CAROLYN WILLIAMS, et al.,

v. Docket No. 94-30-1085

MONONGALIA COUNTY BOARD OF EDUCATION

DECISION

Grievants, Carolyn Williams, Edward Rice, Jimmie Headley, and Clayton Dalton, employed by the Monongalia County Board of Education (Board) as school service personnel, allege a violation of W. Va. Code §18A-2-6 when the Board modified the terms of a sick leave incentive policy without their consent and without proper notice. (See footnote 1) Grievants request payment of a bonus to all employees who would have been eligible had the terms of the policy not been amended.

The facts of this matter are not in dispute.

1. Consistent with W.Va. Code §18A-4-10a, the Board first offered its employees a Sick Leave Incentive Bonus Plan in 1985. This plan, developed to reduce absenteeism, offersa bonus at the end of the employment term for each unused day of personal leave accumulated by the employee during that term.

2. The benefits of the Board's Sick Leave Bonus Plan have fluctuated from year to year depending on available resources. A brief chronological review follows:

1985-86 Professional and service personnel were paid from monies remaining in their respective substitute line items of the budget.

1986-87 Professional personnel were paid from line item; service personnel received no monies as line item depleted.

1987-88 No incentive plan available.

1988-89 Professional and service personnel awarded money for each remaining sick leave day.

1989-90 Same as 1988-89.

1990-91 Professional and service personnel were awarded equal payment for all unused sick leave days. Employees with fewer than three days were not eligible to receive the bonus.

1991-92 Same plan as 1989-90.

1992-93 Same plan as 1989-90.

1993-94 Employees who used no more than five days of sick leave were eligible.

1994-95 No sick leave incentive program funded.

3. The amount paid under the plan has also fluctuated, depending upon available resources. The plan originally provided compensation of $15.00 per day and had increased to$24.50 per day.

4. Grievants used between six and nine and one-half days of sick leave during the 1993-94 school year.

5. The Board did not inform the employees of the change in eligibility requirements for the 1993-94 bonus incentive until spring 1994, following an end of the year budget review.

Grievants assert that during the 1993-94 school year they utilized sick leave and vacation leave in such a way as to retain eligibility for the incentive plan, utilizing the criteria in place during the 1992-93 school year. They argue that sick leave incentive plans are a benefit and to unilaterally terminate a benefit the Board must utilize the procedure outlined in W.Va. Code §18A-2-6.

Additionally, Grievants assert that the Board is prevented from altering the eligibility requirements of the sick leave incentive plan by equitable estoppel. Grievants acknowledge that this doctrine generally requires an affirmative assertion by the Board upon which they relied to their detriment; however, they propose that the Board's silence, in view of its past practice, reasonably led them to rely upon past eligibility requirements. Silence may be considered an affirmative assertion, Grievants argue, when an employer knows or should have known that said silence would be interpreted in this manner.

The Board responds that the Sick Leave Incentive Plan is a bonus, not a benefit, and it is not required to provide saidbonus ad infinitum, or to make changes under the procedure set forth in W.Va. Code §18A-2-6. If the Plan is found to be a benefit, the Board argues that there is no statutory prohibition to its elimination.

Both parties cite Hartman v. Mineral County Bd. of Educ. Docket No. 93-28-072 (July 27, 1993), reversed in the Circuit Court of Kanawha County, Jan. 21, 1994. (See footnote 2) The Board relies upon Hartman to distinguish a bonus from a benefit, which is part of the compensation package, and as authority to discontinue the incentive even if it is construed to be a benefit. Grievants cite the Circuit Court decision issued in Hartman as support for their position that sick leave incentive plans

are a benefit which must be terminated utilizing the procedure outlined in W.Va. Code §18A-2-6.

(See footnote 3)

W.Va. Code §18A-4-10a provides:

County boards of education are authorized to pay to their employees or to defined groups thereof, for the purpose of reducing absenteeism, a bonus at the end of an employment term for each unused day of personal leave accumulated by the employee during that employment term.

Whether such compensation be characterized as a bonus or a benefit, it is clearly not a portion of an employee's annual salary. Further, it is subject to a number of contingencies. The Board apparently determines whether it will be possible to pay an incentive bonus at the end of the year, dependent upon available funding. Evidence establishes that the amount paid has fluctuated over the years. Service personnel were not included in the plan in 1986-87; no bonus was awarded to professional or service employees for the 1987-88 school year. Qualifications to receive the bonus have also varied. It appears that some years no restrictions were placed on the number of days utilized to qualify for the bonus. In 1990-91, employees were required to maintain a balance of three sick leave days in order to qualify. In 1993-94 the bonus was awarded only to employees who had utilized no more than five days of sick leave.

This overview establishes that since its inception, the bonus plan has been offered subject to available funding. With less funding available in 1993-94, the Board narrowed the pool of qualified employees to those who had used no more than five days of sick leave. Although Grievants argue that they could have adjusted the use of their leave to qualify, presumably they were ill on the days they were absent and properly used the sick leave taken. Also, Grievants should have been aware of the variances in the bonus plan from year to year. Based upon an anticipation that the bonus would beawarded at the end of the 1993-94 school year, and with the knowledge that the criterion was subject to change, they were not restricted in adjusting the use of their sick leave as they suggest they could have done.

In conclusion, the Board did not discontinue the bonus plan in 1993-94; therefore, it was not required to amend Grievants' contracts to eliminate the benefit under Code §18A-2-6. Further, because the bonus or benefit had, since its inception, been awarded contingent upon the availability of funding, the amount, if any, and the qualifications for eligibility have changed from year to year.

Because Grievants have not previously objected to the variable nature of the bonus plan, it is presumed that it has been accepted as such without annual modification of their contracts. This history of varying availability and eligibility requirements also negates Grievants' argument regarding equitable estoppel. Accordingly, it cannot be determined that Grievants have proven that the Board's efforts to retain the bonus in some form has violated W.Va. Code §18A-2-6.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, the grievants bear the burden of proving the allegations of the case by a preponderance of the evidence. Taylor v. Putnam County Bd. ofEduc., Docket No. 89-40-429 (Sept. 21, 1989).

2. Grievants have failed to prove that a revision of the eligibility requirements for participation in the 1993-94 sick leave incentive bonus plan was a violation of W.Va. Code §18A-2-6, when the plan historically had varied benefits and requirements from the time of inception.

Accordingly, the grievance is DENIED.

DATED JUNE 28, 1995 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1Grievants filed individual complaints at level one. Their immediate supervisors lacked authority to resolve the issue and the grievances were denied at levels two and three. The matters were consolidated at level four.

Footnote: 2This matter involving the discontinuation of the incentive bonus plan, is currently pending decision by the West Virginia Supreme Court of Appeals.

Footnote: 3 W.Va. Code §18A-2-6 provides in pertinent part that a continuing contract 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, and the employee afforded the right to a hearing before a majority vote of the full membership of the board before the first day of April of the then current year. The contract may also be voided by the written resignation of the employee.