WILLIAM HARMON and THOMAS CHILES,

Grievants,

v. Docket No. 96-10-500

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, William Harmon, is the Attendance Director and Grievant, Thomas Chiles, is an Attendance Worker with the Fayette County Board of Education ("FCBOE"). They allege that FCBOE has violated W. Va. Code § 18A-4-2 by not paying them a $600.00 annual supplement for teachers who have more than twenty years of service. They seek as relief all salaries due them since the time they attained twenty years of service with the county, with the exception of the 1996-1997 school year.

The procedural history of this case is somewhat different than the norm. On September 5, 1996, Grievant Chiles wrote then Superintendent William Capehart to inquire about FCBOE's failure to pay him this supplement. To this inquiry he attached a February 6, 1990 opinion written by State Superintendent of Schools, Dr. Henry Marockie, which stated the $600.00 supplement for classroom teachers should be given to attendance workers. On September 11, 1996, Dr. Capehart approved this supplement for the 1996-1997 school year for Grievants.

This grievance was filed on September 20, 1996, because of Superintendent Capehart's failure to grant this supplement for prior years. On September 24, 1996, Associate Superintendent K. R. Carson asked Grievants to waive the grievance timelines due to Dr.Capehart's illness. (See footnote 1) **Grievants refused. On September 30, 1996, Mr. Carson, the then Interim Superintendent, wrote Dr. Marockie to see if he still recommended the payment of the supplement to attendance workers and requested his opinion about back pay.**

The grievance was denied at Level I on October 3, 1996. Grievants proceeded to Level II, and the grievance was granted at Level II by the Superintendent's Designee. This Decision was dated November 4, 1996, and received by Mr. Carson, who was again the Interim

Superintendent, on November 15, 1996. Pursuant to W. Va. Code § 18-29-3(t), Mr. Carson appealed the decision to Level IV, in a timely manner, on November 21, 1996.

On December 1, 1996, Mr. Carson met with Grievants to inform them he had received verbal notice from Dr. Marockie's office that nothing in the statute required the supplement to be paid to non- classroom teachers, and that he would be receiving a letter shortly instructing him to disregard the February 1990 letter. This promised letter was written on December 5, 1996, and received by Mr. Carson on December 12, 1996.

Shortly thereafter, Grievants wrote Mr. Carson, on December 6, 1996, alleging a "default" at Level II because the Level II decision had not been rendered within the time guidelines. Grievants continued this allegation at Level IV. After being assigned this grievance, the Undersigned Administrative Law Judge asked Mr. Carson, on December 11, 1996, to state his reasons for this appeal as required by W. Va.Code § 18- 29-3(t), and on December 16, 1996, Mr. Carson responded, essentially stating the Level II Decision was contrary to law and attaching Dr. Marockie's letter of December 5, 1996.

A Level IV hearing was scheduled on February 2, 1997, at which time the Undersigned was informed the Level II hearing tape could not be found. The Undersigned offered the parties the opportunity to hold additional hearings, if necessary, to present their case because of this problem. Fortunately, they were able to present their entire case at the one day hearing. As Grievants had won at Level II, the Undersigned placed the burden of proof on FCBOE. This case became mature for decision on February 20, 1997, the deadline for the parties' proposed findings of fact and conclusion of law.

After a careful review of the entire record, the Undersigned makes the following Findings of Fact.

Findings of Fact

1. Grievant Harmon began employment with FCBOE during the 1968-1969 school year. He became a school attendance worker on December 12, 1978, and the Director of Attendance during the 1989- 1990 school year. He has ten years of teaching experience.

2. Grievant Chiles began employment with FCBOE during the 1976-1977 school year. He became a school attendance worker duringthe 1981-1982 school year. He has remained in that

position continuously, with the exception of the 1986-1987 school year, when he was the assistant principal at Fayette Middle School. Grievant Chiles had eight years of teaching experience from Florida and Illinois before he came to FCBOE. He has five years of teaching experience with FCBOE.

3. Both Grievants' salaries are based on the teacher's salary scale utilizing their education and experience. As the Director, Grievant Harmon receives ten more days of pay a year than Grievant Chiles.

4. On September 5, 1996, Grievant Chiles wrote then Superintendent Capehart and requested the $600.00 supplement paid to classroom teachers with twenty years or more of experience. He included with his request the February 6, 1990 letter from Dr. Marockie which stated attendance workers are to receive the supplement because they work directly with school children.

5. On September 11, 1996, Superintendent Capehart issued a memorandum approving the $600.00 supplement for Grievants for the 1996-1997 school year. Dr. Capehart did not address the back pay issue.

6. Subsequently, this grievance was filed and proceeded through the grievance process.

7. FCBOE has paid the supplement to some professional educators who are not classroom teachers. These other employees are in a variety of positions, such as instructional specialist, special education specialist, and federal programs supervisor. FCBOE has never paid the supplement to an attendance worker before Dr. Capehart granted this increase to Grievants.

Discussion

The first issue to discuss is the alleged default at Level II. Grievants are correct that the Level II decision was issued beyond the statutory guidelines. W. Va. Code § 18-29-3(a) states:

> If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in

> **light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy granted so as to comply with the law and to make the grievant whole.**

"The Grievance Board has previously determined that when a grievant asserts a default has occurred, and the employer does not request a hearing at level four pursuant to W. Va. Code § 18-29-3(a), the appropriate procedure is for the grievant to seek relief in circuit court." Smith v. Bd. of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993).

Of course, that is not what happened here. FCBOE appealed to Level IV because it thought the Level II Decision was contrary to law, not because Grievants had alleged or won by default. Also Grievants did not allege default until approximately one month after the lower level decision had been rendered, and they foundout it might be in jeopardy through their discussion with Mr. Carson. In Blair v. Ford Motor Credit Co., 193 W. Va. 250, 253, 455 S.E.2d 809 (1995), the West Virginia Supreme Court cited Rule 55(b) of the West Virginia Rules of Civil Procedure and held default is only appropriate when the other side has failed to respond, defend, or plead. See Parsons v. Consol. Gas Supply Corp., 256 2d 758, 762 (W. Va. 1979). Here, a Level II hearing was held on October 9, 1996, and a Decision issued on November 4, 1996. There are no timelines stated in the grievance statute within which a grievant must file a default; that is because a default must be requested before the decision is rendered, otherwise the issue becomes moot.

Thus, Grievant's request for a default judgement based on the lateness of the Level II Decision is denied, as this default was requested after a Level II Decision had been rendered. However, Grievants should understand that this holding, in actuality, does them no harm. Where the lower level decision is favorable to a grievant, the established standard of review at Level IV requires the respondent to prove this decision is clearly wrong or contrary to law. This is the same standard that would be utilized if a default issue is brought to Level IV by the respondent.

The merits of the case must now be addressed. The salary supplement Grievants seek is discussed in W. Va. Code § 18A-4-2(b). That Code Section states:

> **Six hundred dollars shall be paid annually to each classroom teacher who has at least twenty years of teaching experience. (emphasis added).**

The definition of a classroom teacher is contained in W. Va. Code § 18A-1-1(c). This Code

Section first identifies professional educators as classroom teachers, principals, supervisors, and central office administrators. Subsection (1) defines a classroom teacher as:

> The professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity.

Although W. Va. Code § 18A-1-1 identifies classroom teachers, principals, supervisors, and central office administrators as professional educators, this Grievance Board has held that principals, supervisors, and central office administrators are not eligible to receive the supplement, as it was intended only for classroom teachers. Dayoub v. Hancock County Bd. of Educ., Docket No. 15-86-212-3 (Dec. 31, 1986). In Dayoub, Administrative Law Judge Nedra Koval held, after reviewing the two, above-cited Code Sections, that the meaning and language of the statute was clear and without ambiguity, and the only professional educators the Legislature intended to receive the supplement were classroom teachers.

The next issue to examine is where attendance workers and directors fit in this scenario. W. Va. Code § 18-8-3 requires counties to employ attendance workers. The county is to set the "special and professional qualifications for attendance directors and assistants as are deemed expedient and proper and are consistent" with the state board's regulations. The county board also sets the salaries to be paid. These workers have limitedrights as compared to other county employees as they may be removed by the county board, and this decision is final. Id. W. Va Code § 18-8-4 spells out the duties of attendance workers.

Neither the Attendance Worker nor Attendance Director title is listed in the definitions of professional or school service personnel identified in W. Va. Code §§ 18A-1-1 or 18A-4-8. They are not considered professional educators as defined in W. Va. Code § 18A-1-1(c). Attendance workers and directors are created by a separate statute, and their compensation is fixed separately by each county school board. FCBOE set the compensation for these positions, and listed the salary in the postings as "Teachers[’] salary based on education and experience." (See footnote 2)

Dr. Marockie's December 5, 1996 letter states:

> [I]t is important to note that the W.Va. [sic] Code §18A- 4-2 only grants the supplement to "classroom teachers". The term "classroom teacher" is defined by W.Va. Code § 18A-1-1 as follows; "The professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his

time in this capacity".

Therefore, nothing in the law specifically requires that the supplement be paid to school psychologists or to social service and attendance workers. In a letter dated February 6, 1990, our office stated the school counselors, school psychologist, social service and attendance workers and librarians were entitled to the supplement due to the fact that they work directly with pupils, as required by W.Va. Code 18A-1-1.

The letter of February 6, 1990 should be disregarded. It is now the position of our office that the only other employees who qualify for the supplement are librarians and school counselors. . . . The schoolaid formula allows for "classroom teachers" which includes librarians and school counselor. Any county who has been paying the supplement to school psychologists or social service and attendance workers has been doing so with county funds and not state funds.

Dr. Marockie, as the State Superintendent of Schools, is seen as the chief interpreter of school law. As such his interpretation of statutes is entitled to great weight unless it is clearly wrong. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994); Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Jerden v. Lewis County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993). His interpretation that this statute mandates the payment of the $600.00 supplement only to classroom teachers who have twenty years of teaching experience conforms with the exact wording of the statute and cannot be seen as "clearly wrong." Thus, Grievants are not entitled to the supplement.

Another issue which must be addressed is whether the February 6, 1990 opinion of Dr. Marockie was clearly wrong as the decision to grant Grievants the $600.00 for the 1996-1997 school year was based on this opinion. It is clear from the wording of the statute, which has not changed since 1990, and Dr. Marockie's reversal of himself, that the February 6, 1990 opinion was clearly wrong.

These above-findings do not mean FCBOE may require Grievants to return this supplement. Grievants received the $600.00 as the result of the September 1996 approval letter signed by Dr. Capehart, and this approval was outside the grievance process. It is not an issue raised by Grievants and is not a part of thegrievance before the Undersigned Administrative Law Judge. If FCBOE desires to continue paying Grievants this supplement

out of county funds it may, of course, do so.

Although not clearly pled, it appears Grievants raised a discrimination issue when they presented evidence that FCBOE pays the supplement to some professional educators who are not classroom teachers. W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievants have failed to establish a prima facie case. They are not similarly situated to any employee who receives the supplement. The identified employees who receive the supplement are all professional educators, and although FCBOE does not have to pay these additional employees this supplement, it may do so as long as these monies come from county funds. See Dr. Marockie's letter of Dec. 5, 1996.

No attendance worker or director with FCBOE receives the supplement. Grievants have different job responsibilities and are hired pursuant to another statute. Their salaries are set at the discretion of the county board, and they may be terminated without recourse, pursuant

to this statute. They do not teach, nor are they involved in the educational process. (See footnote 3) Although FCBOE could pay Grievant the supplement, it is not required to do so.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A grievant, in a non-disciplinary action, has the burden of proving his case by a preponderance of the evidence. Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. Default is only appropriate when the other side has failed to respond, defend, or plead. W. Va. Rules Civ. P. 55(b); See Blair v. Ford Motor Credit Co., 193 W. Va. 250, 455 S.E.2d 809(1995); Parsons v. Consol. Gas Supply Corp., 256 2d 758, 762 (W. Va. 1979).

3. Grievants are not entitled to default judgement as a Level II Decision had been rendered a month before the issue of default was raised.

4. W. Va Code § 18-8-3 requires counties to employ attendance workers. The county is to set the "special and professional qualifications for attendance directors and assistants as are deemed expedient and proper and are consistent" with the state board's regulations. The county board also sets the salaries to be paid. These workers may be removed by the county board, and this decision is final. Id. W. Va Code § 18-8-4 spells out the duties of attendance workers.

5. Neither the Attendance Worker nor Attendance Director is a professional educators as defined in W. Va. Code § 18A-1-1(c). Attendance workers and directors are created by a separate statute, and their compensation is fixed separately by a county school board.

6. The only professional educators the Legislature intended to receive the supplement were classroom teachers. See Dayoub v. Hancock County Bd. of Educ., Docket No. 15-86-212-3 (Dec. 31, 1986).

7. The State Superintendent of Schools is seen as the chief interpreter of school law. As such, his interpretation of statutes is entitled to great weight unless it is clearly wrong. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994); Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Jerden v. Lewis County Bd. of Educ., Docket No. 93-03- 034 (July 7, 1993).

8. Grievants did not demonstrate Dr. Marockie's interpretation of W. Va. Code § 18A-4-2, which does not require the payment of the $600.00 supplement to attendance workers or attendance directors, was clearly wrong as his interpretation closely tracked the language of the statute.

9. W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

10. Grievants failed to demonstrate a prima facie case of discrimination as they were not similarly situated to other employees receiving the supplement.

11. The issue raised in this grievance is whether Grievants are entitled to back pay. The $600.00 awarded to Grievants for the 1996-1997 school year is not an issue before this Grievance Board, and FCBOE's request to be allowed to seek the return of this money if it won, cannot be responded to in this forum.

Accordingly, this grievance is DENIED, and the Decision of the Level II Grievance Evaluator is reversed as clearly wrong.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 26, 1997

Footnote: 1

During September and October of 1996, Dr. Capehart was ill, and on sick leave part of the time before he resigned the position due to medical reasons. The Superintendent assigns the Level II grievance evaluator.

Footnote: 2

Grievants' contracts were introduced into the record. These documents did not state or infer Grievants were to be paid the classroom teachers' supplement.

Footnote: 3

Grievant did testify they occasionally are asked to talk to students about their jobs, and they do so. They have not otherwise taught any class on a regular or substitute basis.