SHAROL J. MAYNARD

v. **Docket No. 94-29-580**

MINGO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Sharol Maynard, states that the Mingo County Board of Education ("MCBOE") violated W. Va. Code §18-5-18a when they required her on March 21, 1994, "to supervise and instruct another teachers [sic] class" as well as her own, for a total of thirty-eight students. The remedy Grievant seeks is for MCBOE to cease combining classes and to compensate her for the overage of students. This grievance was denied at Levels I and II and waived at Level III. The parties agreed to submit this case on the record at Level IV and the grievance became mature for decision on October 28, 1994 after the submission of findings of fact and conclusions of law. (See footnote 1)

Findings of Fact

The record in this case is limited and the facts are undisputed:

1. Grievant is a second grade teacher at Dingess Grade School ("DGS").

2. On March 21, 1994, Principal Hugh Talbert assigned the Grievant to teach both second grade classes at DGS, for a total of thirty-eight students.

3. Mr. Talbert took this action because the other second grade teacher was absent, and he had been told by administration at a principals' meeting he could not call in a substitute unless there was a three-day need.

4. Mr. Talbert stated his decision was based on the safety needs of the children. He noted he had followed this practice in similar instances on a school-wide basis.

5. On May 25, 1994, Assistant Superintendent Johnny Fullen, the Superintendent's designee at Level II denied the grievance. The rationale for this denial was:

> The Board is now operating in a deficit situation and funds are insufficient to pay for substitute teachers. Because of the impending deficit, the situation with regard to substitute teachers has been discussed with the Board of Education and they are in

> agreement that Mingo County should cut back on substitute teachers when it is possible. If a principal assigns a teacher additional students within his school and it is done on a equitable basis throughout the school then he/she is exercising the authority granted to him under code 18A-2-9, Duties and Responsibilities of School Principals/Assistant Principals. With regard to substitutes, the Principals has [sic] been instructed to cut back on professional and service personnel. As you can see, this is being done on a equal basis to all personnel in Mingo County. With regard to section of the code 18A-4-10 that states if the funds cannot be paid in the fiscal year, that the remainder shall be paid on or before the thirty-first day of August from the budget of the next fiscal year. The state aide funding for the 1994-95 is not sufficient to cover substitute pay.
>
> Therefore, this grievance is denied based upon lack of funds anticipated for the 1994-95 school year.

6. MCBOE presented no evidence at hearing concerning the financial status of the Mingo County School system.

Discussion

W. Va. Code §18-5-18a mandates that a second grade class will have no more than twenty-five students unless specifically authorized by the State Superintendent after application from the county board of education and only then in "the event of extra-ordinary circumstances." The maximum overage permitted in a second grade classroom is three. Id. If a teacher is required to have an overage, W. Va. Code §18-5-18a requires her/him to be paid additional compensation for each student over the maximum specified by law. Starr v. Lincoln County Bd. of Educ., Docket No. 94-22-125 (Oct. 20, 1994); Burdette v. Kanawha County Bd. of Educ., Docket No. 20-88-263 (Mar. 16, 1989).

In this case it is clear W. Va. Code §18-5-18a was violated by the Respondent, and the Grievant had an overage of thirteen students on March 21, 1994. Respondent defended its action with two theories both of which dealt with why a substitute could not be hired, not with why they refused to pay the Grievant. First, Respondent argues that the overage is permitted in this instance because they are in a deficit situation and have insufficient funds to pay for substitute teachers. Respondent also argues they cannot follow W. Va. Code §18A-4-10, which allows drawing from the next fiscal year to pay for substitutes if the current funds areinsufficient because "state aide funding for the 1994-95 is

not sufficient to cover substitute pay." Level II Dec.

Respondent's first theory, insufficient funds, must fail. In Randolph County Bd. of Educ. v. Scalia, 387 S.E.2d 524 (W. Va. 1989), the Randolph County Board of Education ("RCBOE") argued they had the right to require school guidance counselors and librarians to substitute for absent teachers because these assignments were the result of an emergency authorized under W. Va. Code §18A-4-10 (See footnote 2) . RCBOE stated the system was in a financial crisis because the budget for substitute teachers had been spent, and thus they had no choice but to require other personnel to fulfill these teaching duties. Id. at 526-27. Much evidence was presented concerning RCBOE's financial status, amount budgeted for substitute teachers, and expected income for the following year. The W. Va. Supreme Court held the Board did not provide adequately for substitute teaching expense, nor did the Board prove that there was a fiscal crisis. Id. at 528.

In the instant case, MCBOE presented no evidence about their budgeting for substitute teachers or the school system's financial situation for either the 1993-94 or 1994-95 school year other than unsubstantiated conclusions made in the Level II decision. Thus, no fiscal emergency or crisis was demonstrated. (See footnote 3)

Respondent also defended its action by saying that Principal Talbert's decision was authorized by statute and under W. Va. Code §18A-2-9 he had the authority to assign a teacher additional students. This argument must also fail. W. Va. Code §18A-2-9 states a principal is responsible "for the administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of" his school. However, Principal Talbert was not given a choice in this matter. He was not permitted to call a substitute unless there was an absence of at least three days. In essence, the Board dictated to Principal Talbert that no substitute could be called, thus limiting his ability to "plan" or "manage" the situation. Further, W. Va. Code §18A-2-9, while authorizing a principal to administer and supervise, does not grant a principal the right to violate another code section such as W. Va. Code §18-5-18a. Accordingly, Respondent's second argument must fail.

Conclusions of Law

1. In nondisciplinary matters the Grievant has the burden of proving his grievance by a preponderance of the evidence.

2. Grievant demonstrated Respondent violated W. Va. Code §18-5-18a when she was assigned an overage of thirteen students on March 21, 1994.

3. Respondent did not demonstrate that either W. Va. Code §§18A-4-10 or 18A-2-9 relieved them of the duty to follow the dictates of W. Va. Code §18-5-18a.

Accordingly, this grievance is **GRANTED**. MCBOE is directed to pay the Grievant 1/25th of her daily salary times the number of overage (13). See, Starr, supra.

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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 30, 1995

Footnote: 1Respondent did not submit further argument.

Footnote: 2Although not addressed by the parties, W. Va. Code §18A-4-10 does allow school administration, with the Board's approval, some discretion in deciding when a substitute is needed. This section states:

> *When an allowable absence does not directly affect the instruction of the pupils or when a substitute employee may not be required because of the nature of the work and the duration of the cause for allowable absence of the regular employee, the administration, subject to board approval, may use this discretion as to the need for a substitute where limited absence may prevail.*

Clearly this section is not helpful to the Respondent because this absence did "directly affect the instruction of pupils" and,

"the nature of the work" was such that a substitute was required.

Footnote: 3Lack of sufficient funding is, of course, a legitimate concern of many boards of education.