

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEB GOFF, et al.,

Grievants,

v.

Docket No. 2015-0049-CONS

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

As a group, Grievants¹ filed level one grievances against their employer, Respondent, Calhoun County Board of Education, dated July 11, 2014, stating as follows: “[t]he Grievants are all service employees of the Respondent with contract terms in excess of 200 days. Each has been advised of a reduction of the number of days in their contracts of employment for the 2014-2015 school year. Grievants contend that they were not properly notified of this reduction of employment terms and assert a violation of W. Va. Code 18A-2-6, 18A-4-8(m) & 18A-2-12a (due process).” As relief sought, “Grievants seek: (a) restoration of their employment term for the 2014-2015 school year and future school years; and (b) compensation for wages lost with interest.” These grievances were initially assigned individual docket numbers, but were consolidated by the Grievance Board soon after receipt as *Goff, et al., v. Calhoun County Board of Education*, Docket No. 2015-0049-CONS.

Another group of Grievants² filed level one grievances against their employer, Respondent, dated July 23, 2014, stating as follows: “Grievants are service personnel employed by the Respondent. A yearly six hundred dollar supplement has been

¹ All Grievants are identified in the Stipulation of Facts section that follows.

² All Grievants are identified in the Stipulation of Facts section that follows.

eliminated for the 2014-2015 school year without their consent, without proper notice and without opportunity for a hearing. Grievants alleges (sic) a violation of W. Va. Code 18A-2-6, 18A-4-8(m), & 18A-2-12a (due process).” As relief sought, “Grievants seeks (sic) restoration of the supplement for the 2014-2015 school year and future school years and compensation for all lost wages with interest.” These grievances were also initially assigned individual docket numbers, but were consolidated by the Grievance Board soon after receipt as *Abel, et al., v. Calhoun County Board of Education*, Docket No. 2015-0126-CONS.

These two consolidated grievances were then consolidated into *Goff, et al., v. Calhoun County Board of Education*, Docket No. 2015-0049-CONS by Order entered September 18, 2014. It is noted that some, but not all, of the Grievants were parties to both of these actions. Also, a number of Grievants were dismissed as parties from the actions upon request before the level three hearing.

Grievant Timothy McCumbers filed a grievance against Respondent dated July 23, 2014, stating as follows: “Grievant is a service personnel employed by the Respondent. The number of days of his employment term has been reduced for the 2014-2015 school year without his consent, without proper notice and without opportunity for a hearing. Grievant alleges a violation of W. Va. Code 18A-2-6, 18A-4-8(m), & 18A-2-12a (due process).” As relief sought, “Grievant seeks restoration of his employment term for the 2014-2015 school year and future school years and compensation for lost wages and benefits with interest.” By Order entered September 11, 2014, this grievance was consolidated into the instant grievance action, *Goff, et al., v. Calhoun County Board of Education*, Docket No. 2015-0049-CONS.

Given the nature of this consolidated grievance and the number of Grievants involved, counsel for Grievants indicated that all of the Grievants did not intend to appear at the level three hearing. Further, counsel for the parties informed the undersigned that this matter involved more of a question of law than of fact. Accordingly, by Order entered September 18, 2014, the undersigned ordered the parties to prepare written stipulations of fact to be presented at the level three hearing, which were to include the name of each Grievant, his or her classification, place of work, and which claim(s) each Grievant was asserting.

The parties agreed to waive this consolidated grievance to level three of the grievance procedure. The level three grievance hearing was held on September 23, 2014, at the Grievance Board's office in Charleston, West Virginia, before the undersigned administrative law judge. Grievants appeared in person and by counsel, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent, Calhoun County Board of Education, appeared by counsel, Richard S. Boothby, Esquire, of Bowles Rice, LLP. This matter became mature for consideration on November 7, 2014, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Respondent in various service personnel positions. In May and June 2014, Respondent was faced with a significant budget deficit. In May 2014, Respondent determined that it needed to eliminate employees' \$600.00 salary supplements to save money, and obtained the required permission from the State Board of Education to do so. These salary supplements had not been funded by a levy;

they had been paid from local funds. Respondent eliminated these salary supplements in late June 2014 without providing Grievants notice and opportunity for a hearing. Thereafter, on June 30, 2014, the State Superintendent of Schools sent a letter to Respondent informing it that its proposed budget was insufficient to maintain the proposed educational programs as well as its other financial obligations for the year, and ordered Respondent to reduce employees' extended employment contracts that were in excess of 200 days to reduce salary costs. This letter was received during the afternoon June 30, 2014. Based upon the order of the State Superintendent, Respondent held an emergency meeting that evening during which the order of the State Superintendent was implemented, thereby reducing the contract term of those employees who held extended employment contracts in excess of 200 days. The affected employees received no notice of this change to their contract or an opportunity for a hearing before the same was implemented. Grievants assert that Respondent violated various provisions of the West Virginia Code when it eliminated the salary supplements and reduced their contract terms. Respondent denies Grievants' claims, and asserts it acted lawfully pursuant to certain emergency provisions of the West Virginia Code, and that it was not required to follow the standard notice and hearing provisions in this circumstance. Grievants proved by a preponderance of the evidence that Respondent eliminated their local salary supplements in violation of law. However, Grievants failed to prove by a preponderance of the evidence that Respondent violated West Virginia law when it reduced their contract terms pursuant to the order of the State Superintendent of Schools. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

Stipulation of Facts

The parties, by counsel, submitted their Joint Stipulation of Fact at the level three hearing, which was then admitted to the record. The parties' joint stipulations are recited herein as submitted.³

1. With regard to the respondent's reduction of certain of the grievant's 200-plus-day contracts and respondent's elimination of all grievants' \$600 county supplemental pay, as described below herein, none of the grievants received the notice and opportunity for hearing provided for in West Virginia Code §§ 18A-2-6 or 18A-2-7.

2. The following employee is a Grievant in Goff, et al., v. [Calhoun County Board of Education], [Docket No.] 2015-0049-CONS only and is grieving the reduction of her employment term:

Deb Goff is employed as a secretary at Calhoun Middle School/High School. Her contract term was decreased from 240 days in the 2013-2014 school year to 210 days in the 2014-2015 school year.

3. The following employees are a (sic) Grievants in both Goff, et al., v. [Calhoun County Board of Education], [Docket No.] 2015-0049-CONS and Abel, et al., v. Calhoun County Board of Education, Docket No. 2015-0126-CONS and a (sic) grieving both a loss of their employment term and the loss of the \$600 per year supplement:

a. Sheryl Stevens is employed as a secretary at Arnoldsburg School.

³ It is noted that upon reviewing this document with the parties at the level three hearing, one error was found on page 3 of the document. To correct the error, the undersigned struck out the name of the employee listed at line 4(i) as she had been previously dismissed from this action. Accordingly, paragraph 4(i) is being omitted from this decision.

Her contract term was decreased from 240 days in the 2013-2014 school year to 210 days in the 2014-2014 (sic) [2015] school year.

b. Donna Schoolcraft is employed as a secretary at Calhoun Middle/High School. Her contract term was decreased from 240 days in the 2013-2014 school year to 210 days in the 2014-2015 school year.⁴

c. Loretta Freshour is employed as a custodian at the Arnoldsburg School. Her contract term was decreased from 230 days in the 2013-2014 school year to 205 days in the 2014-2015 school year.

d. Tim Hickman is employed as a sanitation plant operator at the Pleasant Hill School. His contract term was decreased from 239 days in the 2013-2014 school year to 205 days in the 2014-2015 school year.

e. Steve Sams is employed as a custodian at Calhoun Middle/High School. His contract term was decreased from 230 days in the 2013-2014 school year to 205 days in the 2014-2015 school year.

f. Randy Harris is employed as a custodian at the Calhoun Middle/High School. His contract term was decreased from 230 days in the 2013-2014 school year to 205 days in the 2014-2015 school year.

g. Blanche Marie King is employed as a custodian at Calhoun Middle/High School. Her contract term was decreased from 230 days in the 2013-2014

⁴ It is noted that counsel for Grievants indicated that Donna Schoolcraft wished to be removed as a grievant in this matter by letter to the Grievance Board dated July 15, 2014. However, the undersigned has no record of a dismissal order being issued removing her from the case, and by their stipulations, counsel for the parties indicate that she should be a party to this action. Accordingly, to the extent Donna Schoolcraft was ever dismissed from this grievance, or otherwise removed from it, she shall hereby be reinstated as a party to this action.

school year to 205 days in the 2014-2015 school year.

h. Beth Stull is employed as a custodian at the Calhoun Middle/High School. Her contract term was decreased from 230 days in the 2013-2014 school year to 205 days in the 2014-2014 (sic) [2015] school year.

i. Dennis McCumbers is employed as a sanitation plant operator at the Calhoun-Gilmer Career Center. His contract term was not decreased from the 2013-2014 school year to the 2014-2015 school year.

j. Timothy McCumbers is employed as an electrician in the maintenance department. His contract term was decreased from 240 days in the 2013-2014 school year to 230 days in the 2014-2015 school year.

k. Richard Parsons is employed as a mason in the maintenance department. His contract term was decreased from 240 days in the 2013-2014 school year to 230 days in the 2014-2015 school year.

l. Dwayne Yatauro is employed as a heating and air conditioning mechanic in the maintenance department. His contract term was decreased from 240 days in the 2013-2014 school year to 230 days in the 2014-2015 school year.

4. The following employees are Grievants in Abel, et al. v. Calhoun County Board of Education, Docket No. 2015-0126-CONS only and are grieving the loss of the \$600 per year supplement:

- a. Timothy Abel is employed as a bus operator.
- b. Terri Allen is employed as a bus operator.
- c. Randall Ball is employed as a carpenter II in the maintenance department.
- d. Patrick Bell is employed as a bus operator.
- e. Frank Bever is employed as a bus operator.

- f. Tricia Harris is employed as a bus operator.
- g. Sherry Butt is employed as a paraprofessional at the Calhoun County Middle High School.
- h. Marisha Collins is employed as a cook III at the Calhoun Middle/High School.
- i. *Stricken at the level three hearing as this entry was an error.*⁵
- j. Cathy Dickey was employed as a secretary at the Calhoun Middle/High School. She was reduced in force at the end of the 2013-2014 school [year] and is currently a substitute.
- k. Carol Dye is employed as a paraprofessional at the Pleasant Hill School.
- l. Anita Fritch is employed as a paraprofessional at the Pleasant Hill School.
- m. Charles Heiney is employed as a bus operator.
- n. Christina Jones is employed as a cook III at the Calhoun Middle/High School.
- o. Margaret Kirby is employed as a cook III at the Calhoun Middle/High School.
- p. Christopher Lacy is employed as a bus operator.
- q. Robert Lewis is employed as a bus operator.
- r. Shelly Mace is employed as a paraprofessional at Arnoldsburg School.
- s. Kenneth McCumbers is employed as a bus operator.
- t. Richard Metheney is employed as a bus operator.
- u. Aletha Miller is employed as a paraprofessional at Arnoldsburg School.
- v. Holly Miller is employed as a paraprofessional at Arnoldsburg School.

⁵ Rhonda Deweese was dismissed as a party to the Abel grievance upon request of counsel by Order entered August 13, 2014. Counsel's request was included in his letter to the Grievance Board dated August 1, 2014.

- w. Shirley Naylor is employed as a paraprofessional at Arnoldsburg School.
- x. Barbara Norman is employed as a bus operator.
- y. Gerald Riddle is employed as a bus operator.
- z. Donna Schoolcraft is employed as a secretary at Arnoldsburg School.
- aa. Janet Summers is employed as a bus operator.
- bb. Joseph Taylor is employed as a bus operator.
- cc. Barbara Tingler is employed as a cafeteria manager at Arnoldsburg School.
- dd. Richard Trites is employed with a multiclassification title as a sanitation plant operator/bus operator.
- ee. Leslie Ward is employed as a paraprofessional at the Pleasant Hill School.
- ff. Nancy Weekley is employed as a secretary at the Calhoun-Gilmer Career Center.
- gg. Timothy Whipkey is employed as a bus operator.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are all service personnel employees of Respondent, Calhoun County Board of Education.
2. Timothy Woodward is the current Superintendent of Calhoun County Schools. Mr. Woodward interviewed for this position in April 2014, and was hired thereafter. His first day on the job was May 27, 2014.
3. Roger Propst was Superintendent of Calhoun County Schools until his retirement in March 2014. While the record is unclear as to how long Mr. Propst was in

this position, it was suggested that he held that position for years.

4. Following Mr. Propst's retirement, Dan Metz was named interim Superintendent of Calhoun County Schools.

5. Dan Minney is the Treasurer/Chief Business Official of the Calhoun County Board of Education. At the time of the level three hearing, Superintendent Minney had served in this position for about eighteen months.

6. When Superintendent Woodward began in his position, the Calhoun County Board of Education had a deficit of approximately \$1,800,000.00.⁶ A deficit of this size did not accrue overnight; it had been building for years. The first deficit year was the 2010-2011 school year. The Board knew about the growing deficit for years.⁷ Mr. Minney and former Superintendent Propst were, at least, aware of the growing deficit during the 2013-2014 school year.⁸ Former interim Superintendent Metz also knew about the deficit. Despite this knowledge, only one secretarial position was eliminated for the 2014-2015 school year within the statutory deadlines for reduction in force and transfer.⁹ Aside from not filling vacant positions, no other cost-saving measures were taken at that time.

7. In April 2014, Joe Panetta, Assistant State Superintendent for the Division of Student Support Services, contacted Mr. Minney and expressed his concerns regarding the Board's deficit. Mr. Panetta made suggestions to Mr. Minney as to how the Board could make improvements and move forward. However, Mr. Panetta made no demands of action at that time. The record is unclear as to what prompted Mr.

⁶ See, testimony of Timothy Woodward; testimony of Dan Minney.

⁷ See, testimony of Dan Minney.

⁸ See, testimony of Dan Minney.

⁹ See, testimony of Dan Minney.

Panetta to contact Mr. Minney.

8. Normally, school boards are required to submit their budgets [for the coming school year] to the State Department of Education by the end of May each year. It is unclear from the record when Respondent submitted its proposed budget to the State Department of Education. However, Mr. Minney appeared to indicate that Superintendent Propst was still there when the proposed budget was submitted.

9. On May 13, 2014, Respondent attempted to pass an excess levy to acquire funding for a number of its current expenses, stated as follows:

To provide funds to repair and maintain all school facilities, to purchase necessary custodial supplies and equipment, to defray utility costs, and to continue existing maintenance contracts on equipment. (\$311,723.00)

To provide funds for supplies, textbooks, workbooks, fine arts, technology and library operations, to defray vocational and extended curriculum costs and to restore supplements to county support organizations. Funds will be used to reinstate band, choir, and art/music full time in all schools. (\$155,861.00)

To provide funds for supplements and transportation for extracurricular secondary school program, band supplements and program, elementary extracurricular program, to restore funds for professional development and defray and restore funds for substitutes, inclusive of professional and school service personnel. (\$155,862.00)¹⁰

However, this levy failed.

10. On his first day as Superintendent in Calhoun County, Mr. Woodward began working with Mr. Minney to cut spending from the Board's 2014-2015 school year budget. They were able to cut \$200,000.00 through their efforts. Also, Superintendent Woodward obtained permission from Mr. Panetta to set aside \$185,000.00 that had

¹⁰ See, Respondent's Exhibit 3.

been earmarked for purchasing new school buses so that it could be used for payroll.

11. On May 29, 2014, Respondent voted to request permission from the State Board of Education to reduce local funds used to supplement the state minimum salary schedules for teachers and service personnel by \$600.00 annually, effective July 1, 2014. Superintendent Woodward made said request by letter to State Superintendent of Schools, Dr. James B. Phares, dated May 30, 2014.¹¹ Respondent's request was granted by the West Virginia Board of Education at a meeting held on June 11, 2014.¹² This act eliminated the \$600.00 salary supplement for service personnel in Calhoun County.

12. Although Respondent voted to request permission to eliminate the salary supplement on May 29, 2014, and sought permission from the State Board on that day, interim Superintendent Metz made the decision to eliminate the salary supplement before Superintendent Woodward started on May 27, 2014.¹³ However, the record is unclear as to exactly when this decision was made.

13. The \$600 annual salary supplement paid to the Calhoun County Board of Education employees was not funded by a levy. This salary supplement was paid from Step 11 local funds. The levy failing to pass on May 13, 2014, did not cut off the funding for the supplement.

14. In or about the last week of June 2014, Joe Panetta contacted Mr. Minney and Superintendent Woodward and informed them that the budget deficit was the highest in the state, and that they would be receiving a letter from the State

¹¹ See, Respondent's Exhibit 1.

¹² See, Respondent's Exhibit 2.

¹³ See, testimony of Timothy Woodward.

Superintendent of Schools directing them to cut another \$100,000.00 from the budget by reducing the length of employee contracts which exceeded 200 days to 200 days.

15. On the afternoon of June 30, 2014, Superintendent Woodward and Mr. Minney received and reviewed a letter from Dr. James B. Phares, then State Superintendent of Schools. This letter was also dated June 30, 2014. The letter states, in part, as follows:

“[t]his is to notify you that the proposed budget of the Calhoun County Board of Education for the 2014-15 year that was submitted for approval has been reviewed and found to be insufficient to maintain the proposed educational programs as well as other financial obligations of the county board of education for the year. . . . Consequently, under the authority of W. Va. Code 18-9B-8, the Calhoun County Board of Education is required to revise its proposed budget to reduce the projected salary costs of extended employment contracts by at least \$100,000. This is to be accomplished by reducing the number of extended employment days beyond the minimum employment term of 200 days for the 2014-15 year of as many personnel as necessary, exclusive of the superintendent and treasurer/chief school business official, to accomplish the desired cost reductions. . . .”¹⁴

16. After receiving the letter from State Superintendent Phares, an emergency meeting of the Calhoun County Board of Education was called. The meeting was scheduled for that very evening at 7:30 pm as the 2014-2015 school year began the next day. Superintendent Woodward posted notices of the meeting and called the media to try to provide notice of the meeting.

17. At the June 30, 2014, emergency meeting of the Calhoun County Board of Education, Superintendent Woodward recommended that the Board cut the budget by reducing employee contract terms pursuant to the directive of the State Superintendent.

¹⁴ See, Joint Exhibit 1, June 30, 2014, letter.

The Board accepted Superintendent Woodward's recommendation and reduced employee contracts that exceeded 200 days.¹⁵

18. By reducing the contract length of employees employed in excess of 200 days per year, Respondent produced a savings of \$108,801.11.¹⁶

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "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). In other words, "[t]he 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 parties do not dispute the facts in the matter. Grievants argue that Respondent's actions in reducing their contract terms and eliminating their \$600 salary supplement violated various provisions of West Virginia law. Respondent, however, asserts that its actions violated no laws. Respondent argues that because its actions

¹⁵ See, Joint Exhibit 2; testimony of Timothy Woodward.

¹⁶ See, Respondent's Exhibit 6; testimony of Dan Minney.

were in response to financial emergencies, it was not required to follow the standard notice provisions of the West Virginia Code before taking the actions.

West Virginia Code § 18A-2-6, in part, as follows:

After three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: *Provided*, That a service personnel employee holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before March 1 of the then current year, or by written resignation of the employee on or before that date, The affected employee has the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

W. Va. Code § 18A-2-6. Further, West Virginia Code § 18A-4-8(m) states, “[w]ithout 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.” W. Va. Code § 18A-4-8(m). Also, West Virginia Code § 18A-2-7 provides, in part, the following:

(a) The superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel and recommend their dismissal pursuant to this chapter. However, an employee shall be notified in writing by the superintendent on or before February 1 if he or

she is being considered for transfer or to be transferred. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. Any teacher or employee who desires to protest the proposed transfer may request in writing a statement of the reasons for the proposed transfer. The statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before March 15. At the hearing, the reasons for the proposed transfer must be shown.

(b) The superintendent at a meeting of the board on or before March 15 shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. An employee who was not provided notice and an opportunity for a hearing pursuant to subsection (a) of this section may not be included on the list. All other teachers and employees not so listed shall be considered as reassigned to the position or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of the meeting and all those so listed shall be notified in writing in which notice shall be delivered in writing, by certified mail, return receipt requested, to the persons' last known addresses within ten days following the board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

W. Va. Code § 18A-2-7.

Salary Supplement

It is undisputed that Grievants were not given any notice or opportunity for a hearing before Respondent eliminated their \$600.00 salary supplement. The issue is whether Grievants were entitled to such notice before it was eliminated. Respondent

asserts that it eliminated the salary supplement pursuant to West Virginia Code § 18A-4-5b in response to an event over which it had no control; therefore, it was not required to comply with the standard notice requirements set forth in the Code. However, Respondent cites no authority for its position other than the statute itself, principles of statutory construction, and legislative intent.

West Virginia Code §18A-4-5b states, in part, as follows:

The county board of education may establish salary schedules which shall be in excess of the state minimum fixed by this article.

These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county: Provided, That in establishing such local salary schedules, **no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the State Board prior to making such reduction. . . .**

Id. (emphasis added). Respondent contends that this statute contains “fiscal powers of an emergency nature” which exempt it from the standard notice requirements of the Code.¹⁷ Specifically, Respondent argues that its financial condition in May 2014 was an “event over which it had no control.” As such, Respondent was allowed to eliminate the salary supplement for employees upon approval of the State Board, which it received. It

¹⁷ See, Respondent’s proposed Findings of Fact and Conclusions of Law, pg. 16.

is noted that Respondent is **not** arguing that the defeat of the levy in May 2014 was the event that triggered its application of § 18A-4-5b. The salary supplement at issue was never funded by a levy. The defeat of the levy in May 2014 did not eliminate the funding for the salary supplements.¹⁸ Respondent is also not asserting that the State Board of Education ordered it to cut the salary supplements. Pursuant to the testimony of Superintendent Woodward, his predecessor, interim Superintendent Dan Metz, made the decision to eliminate the salary supplement, and that his only duty was to draft the letter to the State Board of Education requesting permission to do so. Strangely, in its proposals, Respondent also appears to argue that West Virginia Code § 18A-4-5b grants emergency powers to the State Board of Education/State Superintendent of Schools. It does not. While the statute requires State Board approval before a county board may reduce local salary supplements, the statute itself pertains to the authority of the county boards of education.

West Virginia Code § 18A-4-5b allows a county board of education to reduce local salary supplements in the following three situations: defeat of a special levy; a loss in assessed values; or, events over which it has no control, and then only after receiving

¹⁸ It is true that had the levy passed, it would have provided Respondent funding for many things, and supplements were listed in one section of the levy. However, the language of the levy indicates that the supplements were low on the list of priorities, and that only a small unspecified amount of the levy funds would have been used to fund the salary supplements. See, Finding of Fact 9 above. The bulk of the levy funds were to be used to repair and maintain all school facilities, to purchase necessary custodial supplies and equipment, to defray utility costs, and to continue existing maintenance contracts on equipment. See, Respondent's Exhibit 3. The portion of the levy in which supplements are mentioned also states that funds would be used for transportation for extracurricular secondary school program, band supplements and program, elementary extracurricular program, to restore funds for professional development and defray and restore funds for substitutes, inclusive of professional and school service personnel. See, *Id.*

the approval of the State Board of Education. The Respondent asserts that events over which it had no control triggered its need to reduce the salary supplements. As such, the undersigned must first determine whether Respondent's financial condition in May 2014 was an "event over which it had no control." Respondent argues that it had no control over its limited financial resources, other than to attempt to pass a levy, which it did, and that it was powerless to cut any positions to save money as the time period for RIF and transfers had passed. As such, it had to eliminate the salary supplements. However, Grievants point out that the Calhoun County Board of Education had a recurring deficit for years, and that the deficit situation did not occur suddenly, or without warning. Such is true. The evidence presented establishes that Respondent had a recurring deficit since the 2010-2011 school year, and that such increased each year.¹⁹ This growing deficit was known to Respondent and the former superintendent(s). However, despite having this knowledge, the former superintendent took no action to RIF or to transfer any personnel to reduce spending. The evidence presented suggests that no serious actions to reduce spending were taken until May 2014 when Mr. Woodward began as superintendent. It appears that this inaction resulted in the last-minute budget cuts which prompted this grievance. Therefore, the financial condition in which Respondent found itself in May 2014 was no surprise, and it certainly did not result from the defeat of the levy in May. Further, it is not clear from the evidence that the levy, had it passed, would have provided new funding for the supplements.

Neither party has provided any legal authority defining "event over which it has no control." The undersigned has found one case directly addressing this subject. The

¹⁹ See, testimony of Dan Minney.

West Virginia Supreme Court of Appeals has stated “[w]here a county has a property tax base which does not increase in assessed value at a rate commensurate with inflation so that there is a decline in revenue relative to expenses and a local school board is forced to choose between eliminating a local pay supplement for teachers or curtailing its educational programs for children, the local board is confronted, in that event, with ‘events over which it has no control’ within the contemplation of W. Va. Code, 18A-4-5 [1969] and may cancel the teacher supplement.” Syl., *Newcome, et al., etc. v. The Bd. of Educ. of Tucker County, et al.*, 164 W. Va. 1, 260 S.E.2d 462 (1979). However, inflation is not the issue in this grievance. It is noted that Respondent repeatedly refers to its financial predicament as a “financial emergency” in its post-hearing proposals. The West Virginia Supreme Court of Appeals addressed the issue of fiscal emergencies in the case of *Randolph County Board of Education v. Scalia, et al.*, 182 W. Va. 289, 387 S.E.2d 524 (1989). In *Scalia*, guidance counselors and a librarian were challenging the Board of Education’s practice of requiring them to substitute for absent classroom teachers. The Board of Education justified the assignments as an emergency measure pursuant to West Virginia Code § 18-4-10(10), which permitted a superintendent to act in case of emergency. See *Id.* The Court examined what constitutes an emergency, concluding that “[i]n general, the essential elements of an emergency are that the condition be unforeseen or unanticipated and that it call for immediate action.” Syl. Pt. 3, *Randolph County Bd. of Educ. v. Scalia, et al.*, 182 W. Va. 289, 387 S.E.2d 524 (1989). However, “[a] fiscal emergency may arise because adequate provision was not made in a budget, even though the purpose for which the funds are needed was foreseeable when the budget was adopted. In such a

case, before an emergency can be found, it must be shown that the amount placed in the budget was reasonable in light of all of the attendant circumstances, including prior budgetary experience.” *Id.* at Syl. Pt. 4. In *Scalia*, the Court found that the Board had not made reasonable efforts to adequately provide for the substitute teacher expense and that there was no fiscal emergency. *See Id.*

Respondent was well aware of its ever-increasing deficit for years before May 2014, and it had the ability to act to try to reduce the same, or to improve its financial condition. Former Superintendent Propst was also aware of the same during his tenure. Respondent asserts that it has no idea why he did not attempt to RIF employees when he had the opportunity. Nonetheless, former Superintendent Propst could have taken actions to reduce the deficit or improve Respondent’s financial condition, but he did not. No evidence was presented concerning what, if any, efforts were made prior to May 2014 to reduce spending or to reduce the deficit, aside from eliminating one secretary position at the Board office. What occurred in this matter is entirely different that what occurred in the *Newcome* case. A county board has no control over a phenomenon such as inflation, but one can control certain expenditures. The inaction of the Respondent and the former superintendent allowed the deficit to spiral out of control, and lead to the situation that existed in May 2014. Respondent knew or should have known that the situation it faced in May 2014 was coming; Respondent created it. Thus, Respondent’s financial condition in May 2014 was not an event over which it had no control. Therefore, Respondent’s elimination of the salary supplements was improper and violated West Virginia Code § 18A-4-5b. As Respondent had no authority pursuant to West Virginia Code § 18A-4-5b to eliminate the salary supplements, there is no need

to address the lack of notice and hearing issue.

Interestingly, the minutes of the meeting of the State Board of Education on June 11, 2014, at which Respondent's request for permission to eliminate the salary supplement was addressed, indicate that Respondent was seeking the permission of the State Board to eliminate the salary supplements based upon *the defeat of the levy*. There is no mention in the minutes of the Respondent's financial condition being an "event over which it had no control," thereby triggering the application of W. Va. Code § 18A-4-5b allowing it to eliminate the salary supplement upon State Board approval. See Respondent's Exhibit 2, Minutes of the West Virginia Board of Education, June 11, 2014. Such suggests that the State Board of Education may have been under the mistaken impression that the levy had been the funding source for the supplements.

Reduction of Contract Term

For a county board of education to operate, it must have a budget approved by the State Board of Education. See W. Va. Code §§ 18-9B-6, 18-9B-7, 18-9B-10, 18-9B-6a. As stated in the letter of June 30, 2014, former State Superintendent Phares informed Respondent that its proposed budget was insufficient, and directed Respondent to cut \$100,000.00 from its budget by reducing employee contract days beyond 200 days. Dr. Phares cited West Virginia Code § 18-9B-8 as authority for his direction. It is noted that the Department of Education and the State Board of Education are not parties to this action, and no one called Mr. Panetta, Dr. Phares, or anyone else from those entities, as witnesses in this case.

West Virginia Code §18-9B-8 states as follows:

If the board of finance finds that the proposed budget for a county will not maintain the proposed educational program

as well as other financial obligations of their county board of education, it may require that the budget be revised, but in no case shall permit the reduction of the instructional term pursuant to the provisions contained in section fifteen [§ 18-5-15], article five of this chapter nor the employment term below two hundred days. Any required revision in the budget for this purpose may be made in the following order:

- (1) Postpone expenditures for permanent improvements and capital outlays except from the permanent improvement fund;
- (2) Reduce the amount budgeted for maintenance exclusive of service personnel so as to guarantee the payment of salaries for the employment term; or
- (3) Adjust amounts budgeted in any other way so as to assure the required employment term of two hundred days and the required instructional term of one hundred eighty days under the applicable provisions of law.

W. Va. Code § 18-9B-8. While it is noted that this statute references the board of finance, West Virginia Code § 18-9A-17 directs the West Virginia Board of Education, through its chief executive officer, to direct and carry out all provisions of article 9B. See *Id.* Therefore, as the State Board of Education/State Superintendent found Respondent's budget insufficient to maintain the proposed educational programs and its other financial obligations, the State Board of Education/State Superintendent had the authority to require Respondent to revise its proposed budget to reduce salary costs by reducing the number of extended employment days beyond the minimum employment terms of 200 days for the 2014-2015 school year, pursuant to subsection three.²⁰

Grievants argue that before reducing their contract terms, Respondent was required to provide them notice and an opportunity for a hearing. Grievants correctly

²⁰ The evidence presented suggests that Respondent implemented budget cuts similar to those described in subsections one and two without being ordered to do so by the State Superintendent.

note that all Grievance Board cases dealing with § 18-9B-8 have involved situations where a board of education *complied* with the notice and hearing requirements of West Virginia Code § 18A-2-6. Meaning, the employees were informed within the statutory time frames and given the opportunity for a hearing. Also, in those cases the reductions and cuts occurred much earlier in the school year. As such, the instant grievance presents a unique set of facts.

Respondent asserts that West Virginia Code § 18-9B-8 grants “fiscal powers of an emergency nature,” and, as such, it did not have to comply with notice and hearing provisions of the Code before reducing the employee contract terms. Respondent cites no authority for this position other than certain principles of statutory construction and legislative intent. The undersigned can find no case law or any provision in the Code that indicates West Virginia Code § 18-9B-8 contains “emergency powers,” or that the statute supersedes any other. Further, the undersigned could find no West Virginia Supreme Court of Appeals opinion, or Grievance Board decision, clearly addressing a situation in which West Virginia Code § 18-9B-8 was invoked after the expiration of the statutory notice and hearing time frames as occurred in this matter. The undersigned must also note that she could find no reported case in which such budget cuts and contract term reductions were imposed at the direction of the State Superintendent during the afternoon of the very last day of the school year, the day before new contracts would have gone into effect.

However, in the case of *Logan County Educ. Ass’n v. Logan County Bd. of Educ.*, 180 W. Va. 326, 376 S.E.2d 340 (1988), revisions to a proposed budget were directed in July. In that case, the county board voted to grant a pay raise for all

employees during a meeting to review its proposed budget on April 15, 1982. The funding for this pay increase was to be from anticipated additional property taxes. The county board believed these additional tax revenues would be available because of a circuit court ruling issued in another case which had been initiated by the county board and its president. Certified questions in that case were pending before the West Virginia Supreme Court of Appeals at the time of the county board's budgeting process. The Supreme Court issued its opinion on July 2, 1982, and such did not allow for the additional tax revenues the county board had anticipated. On July 9, 1982, pursuant to West Virginia Code § 18-9B-6, the "Board of Finance" ordered the county to revise its budget downward to reflect a lower tax revenue estimate without the increase they had originally anticipated. The county board complied by amending its budget on July 22, 1982, which voided the proposed pay raise. Thereafter, the county education association asserted violations of West Virginia Code §§ 18-9B-8 and 18A-4-5, as well as breach of contract and denial of due process because the pay raises were eliminated without notice and a hearing. The Court found that West Virginia Code § 18A-4-5 did not apply because the pay raise had only been proposed and not implemented, so there was no reduction of funds from the prior year. Further, the Court found no violation of West Virginia Code § 18-9B-8. The Court also rejected the breach of contract and property interest claims as the county could not be bound by a proposed budget that was never approved by the State Board. *See Id.* There was no discussion of the notice and hearing arguments in the decision. However, the Court affirmed the lower court's ruling granting partial summary judgment ". . . based upon a finding that the County Board had not violated the constitutional, statutory, or contractual rights of its

professional employees by not implementing the previously approved salary increase.” *Id.* at 342, 328. While this case is not directly on point because it did not concern the reduction of benefits already in the employees existing contracts, it gives at least an example of State-ordered budget revisions that occurred late in a year which were ultimately upheld.

Neither party has analyzed Article 9B, or addressed many of the statutes contained therein, in their post-hearing proposals. West Virginia Code § 18-9B-1 et seq. pertains to the authority, duties, responsibilities, and powers of the State Board of School Finance, which are now conferred upon the State Board of Education/State Superintendent. These statutes are very different from West Virginia Code § 18A-4-5b. Upon review of Article 9B in its entirety, the undersigned concludes that West Virginia Code § 18-9B-1 et seq. confers no “emergency powers” upon the State Board of Education/State Superintendent or Respondent. However, the authority granted by West Virginia Code § 18-9B-1 et seq. is great. For instance, West Virginia Code § 18-9B-17 states, “[a] county board of education and a county superintendent shall comply with the instructions of the State Board of School Finance and shall perform the duties required of them in accordance with the provisions of this article.” *Id.* West Virginia Code § 18-9B-18 states, “[t]he board of finance shall enforce the requirements of and its regulations issued under this article. The board may issue orders to county boards of education requiring specific compliance with its instructions. If a county board fails or refuses to comply, the board may proceed to enforce its order by any appropriate remedy in any court of competent jurisdiction.” *Id.* Further, West Virginia Code § 18-9B-19 states, “[t]he board of finance may withhold payment of state aid from a county board

that fails or refuses to comply with the provisions of this article or the requirements of the state board made in accordance therewith.” *Id.* These powers are *not* limited to times of emergency. Further, the undersigned can find no time constraints upon these powers that would limit their application only to those times before the expiration of the statutory notice and hearing time lines. Article 9B essentially grants the State Board of Education/State Superintendent the authority to shut down a county board of education. A county board cannot operate without a budget approved by the State Board, the State Board can require county boards to revise their budgets, and can enforce compliance with its orders. Accordingly, the undersigned must conclude that the legislature did not intend to limit the State Board/State Superintendent’s authority pursuant to West Virginia Code §§ 18-9B-8, 18-9B-1 et seq. only to those times before the expiration of the notice and hearing time limes set forth in the other statutes. In this case, the State Superintendent ordered Respondent to reduce employee contract terms. While the undersigned is sympathetic to Grievants’ case, and finds it ridiculous that all of this happened on the afternoon of the last day of the school year without affording them notice and an opportunity to be heard, it appears that the Respondent had to comply with the order of the State Superintendent. However, ultimately, Respondent was responsible for the disastrous financial condition that triggered the State Board/State Superintendent’s actions. As such, and given the very unique circumstances that existed in this case, the undersigned must conclude that Respondent properly complied with a lawful directive from the State Superintendent when it reduced Grievants’ employment contract terms. Therefore, this grievance is granted in part, and denied in part.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. West Virginia Code §18A-4-5b sets forth the circumstances under which a county board of education may reduce local salary supplements for its employees, and states, in part, as follows:

. . . Further, uniformity shall apply to all salaries rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county: Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the State Board prior to making such reduction. . . .

2. "Where a county has a property tax base which does not increase in assessed value at a rate commensurate with inflation so that there is a decline in revenue relative to expenses and a local school board is forced to choose between eliminating a local pay supplement for teachers or curtailing its educational programs for children, the local board is confronted, in that event, with 'events over which it has no control' within the contemplation of W. Va. Code, 18A-4-5 [1969] and may cancel the

teacher supplement.” Syl., *Newcome, et al., etc. v. The Bd. of Educ. of Tucker County, et al.*, 164 W. Va. 1, 260 S.E.2d 462 (1979).

3. “In general, the essential elements of an emergency are that the condition be unforeseen or unanticipated and that it call for immediate action.” Syl. Pt. 3, *Randolph County Bd. of Educ. v. Scalia, et al.*, 182 W. Va. 289, 387 S.E.2d 524 (1989).

4. “A fiscal emergency may arise because adequate provision was not made in a budget, even though the purpose for which the funds are needed was foreseeable when the budget was adopted. In such a case, before an emergency can be found, it must be shown that the amount placed in the budget was reasonable in light of all of the attendant circumstances, including prior budgetary experience.” Syl. Pt. 4, *Randolph County Bd. of Educ. v. Scalia, et al.*, 182 W. Va. 289, 387 S.E.2d 524 (1989).

5. West Virginia Code §18-9B-8 addresses the power of the State Board of Education/State Superintendent to require county boards to revise their proposed budgets, and states as follows:

If the board of finance finds that the proposed budget for a county will not maintain the proposed educational program as well as other financial obligations of their county board of education, it may require that the budget be revised, but in no case shall permit the reduction of the instructional term pursuant to the provisions contained in section fifteen [§ 18-5-15], article five of this chapter nor the employment term below two hundred days. Any required revision in the budget for this purpose may be made in the following order:

(1) Postpone expenditures for permanent improvements and capital outlays except from the permanent improvement fund;

(2) Reduce the amount budgeted for maintenance exclusive of service personnel so as to guarantee the payment of salaries for the employment term; or

(3) Adjust amounts budgeted in any other way so as to assure the required employment term of two hundred days and the required instructional term of one hundred eighty days under the applicable provisions of law.

W. Va. Code § 18-9B-8.

6. County boards of education and county superintendents are required by law to comply with the instructions of the State Board of Education/State Superintendent with respect to revising their proposed budgets. See W. Va. Code § 18-9B-17. Further, the State Board of Education/State Superintendent may enforce compliance with their orders in the court system, and may withhold state aid for noncompliance. See W. Va. Code §§ 18-9B-18, 18-9B-19.

7. Grievants proved by a preponderance of the evidence that Respondent's elimination of their local salary supplements was improper and violated West Virginia Code § 18A-4-5b.

8. Grievants failed to prove by a preponderance of the evidence that Respondent violated the notice and hearing provisions of the West Virginia Code when it reduced their contract terms on June 30, 2014, upon order of the State Superintendent.

Accordingly, this Grievance is **GRANTED IN PART**, and **DENIED IN PART**.

Respondent is hereby **ORDERED** to restore the \$600 salary supplements for those Grievants herein who were denied the same for the 2014-2015 school year, plus interest.

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: March 10, 2015.

**Carrie H. LeFevre
Administrative Law Judge**