LOUISE SMITH, .

Grievant, .

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v. . Docket Number: 95-29-013

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MINGO COUNTY BOARD OF EDUCATION, .

Respondents. .

D E C I S I O N

Louise Smith (hereinafter Grievant) filed this grievance on or about November 16, 1994, pursuant to the provisions of West Virginia Code §§18-29-1, et seq., against her employer, the Mingo County Board of Education (hereinafter Board). Grievant's statement of grievance reads as follows:

Under W. Va. Code §18A-4-8, no service employee shall be required to report to work more than five days a week. My work schedule has included a Monday thru [sic] Sunday (including holidays) work assignment for the past 14 years. I ask that my schedule be changed to reflect a Monday thru [sic] Friday regular work week and that I be paid for the previous 14 years of weekends and holidays (18A-4-8a) that I have worked.

Her claim was denied at level one on November 21, 1994, and she appealed to level two. Thereafter, a hearing was held before theBoard on November 29, 1994. By decision dated December 5, 1994, the Board granted Grievant a Monday through Friday work schedule but denied her request for back pay.

Grievant appealed to level four on January 10, 1995, and the case was set for hearing on

February 16, 1995; however, the Board's counsel moved for a continuance of the hearing and this request was granted. By letter dated April 25, 1995, Grievant's representative notified the Undersigned that the parties wished to submit the case for decision based on the record developed at level two. Further, four stipulations of fact were agreed upon by the parties. A briefing schedule was established and the case became mature for decision on May 22, 1995, after receipt of Grievant's Proposed Findings of Fact and Conclusions of Law. The Board chose not to submit any brief in this matter.

The parties have stipulated to the following facts:

Stipulations of Fact

1. Grievant has worked as a Custodian III for the past fourteen years for Mingo County Schools.

2. Grievant has worked during weather conditions that require Saturdays, Sundays and holidays in order to maintain the furnace at Gilbert Grade School.

3. Grievant's work records from November 7, 1994, to April 14, 1995, will be made a part of the record. (Joint exhibit 1). The exhibit is a reflection of Grievant's actual hours worked and does not reflect what she was actually paid.

4. Grievant was paid for 45 hours a week from November 7, 1994, to the present time.

The following additional facts have been deduced from the record in the case:

Findings of Fact

1. Because Grievant maintains the furnace at Gilbert Elementary School, she must work abnormal hours based upon fluctuations in the outside temperature. Therefore, Grievant works a flexible schedule in that she sets her own starting and ending work hours.

2. The furnace is not used at Gilbert Elementary School every day of the year. Grievant is only required to work Saturdays, Sundays and holidays during the portion of a school year when the furnace is needed.

3. Grievant normally works from 7:00 a.m. until 11:30 a.m. and then from 12:30 p.m. until 5:00 p.m. on each weekday. Grievant's daily starting and ending times vary from as early as 6:30 a.m. in the morning, to as late as 6:00 p.m. in the evening.

4. When Grievant works on Saturdays, Sundays or holidays, she works at least two hours per day.

5. Prior to November 21, 1994, Grievant filled out time sheets for payroll purposes indicating that she worked an eight-hour day, five days per week, even though she actually worked approximately nine hours per day.

Discussion

Grievant contends that the Board has violated both W. Va. Code §§18A-4-8 and 8a. She asserts that she has not been paid properly for the holiday and weekend hours she has worked since August 24,1981, and requests back pay, plus interest, for that entire period. The Board has presented no legal argument in defense to Grievant's position on appeal to level four. The only question to be answered is whether Grievant is entitled to back pay for the hours she claims she worked on each Saturday, Sunday or holiday since she was hired in 1981.

W. Va. Code §18A-4-8, dealing with school service employees' salaries and benefits, states in pertinent part,

No service employee, without his agreement, shall be required to report to work more than five days per week and no part of any working day may be accumulated by the employer for future work assignments, unless the employee agrees thereto.

Should an employee whose regular work week is scheduled from Monday through Friday agree to perform any work assignments on a Saturday or Sunday, the employee shall be paid for at least one-half day of work for each such day he reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, he shall be paid at least a full day of work for each such day.

With regard to Grievant having working on recognized holidays, W. Va. Code §18A-4-8a, states "Any service employee required to work on any legal school holiday shall be paid at a rate one and one-half times the employee's usual hourly rate."

According to Grievant's unrebutted testimony, she has had a weekly schedule which requires her to work at least 45 hours per week or nine hours per day, Monday through Friday. The parties have stipulated to the fact that Grievant has been paid for 45 hours of work each week since November 7, 1994. However, there is no evidence to support the conclusion that she was not paid the same salary

prior to that date. In fact, the record does notcontain any information as to Grievant's actual salary during any point in time. Therefore, Grievant cannot establish that she is entitled to any back wages in this regard as she has not established that she has not been paid for the number of hours she has worked during the normal, Monday through Friday workday.

However, Grievant has established, pursuant to the clear and unambiguous language of Code §18A-4-8, that she is entitled to payment for the hours that she has been required to work on Saturdays and Sundays. What is not clear is the number of weekend days that she has worked and the number of hours she has worked on those days, during her fourteen-year period of employment. The record only establishes that Grievant has worked Saturdays and Sundays from November 21, 1994, to April 14, 1995, after she filed this grievance. Grievant worked less than three and one-half hours on each of the Saturdays and Sundays during this period, except for January 29, 1995, when she worked three and one-half hours. Based upon the concept that a grievant must establish his/her damages to a reasonable certainty, it is hereby determined that Grievant is only entitled to back wages from the time period of November 21, 1994, to April 14, 1995, calculated in the amount set forth in Code §18A-4-8. Grievant has likewise not established that she has worked any recognized holidays during this, or any other period, for which she has not been paid.

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

Conclusions of Law

1. Grievant has established that the Board has violated W. Va. Code §18A-4-8, by not paying her additional salary for the Saturdays and Sundays she worked between November 21, 1994, and April 14, 1995.

Therefore, this grievance is **GRANTED IN PART**. The Board is hereby **ORDERED** to pay grievant back wages, plus interest, pursuant to the discussion in this Decision, for the hours she worked during the weekends during the period between November 21, 1994, and April 14, 1995. Based upon the level two decision, it is assumed that Grievant is no longer required to work Saturdays and Sundays. If Grievant is to work one of these days, she is to be paid accordingly.

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

of Mingo 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

July 6, 1995