee who holds a 261-day contract.

13. On or before July 19, 2011, LCBE issued a meeting notice including an agenda item which proposed that the JROTC Instructors be awarded a 240-day contract rather than a 220-day contract. The Board took no official action on the agenda item which would have accomplished this change. *See* R Exs 6 & 7.

14. During that July 19, 2011 Board meeting, Grievant Plumley addressed the Board, explaining the JROTC program for approximately fifteen minutes, and opposing the proposed "correction." His remarks to the Board were summarized in the meeting minutes in three sentences covering six lines. *See* R Ex 6.

15. In September 2011, Grievants began questioning LCBE officials regarding whether they were being paid correctly. Initially, Ms. Lucas responded to Grievant Plumley by stating: "We are looking into it." When he followed up on his inquiry two

weeks later to see if she had obtained any more information, Ms. Lucas stated: “We are still looking into it.”

16. Ms. Gandy responded to the initial inquiry from one of the Grievants by stating “I was not aware of any pay raise.” Ms. Gandy recalled contacting the Board Members to determine if it was their intent to increase Grievants’ pay. Ms. Gandy indicated that she was told that was not the Board’s understanding of the 11-month, 220-day contract they had approved. However, Ms. Gandy did not indicate when, if, or how this information was communicated to Grievants.

17. As of the time of the hearing, Ms. Gandy was still in discussions with Johnny Reid, Lead Pay Technician for U.S. Army Cadet Command, in an effort to obtain agreement that LCBE was paying Grievants in accordance with Army requirements. Ms. Gandy testified that she “did not realize the Army sent us 11 months of pay until recently.”

18. Grievant Plumley indicated that he began looking into submitting a grievance once he realized that the Army had paid LCBE for 11 months, and he and Grievant Adkins had only been paid for 10 months.

19. On January 8, 2013, Loretta B. Owens, Chief Instructor for the Management Division for Army JROTC with United States Army Cadet Command, wrote to LCBE Superintendent Lucas stating:

> In response to Lieutenant Colonel Dallas Plumley, Junior ROTC Instructor’s request for inquiry reference Lincoln County Board of Education, WV not being in compliance of paying the required Minimum Instructor Pay (MIP). In accordance with US Code Title 10, Section 2031, Department of Defense Instruction 1205.13, Army Regulation 145-2, Department of Army Form 3126, Application and Contract for Establishment of a JROTC Unit,

> Department of Defense Form 2767 (DD 2767) JROTC Instructor Certification of Pay and Data form, the school system is the employing agency of the JROTC Instructor, and is responsible for paying the full amount of the cost-share.
>
> The Army will determine MIP for each cost-shared instructor for any period that the instructor performs duties in direct support of the JROTC program. The school system must pay at least the MIP. If the school/district does not uphold the conditions set forth in the above laws, regulations and guidelines, JROTC will be forced to collect back a portion of or all of the reimbursement from U.S. Army Cadet Command for the instructor. Schools may pay instructors more than the MIP, and will offer instructors the same benefits package received by teachers in a comparable status.
>
> Based on JROTC Instructor Management records (Monthly District EFT statements), the school/district has received 50% cost share in the amount of $34,216.33 during the 11/12 SY running from 08/01/2011 – 06/30/2012. The instructor's total MIP for the same time period is $68,432.66. Please ensure the Lincoln County Board of Education is in compliance of paying LTC Plumley the required MIP.

G Ex 1.

20. A virtually identical letter was sent to Superintendent Lucas regarding Grievant Adkins and designating his MIP for the same period as $63,386.26. G Ex 2.

Discussion

Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "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).

LCBE is asserting that Grievants did not file their grievances challenging the calculation of their pay within the statutory time limit set forth in W. Va. Code § 6C-2-4(a)(1):

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

Any assertion by an employer that a grievance was not timely filed is an affirmative defense, and the employer has the burden of proving such untimely filing by a preponderance of the evidence. *Carroll v. Mingo County Bd. of Educ*., Docket No. 98-29-396 (Feb. 3, 1999). Once the employer has demonstrated that a grievance has not been timely filed, the employees have the burden of demonstrating a proper basis to excuse their failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ*., Docket No. 2012-0188-RalED (Mar. 28, 2012). As required by W. Va. Code § 6C-2-3(c)(1), Respondent asserted a timeliness defense before Level Two in its Level One proposals and in its Level One decision.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Whalen v. Mason County Bd. of Educ*., Docket No. 97-26-234 (Feb. 27, 1998). *See Rose*, *supra*; *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). In this matter,

Grievants began questioning their pay in September 2011, because their pay had not changed after they were awarded an 11-month, 220-day contract. The School Superintendent responded to this inquiry by indicating that she was looking into it, and the Treasurer indicated that she was not aware of any pay raise being approved, but she would check with the Board. Following Ms. Gandy's inquiry, the Board placed an item on its meeting agenda to revise the 11-month, 220-day contract it had approved in May. After hearing from Grievant Plumley during the public comment portion of that meeting, the Board took no action. However, neither Ms. Gandy nor Superintendent Lucas followed up on this development by informing Grievants that they would not receive their MIP for the 2011-2012 school year.

Nonetheless, as time passed, it would appear less and less likely that Grievants were going to see a change in their pay. However, Ms. Gandy acknowledged that she was surprised at the end of the school year when the Army sent 11 months of pay rather than the 10 months she was expecting and, even after the grievances were filed, she was still communicating with Army officials in an effort to obtain agreement that LCBE was paying Grievants in accordance with Army requirements. Consistent with the Court's approach in *Naylor*, *supra*, LCBE did not establish by a preponderance of the evidence that its officials ever told Grievants unequivocally on any particular day that the employer was not going revise the pay formula, even though LCBE officials may have attempted to explain to Grievants the basis for their interpretation of the requirement to pay them the MIP amount set by the Army. Thus, the Respondent failed to establish that this grievance was not timely.

Prior to the Level Three hearing, Respondent LCBE filed a Motion to Dismiss this grievance asserting that the matters raised in this grievance are barred from consideration under the doctrine of *res judicata*. The Grievance Board has previously applied the doctrine of *res judicata* to bar repetitive grievances. *See, e.g.*, *Meeks v. Kanawha County Bd. of Educ*., Docket No. 96-20-095 (Feb. 28, 1997); *Woodall v. W. Va. Dep't of Transp*., Docket No. 93-DOH-393 (Feb. 2, 1994); *Ramsey v. W. Va. Dep't of Health & Human Serv*., Docket No. 90-H-478 (July 31, 1991). *See also Salmons, et al., v. Dep't of Transp*., Docket No. 93-DOH-443 (Sept. 30, 1994) (*res judicata* applied to bar a grievance that had been the subject of litigation in federal court). Indeed, the Grievance Board has previously applied the doctrine of *res judicata* to bar Grievant Adkins from relitigating the compensation he was receiving from LCBE as a JROTC Instructor. *See Adkins II, supra.*

Res judicata is a well-established legal doctrine which states that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Meeks*, *supra*; *Woodall*, *supra*. "Before the prosecution of a lawsuit may be barred on the basis of *res judicata,* three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of

action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

LCBE contends that earlier decisions of this Grievance Board which were sustained on appeal to the Circuit Court of Kanawha County, *Adkins I*, and *Adkins II*, serve to bar the present grievance. Because this Grievance Board and the Circuit Court determined that the second of these two grievances (*Adkins II*) involved an attempt to relitigate the first grievance (*Adkins I*), the principal cause of action which is arguably barred by the doctrine of *res judicata* involves that particular matter which was adjudicated in the first grievance. LCBE correctly notes that adding Grievant Plumley to the present grievance does not avoid the bar established by application of *res judicata* because he is another JROTC Instructor, and therefore constitutes a party in privity to Grievant Adkins. *See Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (1938). *Accord Beahm v. 7 Eleven, Inc*. 223 W. Va. 269, 672 S.E.2d 598 (2008) (*per curiam*). In other words, if LCBE has been properly paying JROTC Instructor Adkins, it necessarily follows that LCBE has been properly paying JROTC Instructor Plumley, provided Grievant Plumley is being paid in the same manner as Grievant Adkins. According to the record established at Levels One and Three, that is the situation here.

Therefore, in accordance with *Blake*, the only remaining issue is whether the cause of action submitted for resolution in this proceeding is identical to the cause of action determined in the prior grievance, or could it have been resolved, if presented, in

the prior grievance. *See Blake*, *supra*. In the original grievance submitted by Grievant Adkins in 2005, his complaint read:

> My monthly employment changed from "Twenty" (20) days to equal to one month to "forty" (40) days equal to one (1) month when I went from "Normal School Employment Days" to "Additional or Extended Calendar Days." This causes my daily rate to change from $206.89 to $189.00.
>
> The Relief Sought: Either pay me my correct daily rate of $206.89 for 240 days or correct my employment to 220 days equal to eleven months (11).

Adkins I.

This grievance was denied and, as previously noted, that denial was upheld on appeal to the Circuit Court of Kanawha County. The crux of that decision was a determination that Grievant Adkins was not entitled to an employment contract for 220 days for 11 months. However, the present grievance involves the meaning and application of a subsequent 220-day employment contract which Grievants were awarded for the 2011-12 school year. Grievants are contending that their daily rate of pay is being improperly calculated and, as a result, they are being underpaid in violation of their **current** employment contract. Although the previous grievance decision on the methodology applied by LCBE to calculate the proper rate of pay for JROTC Instructors in its employee may be persuasive, *res judicata* does not bar the present grievance from consideration because this grievance involves a new and materially different employment contract, a 220-day contract which supplanted the 240-day contract around which the prior grievance revolved. Further, the proper methodology to be employed in calculating the daily rate of pay under a 220-day contract was not at issue in *Adkins I*, and could not have been decided in that grievance, because Grievants did

not have a 220-day contract with LCBE at that time.[1] Moreover, the focus of the current grievance is on the Respondent's failure to pay Grievants their MIP as calculated by the Army. There was no reference to the MIP documented in *Adkins I* or *II*. Therefore, this cause of action is not identical to the one resolved by the prior grievance, and the present grievance is properly before the undersigned Administrative Law Judge for consideration on its merits.

Turning to those merits, any analysis must begin by recognizing that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be 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). Nonetheless, "[s]chool personnel regulations and laws are to be construed strictly in favor of the employee." Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). *See Trimboli v. Bd. of Educ*., 163 W. Va. 1, 254 S.E.2d 561 (1979). Further, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

Grievants' arguments are largely focused upon LCBE's agreement with the Army for establishing a JROTC Unit in which the Board agreed "to pay retired Army JROTC instructors in accordance with applicable federal law and regulations." G Ex 4. In clarification of what this obligation entails, Grievants produced correspondence dated

[1] Although a 220-day contract may have comprised a portion of the relief Grievant Adkins was seeking in *Adkins I*, such contract was not part of the *status quo* which that grievance was brought to challenge.

January 8, 2013 from the Chief Instructor of the Management Division of the U.S. Army Cadet Command to LCBE Superintendent Lucas stating that a school system which participates in the JROTC Program, and receives reimbursement for 50 per cent of the salary of each JROTC Instructor, is obligated to pay Minimum Instructor Pay ("MIP") to these Instructors. *See* G Exs 1 & 2. This MIP is calculated, in part, according to the amount of retired pay[2] for which each particular Instructor is eligible, and the amount each Instructor would receive, in theory, if recalled to active service. See 10 U.S.C. § 1031(d) (2013). *See also Lyle v. Comm'r of Internal Revenue*, 76 T.C. 668 (1981). The Army-established MIP for Grievant Plumley is $68,432.66. G Ex 1. The MIP for Grievant Adkins is $63,386.26. G Ex 2.

"Minimum" means "of, relating to, or constituting the smallest acceptable or possible quantity in a given case." Black's Law Dictionary 1010 (7th Ed. 1999). The statute, forms, correspondence, and testimony of Grievant Plumley all confirm that the Army permits school boards employing JROTC Instructors to pay more than the established MIP, but it is not permissible to pay less. *See* G Exs 1 & 2.

Because Grievants, like other teachers, are not simply paid their annual salary in one lump sum, the Board's established practice is to convert every employee's contract into a specific amount for each workday. Given that Grievants are 220-day employees, it makes sense that their daily rate of pay would be based upon their MIP divided by 220. Thus, for each day either Grievant performs his assigned duties, he would receive 1/220th of his annual salary.

[2] It should be noted that Grievants are entitled to receive retired pay based upon twenty or more years of active military service, whether they work for LCBE or anyone else.

However, LCBE does not pay Grievants in this straightforward manner. Instead, as explained by the Board's Treasurer, Birdie Gandy, during the Level Three hearing, Grievant's daily rate of pay is calculated by using 261 days as the divisor. The rationale, or lack thereof, for this mathematical mystery may be garnered from the following extended colloquy between Mr. Blaydes and Ms. Gandy:

> Q. (Mr. Blaydes) Did you, in fact, make determinations as to the daily rate of pay for the Grievants?
>
> A. (Ms. Gandy) Yes.
>
> Q. Could you describe how you calculated their daily rate of pay?
>
> A. I simply look at what is the maximum amount of money you could make if you worked 261 days, which is workdays.
>
> Q. Let me stop you there. I want to make sure I understand as we go through, talk through, the math in this case. You wanted to know what was the maximum they could make for 261 days?
>
> A. For a full year of employment.
>
> Q. Why 261 days for two employees who had contracts that were eleven months, 220?
>
> A. Well, you have to determine what is the maximum amount a person could be paid, since there was not a daily rate set. No one said, "Pay these instructors this amount of money." So, I had to determine what the maximum amount of pay could be. In order to do that, I had numbers for monthly amounts. So I took the monthly amounts for twelve full months and, instead of using thirty days like the Army uses, I simply used work days, week days.
>
> Q. Okay. Would it be fair to say, what is the calculation or the equation that you ultimately used? You divided something by 261?
>
> A. Yes.
>
> Q. What did you divide by 261?

A. The monthly MIP documents that I receive from the Army. So, I get a statement from the Army that tells me what their monthly pay is going to be. So, I just use 12 months of those. The first six months is one rate and the second six months is another rate.

Q. Their pay adjusts a little bit upward?

A. Yes. They get a pay raise every January. So, I start out the year, I say here's what I expect them to make. I use the current rate, the June rate. I do that for twelve months. So, if they would work for twelve full months, their daily rate would be X dollars.

Q. But they don't work twelve full months, right?

A. That is correct.

Q. Why wouldn't you instead divide the amount by 220 days which is what their contract is for?

A. Well, what would be the daily rate is the question.

Q. Well, that would be the same calculation, correct? You have, let's say you use - - Are you familiar with the term, Minimum Instructor's Pay?

A. Yes, I am.

Q. What is that, as you understand it?

A. That is the minimum pay that the instructors are to be paid.

Q. Who determines that?

A. The military.

Q. The military. Okay, so let me back up just a little bit. You were around in 2002. If you have been around eighteen years, you were there when the program started, right?

A. That is correct.

Q. So JROTC started around 2002 in Lincoln County?

A. Yes.

Q. And at that point, Lincoln County entered into a contract with the Army to employ JROTC Instructors? That right?

A. Yes.

Q. And as part of that arrangement, the Army will pay fifty per cent of the salaries for the instructors, is that right?

A. Yes.

Q. And Lincoln County is responsible for the other fifty per cent?

A. Plus benefits.

Q. Plus benefits.

A. Correct.

Q. But the Army pays fifty per cent of the salary?

A. Correct.

Q. And the Army will determine the Minimum Instructors Pay and, by contract, that is the amount that the JROTC Instructors are to be paid, right?

A. Correct.

Ms. Gandy's testimony indicates that although she thought she was being fair and consistent in compensating Grievants, she began this process by placing the proverbial cart in front of the horse. Ms. Gandy had no need to develop an algebraic formula to calculate the maximum amount of pay Grievants could receive because, like classroom teachers, whose salary is set by statute, the Army had already set the Minimum Instructor Pay for Grievants, and LCBE had already agreed with the Army it would pay this MIP to its JROTC Instructors. In other words, you do not need to

calculate “X” when “X” is already known, as in this instance where the MIP defines the maximum amount Grievants may be paid, unless LCBE elects to pay them more.

Ms. Gandy provided elaborate calculations to explain the process she went through to make sure Grievants were not overpaid. However, this entire process was unnecessary, provided their daily rate was properly calculated in the first instance. Ms. Gandy explained that a teacher’s daily rate is based on dividing their minimum salary, as set by statute, by 200 (the number of days teachers ordinarily work). In the same manner, Grievants’ daily rate may be properly calculated by dividing their MIP by 220. LCBE’s effort to “translate” what are referenced as “military months” into “teacher months” is based on an assumption, not established by any credible evidence, that the Army follows a different calendar when establishing the MIP for JROTC Instructors. The standard forms introduced into evidence illustrate that the Army uniformly deals with school systems in multiple states where JROTC Programs have been established, as they are required by 10 U.S.C. 1031, part of the federal law which authorizes the JROTC Program. There is simply no rational basis for the supposition that the Army agency responsible for over 1600 local JROTC Programs does not understand how civilian school systems pay their teachers.

After observing that active duty Army personnel are paid the same each month for their service during a 12-month, 365-day year, Ms. Gandy inexplicably determined that it was necessary to convert the MIP into a 10-month, 20 work days per month “teachers’ pay period.” Moreover, neither Ms. Gandy nor Superintendent Lucas could provide a satisfactory explanation for choosing 261 as the divisor for calculating the

daily rate from Grievants' MIP, beyond stating that it resulted in Grievants "not being overpaid," or that it kept Grievants from receiving a "pay raise" which they believed might otherwise have been an unintended consequence of the Board's action in approving an 11-month, 220-day contract in May 2011.[3] Indeed, LCBE's approach would only be correct if the MIP funds provided by the Army were intended as the Maximum Instructor Pay, rather than the minimum. The Army has not overpaid LCBE; LCBE has simply failed to properly apply the funds provided for their intended purpose: to reimburse LCBE for 50 per cent of the annual cost of Grievants' teacher salaries as JROTC Instructors.

The Board's action in approving an 11-month, 220-day employment term for Grievants, coupled with the language in the agreement between the Board and the Army, which mirrors that 11-month, 220-day term, and of which Grievants are third party beneficiaries, compels the conclusion that 220 is the proper divisor for calculating the Grievant's daily rate of pay. As with all of Ms. Gandy's elaborate calculations and charts, it can be stated with mathematical certainty that a daily rate based upon dividing their MIP by 220 will not result in Grievants being paid more than their established MIP for working 220 days.

Accordingly, where the MIP for Grievant Plumley is set at $68,432.66, dividing that amount by 220 equals a daily rate of $311.05, rounded down to the last penny. If Grievant Plumley works for 220 days, he would receive $68,431.00, and would not

[3] Ms. Gandy and Superintendent Lucas both opined that the contract approved by the Board in May 2011 was a "mistake" or "error." However, the Board had a clear opportunity to "fix" this problem at a subsequent meeting and, for whatever reason, chose not to rescind the previous action. Therefore, the Board must be bound by its official action in May 2011. *See Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

exceed the MIP. Similarly, dividing Grievant Adkins' $63,386.26 MIP by 220 equals a daily rate of $288.11, rounded down to the last penny. When Grievant Adkins works 220 days, he would be paid $63,384.20, and would not exceed the MIP. Henceforth, if Grievants continue to hold 11-month, 220-day contracts, their daily rate may be calculated by multiplying the first month's MIP amount provided by the Army by 12, and dividing that sum by 220.[4] Should the monthly MIP change because of a change in Army active duty pay upon which the MIP is based, LCBE may similarly take the new monthly MIP, multiply that amount by 12 and divide the sum by 220, in order to establish the new daily rate which Grievants will be paid for the remainder of the school year, or until the Army provides a new MIP amount, whichever comes first. Likewise, should Grievants be awarded a different contract term, such as a 240-day contract, 240 would then become the new divisor for calculating their daily pay rate.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ*., Docket No. 93-29-481 (Apr. 4, 1993).

2. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Rose v. Raleigh County Bd. of Educ*., 199

[4] The evidence presented by LCBE indicates that the Army reimburses the Board for 50 per cent of Grievants' MIP annually in 12 monthly payments. *See* R Exs 10 & 11.

W. Va. 220, 483 S.E.2d 566 (1997). *See Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

3. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Whalen v. Mason County Bd. of Educ*., Docket No. 97-26-234 (Feb. 27, 1998). *See Rose*, *supra*; *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. Under W. Va. Code § 6C-2-3(c)(1), "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." Respondent timely asserted this affirmative defense.

6. Respondent failed to establish by a preponderance of the evidence that Grievants were unequivocally put on notice that the employer would not adjust their pay to pay them the full amount established by the Army as the Minimum Instructor Pay an employing school board will pay to retired military personnel employed as JROTC Instructors. Accordingly, Grievants demonstrated a proper basis to excuse any arguable failure to file their grievances in a timely manner.

7. A grievance which involves the same parties, cause of action, relief requested, and factual situation as that of a prior matter decided by the Grievance Board may be barred from further consideration in accordance with the doctrine of *res judicata*. *Woodall v. W. Va. Dep't of Transp*., Docket No. 93-DOH-393 (Feb. 2, 1994); *Ramsey v. W. Va. Dep't of Health & Human Serv*., Docket No. 90-H-478 (July 31, 1991). *See Blake v. Charleston Area Med. Ctr*., 201 W. Va. 469, 498 S.E.2d 41 (1997).

8. This grievance does not involve the same cause of action, factual situation, or relief requested as the matter before this Grievance Board in *Adkins v. Lincoln County Bd. of Educ*., Docket No. 05-22-331D (May 31, 2006), *aff'd* Cir. Ct. of Kanawha County No. 06-AA-97 (Jan. 24, 2007), or *Adkins v. Lincoln County Bd. of Educ*., Docket No. 06-22-368 (Feb. 5, 2008), *aff'd* Cir. Ct. of Kanawha County No. 08-AA-23 (June 8, 2010), and this grievance is therefore not barred from consideration by the doctrine of *res judicata*. *See Blake*, *supra*.

9. Grievants established by a preponderance of the evidence that they did not receive the amount of compensation to which they were entitled under the Board's contract with the U.S. Army, and by federal law, as retired military personnel employed as JROTC Instructors, consisting of an annual sum certain labeled "Minimum Instructor Pay," and calculated by the Army, in accordance with their 11-month, 220-day teaching contracts approved by the Board.

Accordingly, this grievance is **GRANTED.** Respondent LCBE is hereby **ORDERED** to pay back pay to each Grievant based upon the difference each month of the 2011-2012 school year by applying the proper daily pay rates of $311.05 for

Grievant Plumley and $288.11 for Grievant Adkins. LCBE is further **ORDERED** to pay prejudgment simple interest on this back pay at the statutory rate currently set in W. Va. Code § 56-6-31. *See Clark, et al. v. Putnam County Bd. of Educ*., Docket No. 2012-0944-CONS (June 28, 2013); *Stickley v. Berkeley County Bd. of Educ*., Docket No. 95-02-573 (Feb. 20, 1998); *Yokum v. Randolph County Bd. of Educ*., Docket No. 97-42-299 (Jan. 14, 1998).

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 30, 2013

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LEWIS G. BREWER
Administrative Law Judge