JERRY SEXTON, .

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Grievant, .

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v. . Docket No. 94-03-044

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BOONE COUNTY BOARD OF EDUCATION, .

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Employer. .

D E C I S I O N

Jerry Sexton (hereinafter Grievant) filed this complaint against his employer, the Boone County Board of Education (hereinafter Board), sometime on or around November 1993. His claim has proceeded to level four of the Grievance Procedure for Education Employees, W.Va. Code §18-29-1 et seq., by virtue of appeal dated February 4, 1994. Grievant's substantive claim at issue herein is set forth below:

> Grievant is employed as a custodian. He is currently assigned to Van Elementary School for one-half of the work day and to Scott High School for the remaining half of the work day. Immediately prior to the 1989-1990 school year, Grievant was assigned full-time to Van Elementary. In the spring of 1989, he was placed on the transfer list. He was to remain at Van Elementary for half the working day and to be placed at another location for the remainder of the working day. Ultimately, Grievant was placed at Scott High School forthe remaining half of the day. He has continued working half a day at Van and half a day at Scott through to the present.
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> Grievant has learned that he was due mileage expense for travel between the two schools during [an] inservice at the beginning of the 1993-1994 school year. On October 12, 1993, Grievant turned [sic] a Travel Expense Claim for the months of August and September 13, 1993. On October 26, 1993, Superintendent Arvon denied Grievant's request for payment. Within a few days, Grievant filed a grievance seeking compensation for travel expenses retroactive to September 1989.

The following findings of fact are deduced from the record developed at level four.

Findings of Fact

1. Grievant is employed by the Board as a custodian.

2. Grievant was assigned to Van Elementary School full-time during the 1988-1989 school year.

3. At the end of the 1988-1989 school year, Grievant was the subject of a reduction in force with respect to one half of his position. Because this action took place in the spring of 1989, Grievant was placed on the transfer list for future assignment.

4. At the beginning of the 1989-1990 school year, Grievant bid on and received a half-time position as a custodian at Scott High School. As a result, Grievant worked half of the day at Van Elementary School and half of the day at Scott High School.

5. For the 1989-1990 school year, Grievant had one contract of employment which listed Van Elementary School and Scott High School as his areas of assignment.

6. Grievant drives fourteen miles every day from Van Elementary to Scott High School.

7. During an inservice meeting in August 1993, Grievant was informed by the Executive Secretary of the West Virginia School Service Personnel Association that service personnel who travel in the performance of their jobs have received mileage reimbursement from the Board.

8. The Board has a practice of reimbursing employees for travel expenses who are full-time employees and who have positions which require travel throughout the regular course of the work day (itinerant positions).

9. On October 12, 1993, Grievant submitted a Travel Expense Claim Form to the Board for reimbursement of mileage covering the period of August 27 to September 21, 1993. This request was denied.

Discussion

Grievant contends that he is entitled to travel reimbursement for the mileage he drives from Van Elementary School to Scott High School because he is a full-time employee who is required to travel as a condition of his employment. He cites to four State Superintendent of Schools' opinions in

support of this proposition. The Board denies that Grievant is entitled to reimbursement for travel expenses on the basis that he is not a full-time, itinerant employee. It contends that Grievant actually holds two half-time positions instead of one full-time position; therefore, he is no more entitled to be reimbursed for travel than someone who simply leaves home everyday to drive to work.

The Undersigned is unaware of any statutory provision related directly to this issue. The four State Superintendent of Schools' opinions relied upon by Grievant as support for his argument are entitled to great weight unless shown to be clearly wrong. Wass v. Ritchie Co. Bd. of Educ., Docket No. 43-87-206-3 (Oct. 31, 1988). On December 9, 1993, Kenneth Legg, Executive Secretary of the West Virginia School Service Personnel Association, requested an opinion from the State Superintendent of Schools on the exact issue in this case. (See footnote 1) By letter opinion dated December 22, 1993, Victor A. Barone, Director of Legal Services, responded to Mr. Legg's request in the affirmative, citing to three previous Superintendent's interpretations. Mr. Barone's answer was in response to a hypothetical scenario which contained the same facts at issue in this case.

The State Superintendent's opinions referred to in the December 22, 1993 letter from Mr. Barone addressed different facts than those at issue in the instant case. The opinion dated April 28, 1992, stated that a teacher who is required to travel from the school where he/she teaches to a school where he/she coaches pursuant to an extra-curricular contract of employment is entitled to travel reimbursement. A May 14, 1992 opinion concluded that a bus operator who finished his afternoon run and then traveled toanother school to perform custodial duties was also entitled to travel reimbursement. Finally, in an opinion dated May 10, 1982, it was again reiterated that an itinerant employee (an aide) was entitled to travel reimbursement for the distance traveled between schools during the same work day. None of these opinions referred to or interpreted any statutory provisions in support of the conclusion that travel reimbursement was warranted. Upon a review of these opinions, it cannot be determined that they are clearly wrong.

In Grievant's case, he is employed as a full-time custodian under one contract of employment which sets forth two separate areas of assignment. He does not have two separate or distinct **jobs** as the Board contends. The mere fact that he was reduced to part-time at the end of the 1988-1989 school year does not change his employment relationship with the Board. In fact, Grievant never worked a part-time schedule because he was assigned to Scott High School at the beginning of the 1989-1990 school year. The evidence indicates that Grievant was entitled to a full-time assignment

at the time of his reduction of work hours, based upon his seniority. To conclude that Grievant actually maintains two custodial positions, as the Board would have the undersigned find, puts form over substance. Further, the mere fact that Grievant was required to bid on the Scott High School assignment does not compel a finding that he has two part-time jobs. Notice is taken that service personnel are often required to bid on or verify in some manner that they will accept an assignment before that assignmentis formalized, even though the employee has a legitimate right to such assignment. Employees may waive their rights to employment benefits.

Grievant is, in essence, an itinerant custodian who is required to travel as a routine part of his job. Therefore, consistent with the State Superintendent of Schools' opinions and the established practice of the Board, he is entitled to reimbursement for the travel which he performs during the split in his shift. The Board has failed to establish any rational basis upon which to determine that the State Superintendent's opinions on this issue are clearly wrong or that its own practice should not be applied to Grievant. The issue of damages must now be addressed.

Grievant claims that he is entitled to travel reimbursement retroactive to September 1989, the point in time when he was first assigned to work at both Van Elementary and Scott High Schools. He contends that he only became aware of his entitlement to reimbursement at an inservice meeting held sometime on or before the beginning of the 1993-1994 school year. The Board contends that the remedy in this case should be limited to Grievant's requests made in October 1993 because the grievance was not filed in a timely fashion with regard to the requested relief back to 1989.

This Grievance Board has previously ruled that generally, when a grievance is determined to be timely filed because it is based upon a continuing practice, a grievant still may not recover backpay or other damages except for the period of ten or fifteen days (See footnote 2) (depending upon whether the employee is a state or education employee) prior to the filing of the initial complaint if he/she waited an extended period of time with which to file said complaint after the continuing violation originated. See, Adkins v. W.Va. Div. of Highways, Docket No. 93-DOH-146 (Sep. 3, 1992). In this case, Grievant has been aware of the fact that he was not being reimbursed for travel expenses for over four years. The length of delay between the date he began working as a itinerant employee and the date on which he filed the within complaint justifies a limitation of the remedy awarded consistent with the approach utilized in Adkins. Grievant was unaware that he had a legal claim to travel reimbursement until he discovered such at the August 1993 inservice meeting, not of the facts upon

which that claim may be based. Therefore, it is inappropriate to apply a discovery rule to the instant claim to allow him to recover damages back to the point when the damages originated. This case involves the issue of a continuing practice and not an isolated violation. See, Spahr v. Preston Co. Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990).

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. Grievant is a full-time employee of the Board who is assigned to work at two schools during each work day. Therefore, consistent with the Board's established practice, he is entitled to be reimbursed for mileage for the distance traveled between the two schools.

2. Grievant is entitled to be reimbursed for mileage for the fourteen miles he traveled between Van Elementary School and Scott High Scott for each day he made that trip beginning with the date fifteen days preceding the filing of the instant grievance. Grievant is also entitled to be reimbursed for mileage for all present and future trips from Van Elementary to Scott High School.

Accordingly, this grievance is hereby **GRANTED** and the Board is **ORDERED** to reimburse Grievant for mileage consistent with the conclusions of law set forth above.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

June 22, 1994

Footnote: 1This official opinion was obviously requested as a result of this grievance having been filed because the facts

contained in the hypothetical scenario given are identical to the facts herein and because the date of the request is after the date the grievance was filed. However, this should not act to render the opinion at issue invalid.

Footnote: 2These time frames have been taken from the respective grievance procedure statutes wherein time periods have been established for the filing of grievances.