BETTY PIETRANTOZZI, .

Grievant, .

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v. . Docket Number: 94-27-130

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MERCER COUNTY BOARD OF EDUCATION, .

Respondent. .

DECISION

Ms. Pietrantozzi (hereinafter Grievant) filed this grievance pursuant to the provisions of West Virginia Code §18-29-1 et seq., on February 28, 1994. The grievance was denied at level one and a hearing was held at level two on March 22, 1994. Thereafter, a level two decision denying the grievance was issued on March 29, 1994. Level three of the procedure was bypassed and Grievant appealed to level four by appeal form dated April 5, 1994. After numerous attempts to schedule and conduct a level four hearing proved unsuccessful, the parties agreed that this Decision could be based upon the evidence adduced at level two. A briefing schedule was established and the case became mature on September 2, 1994.

The material facts are not in dispute and are set forth below as the Undersigned's proper findings of fact.

Findings of Fact

1. Grievant was hired as an Aide by the Mercer County Board of Education (hereinafter Board) in August 1971 for the 1971-1972 school year.

2. When Grievant was hired, she began working seven-hour days, 200 days per school year.

3. Grievant signed a contract of employment with the Board in August 1975 which contained her stated terms and conditions of employment. This contract stated that she was to work an employment term of 200 days per year, seven hours per day.

4. In 1983, Grievant again entered into an employment contract with the Board. This contract was also for a period of 200 days; however, the contract did not contain reference to the number of hours per day Grievant was required to work. Grievant was to be paid $10,100.00 for the 200-day term.

5. The 1993 contract was a form contract created by the Legislature identical to the form contained in W. Va. Code §18A-2-5.

6. Grievant has been required to work beyond a seven-hour day starting with the 1986-1987 school year. From that point, her required hours of work have increased gradually each succeeding year. Grievant's work schedule for the 1993-1994 school year has been from 7:55 a.m. to 3:20 pm., with one-half an hour for lunch. Therefore, Grievant has been required to work seven hours and twenty-five minutes per day for the 1993-1994 school year.

7. Grievant filed the instant complaint on February 28, 1994.

Discussion

Grievant contends that she is entitled to work a seven-hour day based upon the terms of the initial contract of employment she executed with the Board. Further, she argues that the 1983 contract which she signed did not operate to extinguish this right. Grievant relies upon the following language of Code §18A-2-5:

> The use of this form shall not be interpreted to authorize boards to discontinue any employee's contract status with the board or rescind any rights, privileges or benefits held under contract or otherwise by any employee prior to the effective date of this article.

Because she has been required to work almost a seven and one-half hour day, she maintains that the Board has illegally reduced her rate of pay without her written consent according to W. Va. Code §18A-4-8. Grievant requests that she be reinstated to a seven-hour per day work schedule and be paid back pay for the 1993-1994 school year.

The Board asserts as an affirmative defense that this grievance was untimely filed because Grievant began working over seven hours per day in 1986 but did not file a grievance until 1994. On the merits, it contends that it has not violated Code §18A-4-8. It maintains that it adopted a policy on February 25, 1982, which provides that the length of workday for all service employees is eight hours. It maintains that Grievant acquired no right to indefinitely work a seven-hour work day based upon the contract entered into prior to 1983 because those contracts haveexpired. Grievant contends that the grievance was timely filed because the violation was a continuing one.

W. Va. Code §18-29-4(a)(1) states as follows:

> Before a grievance is filed and within fifteen days following the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. (Emphasis added).

Under this Code provision, a grievance will not be held untimely if the practice giving rise to the grievance is a continuing one. In the instant case, it is determined that such is the case. Therefore, the Board's affirmative defense must be denied.

W. Va. Code §18A-2-6 (1969), states in pertinent part,

> After three years of acceptable employment each auxiliary and service personnel, at the end of his contractual period of employment, shall be notified in writing on or before the first day of May in the year in which such employment shall terminate if he is not to be reemployed for the ensuing year.

In 1973, the Legislature amended W. Va. Code §18A-2-6, to read as follows:

> After three years of acceptable employment, each auxiliary and service personnel who enters into a new contract of employment with the board shall be granted continuing contract status. 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 the cause or causes, to the employee . . .
>
> Those employees who have completed three years of acceptable employment as of the effective date of this legislation shall be granted continuing contract status.

The is no evidence in the record to indicate whether Grievant executed a contract with the Board upon being hired in 1971; however, it is clear that she was under contract with the Board at the beginning of the 1975-1976 school year to work as an Aide I, seven hours per day, for 200 days. These were material terms of her contract. Thereafter, Grievant achieved continuing contract status with the Board beginning with the 1978-1979 school year under the same terms contained in the 1975 contract.

In 1983, the Legislature created a form contract and incorporated it into W. Va. Code §18A-2-5; this form contract was to be used by all boards of education when hiring new service personnel. As noted by Grievant, the Legislature stated that a board's use of this form contract "shall not" operate to "rescind" any contractual rights already held by presently employed service personnel. Grievant had a contractual right in 1983 to work 200 hundred seven-hour days. The contract she then signed in 1983 did not contain a term relating to her daily required hours of work. Therefore, under the applicable language of Code §18A-2-5, Grievant legally maintained the right to work a seven hour day. The 1983 contract could not operate to rescind this material term of her employment absent her agreement.

Based upon the rights Grievant received under her 1975 contract and the provisions of W. Va. Code §18A-4-8, the Board has, in effect, improperly reduced her rate of pay by requiring her to work extended hours. Code §18A-4-8 states, in pertinent part,

> No service employee, without his written consent, may be reclassified by class title, nor may a serviceemployee, without his written consent, be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years.

Therefore, the Board has continually violated Code §18A-4-8 by requiring Grievant to work a longer daily schedule without increasing her salary or rate of pay.

With regard to Grievant's request for monetary damages, it is determined that her request for back pay be limited to a period of fifteen days preceding her filing of her claim consistent with this Grievance Board's decision in Allman v. Harrison Co. Bd. of Educ., Docket No. 89-17-215 (Jun. 29, 1990).

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. After a school service employee has been employed for three years by a board of education and it is determined that their performance is acceptable, said employee acquires continuing contract status and the terms of his/her contract must remain the same until legally modified or terminated pursuant to W. Va. Code §18A-2-6.

2. With regard to the case at hand, the contracts executed by the board and Grievant in 1983, pursuant to W. Va. Code §18A-2-5, did not operate to "rescind" any contractual rights that she maintained.

3. Here, the Board has violated W. Va. Code §18A-4-8 in allowing Grievant to be placed on a daily work schedule which consisted of more than a seven hour day because this condition of employment is inconsistent with the contractual rights Grievant received pursuant to her contract of employment of 1975.

4. Grievant's request for back wages is limited to the period of fifteen days prior to the filing of the instant complaint pursuant to this Grievance Board's holding in Allman v. Harrison Co. Bd. of Educ., Docket No. 89-17-215 (Jun. 29, 1990).

Therefore, this grievance is hereby **GRANTED**. Further, it is hereby **ORDERED** that Grievant be returned to a seven-hour per day work schedule and that she also be paid back pay for the period of fifteen days prior to February 28, 1994, representative of the amount of time she worked greater than seven hours per day during the 1993-1994 school year, less any appropriate deductions.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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

December 29, 1994