THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Karen Vance,
Grievant,

v. **DOCKET NO. 2009-0232-JefED**

Jefferson County Board of Education,
Respondent.

DECISION

Grievant filed this grievance directly to level three on August 20, 2008, stating:

> Karen Vance is a seventeen year seniority employee with the Jefferson County School District (JCSD). On July 31, 2008, Karen Vance received notice her Special Education Aide position and contract expired on June 30, 2008. The JCSD violated West Virginia School Law, including but not limited to the following statutes:
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> **§18A-2-7:** The JCSD failed to place Karen Vance on the Transfer List upon not renewing her Contract and position as a Special Education Aide.
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> **§18A-2-5 and §18A-2-6**: The JCSD failed to maintain Karen Vance's Continuing Contract with the County. Furthermore, the JCSD uses "one (1) year only positions", not provided for by the Statutes, or any Statutes of West Virginia School Law.
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> **§18A-4-8b and §18A-4-8g**: The JCSD violated Karen Vance's seniority by not maintaining her Continuing Contract and by not placing her on the Transfer List when the County did not continue her position as a Special Education Aide. In addition, the JCSD has further violated Karen Vance's seniority by allowing lower seniority employees to fill and work in her position as a Special Education Aide. Furthermore, no reduction in force procedures were followed, as outlined in the West Virginia School Law, nor was Ms. Vance placed on any preferred recall list, all resulting in continuing violation of Karen Vance's seniority.

Her stated relief sought is "Make the Grievant, Karen Vance, whole in every way including all lost wages, benefits and seniority rights. Return Karen Vance as a regular seniority employee with the Jefferson County School District, including all contractual seniority rights and considerations."

A level three hearing was held in the Grievance Board's Westover office on January 7, 2009. Grievant was represented by H. David Kelly, Jr. and Respondent was represented by its General Counsel Amy S. Brown. The matter became mature for decision on February 27, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.[1]

Synopsis

The issue presented is whether Grievant voluntarily gave up her continuing contract by applying for a position that was posted expressly as "one year only." Absent an express waiver of her continuing contract right, Respondent was unable to meet its burden of proving a waiver should be implied, and the grievance is consequently granted.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. At the time this grievance arose, Grievant had been employed by Respondent in various service employee positions for approximately seventeen years.

2. From September 2003 to September 2006, Grievant had been employed as a Kindergarten Aide at T. A. Lowery Elementary School, under a continuing contract of employment.

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[1]This matter was originally heard by Administrative Law Judge Denise Spatafore. She subsequently resigned, and the matter was reassigned to the undersigned Administrative Law Judge for decision, based on the record created at Level Three.

3. In August 2006, Respondent posted a position, No. 4210, for a "Special Education Classroom Aide, One Year only, at T.A. Lowery Elementary School." Under "Terms of Employment," the posting listed "2006–2007 School Year – 200 Days."

4. Grievant bid on and was awarded the position.

5. In March 2007, Respondent posted an identical position, No. 4367, for the 2007-2008 school year, for which Grievant applied and to which she was instated.

6. During the 2006-2007 school year, Grievant's principal assigned her to assist a visually impaired student on a one-on-one basis. The student continued at the school the following year, and Grievant was again assigned to assist the student.

7. By letter dated April 8, 2008, Grievant was reminded that her position was posted as "one year only" position. The letter further stated that "your contract with Jefferson County Schools will expire at the end of this school term, effective June 30, 2008."

8. A second letter was sent July 30, 2008, stating Grievant had been sent the first letter and repeating that her contract would expire. The letter also provided information on current postings and stated that she had "not secured a position with Jefferson County Schools for the 2008-2009 school year."

9. Grievant was not placed on the transfer list at the end of the 2007-2008 school year.

10. Grievant was transferred into the "one year only" positions at the beginning of the 2006-2007 school year and the 2007-2008 school year.

11. The letters sent by Respondent are consistent with its past practice with service and professional positions posted as "one year only."

12. Grievant did not apply for any of the available vacancies for the 2008-2009 school year. She did work through the summer of 2008 under an extracurricular contract.

Discussion

This grievance does not concern a disciplinary matter, therefore the burden of proving the material allegations is allocated to the Grievant. Her claim must be proven by a preponderance of the evidence.[2] "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not."[3]

Respondent filed a Motion to Dismiss alleging that the Grievant had no standing to pursue her claim through the grievance process due to the fact that she was no longer an employee at the time she filed her grievance, and also alleging that the grievance was untimely. Administrative Law Judge Spatafore denied the motion on both grounds, finding that the grievance was timely filed and that, since the Grievant's employment status at the time of filing was the issue raised by the grievance, dismissal at that time "would be premature."

Many, many extraneous facts were presented at the hearing and argued in the parties' proposed findings of fact and their reply briefs to each others' proposed findings. However, most of those issues are irrelevant, as this case presents an issue that is almost entirely a legal issue: Whether Grievant's continuing contract of employment was

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[2]*Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

[3]*Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

terminated by her application and transfer to a "one year only" position. The most relevant fact is actually the lack of a fact – neither party introduced as evidence a new contract for either of the "one year only" positions, nor any writing modifying the existing continuing contract.

Grievant contends that her acceptance of a "one-year only" position was merely that – a position – which did not extinguish her status as a continuing contract employee. West Virginia Code § 18A-2-6 addresses continuing contracts for service employees, as follows:

> 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 . . . . 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.

This statute has remained virtually unchanged for some 40 years, and, as recognized long ago by the West Virginia Supreme Court of Appeals, it was clearly intended that service personnel are given tenure after three years of employment and may only be terminated for cause.[4] Moreover, as also discussed in *Bonnell*, and pertinent to the instant case, is the following language:[5]

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[4]*Bonnell v. Carr*, 170 W. Va. 493, 294 S.E.2d 910 (1982).

[5]170 W. Va. at 497 (emphasis added).

> In Perry v. Independent School District No. 969, 297 Minn. 197, 210 N.W.2d 283 (1973), the court concluded that once a teacher[6] had obtained continuing contract status, the fact that she signed a limited contract denominated as a "long-term substitute" which expired at the end of a year, would not foreclose her right to have the contract treated as a continuing contract. . . . The courts in [other] cases recognized that **it might be possible for a teacher to voluntarily agree to something less than a continuing contract once she had met the qualifications for a continuing contract, but they also recognized that such a waiver could not be lightly inferred.**
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> [Emphasis added.]

It has also been held that, once an employee is working under the terms of a continuing contract, the terms of that contract (such as employment term) cannot be modified without following the provisions of West Virginia Code § 18A-2-6.[7]

Respondent contends that, by her acceptance of a one year only position, Grievant has provided the "mutual consent" required for termination of her continuing contract status. It argues that, once she accepted the position and was approved by the board of education, she knew that her position terminated at the end of that year. By reminding her in its April 8, 2008, "courtesy" letter that her contract would expire of its own terms in June, Respondent believes that Grievant should have understood that her continuing contract status was terminated. "The concept of an actual waiver of one's established rights implies a voluntary act."[8] "'A waiver of legal rights will not be implied except upon clear and

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[6]The virtually identical continuing contract statute for professional employees, West Virginia Code § 18A-2-2, was the subject of the cases cited in *Bonnell*.

[7]*Sanders v. Putnam County Bd. of Educ.*, Docket No. 96-40-382 (May 28, 1997); *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 466 S.E.2d 487 (1994); *Bd. of Educ. v. Hunley*, 169 W. Va. 489, 288 S.E.2d 524 (1982); *Drown v. Cabell County Bd. of Educ.*, Docket No. 96-06-323 (Feb. 28, 1997).

[8]*Sellers v. W. Va. Univ. - Parkersburg*, Docket No. 06-HE-276D (Feb. 27, 2007), citing *Smith v. Bell*, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947).

unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'"[9] "To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right."[10]

In this case, Grievant took no affirmative actions with regard to her contract terms other than bidding on a job posted as "one year only." She also failed to act after she received clear notice from the Respondent that it believed her contract was ending. With regard to her contract terms, there has been no express waiver of her right to a continuing contract, so if a waiver exists, it must be an implied waiver. "Waiver may be established by express conduct or impliedly, through inconsistent actions."[11] However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right.[12]

Grievant, and others from her classroom, credibly testified that there was an expectation that the student she worked with would continue in that class for the upcoming school year. Therefore, just as she had done the previous two years, Grievant presumed she would be the successful applicant when the position was again posted for 2008-2009. It is quite difficult to presume a voluntary waiver of Grievant's continuing contract status under these circumstances, when she had justification for believing that she would likely

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[9] *Id., citing Rucker v. Dep't of Transp.*, Docket No. 05-DOH-123D (2005).

[10] *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

[11] *Dye v. Pennsylvania Cas. Co.*, 128 W. Va. 112, 118, 35 S.E.2d 865, 868 (1945) (citing *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 119 S.E.2d 336, 339 (1961)).

[12] *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950).

end up in the same position the next school year. Accordingly, the evidence does not establish that there was "mutual consent" to terminate Grievant's continuing contract, and there is not clear and convincing evidence that Grievant intended to waive her right to a continuing contract.

In addition to the questions of whether Grievant voluntarily gave up her continuing contract status, it must be noted that the Board failed to comply with the requirements of W. Va. Code § 18A-2-6 in terminating the contract at the end of the year. That provision states that a contract continues under its own terms "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." Grievant was not sent written notice until April 8 of the current year.

As a result, Grievant should have been placed on the transfer list at the end of the school year and transferred into an appropriate position based on her seniority through the reduction in force process.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant's claim must be proven by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Where waiver is asserted as a defense to the assertion of the right to a continuing contract, in the absence of an express waiver, Respondent must prove by clear and convincing evidence the implication that the employee intended to relinquish the right. *See Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950). *See also, Mundy v. Arcuri*, 165 W. Va. 128, 131, 267 S.E.2d 454, 457 (1980).

3. Service personnel are given tenure [and a continuing contract] after three years of employment and may only be terminated for cause. *Bonnell v. Carr*, 170 W. Va. 493, 294 S.E.2d 910 (1982).

4. Once an employee is working under the terms of a continuing contract, the terms of that contract (such as employment term) cannot be modified without following the provisions of West Virginia Code § 18A-2-6. *Sanders v. Putnam County Bd. of Educ.*, Docket No. 96-40-382 (May 28, 1997); *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 466 S.E.2d 487 (1994); *Bd. of Educ. v. Hunley*, 169 W. Va. 489, 288 S.E.2d 524 (1982); *Drown v. Cabell County Bd. of Educ.*, Docket No. 96-06-323 (Feb. 28, 1997).

5. "'The concept of an actual waiver of one's established rights implies a voluntary act.' *Smith v. Bell*, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947)." *Sellers v. W. Va. Univ. - Parkersburg*, Docket No. 06-HE-276D (Feb. 27, 2007). "To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right." *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

6. Grievant did not expressly waive her right to a continuing contract, and Respondent did not meet its burden of proving a waiver of Grievant's right was implied by her actions or her failure to act.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to recognize Grievant's continuing contract, and to grant her any lost seniority, pay and benefits to which she would have been entitled had she been properly transferred to an available position for the 2008-2009 school year, and to take any actions consistent with her continuing contract status for the 2009-2010 school year.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

April 23, 2009

M. Paul Marteney
Administrative Law Judge