MARK BYRD,

Grievant,

v. **DOCKET NO. 02-20-376**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

The grievance of Mark E. Byrd filed on August 6, 2002, states, “George Beckett is not honoring my continuing contract, which was signed by me, president of the Board and Superintendent of Schools.” As relief, he seeks to have his continuing contract and job description honored. His immediate supervisor, George Beckett, denied the grievance at Level I and it was also denied at Level II. Level III was waived, and the parties requested a Level IV decision based on the lower-level record. Grievant, represented by Clarence Basham, and Respondent, represented by James Withrow, Esq., agreed to submit their proposed findings of fact and conclusions of law by January 13, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Mechanic, having received his continuing contract in 1999. He is also licensed and certified as a school bus operator.

2. Grievant's continuing contract states, in part, “at a lawful meeting of the Board of Education of the County of Kanawha held at the offices of said Board, in the City ofCharleston, Kanawha County, West Virginia, on May 3, 1999, the Employee was duly hired and appointed for employment as a MECHANIC at BUS TERM/ST.ALBANS for the employment term and at the salary and upon the terms hereinafter set out.” Level II Grievant's Exhibit No. 1.

3. Grievant was hired under a posting for a multiclassified mechanic/bus operator position and

had previously been employed under probationary contracts. The first of these, dated May 21, 1997, correctly listed his classification as mechanic/bus operator. In 1998, his contract simply listed "mechanic" as his classification.

4. The language change was due to a change in the computer system Respondent used to manage its personnel contracts and employment letters. The new system was unable to generate contracts using multi-classification job titles.

5. Respondent requires all of its transportation mechanics to be certified as school bus operators, and uses them as substitute bus operators as the need arises.

6. Timeliness was not raised at any level by Respondent.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant alleges that he was hired under a continuing contract that classifies him as a mechanic, not as a mechanic/bus operator, and that requiring him to perform bus operator duties is therefore improper. Respondent contends that due to a computer system deficiency, there was a "clerical error" in Grievant's contract, and that he is in actuality multi-classified as a mechanic/bus operator.

The effect of specific language in a school employee's continuing contract has not been thoroughly analyzed by the Grievance Board. It has found in the past that "Teachers who obtain continuing contract status under W. Va. Code 18A-2-2 do not have a vested rightto be assigned to a particular school nor to a particular set of duties. [Citations omitted.]" Mahon v. Mingo County Bd. of Educ., Docket No. 94-29-305 (Mar. 17, 1995). Although that case found a teacher under a continuing contract could be used to temporarily teach outside his certification, that finding does not imply that a teacher could be assigned the duties of a principal, counselor or other job outside his classification.

The authority of a County Board of Education to enter into contracts with employees is found in W. Va. Code §§ 18A-2- 1 *et seq*. The section applicable to Grievant's situation, 18A-2-6, states in pertinent part:

> After three years of acceptable employment, each service personnel employee who

> enters into a new contract of employment with the board shall be granted continuing contract status: . . . The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year, or by written resignation of the employee before that date, except that for the school year one thousand nine hundred eighty-eight--eighty-nine only, the board shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

While a continuing contract does not entitle an employee to a particular assignment, its form is prescribed by W. Va. Code § 18A-2-5, and part of the form is a designation of the employee's classification. It has not been similarly held that the contract does not entitle an employee to a particular classification. Grievant holds such a continuing contract, designating his classification as "Mechanic."

Respondent avers that the failure of Grievant's contract to properly state his classification as "Mechanic/Bus Operator" is mere clerical error, and that its computer records accurately reflect Grievant's true classifications despite the express language of hiscontract. However, Respondent's computer and personnel records do not control the parties' employment relationship. The contract itself does that.

Generally, in the construction of a written instrument, in cases of doubt, the language is to be taken most strongly against the party using it. Lewis v. Barnes Contracting Co., 179 F. Supp. 673 (N.D.W. Va. 1959). Any ambiguity in a contract must be resolved against the party who prepared it. Nisbet v. Watson, 162 W. Va. 522, 251 S.E.2d 774 (1979). The conduct of the parties in performing a contract has a bearing on its proper interpretation. Highway Engrs, Inc. v. State Rd. Comm'n, 8 W. Va. Ct. Cl. 68 (1970). However, where a contract is clear and not ambiguous, it need not be construed or interpreted. "While it is true that ambiguities are resolved against the party preparing the contract, where a document is clear and unambiguous, the doctrine does not apply." Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981), *affg.* 500 F. Supp. 307 (E.D. Va. 1980). In this case, the contract is clear and unambiguous. No reasonable person reading the contract would infer that "Mechanic" meant "Mechanic/Bus Operator." The contract need not be construed. Neither is it necessary to look at the intent of the parties in order to divine the meaning of the clear terms. Where the terms of a contract are clear and unambiguous, they must be applied and not construed.

Orteza v. Monongalia County Gen. Hosp., 173 W. Va. 461, 318 S.E.2d 40 (1984). Bass v. Coltelli-Rose, 536 S.E.2d 494 (W. Va. 2000). Applying the terms of the contract, Grievant is unequivocally classified only as a Mechanic.

However, in order for the terms of the contract to have any binding effect on the parties, the contract must be valid. On its face, it appears to be. It is in writing, it is signed by the parties, was approved at a lawful meeting of the Kanawha County Board of Education, and it was delivered to the Grievant by its drafter. The evidence shows Respondent knew of the inability of its computer system to properly print out the contract, and that severalinaccurate contracts were printed, approved, signed and mailed to various employees. It contends that the job of doing so is so large it could not read each contract to make sure it was correct. Nevertheless, "[a] party to a contract has a duty to read the instrument." Syl. Pt. 5, Soliva v. Shand, Morahan & Co., 176 W. Va. 430, 345 S.E.2d 33 (1986). "If one sign a written contract without acquainting himself with its contents, he is estopped by his own negligence from asking relief against its obligation, if his signature is procured without fraud." Ferrell v. Ferrell, 53 W. Va. 515, 44 S.E. 187 (1903).

Mistake can be a basis for reformation of a contract, but it must be mutual. In case of unilateral mistake, the contract can only be rescinded. This was not a mutual mistake, given that Grievant had no part in the contract formation other than to sign and return the form that was sent to him, and that Respondent created the contract fully conscious of the limitations of its contract-preparing software. Although Grievant knew he was originally hired as a mechanic/bus operator and had performed bus operator duties, he was also aware that his continuing contract only stated "mechanic" and that the singular classification comported with his wishes. He signed the contract with full knowledge of its contents. In a sense, Grievant is elevating form over substance by arguing that his classification is not based on his actual duties, but in the case of a clear written contract, form is normally what counts.

Although rescission of the contract would appear to be the only method of resolving the error, neither party requested that the existing contract be rescinded and it is apparent that neither party wishes to have their contractual relationship entirely severed. Rescinding the contract would in practical effect terminate Grievant's employment. The West Virginia Supreme Court of Appeals has found, however, that the work performed by an employee for a county board of education can be the basis for an implied contract. In Bonnell v. Carr, 170 W. Va. 493, 294 S.E.2d 910 (1982), the court

stated, “Under W. Va. Code, 18A-2-6 (1973),a continuing contract of employment shall be granted to auxiliary and service personnel 'after three years of acceptable employment.' While W. Va. Code, 18A-2-4 (1969), authorizes the employment of auxiliary personnel by 'a written contract which may be in letter form,' we do not believe that a written contract is essential in all instances once an employee completes three years of acceptable service and is reemployed by the board.” In other words, if the employer fails to grant continuing contract status to an employee, the law operates to create a continuing contract once the employer has employed a worker in a given position for three years, and accepts that employee again for the fourth year. In this case, the Board failed to grant Grievant continuing contract status in the multiclassification by accident, but nevertheless employed him in that position for three years as a probationary employee and thereafter as a tenured employee. Grievant's continuing contract as a multiclassified mechanic/bus operator was therefore created by the law in that fourth year, and he has enjoyed the benefit of that contract ever since.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

3. The authority of a County Board of Education to enter into contracts with employees is found in W. Va. Code §§ 18A-2-1 *et seq*., which states in pertinent part:

> After three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: . . . The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year, or by written resignation of the employee before that date, except that for the school year one thousand nine hundred eighty-eight--eighty-nine only, the board shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

W. Va. Code § 18A-2-6.

4. “A party to a contract has a duty to read the instrument.” Syl. Pt. 5, Soliva v. Shand, Morahan & Co., 176 W. Va. 430, 345 S.E.2d 33 (1986). “If one sign a written contract without acquainting himself with its contents, he is estopped by his own negligence from asking relief against its obligation, if his signature is procured without fraud.” Ferrell v. Ferrell, 53 W. Va. 515, 44 S.E. 187 (1903).

5. In the construction of a written instrument, in cases of doubt, the language is to be taken most strongly against the party using it. Lewis V. Barnes Contracting Co., 179 F. Supp. 673 (N.D.W. Va. 1959); Any ambiguity in a contract must be resolved against the party who prepared it. Nisbet v. Watson, 162 W. Va. 522, 251 S.E.2d 774 (1979).

6. The work performed by an employee for a county board of education can be the basis for an implied continuing contract. “Under W. Va. Code, 18A-2-6 (1973), a continuing contract of employment shall be granted to auxiliary and service personnel 'after three years of acceptable employment.' While W. Va. Code, 18A-2-4 (1969), authorizes the employment of auxiliary personnel by 'a written contract which may be in letter form,' we do not believe that a written contract is essential in all instances once an employee completesthree years of acceptable service and is reemployed by the board.” Bonnell v. Carr, 170 W. Va. 493, 294 S.E.2d 910 (1982).

7. Grievant's continuing contract as a multiclassified mechanic/bus operator was created by law in the fourth year of his employment.

For the foregoing reasons, 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: January 28, 2003 _____

M. Paul Marteney

Administrative Law Judge