MARCIA KOBILY, et al.,

Grievants,

v. **DOCKET NO. 95-15-200R**

HANCOCK COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was remanded to level four by the Circuit Court of Kanawha County, West Virginia, on November 8, 1996, for "further proceedings consistent" with its Order of that date. Accordingly, a level four hearing was held in this Grievance Board's office in Wheeling, West Virginia, on June 26, 1997. The parties submitted proposed findings of fact and conclusions of law by August 14, 1997. For administrative reasons, this case was transferred to the undersigned administrative law judge on September 30, 1997.

The following findings of fact are appropriate in this grievance.

Findings of Fact

1. This grievance was initiated on February 16, 1995, by Grievants Marcia Kobily and Lois Robb on behalf of themselves and 153 service employees of the Hancock County Board of Education ("HCBOE"). The 153 employees signed prepared "sign-up sheets" indicating they wished to be part of this grievance. (See footnote 1)

2. The basis of the grievance was that the 1994-1995 HCBOE pay scale for service employees did not comply with the uniformity provisions of W. Va. Code § 18A-4-5b. 3. A level four decision was issued by Administrative Law Judge Nedra Koval on September 18, 1995, wherein ALJ Koval ruled that the 1994-1995 pay scale for service employees did not violate any statute and was not improper.

4. Also in the level four decision, ALJ Koval found that only Grievants Marcia Kobily, Don Sage, Sandra Stanley, Sharon K. Thoman, Margaret Wagoner, E. Ronald Stanley, Edward S. Chamberlain, Penny Dotson, Sandra Drury, Reida Lojszcyk and Debbie Hissom indicated in writing that they wished to appeal to level four. However, ALJ Koval failed to note that Lois Robb was specifically named, along with Marcia Kobily, as a grievant on the face of the level four appeal form.

5. The level four decision was reversed by Judge Charles E. King, Circuit Court of Kanawha County, on November 8, 1996. Judge King found "that the Hancock County pay grade scales do not comply with the uniformity requirements of W. Va. Code § 18A-4-5b. The scales do not provide for uniform increases based upon years of employment."

6. Grievants did not file grievances regarding the 1995-1996 or 1996-1997 pay scales for service personnel.

7. HCBOE interpreted Judge King's decision to be prospective only, and did not implement a pay scale which it believed complied with that Order until the 1997-1998 school year. Service employees of HCBOE have filed a separate grievance regarding the 1997-1998 pay scale, which is currently pending before this Grievance Board.

Discussion

Because this grievance was remanded to level four by Judge King specifically for the purpose of compliance with his Order, the issues to be addressed are limited. Since it has been decided by the circuit court that HCBOE's pay scale did violate the uniformity statute (W. Va. Code § 18A-4-5b), the only issues presented at this time are (1) what relief is appropriate and (2) who should receive it.

As stated previously, the circuit court declared HCBOE's pay scale to be in violation of W. Va. Code § 18A-4-5b, which provides, in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
>
> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrolllment, size of buildings, operation of equipment or other requirements.

Specifically, the circuit court found HCBOE's scale to violate the statute insofar as the incremental pay increases that are given to employees at each level of "years of employment" (See footnote 2) are

different for employees in the various pay grades. Judge King explained how this aspect of the pay scale was improper, as follows:

> For example, employees in pay grades “A”, “C”, “D” and “E” receive a $25 increase after their first year of employment, while employees in pay grade “B” receive a $27 increase and employees in pay grade “F” receive a $26 increase. After their second year of employment, all employees receive a $25 increase. After their third year of employment, employees in pay grades “A”, “C” and “E” receive a $41 increase, while employees in pay grade “B” receive a $39 increase, employees in pay grade “D” receive a $25 increase, and employees in pay grade “F” receive a $24 increase.

Accordingly, the court found that, while the pay increases at each level of experience need not be uniform, such as granting all employees a $25 increase each and every year, the increase at each level of experience must be uniform throughout the pay grades. Therefore, it would be appropriate to award all employees in the various pay grades with three years of experience a $25 increase and allemployees, regardless of pay grade, at six years of experience could be granted a $40 increase, which would not violate the uniformity statute.

Grievants argued at the level four hearing in this matter that they should be granted back pay not only for the 1994-1995 school year, but also for 1995-1996 and 1996-1997, even though they did not file grievances for the two latter years. The explanation given by Lois Robb, who testified on behalf of Grievants, was that they assumed that, once a final decision was rendered regarding the 1994-1995 pay scale, that would resolve the issue for the following years' pay scales. However, the undersigned cannot find any legal basis for awarding the relief requested.

For each school year, HCBOE promulgates and implements a separate, individual pay scale, which differs from the pay scale for the year before. The starting salary for each pay grade is changed, and also the increments granted at each year of experience are different from the prior year. Grievants have not shown that the 1994-1995 pay scale was interconnected with the following year's pay scale or was used as its basis. Each time Grievants were paid according to the 1994-1995 pay scale, which has been deemed illegal, a continuation of the same grievable event occurred. However, once the 1994-1995 pay scale was no longer in use, and a brand new, different pay scale was implemented for the new school year of 1995-1996, Grievants had an obligation to assess whether they believed the new pay scale to be illegal in some respect and, if so, file a grievance regarding that year's pay scale. While the 1995-1996 and 1996-1997 pay scales do appear to similarly violate the uniformity statute, no grievances were filed regarding them, and it is not

appropriate to grant Grievants back pay based upon pay scales which have not been properly challenged.

Insofar as the 1994-1995 pay scale is concerned, Grievants are entitled to back pay for the increment levels where the pay scale was improper. For example, if Grievant Kobily was a paygrade D employee with thirteen years of experience during the 1994-1995 school year, she is entitled to an additional $21 per month for each month she was paid during that school year. This calculation is based upon the following inequities in the pay scale:

> Employees with one year of experience in pay grade B received a monthly increase of $27, employees in pay grade F received an increase of $26, and all other pay grades received a monthly increase of $25. Accordingly, Grievant Kobily is entitled to an additional $2 per month to correct this inequity.

> Employees with three years of experience in pay grades A, C, and E received an increse of $41 per month, those in pay grade B received $39, employees in pay grade F received $24, and all others received $25. Accordingly, Grievant Kobily is entitled to an additional $16 per month.

> Employees with four years of experience in pay grades A, C, and E received $27, and all others received $25. This entitles Grievant Kobily to an additional $2 per month.

> Employees with five years of experience in pay grades B and F received an additional $26, pay grade E received $24, and all others received $25. This would entitle Grievant Kobily to an additional $1 per month.

Accordingly, 2 + 16 + 2 + 1 = 21, and Grievant Kobily should receive an additional $21 per month.

To further illustrate, using the above example, Grievant Kobily's total monthly salary for the 1994-1995 school year was $1,636, the result of the following increments in the pay scale for employees in pay grade D:

Experience	Monthly Salary
0 years	$1,279.00
1 year	$1,304.00
2 years	$1,329.00

3 years	$1,354.00		
4 years	$1,379.00		
5 years	$1,404.00		
6 years	$1,429.00		
7 years	$1,454.00	8 years	$1,479.00
9 years	$1,504.00		
10 years	$1,529.00		
11 years	$1,566.00		
12 years	$1,599.00		
13 years	$1,636.00		

Thus, the pay scale is cumulative, so no matter what level of experience an employee currently holds, his or her monthly salary is calculated based upon a total of the various incremental increases given at the lower levels of experience for that pay grade.

The record does not contain specific information regarding each grievant who is a party to this case, so it is impossible for the undersigned to state the exact relief to which each one is entitled. However, the above example should give Respondent sufficient information to calculate the appropriate back pay for each grievant, depending on the employee's years of experience and pay grade. As shown above, for each experience level of the pay scale where inequities exist, Grievants should be awarded back pay in an amount which will equalize their pay with employees in the pay grade at that experience level who received the largest increment. Then, depending on each grievant's employment term, Grievants should be paid that amount for each month of their contract for the 1994-1995 school year. However, as will be discussed below, Grievants are not entitled to relief for the entire 1994-1995 school year, because of the delay in filing their grievance.

In grievances involving salary disputes, as with misclassification cases, back pay is limited to from and after fifteen days preceding the filing of the grievance, in accordance with W. Va. Code § 18-29-4(a). Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W. Va. 1995). (See footnote 3) This isbased upon the principle that “where a[n] . . . employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the [fifteen-day] period preceding the filing of the grievance.” Easterly v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-053 (July 25, 1996). In the absence of evidence of some unlawful action or coercion on the part of the

employer, grievants are not excused from this timely filing requirement; no evidence of improper conduct on HCBOE's part exists in this case. See Easterly, supra. Although Respondent asserted that the entire grievance is time-barred, because the grievance was not initiated as soon as the 1994- 1995 pay scale was implemented, the undersigned finds that each paycheck received under the illegal pay scale was a separate grievable event. See Blankenship v. Summers County Bd. of Educ., Docket Nos. 92-45-133, 134, 135 (Nov. 30, 1992). Accordingly, the grievance was timely, but Grievants are only entitled to back pay for the fifteen working days prior to February 16, 1995, and the remainder of their respective contract periods under the 1994-1995 pay scale.

The final issue to be resolved in this case is which of the grievants are proper parties and, therefore, entitled to the relief granted. Prior to level two, approximately 153 service employees signed their names to “sign-up sheets,” which stated at the top of each page “I wish to be part of the non-uniformity grievance filed by the Hancock County Schools Service Personnel Association.” These employees were attempting to file a “class action,” which is permitted by W. Va. Code § 18-29-2:

> A grievance may be filed by one or more employees on behalf of a class of similarly situated employees: Provided, That any similarly situated employee shall indicate in writing of his or her intent to join the class of similarly situated employees. Only one employee filing a grievance on behalf of similarly situated employees shall be required to participate in the level one hearing required in section four of this article.

There is no question that this requirement was met at level one of this grievance. However, as ALJ Koval noted in the prior level four decision in this case, a limited number of employees submitted written notice of a desire to appeal to level four, leaving the implication that only those employees were still part of the grievance. The statute does not address the issue of whether or not class members must provide this written notice of intent to be included at each separate appeal level of the grievance process. However, the fact that a limited number of grievants signed the sign-up sheet submitted with the level four appeal form could cause one to believe that the others no longer wished to participate. Respondent argues that those “class members” who did not bother to sign a level four appeal form should be deemed to have abandoned the grievance.

The statute states that “only one employee” who files on behalf of the class is “required to participate in the level one hearing.” Therefore, it is logical and sensible to conclude that, as a grievance is appealed to each higher level of the grievance procedure, all members of the class who have complied with the statute by indicating their desire to participate would not need to again “sign

on" to the grievance. The fact that a limited number of grievants in this case signed a level four appeal form should not eradicate the fact that is was properly filed as a class action. Accordingly, the undersigned finds that all service employees who originally signed on to the grievance prior to the level four appeal are proper parties and entitled to the relief fashioned herein.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of her claim by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan CountyBd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. The Hancock County Board of Education pay scale for the 1994-1995 school year did not comply with the uniformity requirements of W. Va. Code § 18A-4-5b, in that it did not provide for uniform increases based upon years of employment. See Kobily v. Hancock County Bd. of Educ., Civil Action No. 95-AA-259, Circuit Court of Kanawha County, West Virginia (Nov. 8, 1996).

3. The 1995-1996 and 1996-1997 pay scales were separate grievable events, and Grievants are not entitled to relief for pay scales they did not challenge through the grievance procedure.

4. In cases in which the employer raises a timeliness defense, back pay is limited to from and after fifteen days preceding the filing of the grievance, in accordance with W. Va. Code § 18-29- 4(a). See Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399 (W. Va. 1995).

5. Grievants are entitled to back pay in an amount which will equalize their pay with employees at each experience level of the 1994-1995 pay scale who received the largest increment.
relief granted.

6. All service employees who joined the "class action" prior to the time this case was appealed to level four are entitled to the relief granted.

Accordingly, this grievance is **GRANTED**, and Grievants are to be paid back pay for the period of fifteen working days prior to February 16, 1995, through the end of their respective contract periods under the 1994-1995 pay scale, as set forth in this Decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock County, and such appeal must be filed within thirty (30) days of receipt of thisDecision. 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.

Date: February 25, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Although these "sign-up" sheets were not dated, the record indicates that they were made part of the grievance prior to the level two hearing.

Footnote: 2

While Judge King's Order refers to this portion of the pay scale as "years of employment," the HCBOE pay scale actually refers to it as "years of experience." However, the label attached to this portion of the pay scale does not affect the outcome of this case.

Footnote: 3

Note that this Grievance Board only limits relief in this fashion when the employer, as in this case, has properly asserted a timeliness defense by level two of the grievance procedure.