LINDA MOSS, et al.,

Grievants,

v.

DOCKET NO. 98-53-402

WIRT COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance was instituted by 26 professional employees of the Wirt County Board of Education ("Board"). (See footnote 1) Their written grievance complaint is as follows:

> The Wirt County Superintendent and the Board of Education violated West Virginia Code 18A-5-2 and 18-5-15 when they altered the 1997-98 school calendar and required teacher's [sic] to report to work on April 10, 1998. April 10th was originally scheduled as an "outside school environment day" on which teacher's [sic] are not required to report to school.
>
> A resolution to the grievance would be to compensate the grievant's [sic] for the additional work performed.

Grievants' immediate supervisors felt they had no authority to resolve the grievance at level one of the grievance procedure. Grievants appealed to level two, where two of thenamed grievants, Charles Mills and Linda Williams, withdrew from the case, leaving 24 grievants. A level two hearing was held on August 24, 1998, and a decision denying the grievance was rendered by the Superintendent's designee, Martha Dean, on September 22, 1998. The grievance was bypassed at level three, and Grievants appealed to level four on October 26, 1998. The parties agreed to submit the grievance on the record below, as well as a joint stipulation of facts and exhibits submitted on January 11, 1999. This matter became mature for decision on February 19, 1999, the deadline for the parties' proposed

findings of fact and conclusions of law. Grievants were represented by William B. McGinley, Esq., West Virginia Education Association, and the Board was represented by Howard E. Seufer, Jr., Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

Level Two Agreed Exhibits

Ex. 1 - Grievance documents.

Ex. 2 -

1997-98 School Year Calendar, adopted by Board on April 15, 1997, with excerpt from April 15, 1997 Board minutes.

Ex. 3 -

Report of Canceled and Rescheduled Instruction Days 1997-98 School Year.

Ex. 4 -

Article from Wirt County newspaper, dated March 25, 1998.

Ex. 5 -

April 8, 1998, memorandum from Dr. Pamela Cain, Superintendent, to All Staff re: Makeup of Instructional Days; April 7, 1998 letter from Cynthia E. Evans, Director, Legal Services, to Dr. Pamela D. Cain, Superintendent.

Ex. 6 -

June 10, 1998 memorandum from Joseph Panetta, Director of School Finance, to County Superintendents.

Ex. 7 -

W. Va. Code § 18A-5-2. Holidays; closing of schools; time lost because of such; special Saturday classes.

Ex. 8 -

W. Va. Code § 18-5-15. School term; exception; levies; ages of persons to whom schools are open.

Level Four Agreed Exhibits

Ex. 1 -

January 26, 1994 memorandum from Henry Marockie, State Superintendent of Schools, to County Superintendents.

Ex. 2 -

January 26, 1994 letter from Henry Marockie, State Superintendent of Schools, to Mr. Larry A. Williams, Superintendent.

Ex. 3 -

January 12, 1996 memorandum from Henry Marockie, State Superintendent of Schools, to County Superintendents.

Ex. 4 -

March 6, 1997 memorandum from Henry Marockie, State Superintendent of Schools, to County Superintendents.

Testimony

Grievants presented the testimony of Dr. Pamela Cain. The Board presented no additional witnesses.

FINDINGS OF FACT

1. During the 1997-98 school year, Grievants were all professional employees of the Board.

2. For and in advance of the 1997-98 school year, the Board adopted an official calendar which contemplated 180 instructional days, in accordance with W. Va. Code § 18-5-15, which requires an instructional term for pupils of not less than 180 days.

3. Wednesday, February 4, 1998, was scheduled on the original calendar as an instructional day. However, the Board closed its three schools that day due to snow. This meant that one of the originally scheduled 180 instructional days was lost and that the 1997-98 school year would have 179 instructional days.

4. Monday and Tuesday, March 23 and 24, 1998, were scheduled on the original calendar as

instructional days. However, the Board closed its three schools on both days due to a public water system emergency in the Town of Elizabeth. The Mayorof Elizabeth had requested the school closings to conserve water. (See footnote 2) In the Superintendent's judgment, the school closings were necessary for the health and safety of students, since the schools rely upon water for fire protection, restrooms, and food service sanitation. The closings on March 23 and 24 resulted in two more of the originally scheduled 180 instructional days being lost. As a result, the 1997-98 school year would have only 177 instructional days absent a calendar adjustment.

5. Thursday, April 9, 1998, was scheduled on the original calendar as a faculty senate day on which students would attend school for half the day and be released early. (See footnote 3) Friday, April 10, 1998 (Good Friday), was scheduled on the original calendar as an “outside the school environment,” or “OSE”, day; (See footnote 4) it was the first non-instructional day following the school closings for the water emergency described in Finding of Fact 4.

6. The Board adjusted the calendar by changing the April 10 OSE day to an instructional day and moving it to Thursday, April 9. The Board also moved the April 9 faculty senate and early release to Friday, April 10. The conversion of the OSE day to an instructional day meant that one of the instructional days lost by the school closings was restored and that the 1997-98 school year would now have 178 instructional days. It also meant that school employees had five instead of six OSE days in 1997-98. (See footnote 5) 7. The calendar changes described in Finding of Fact 6 were made under W. Va. Code § 18-5-15. That statute requires that once a county board has canceled scheduled instructional days to the point where fewer than 178 are provided for, subsequent non-instructional days, except holidays, must be converted to instructional days until there are at least 178 instructional days in the school year. In response to the Superintendent's prior request, and consistent with the statute, the State Department's Director of Legal Services, and the Board's own legal counsel, advised the Board to convert the April OSE day to an instructional day. (See footnote 6) Moreover, at the end of the school year, the State Department of Education required all county superintendents to account for canceled 1997-98 instructional days and to demonstrate that, where school closings brought the number of instructional days below 178, non-instructional days were converted to instructional days, as W. Va. Code § 18-5-15 requires, to ensure an instructional term of at least 178 days. 8. The calendar changes described in Findings of Fact 3, 4 and 6 are the only ones in the 1997-98 school year which impacted the number of instructional days. The Board

completed the 1997-98 school year with 178 instructional days.

9. The calendar changes in Findings of Fact 3, 4 and 6 did not cause any employee to earn less compensation in 1997-98, nor did they require employees to work beyond their contracted employment terms.

10. The calendar changes in Finding of Fact 6 did not involve any days after the second day before the end of the 1997-98 employment term established by the Board.

11. In school years 1993-94, 1995-96, and 1996-97, West Virginia schools were closed for so many days due to snow and flood that it appeared impossible to make them all up. The State Superintendent of Schools sent memoranda to all county superintendents informing them that certain of the lost days need not be made up and that his office would count them toward the requirement of a minimum term of 180 days. The State Superintendent sent no such memorandum in the instant case. In fact, his Director of Legal Services expressly directed the Board to make up one of the lost instructional days which is at issue.

DISCUSSION

The facts in this matter are not in dispute, and the issue to be decided is whether the Board erred in requiring Grievants to work on April 10, 1998, originally an OSE day, for which Grievants should be entitled to an additional day's compensation. Grievants contend that the applicable Code provisions did not require that the days the schools wereclosed, March 23 and 24, 1998, due to the water shortage in the city of Elizabeth, be made up using the April 10, 1998 OSE day.

W. Va. Code § 18-5-5 provides, in pertinent part:

> Within the employment term there shall be an instructional term for pupils of not less than one hundred eighty nor more than one hundred eight- five instructional days: . . .
>
> Noninstructional days in the employment term may be used for making up canceled instructional days, curriculum development, preparation for opening and closing of the instructional term, in-service and professional training of teachers, teacher-pupil-parent conferences, professional meetings and other related activities. In addition, each board shall designate and schedule for teachers and service personnel six days to be used by the employee outside the school environment. However, no more than eight noninstructional days, except holidays, may be scheduled prior to the first day of January in a school term.
>
> Notwithstanding any other provisions of the law to the contrary, if the board has canceled instructional days equal to the difference between the total instructional days scheduled and one hundred seventy-eight, each succeeding instructional days canceled shall be rescheduled, utilizing only the remaining noninstructional days,

> except holidays, following such cancellation, which are available prior to the second day before the end of the employment term established by such county board.

W. Va. Code § 18A-5-2 provides, in pertinent part:

> Any school or schools may be closed by proper authorities on account of the prevalence of contagious disease, conditions or weather or any other calamitous cause over which the board has no control. Under any or all of the above provisions, the time lost by the closing of schools is counted as days of employment and as meeting a part of the requirements of the minimum term of one hundred eighty days of instruction. On such day or days, county boards of education may provide appropriate alternate work schedules for professional and service personnel affected by the closing of any school or schools under any or all of the above provisions. Professional service personnel shall receive pay the same as if school were in session. Insofar as funds are available or can be made available during the school year, the board may extend the employment term for the purpose of making up time that might affect the instructional term.

Chapters 18 and 18A of the West Virginia Code must be read in pari materia, and the provisions of Chapter 18A are to be used when the two Sections are inconsistent. W. Va. Educ. Assoc. v. Preston Cty. Bd. of Educ., 171 W. Va. 38, 297 S.E.2d 444 (1982); Smith v. Siders, 155 W. Va. 193, 183 S.E.2d 433 (1971). When discussing school closings pursuant to Code § 18A-5-2, “calamitous cause” must be taken to mean any emergency which threatens the welfare or safety of the school, its pupils, and personnel. Dillon v. Bd. of Educ. of County of Mingo, 171 W. Va. 631, 301 S.E.2d 585 (1983). A county superintendent has the authority to temporarily close a school where conditions exist that are detrimental to the health, welfare, or safety of the pupils. W. Va. Code § 18- 4-10; Dillon, supra.

The issue of whether professional employees who are required to work on a previously designated OSE day are entitled to additional compensation has been addressed previously by this Board in Corder/Poling v. Barbour County Bd. of Educ., Docket No. 01-86-264-2 (Mar. 3, 1987), aff'd Circuit Court of Kanawha County, Civil Action 87-AA-104 (Nov. 19, 1987). W. Va. Code § 18A-5-2 provides that school closings caused by conditions of weather or other calamitous cause shall be counted as days of employment and towards meeting a part of the requirements of the minimum instructional term. However, W. Va. Code § 18-5-15 limits Code § 18A-5-2 by requiring a board, if it has canceled instructional days equal to the difference between the total instructional days scheduled and 178, to reschedule each succeeding instructional day canceled, utilizing the remaining noninstructional days available prior to the second day before the end of theemployment term. Such changes in the school calendar do not result in a violation of the Grievants' employment term as

defined by Code § 18-5-15. Corder/Poling, supra.

It is understandable that the teachers, parents, and students, were probably upset about the rescheduling of school days on an OSE day immediately preceding Easter break, and there is nothing in the statute which would have prevented the Board from rescheduling the missed day at some later time. (Cf. Corder/Poling, supra, where outpouring of complaints from teachers and parents resulted in Board electing to reschedule make-up days at end of school year, rather than during Christmas vacation.) However, there is also nothing in the statute which prohibited the Board from utilizing that day for make up. Further, Grievants appear to argue that an OSE day is really meant to be a “vacation” day, and thus, requiring them to work on their vacation day requires additional compensation. There is nothing in the statutes or law to support Grievants' characterization of an OSE day as a “vacation” day.

The Board relied on the State Superintendent's Director of Legal Services' opinion when it rescheduled an instructional day on an OSE day. Without evidence to the contrary, it must be assumed that the State Superintendent concurred with this opinion. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. The State Superintendent of Schools is charged under W. Va. Code § 18-3-6 with interpreting school law. Dillon, supra. No argument has been presented to convince the undersigned that the State Superintendent's opinion in this case is clearly wrong.

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievants to establish their allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987); 156 C.S.R. 4.19 (Procedural Rules, West Virginia Education and State Employees Grievance Board).

2. “Within the employment term there shall be an instructional term for pupils of not less than one hundred eighty nor more than one hundred eighty-five instructional days.” W. Va. Code § 18-5-15. The official calendar which the Board adopted for the 1997-98 school year satisfied this requirement.

3. W. Va. Code § 18-4-10(10) specifies that a duty of the county superintendent is to “[a]ct in case of emergency as the best interests of the school demand: Provided, That an emergency as

contemplated in this section shall be limited to an unforeseeable, catastrophic even including natural disaster or act of war: Provided, however, That nothing in this section shall be construed as granting the county superintendent authority to override any statutory or constitutional provision in the exercise of said emergency power except where such authority is specifically granted in the particular code section." The water emergency clearly fell under the duties of a superintendent as specified in the Code. Making a decision to close school then requires adherence to the provisions of W. Va. Code § 18-515 to reschedule a noninstructional day, if available, for instruction.

4. "Any school or schools may be closed by proper authorities on account of the prevalence of contagious disease, conditions of weather or any other calamitous cause over which the board has no control." W. Va. Code § 18A-5-2. The public water systememergency in the Town of Elizabeth on March 23 and 24, 1998, certainly amounted to a calamitous cause over which the Board had no control and justified the school closings, even though the closings meant that, without further calendar adjustments, the 1997-98 school year would have only 177 instructional days.

5. "Noninstructional days in the employment term may be used for making up canceled instructional days." W. Va. Code § 18-5-15. Indeed, where the number of instructional days falls below 178, subsequent noninstructional days must be used for that purpose:

> Notwithstanding any other provisions of the law to the contrary, if the board has canceled instructional days equal to the difference between the total instructional days scheduled and one hundred seventy-eight, each succeeding instructional day canceled shall be rescheduled, utilizing only the remaining noninstructional days, except holidays, following such cancellation, which are available prior to the second day before the end of the employment term established by such county board.

That is precisely what the Board did when it made the calendar changes described in Finding of Fact 6, converting a non-instructional OSE day into an instructional day.

6. W. Va. Code § 18A-5-2 provides that school closings caused by conditions of weather or other calamitous cause shall be counted as days of employment and towards meeting a part of the requirements of the minimum instructional term. However, W. Va. Code § 18-5-15 limits Code § 18A-5-2 by requiring a board, if it has canceled instructional days equal to the difference between the total instructional days scheduled and 178, to reschedule each succeeding instructional day canceled, utilizing the remaining noninstructional days available prior to the second day before the end of the employment term. Such changes in the school calendar do not result in a violation of the

Grievants'employment term as defined by Code § 18-5-15. Corder/Poling v. Barbour County Bd. of Educ., Docket No. 01-86-264-2 (Mar. 3, 1987), aff'd Circuit Court of Kanawha County, Civil Action 87-AA-104 (Nov. 19, 1987).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wirt 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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MARY JO SWARTZ

Administrative Law Judge

Dated: March 3, 1999

Footnote: 1

Linda Moss, Millicent Stoneking, Jane Sims, Kimberlee Poling, Rodney Watson, Michael Goodwin, Lynn Style, Anna Exline, Beverly Prince, Lewis Villers, Shely ___, Linda Williams, Karen White, Nancy Thomas, Carolyn Corbett, Louise Villers, Sandra Mace, Bruce Wendelken, Dina Harrison, Eloise Jones, Angie Cox, Joseph March, Sherol Gonzalez, Brenda Metz, Kathy Haase, Charles Mills.

Footnote: 2

All of the Board's three schools are located in the Town of Elizabeth.

Footnote: 3

Under W. Va. Code § 18-5A-5(12), designated faculty senate days are counted as instructional days.

Footnote: 4

Under W. Va. Code § 18-5-15, OSE days are not counted as instructional days.

Footnote: 5

W. Va. Code § 18-5-15 provides that each county board shall annually schedule six OSE days.

Footnote: 6

The Director of Legal Services' advice was in writing, and provided, in pertinent part:

> *This is in response to your question concerning the missing instructional day due to the countywide water shortage. If missing the day puts the county below the 178 required instructional days, pursuant to W. Va. Code § 18-5-15, then the instructional day must be made up. If you have any noninstructional days left on your calendar you should take one of these days and convert it to an instructional day. Because the noninstructional days on the school calendar have already been contemplated and made part of the salary of the professional personnel there is no need to pay additional compensation for this recovered instructional day.*