THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALLAN KAPLAN,

Grievant,

v. **DOCKET NO. 2009-0334-CabED**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant Allan Kaplan filed a grievance on December 8, 2009. The statement of grievance reads:

> Cabell County BOE and the WV State Superintendent of Schools has failed to define the workday for assistant principals. Grievant believes SAT responsibilities along with other administrative duties prevent him from effectively completing daily responsibilities in a reasonable time. Grievant is also not receiving a daily uninterrupted duty-free lunch period of at least 30 minutes as guaranteed in WV Code 18A-4-14.

His relief sought is, "Grievant wishes to have SAT [Student Assistance Team] responsibilities removed from his duties and assigned to a separate position, have a defined workday and receive a daily duty-free lunch period of not less than 30 minutes."

This grievance was filed directly to level two. Respondent filed a Motion to Dismiss on December 9, 2009. Grievant filed a Memorandum in Opposition to Respondent's Motion to Dismiss on February 5, 2010. Both parties attended a telephonic conference on March 4, 2010. Grievant was represented by Andrew J. Katz, Esq., and Respondent was represented by Rebecca Tinder of Bowles Rice McDavid Graff & Love.

Findings of Fact

1. Grievant filed a grievance on December 8, 2009.

2. Grievant had previously filed a grievance on September 10, 2008. The statement of grievance read:

> Grievant believes SAT responsibilities along with other administrative duties prevent him from effectively completing daily responsibilities in a reasonable time. Grievant is also not getting a duty free lunch pursuant to 18A-4-14.

Grievant's relief sought was "to have SAT responsibilities removed from duties, have a defined workday, and receive a duty free lunch."

3. After the September 10, 2008, grievance was denied at level one, Grievant appealed, and a mediation session was held on December 8, 2008.

4. The following agreement was reached by the parties:

On this 8th day of December, 2008, the parties agree as follows:

1. In exchange for the dismissal of this grievance, the Respondent will:

a. request a Superintendent Interpretation to clarify the definition of "workday" and "flex time" as it relates to administrative positions at schools;
b. provide, thru [sic] the building principal, SAT training to clarify rules and roles; and
c. permit the grievant to take a 30 minute lunch after the second lunch (approx 12:30-1:00) or as otherwise designated if there are no emergencies or unusual needs prohibiting the same.

5. The agreement is signed by Grievant, his representative, an attorney, the mediator, Respondent's counsel, and the Assistant Superintendent.

6. Respondent requested a Superintendent Interpretation regarding the definition of "workday" and "flex time."

7. It was not until the second and subsequent grievance was filed that the State Superintendent of Schools had the Office of Legal Services respond with an informal opinion.

Discussion

The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994). This Grievance Board has recognized the principle that grievance settlements should be upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. *Adkins v. Logan County Bd. of Educ.*, Docket No. 97-23-216 (Sept. 29, 1997); *Vance v. Logan County Bd. of Educ.*, Docket No. 95-23-190 (Mar. 15, 1996).

Grievant, with the assistance of a representative and attorney, bargained for and agreed to a settlement agreement whereby Respondent would request an interpretation from the State Superintendent regarding the definition of "workday" and "flex time." Respondent made the request. Unfortunately, what was agreed to by the parties was not within either party's control, as the State Board of Education was not a party to the grievance. While the State Superintendent did forward the inquiry to the State Department of Education General Counsel who drafted an informal opinion, this was clearly not what Grievant expected.

Counsel for Grievant[1] asserts the bargained for agreement was impossible to satisfy and then cites to the letter from the General Counsel's letter which reads, "It is not the

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[1]Andrew Katz, Esq., who is currently Grievant's attorney, did not represent Grievant in the prior grievance and was not a party to the settlement agreement currently in question.

practice of the State Superintendent to issue a Superintendent's Interpretation with respect to matters that are the subject of a grievance."

The agreement was for Respondent to request the interpretation, which it did. Second, by the time the letter from General Counsel was issued, the second grievance was pending, so the undersigned is not prepared to interpret the letter as saying it is the State Superintendent's policy to never provide an interpretation. However, it is unfortunate that the State Superintendent allowed a year to expire and another grievance to be filed before taking some action on Respondent's request.

The current grievance addresses the exact same issues raised in the previous one. The mediation agreement has been fulfilled, in that Respondent has completed the tasks within its control. Therefore, this grievance is dismissed.

Conclusions of Law

1. The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994).

2. This Grievance Board has recognized the principle that grievance settlements should be upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. *Adkins v. Logan County Bd. of Educ.*, Docket No. 97-23-216 (Sept. 29, 1997); *Vance v. Logan County Bd. of Educ.*, Docket No. 95-23-190 (Mar. 15, 1996).

3. The parties reached an agreement which resolved the issues in dispute. This agreement was reduced to writing and signed by the parties.

4. The settlement was entered into fairly and the agreement was not in contravention of law or public policy.

Accordingly, this grievance is DISMISSED.

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. *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 (2008).

DATE: March 31, 2010

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Wendy A. Elswick
Administrative Law Judge