VIRGINIA GAIL STICKLER, et al.,

Grievants,

v. **Docket No. 98-22-058**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Virginia Gail Stickler, Deloris Burton, Reva Wade, Veronica Lynn Gallion, Debra Browning, Lisa Owens, Tracey Hazelett, Gloria Prichard, Vina Mae Ellis, Ruth Dalton, Tamra Adkins, and Phyllis Sanders (Grievants) are substitute teacher aides employed by Respondent Lincoln County Board of Education (LCBE). Grievants filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that LCBE violated W. Va. Code §§ 18A-4-8 and 18-5-13(10) when it failed to compensate them for attending inservice training. The grievance was waived at Level I. A Level II evidentiary hearing was held on January 26, 1998. Grievants were represented at this hearing by Anita Mitter and Sheila Stapleton of the West Virginia Education Association. LCBE was represented by Charles Damron, Esq. The grievance was denied at Level II by Grievance Evaluator Charles McCann (McCann) on February 24, 1998. (See footnote 1) As authorized by W. Va. Code § 18-29-4(c), Grievantsbypassed Level III, appealing to Level IV on March 3, 1998. After two Level IV hearings were scheduled and canceled, the parties agreed to submit this matter for decision on the record developed at Level II. The parties were invited to submit proposed findings of fact and conclusions of law at Level IV, and Grievants did so. The matter was submitted for decision on the lower level record on April 14, 1998, and became mature for decision on May 4, 1998. (See footnote 2) The facts in this matter are essentially undisputed. Accordingly, the following Findings of Fact are established, by a preponderance of the evidence, from the testimony and exhibits presented at Level II.

FINDINGS OF FACT

1. Grievants are substitute teacher aides employed by Respondent LCBE.

2. Some or all of Grievants aid in the education of special education students and students with special health needs.

3. By correspondence dated November 12, 1997, Charles McCann advised Grievants that LCBE would be offering workshops on specialized health procedures from 5:00 p.m. to 9:00 p.m. on November 14 and 19, 1997.

4. Grievants were required to attend and complete both training sessions in order to continue working with special education students and students with special health needs. If they did not attend and complete both training sessions, they would be limited to working in Kindergarten or Chapter I classrooms.

5. Kindergarten or Chapter I classroom assignments occur infrequently.

6. Grievants attended the workshops as required, and have not beencompensated for their time.

7. Grievants attempted to resolve this dispute with R.P. Powell (Powell), LCBE's Superintendent of Schools, until December 22, 1997. On that date, Powell wrote a letter to Grievants' representative, stating that Grievants were not entitled to compensation. 8. This letter was received by Grievants' representative on January 6, 1998. 9. This grievance was filed on or about January 20, 1998.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

LCBE has raised a timeliness defense. W. Va. Code § 18-29-4(a)(1) requires that Grievants request a conference or file their grievance within fifteen days of the event giving rise to it. “Days” is defined as “days. . . exclusive of Saturday, Sunday, official holidays or school closings[.]” W. Va. Code § 18-29-2. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb.

17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380(Mar. 18, 1997).

The testimony regarding the filing date of this grievance was uncontested. The record does not reveal when Grievants were first told they would not be compensated for the training. (See footnote 3) Grievants, through their representatives, attempted to resolve this dispute with Powell until December 22, 1997. On that date, Powell wrote a letter to Grievants' representative, stating that Grievants were not entitled to compensation. This letter was received by Grievants' representative on January 6, 1998. This grievance was filed on or about January 20, 1998, some seven working days after Grievants first received unequivocal notice that Powell had denied their request for compensation. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). Because LCBE failed to introduce any evidence that Grievants learned before January 6, 1998 that they would not be compensated, LCBE has failed to meet its burden of establishing that this grievance was not timely filed. See Lilly v. Raleigh County Bd. of Educ, Docket No. 94-41- 195 (Nov. 28, 1994), Naylor v. W.Va. Human Rights Comm'n, 180 W.Va. 634, 378 S.E.2d 843 (1989).

Boards of education have authority, in the case of service personnel assuming duties as teacher aides in exceptional children programs, to provide a four clock-hour program of training prior to the assignment which shall, in accordance with rules of the state board, consist of training in areas specifically related to the education of exceptional children. W. Va. Code § 18-5-13(10).

Grievants contend that they are entitled to compensation for attending requiredinservice training workshops, in accordance with an opinion issued by State Superintendent of Schools Tom McNeel on October 7, 1985. That opinion contains the following language pertinent to resolution of this grievance:

> A substitute driver from last year - even one who has been driving for the board for a few years - nevertheless, must become recertified each year if he or she wants to continue to drive. If the substitute driver chooses to take in-service training to help prepare him/herself for recertification, then the driver is not entitled to be paid salary for the period of the training. The bus operator takes the training on his or her own time. On the other hand, if the county board of education insists that a substitute bus operator go to in-service training in order to become certified to drive for the school year, then the board must pay salary to the driver for his or her time spent in the in-service training.

The foregoing opinion, rendered pursuant to the State Superintendent's authority under W. Va. Code § 18-3-6, is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Atkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Board of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997); Chafin v. Boone County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989).

This Grievance Board has held that this State Superintendent's opinion is not clearly erroneous. Jarman and Aliff v. Fayette County Bd. of Educ., Docket No. 97-10-541 (April 13, 1998). Therefore, the only issue remaining is whether Grievants qualify for compensation under the terms of that opinion. Although the State Superintendent's opinion pertains to substitute bus operators, the undersigned finds that its reasoning mayfairly be applied, in the absence of contrary authority, to other substitute school service personnel.

Grievants established that they were required to attend both sessions of the workshop in order to continue working with special education students and students with special health needs. McCann's letter plainly stated, “[y]ou must attend and complete both sessions. If you are not in attendance, you will only be called out to work in a Kindergarten or Chapter I classroom.” In his letter denying Grievants compensation, Powell wrote, “The aides who have chosen to qualify to work in these settings were required to attend.”

Respondent argued that the workshops were purely voluntary, and that employees who were not then working with special education students and students with special health needs could voluntarily attend the workshops and acquire new skills. It is clear, however, that Grievants who were already employed as substitute teacher aides working with special education students and students with special health needs were required to attend the workshops as a condition of their continued employment as such. Grievants were in the same position as the bus operators in Superintendent McNeel's opinion. They could refuse the training only at the cost of their jobs.

As long as Grievants attended required training, and not training they chose to take for their personal convenience, LCBE is required to compensate them for the time spent in such training. Jarman and Aliff, supra.

Grievants' situation differs from those in Zirkle v. Hancock County Bd. of Educ., Docket No. 94-15-441 (Feb. 24, 1995) and Teller v. Hancock County Bd. of Educ., Docket No. 97-15-457 (May 27, 1998) in that the Zirkle and Teller grievants were unable to identify any law, policy, or regulation that required the board of education to compensate them forundergoing mandatory training. Here, Grievants have relied on the State Superintendent's opinion set forth in Jarman and Aliff. This grievance may also be distinguished from Zirkle in that the Zirkle grievants could choose to obtain their required training at other times and from other sources in their area. In the instant grievance, Grievants were required to attend specific training sessions, from 5:00 p.m. to 9:00 p.m. on November 14 and 19, 1997. The record does not show that alternative training sessions were available to Grievants.

Of course, any Grievants who were not employed as substitute teacher aides working with special education students and students with special health needs were not required to attend the workshops as a condition of their continued employment as such. Such Grievants attended the workshops voluntarily, to acquire new skills, and so are not entitled to compensation.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Boards of education have authority, in the case of service personnel assuming duties as teacher aides in exceptional children programs, to provide a four clock- hour program of training prior to the assignment which shall, in accordance with rules ofthe state board, consist of training in areas specifically related to the education of exceptional children. W. Va. Code § 18-5-13(10).

2. School personnel laws and regulations are to be construed strictly in favor of the employee. Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. An opinion of the State Superintendent of Schools interpreting a provision of the laws

applicable to the West Virginia schools is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Atkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Board of Education, 341 S.E.2d 685 (W. Va. 1985); Jerden v. Lewis County Bd. Of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See Security Nat'l Bank v. First W. Va. Bancorp, 277 S.E.2d 613 (W. Va. 1981).

4. A 1985 opinion by the State Superintendent of Schools stating that a county board of education must pay substitute Bus Operators for attending inservice training that is required for them to continue working in that capacity is not clearly erroneous.

5. Grievants established that they were required to attend inservice training workshops as a condition of their continued employment as substitute teacher aides working with special education students and students with special health needs and, in accordance with a 1985 opinion by the State Superintendent of Schools, should have been compensated for their time. Jarman and Aliff v. Fayette County Bd. of Educ., Docket No. 97-10-541 (April 13, 1998).

Accordingly this Grievance is hereby **GRANTED** and Respondent Lincoln County Board of Education is **ORDERED** to compensate Grievants who were serving as substitute teacher aides working with special education students and students with special healthneeds, at their regular rate of pay, (See footnote 4) for the hours they spent attending the inservice training workshop on November 14 and 17, 1997.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated July 9, 1998

Footnote: 1 *In addition to serving as Grievance Evaluator, Mr. McCann was LCBE's only witness.*

Footnote: 2 *For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on June 12, 1998.*

Footnote: 3 *The record in this grievance is quite sparse, consisting of a sixteen-page transcript and three exhibits.*

Footnote: 4 *Grievants requested pay at the rate of time and one-half. The lack of evidence concerning this claim precludes the undersigned from finding that it has been proven by a preponderance of the evidence.*