DIANA LONG,

Grievant,

v. DOCKET NO. 00-20-308

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Diana Long, filed this grievance against her employer, the Kanawha County Board of Education ("KCBOE") on or about September 17, 2000. Her Statement of Grievance reads:

> **I was denied reimbursement for legal fees by the Superintendent after being directed by my supervisor, Joe Godish, to retain counsel and told by Mr. Godish that I would be reimbursed if "I won."**
>
> **Relief Sought: Requesting reimbursement for original legal fees and costs incurred with filing this grievance.**

This grievance was denied at Levels I and II. Grievant appealed to Level IV on September 26, 2000, and the parties asked to have the case submitted on the "Stipulation of Facts" submitted for the Level II Decision. This case became mature for decision on February 21, 2001, the date the parties' proposed findings of fact and conclusions of law were due. (See footnote 1)

Issues and Arguments

Grievant argues she was directed by her supervisor to obtain outside counsel, and she was promised that, "if she won" she would be reimbursed. Grievant maintains she relied on this promise, and was denied this reimbursement for her legal fees after the fact. The supervisor who informed Grievant she would be reimbursed now says this promise was

based on his "erroneous interpretation of KCS Administrative Regulation 15.03." **(See footnote 2)** **Affidavit of Mr. Godish dated September 20, 2000.**

Respondent cites to W. Va. Code § 18-29-8 which states "any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expense." Respondent argues this Code Section requires Grievant to pay her own expenses incurred in the grievance process. Respondent also argues the promise made by Grievant's supervisor was ultra vires; thus, KCBOE cannot be required to keep this promise.

Stipulations of Fact

The parties to this grievance hereby agree that the following is a recitation of the pertinent facts giving rise to this grievance:

1. Diana Long, Ph. D., Director of Vocational Education for the Respondent, investigated a complaint by a parent of alleged sexual harassment occurrence involving Dorris Walls, a teacher at Ben Franklin Vocational and Career Center, and a student at the Center. According to the parent, the principal had refused to look into her son's complaint, and Dr. Long was the next step in the process since she supervised the principal. This occurred in September 1997 - March 1998. 2. Dr. Long conducted an investigation for the superintendent, Dr. Jorea Marple, who ordered a hearing. After the hearing Mr. Walls was exonerated of the charges.

3. Dr. Long received an anonymous threatening note referencing retaliation because of her involvement in the Walls investigation.

4. On October 5, 1998, Dr. Diana Long used her personal E-mail account and sent an E-mail message with an accompanying political cartoon/photograph to a list of twenty-five (25) individuals at their various E-mail addresses. One of these individuals was Gregory Bailey, then counsel at Kanawha County Schools. Dr. Long sent this E-mail to Mr. Bailey at his Kanawha County Schools E-mail address.

5. The political carto[o]n/photograph accompanying Dr. Long's E-mail on October 5, 1998, purports to be a picture of Monica Lewinsky wearing a black T-shirt with a light splotch and with writing on it that says "I interned under President Clinton and all I got was this lousy T-shirt."

6. Mr. Dorris Walls obtained a copy of Dr. Long's E-mail message and accompanying cartoon/picture from someone at his school. This paper copy is incomplete and/or altered as

it does not show the usual designations for "From" and "To." Mr. Walls was not a listed addressee of the E-mail message. Mr. Walls made a complaint against Dr. Long alleging sexual harassment of Mr. Walls by Dr. Long and misuse of the West Virginia Department of Education Internet and e-mail system. Mr. Walls testified at the hearing and declined to identify the person who gave him the hard copy and declined to answer any questions concerning the person who gave him the hard copy. 7. Initially, upon hearing about Mr. Walls' complaint, Dr. Long called her supervisor and scheduled a meeting with Mr. Joseph Godish, and interim superintendent, Dr. Ron Duerring and discussed the history of her involvement with Mr. Dorris Walls. Further, during that meeting Dr. Long was advised that Mr. Jim Withrow, counsel at Kanawha County Schools, would not be able to legally advise her and, therefore, Dr. Long should secure her own lawyer and if she prevailed in the hearing, then, in that event, she "would be reimbursed her attorney fees."

8. During the principals' meeting at Capital High School the next day after meeting with Dr. Ron Duerring and Mr. Joseph Godish, Caroline Cloer, Norma Miller and Dr. Long, again, discussed the matter with Mr. Joseph Godish and Norma Miller asked, "I do not see why Dr. Long has to get her own lawyer, always before, Greg (Greg Bailey) represented me with a complaint from a teacher." Mr. Godish replied, "It is for her own good, besides we will reimburse her if she is cleared."

9. Please see the affidavit signed by Mr. Joseph Godish, appended hereto as exhibit A.

10. Dr. Duerring appointed a hearing examiner, Anne Werum Lambright, and scheduled a hearing to determine by way of recommendation from the hearing examiner: (See footnote 3)

> **a - Whether the E-mail message and accompanying cartoon/picture constituted sexual harassment of Mr. Dorris Walls by Dr. Long, and**

> **b - Whether the E-mail message and accompanying cartoon/picture constitued (sic) a violation of Kanwha (sic) County Schools Computer and TelecommunicationsAcceptable Use Policy for Employees or an West Virginia Department of Education computer or internet (sic) policy or State or Federal Law.**

11. Caroline Cloer, Kanawha County Schools' Title IX Coordinator (which includes sexual harassment), testified in the hearing that it was her professional opinion that the E-mail

was not nor does it constitute sexual harassment of Mr. Dorris Walls by Dr. Long. Further, Ms. Cloer indicated that after determining the facts in this case she had voiced her opinion early on and offered the opinion to Mr. Dorris Walls on January 25, 1999, that the facts did not constitute sexual harassment. Ms. Clorer (sic) reiterated this professional opinion at their second meeting in February, 1999. Mr. Walls acknowledged Ms. Cloer had so indicated her opinion. However, Mr. Walls, continued to press his complaint for sexual harassment.

12. Mr. Dorris Walls denied that he personally accessed Dr. Long's E-mail message and accompanying cartoon/picture directly from the Internet. Although a computer is in his classroom at school, he testified that the computer is "locked in a box and I won't open it or I wouldn't let the kids open it." Mr. Walls also denied possession or access to a computer at home. He testified that he doesn't know "anything about the Internet or how it functions or work[s]." However, Mr. Wall. (sic) would not divulge where i.e (sic) received *the* (sic) E-mail message and accompanying cartoon/picture.

13. The hearing examiner, Anne Werum Lambright, recommended to the Superintendent "that Mr. Wall's (sic) allegations of Dr. Long's sexual harassment of him and her violations of computer Internet policies be dismissed as unproven and that no disciplinary action be taken against Dr. Diana Long." 14. Dr. Duerring upheld the recommendations of the hearing examiner and so notified Dr. Long on August 10, 1999.

15. Dr. Long submitted her invoices for attorney fees to Mr. James Withrow for reimbursement. Initially, Mr. Withrow indicated there was no precedent cited for reimbursement of attorney fees. Dr. Long advised Mr. Withrow that Kanawha County Schools had reimbursed a school principal for attorney's fees incurred when the principal was accused of sexual misconduct concerning students, which resulted in a criminal investigation, which was later dropped. Dr. Long's request for reimbursement of attorney fees was rejected the second time on the grounds the alleged conduct of Dr. Long occurred "on your off duty time and was not undertaken as part of her official duties, but consisted of a personal lark."

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

Grievant has requested she be reimbursed for her legal fees in both the grievance/action filed by Mr. Walls, and this grievance she has filed to recover those legal expenses. As will be explained below, these two requests are not the same and will beaddressed separately. Reimbursement for the Walls grievance/action will be addressed first.

Respondent relies upon W. Va. Code § 18-29-8 which states in its entirety:

> **Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses except as to the costs of transcriptions as provided for in section six [§ 18-29-6] of this article.**
>
> **In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.**

W. Va. Code § 18-29-2 defines the terms and parties involved in a grievance as follows:

> **(a) "Grievance" means any claim by one or more affected employees of the . . . county boards of education . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.**
>
> **. . .**
>
> **(c) "Employee" means any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.**

(d) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (a) of this section.

(e) "Institution" means any state institution of higher education, the governing boards of higher education, any institution whose employees are hired by the state board of education including the department of education, and any public school, regional educational service agency or multi-county vocational center.

(f) "Employer" means that institution contracting the services of the employee.

. . .

(i) "Governing board" means the administrative board of any state or county educational institution, including institutions whose employees are hired by the state board of education, and refers, as is applicable, to the governing boards of higher education, state board of education, county boards of education, the school board members of any board of directors of a regional educational service agency or the school board members of any administrative council of a multi-county vocational center.

W. Va. Code § 18-29-8 is clear that the "parties" are required to pay their own expenses, at the first three levels. W. Va. Code § 18-29-2 also makes it clear Grievant was not a party to the grievance filed by Mr. Walls. KCBOE was the party against whom the grievance was filed; this was Mr. Walls' employer. Although it may seem simplistic to say, there can only be three "parties" involved in a grievance: the grievant, the employer, and, at times, an intervenor. When grievants allege another employee has harassed, discriminated, or retaliated against them, the party on the other side of the grievance process is the employer. The employee alleged to have committed the wrongdoing is not a party to the grievance. After this review of the definitions in W. Va. Code § 18-29-8, it is clear the statement: "[a]ny expenses incurred relative to the grievance procedure atlevels one through three shall be borne by the party incurring such expenses . . . " cannot apply to Grievant. (Emphasis Added.)

It would appear from the Stipulations and a review of Mr. Walls' grievance Decision, that Mr. Walls has a grudge against Grievant. He did not like the fact that she investigated him for

sexual harassment at the direction of the then Superintendent. This issue was discussed in Mr. Walls' grievance at Level IV, Walls v. Kanawha County Board of Education, Docket No.98-20-325 (Dec. 30, 1998), and it was found that KCBOE had a duty to investigate all complaints of sexual harassment, and Dr. Long was correct to do so at the direction of the Superintendent. The relief sought by Mr. Walls in his grievance was denied. Apparently after this Decision was issued, Mr. Walls sought to retaliate against Dr. Long by alleging she sexually harassed him. This complaint of sexual harassment against Dr. Long cannot be seen in any other light, as it is clear Dr. Long did not send Mr. Walls the e-mail, did not sexually harass him in any way, and he was informed by Ms. Cloer, the Title IX Coordinator, that the e-mail message was not sexual harassment against him. Still he continued with this "grievance".

The second issue, alleged violation of KCBOE's Acceptable Use Policy, is not a grievance that could be brought by Mr. Walls. Mr. Walls did not have standing to grieve Dr. Long's alleged violation of this Policy. (See footnote 4) **When an individual is not personally harmed,there is no cognizable grievance. Cremeans v. Board of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992). Mr. Walls can, of course, inform KCBOE of an alleged violation of a Policy. KCBOE would then look into the allegations, if it deemed necessary, bring charges, if it deemed necessary, and Grievant would have an opportunity to defend herself from the charges, again if necessary. In other words, Grievant should never have been required "to defend herself" in this "grievance" brought by Mr. Walls.**

That said, the next issue is whether KCBOE should be required to pay for the legal representation KCBOE told Grievant she should get, and they would pay for if she "won".

Grievant was told both by her supervisor and the Superintendent she would be reimbursed for her legal fees, if she prevailed. Grievant believed this statement and relied on what she was promised. She prevailed, submitted her fees, and they were then denied. KCBOE now argues this action was an ultra vires act on the part of her supervisor, Mr. Godish, and Superintendent Duerring to represent to Grievant that her legal fees would be paid.

This Grievance Board has discussed the issue of ultra vires acts at some length. (See

footnote 5) The board of education is the final authority on the use of its funds. See Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000). If Grievant were promised these fees would be paid, this action can be seen as an ultra vires act. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

The rule is clear. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers[,] and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415, 421 (1985)(citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)). See also, Parker, supra. It is well settled that a supervisor's oral representation is not binding on an agency, where the supervisor does not possess authority to make that determination. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998). See Fraley v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR- 448 (Mar. 12, 1993); Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993).

As in Ollar, the person making assurances was a school superintendent, Superintendent Duerring, and he lacked final authority to promise Grievant KCBOE wouldpay her legal fees. See Haney v. Mingo County Bd. of Educ., Docket No. 97-29-292 (Oct. 30, 1997). At most, Superintendent Duerring could have told Grievant that he would recommend such action to the board of education. In these circumstances, there can be no legally binding promise. Malone v. Marion County Board of Educ., Docket No. 96-24- 084 (May 30, 1996). See Chapman v. Dep't of Transp., Docket No. 97-DOH-261 (Nov. 24, 1997).

Although this is a harsh rule, it is one espoused by the West Virginia Supreme Court of Appeals and, of course, by this Grievance Board in earlier decisions. Thus, while promises were made to Grievant, Grievant must accept the consequences of relying upon them when

they were not made by the board of education, which had final authority to act. Superintendent Duerring lacked the authority to make the promise he made.

As for Grievant's attorney fees for this grievance, W. Va. Code § 18-29-8 is clear. She cannot receive these fees. This Code Section states the parties are to bear their own costs at the first three levels, and there are no provisions for this Grievance Board to grant attorney fees for a grievance at Level IV.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.121(2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. KanawhaCounty Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2. As Grievant was not a party to the Walls grievance, W. Va. Code § 18-29-8 does not apply to her.

3. Grievant relied to her detriment on the promise made by Superintendent Duerring. Conners v. Hardy County Bd. of Educ., Docket No. 99-16-459 (Jan. 14, 2000); Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995).

4. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

5. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers[,] and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the

people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415, 421 (1985)(citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)). See also, Parker, supra.

6. It is well settled that a supervisor's oral representation is not binding on an agency, where the supervisor does not possess authority to make that determination. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998). See Fraley v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993), at 3-4; Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993).

7. Superintendent Duerring, lacked final authority to promise Grievant KCBOE would pay her legal fees. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998). See Haney v. Mingo County Bd. of Educ., Docket No. 97-29-292 (Oct. 30, 1997); Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993).

8. Grievant cannot be reimbursed for the legal costs incurred in this grievance. W. Va. Code § 18-29-8.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____ JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 29, 2001

Footnote: 1

Grievant was represented by Attorney Lonnie Simmons, and Respondent was represented by KCBOE's Attorney, James Withrow. Neither party elected to submit these proposals.

Footnote: 2

KCS Administrative Regulation 15.03 states that if an employee is charged with criminal conduct in connection with job-related activity, and the charges are dismissed, the employee may petition the Superintendent for reimbursement of any reasonable attorney fees actually incurred. If the Superintendent determines the actions were job-related and taken in good faith, he may recommend to the Board the petition for attorney fees be approved.

Footnote: 3

Although not specifically stated in the Stipulations, it is assumed Mr. Walls' complaint was responded to as a grievance, and the hearing conducted was a grievance hearing.

Footnote: 4

"Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979); Lyons v. Wood County Board of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

Footnote: 5

Most of these case have dealt with hiring and compensation issues. See Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chapman v. W.Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997); Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92- HHR-186 (Jan. 22, 1993).