KATHLEEN B. WADE,

Grievant,

v. Docket No. 97-10-047

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance alleging that "But for my reliance to my detriment upon the representation made to me by the Director of Personnel for the Fayette County Schools, I would have worked at least 133 days in 1994-1995." For a remedy, Grievant states, "I seek advancement on the salary schedule by one year of experience."

The matter was heard at Level II on December 19, 1996, after a waiving of timeliness by Grievant. An unfavorable decision was issued January 15, 1997. Grievant appealed to Level III. The Level III decision of January 21, 1997, was also unfavorable. Grievant then appealed to Level IV, January 22, 1997. The matter was submitted upon the record and became mature for decision with the submission of briefs by both parties, February 20, 1997.

DISCUSSION

This is the second of two grievances filed regarding Grievant's request to be given experience credit for the 1994-1995 school year. A year's teaching experience is awarded to the teacher who teaches 133 days or more during the school year. See Harkins v. Ohio County Bd. Educ., 179 W.Va. 373, 368 S.E.2d 224, (1988).

The first grievance was based upon Ms. Wade's claim and belief that she had taught in excess of 133 days. During the course of the grievance, it was determined that Grievant had worked only 131 days. This shortage by two days was critical. For salary purposes, she wished to be given credit for ten years teaching experience instead of nine. At a Level II hearing held on October 2, 1996, Grievant alleged that she had been misled by Respondent's Director of Personnel, Douglas Kincaid, about the number of days she had accumulated. If she had known of the shortage, she would have been able to achieve the 133 day requirement through more substitutions. (See footnote 1) The

change in allegations was determined by the Level II Hearing Examiner to be a new grievance and that it was necessary that it be refiled. Grievant did so on October 8, 1996.

At the Level II hearing of December 19, 1996, Grievant testified that she did not have a regular contract for 1994-95 school year and began as a substitute, teaching reading recovery at East End Elementary. This position plus other substitute work amounted to a total of forty-one days during the school year. On September 19, 1994, she began a regular 100 day contract, teaching kindergarten, working a full day every other day. (Level II hearing, Ex. No. 2) It was regarded as a half-time position. Grievant stated that around the middle of March, 1995, she consulted by telephone with Douglas Kincaid, Director of Personnel for Respondent, regarding her contract. Hertestimony was that she inquired, “How do I determine one-hundred-thirty-three days to receive a years credit?” (Level II transcript, page 22). Grievant states that Mr. Kincaid told her that the contract counted as one-hundred days. This, added to her 41days as a substitute, by her calculations, would give her 141, over the 133. There was no evidence that Mr. Kincaid examined the contract during this conversation. Grievant kept no written record or notes of the conversation.

It was this information from Douglas Kincaid that the Grievant contends misled her into believing that she had worked more than 133 days.

Douglas Kincaid testified at the Level II hearing for the Respondent. He remembered the conversation with the Grievant and that it took place during March of 1995. He testified that she asked how to calculate her years of experience. He replied that, “she would combine the number of days **that she worked** as a kindergarten teacher and that she would have to work enough days as a substitute to come up to 133 to get a year's experience.” (emphasis added) (See Level II transcript, page 32). He further stated that he explained to the Grievant that this contract was different from other half-time contracts that she had in the past where she worked a half day every day, and that “she would have to calculate the number of days that she worked”. (See Level II transcript, page 33.)

Without designating it as such, Grievant is asserting the doctrine of equitable estoppel. To prevail, she must show that there was a representation made or information given by Respondent upon which she relied, causing her to alter her conduct or change her position to her detriment. Ara v. Erie Insurance Co., 182 W. Va. 266, 387 S.E.2d 320 (1989).

She is alleging that misrepresentations in the form of incorrect information were made to her by respondent. However, a review of the evidence indicates conflicting testimony on that point. The

testimony of Mr. Kincaid would indicate that he correctly advised her. There are no other sourcesof information or documentation on this important point, no notes or accompanying memoranda. Her conduct after being advised by Mr. Kincaid is also inconclusive. Ms. Wade, although allegedly believing that she had accomplished the required 133 days, continued to accept substitute teaching assignments. She also turned some down. This provides no insight as to whether she accepted or refused assignments relying on Mr. Kincaid's statements, or simply worked when she wanted to. Respondent argues that this conduct is not consistent with Grievant believing she had already achieved 133 days. He argues that it would have been more consistent to turn down assignments after reaching that point. The undersigned believes it to be merely inconclusive.

Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). It is the opinion of the undersigned that this burden has not been met. I find there to be no evidence beyond the testimony of the Grievant that Respondent misled or gave incorrect information to her. I also find there to be no clear and convincing evidence that she relied upon the information given her or in any way changed her course of conduct to her detriment.

Accordingly, consistent with the foregoing, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant, during the 1994-1995 school year worked a total of 131 teaching days.
2. Included within the 131 teaching days are 41 days taught as a substitute teacher.
3. Also, included within that 131 teaching days are days taught under a contract to teach kindergarten half time. 4. Although designated as a one-hundred day contract, the actual number of days worked was 90.
5. In March of 1995, Grievant contacted Douglas Kincaid, Director of Personnel for Respondent and requested information for the interpretation of her 1994-1995 employment contract regarding the number of days it would count toward 133 needed to qualify for one year's teaching experience.
6. Subsequent to Grievant's discussion with Mr. Kincaid, she continued to accept assignments for substitute teaching.

CONCLUSIONS OF LAW

1. "One must work 133 days in order to receive credit for a year of teacher's experience for pay increment purposes". See Superindent's Interpretations 1966 (SDE) and October 1, 1968 (36). as cited in Harkins v. Ohio County Bd. Educ., 179 W.Va. 373, 368 S.E.2d 224, (1988).

2. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

3. Grievant has not proven by a preponderance of the evidence that Respondent through it's agent, Douglas Kincaid, misled Grievance or gave her information that was incorrect.

4. Grievant has not proven by a preponderance of the evidence that she relied upon the information provided by Mr. Kincaid.

Therefore, this grievance is hereby **DENIED**.

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

JAMES D. TERRY

Administrative Law Judge

DATE: July 29, 1997

Footnote: 1 *There was no testimony or evidence offered to corroborate or establish that substitute work would have been available beyond that which she performed.*