THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BONITA K. REDD,

Grievant,

v. **DOCKET NO. 2008-1773-McDED**

McDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On June 13, 2008, Bonita Redd ("Grievant"), an Assistant Principal at Mount View High School, filed a grievance against the McDowell County Board of Education ("Respondent" or "MCBE") alleging various violations involving W. Va. Code § 18A-2-12a(4), W. Va. Code § 18A-4-7a(s), Titles VII and IX of the Civil Rights Act, and a breach/violation of contract. Grievant requested a Level One conference which was held by the Board's Superintendent, Suzette Cook, on June 30, 2008. Superintendent Cook issued a Level One decision on July 8, 2008, granting relief on three of Grievant's complaints but denying relief on two of her allegations, and Grievant appealed that portion of her grievance which Ms. Cook denied.

On October 10, 2008, Grievant sought to enforce a default judgment under the provisions of W. Va. Code § 6C-2-3 because the Grievance Board had not scheduled a mediation session within 20 days of her appeal to Level Two as required by W. Va. Code § 6C-2-4(b)(2). On October 7, 2008, Acting Deputy Chief Administrative Law Judge Ronald L. Reece issued an Order denying a default because the Grievance Board is not Grievant's employer, and the cited default provision only applies to

employers, not to entities over whom neither Grievant nor Respondent have control.[1]

Following a mediation session on March 10, 2009, Grievant appealed to Level Three on March 19, 2009. Over three years later, on April 13, 2012, Grievant again wrote to the Grievance Board requesting a default judgment be rendered because no Level Three decision had been rendered. According to the documentation maintained by the Grievance Board, Grievant's Level Three appeal was included with a request for hearing in a separate grievance involving the same parties, and the other grievance was processed by the staff which did not recognize that the documents involved two separate matters. Unfortunately, this oversight was not discovered until Grievant brought this matter to the Board's attention in April 2012.

This matter was subsequently set for a Level Three hearing which the undersigned Administrative Law Judge conducted in Beckley, West Virginia on September 28, 2012. Grievant appeared *pro se* and Respondent, McDowell County Board of Education, was represented by its attorney, Howard Seufer, with Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision on October 15, 2012, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

This grievance was filed in June 2008 and the Respondent's Superintendent granted relief on three of Grievant's five issues at Level One. The matter was advanced to Level Two but no mediation was scheduled until after Grievant filed a

[1] To the extent Grievant seeks to challenge or overturn the earlier determination that no default took place, the undersigned Administrative Law Judge has no authority to reconsider this determination by another Administrative Law Judge because this previous determination has now become "the law of the case." *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012). *See also Tressler Coal Mining Co. v. Klefeld*, 125 W. Va. 301, 24 S.E.2d 98 (1943); *Bass v. Kanawha County Bd. of Educ.*, Docket No. 92-20-214 (Nov. 4, 1994).

request for default on October 10, 2008. The default was denied because the Grievance Board, which was responsible for scheduling the mediation, is not Grievant's employer, and only an employer may be found in default. Grievant appealed to Level Three on March 19, 2009. Over three years later, Grievant again wrote the Grievance Board asking for a default finding because this matter had not been set for a Level Three hearing. Grievant renewed her request for default during the Level Three hearing on September 28, 2012.

The two substantive issues remaining in this grievance involve a complaint that MCBE did not compensate Grievant for two days she was required to perform duties that were not part of her 210-day contract as an Assistant Principal and an allegation that MCBE failed to comply with the requirement in W. Va. Code § 18A-4-7a(s) to make available copies of its annual seniority list for professional personnel to all employees, including Grievant. As will hereinafter be discussed, Grievant met her burden of proof on each of these issues and this grievance will be GRANTED.

The following Findings of Fact are made based upon the record developed through the Level Three hearing.

Findings of Fact

1. At the time of the events pertinent to this grievance, which took place during the 2007-2008 school year, Grievant Bonita Redd was employed by Respondent McDowell County Board of Education as an Assistant Principal at Mount View High School. Grievant's primary responsibilities in that position involved grades 6 through 8.

2. Grievant was employed by Respondent under a 210-day contract for the 2007-2008 school year. R Ex 3.

3. Grievant was required to perform duties relating to sports activities on Saturday, September 8, 2007 and Friday, April 18, 2008, which was the final day of Spring Break. September 8, 2007 and April 18, 2008 were not instructional days in the 2007-2008 school calendar adopted by McDowell County Schools. Further, neither September 8, 2007 nor April 18, 2008 were working days for which Grievant was compensated as part of her 210-day contract. *See* G Ex 3.

4. On June 12, 2006, then Superintendent Mark A. Manchin approved a $1000 "supplement/increase" for all Assistant Principals employed by Respondent. Principals employed by Respondent had been receiving a $1000 annual supplement since some time in 1975.

5. McDowell County Schools Policy 8-016, as revised in 1993, provides a salary schedule for Assistant Principals and states: "These positions will dictate additional work hours within a reasonable time frame commensurate with duties." G Ex 5.

6. As of the 2007-2008 school year, Grievant had a master's degree plus 45 hours of college credit, and 21 years of teaching experience. As a result, her daily rate of pay for that school year, including the $1000 supplement that was added the previous year, was $263.1659 (rounded to $263.17). *See* R Ex 4.

7. W. Va. Code § 18A-4-7a(s) states: "The county board shall compile annually on July 1 and make available by electronic or other means to all employees a

list of all professional personnel employed by the county, their areas of certification and their seniority."

8. As of the 2007-2008 school year, MCBE attempted to comply with W. Va. Code 18A-4-7a(s) by posting copies of the annual seniority list on official bulletin boards within each school.

9. On an unspecified date during the 2007-2008 school year, Grievant sought to consult the seniority list regarding a position posting but no list was posted on either of the two official bulletin boards at Mount View High School where such notices are ordinarily posted.

10. After Grievant presented this grievance at Level One, she observed that the seniority list was properly posted at Mount View High School. However, she subsequently looked for the list on the official bulletin boards at Mount View High School, and it was no longer posted.

11. Grievant appealed this grievance to Level Three on March 19, 2009, properly sending a request for a Level Three hearing to the Public Employees Grievance Board.

12. No action was taken on Grievant's request for a Level Three hearing until after she submitted a request for default over three years later, on April 13, 2012.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3

(2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "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 Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

Grievant initially asserts that she should prevail on her grievance by default because she had to wait over three years after appealing to Level Three before she received a hearing on her grievance. W. Va. Code § 6C-2-3(b) provides: "The grievant prevails by default if a required response is not made by the employer within the time limits established in this article . . . ." When a grievant appeals to Level Three, the administrative law judge is required to schedule a hearing "within a reasonable time." W. Va. Code § 6C-2-4(c)(3). Grievant properly asserts that three years is not a reasonable time for scheduling a Level Three hearing. However, the default provision only applies to the actions of her employer, and the Grievance Board is not her employer. The default provision simply does not apply to the Grievance Board because it does not apply to Administrative Law Judges over which neither party has control. *See Flint v. Bd. of Educ*., Cir. Ct. of Harrison County Civil Action No. 95-C-485-1 (Nov. 10, 1998). Therefore, Grievant's request for a default judgment is hereby DENIED.

Turning to the first of two substantive issues presented in this grievance, Grievant is asserting that she should receive additional compensation for two days she was required to work because those days were not included as part of her 210-day

employment contract.[2] In other words, her employment contract with MCBE did not require her to work on weekends, holidays, or other days when the schools are closed. Indeed, W. Va. Code § 18-5-45(c)(1) requires that county boards provide an "employment term for teachers of no less than two hundred days, exclusive of Saturdays and Sundays." However, Grievant was directed to report and perform duties related to athletic activities on a Saturday in 2007 and a Friday during MCBE's Spring Break in 2008. MCBE responded by arguing that Assistant Principals are paid an annual "supplement" which is intended to cover additional work such as Grievant performed.

"A teacher's work day are (*sic*.) those hours established by a county board not exceeding eight hours." *Soltes v. Brooke County Bd. of Educ*., Docket No. 05-86-259-3 (Feb. 19, 1987). It stands to reason that the supplement MCBE pays to its Principals and Assistant Principals is intended to recognize that their work days are often extended to supervise various after school and extracurricular events. *See Redd v. McDowell County Bd. of Educ*., Docket No. 2009-1477-McDED (May 26, 2011). Grievant's position is that the language stated in the MCBE policy authorizing this supplemental compensation ("These positions will dictate additional work hours within a reasonable time frame commensurate with duties.") merely contemplates working additional hours on those days which are part of an employee's contract, but does not extend to days which are not included in that contract. MCBE essentially contends that

[2] Because Grievant did not simply "volunteer" to work on these days, the facts in this matter are different from the situation presented in *Redd v. McDowell County Bd. of Educ*., Docket No. 2009-1477-McDED (May 26, 2011), where Grievant was denied compensation for working on a Saturday.

the supplemental pay covers any date and time that an Assistant Principal's services are required.

Ordinarily, school personnel regulations and laws are to be strictly construed in favor of the employee. Syl. pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 SW.E.2d 592 (1972). Under MCBE's approach, this "annual supplement" to compensate Assistant Principals for "additional work hours within a reasonable time frame commensurate with duties" would essentially render the 210-day term in Grievant's employment contract meaningless, and she could routinely be required to report on weekends and holidays to perform any duties that come within the purview of an Assistant Principal. If MCBE intended the supplemental compensation paid to Assistant Principals to supersede the employment term established in Grievant's annual contract, requiring Grievant and her peers to work on days that are not part of the school term (even for administrators holding an extended contract term), the county board needed to make this intent clear and unambiguous. *See Soltes*, *supra*. *See also Carvey v. W. Va. State Bd. of Educ*., 206 W. Va. 720, 527 S.E.2d 831 (1999); *Hawkins v. Tyler County Bd. of Educ*., 166 W. Va. 363, 275 S.E.2d 908 (1981). It did not.

Therefore, Grievant has established by a preponderance of the evidence that she was required to report to work on two days which were not part of her employment contract, and for which she was not otherwise compensated. Accordingly, that portion of the grievance seeking compensation for work performed on September 8, 2007 and April 18, 2008 is GRANTED, and Grievant shall be paid for those two days at her daily rate of pay for the 2007-2008 school year ($263.17 X 2 = $526.34), plus statutory

interest from 10 days preceding the date this grievance was filed on June 13, 2008 to the date of this decision.

Grievant's remaining claim involves MCBE's alleged failure to properly comply with W. Va. Code § 18A-4-7a(s). That particular Code provision states: "The county board shall compile, update annually on July 1 and make available by electronic or other means to all employees a list of all professional personnel employed by the county, their areas of certification and their seniority." This Code provision is entitled "[e]mployment, promotion and transfer of professional personnel; seniority." Grievant is asserting that MCBE failed to comply with this statutory requirement because the seniority list was not available at Mount View High School on an unspecified date during the 2007-2008 school year when she wanted to research her seniority in comparison to other employees who might be competing to fill a position posting.

Grievant is not contending that MCBE failed to compile a proper seniority list, only that it was not made available to professional personnel in compliance with the statute. Grievant acknowledged that after she filed her grievance, the seniority list was properly posted. However, she testified without contradiction that she was later unable to find a copy posted, and that it was not posted on either official bulletin board at Mount View High School at the time she wanted to refer to it during the 2007-2008 school year, when she was considering applying for a posted position.

MCBE argues that Grievant has suffered no harm and therefore lacks standing to grieve this issue. Certainly, Grievant would not have standing to complain about the school board's selection of an applicant to fill a position for which she failed to make

application. *See Redd v. McDowell County Bd. of Educ*., Docket No. 2012-0419-McDED (July 18, 2012). However, this particular subsection in W. Va. Code § 18A-4-7a is immediately preceded by subsection (r) which states: "Any board failing to comply with the provisions of this article may be compelled to do so by mandamus and shall be liable to any party prevailing against the board for court costs and reasonable attorney fees as determined and established by the court." One of the purposes of the grievance procedure is to allow for the resolution of grievances by public employees in a cost-effective manner. *See* W. Va. Code § 6C-2-1(a) and (b).

Clearly, Grievant is a member of the class of professional personnel who benefit from the requirement in (s) that the county seniority list be compiled and disseminated. MCBE normally complies with this requirement by posting a copy on all official bulletin boards in its schools. Grievant established that the seniority list was not posted on either of the official bulletin boards in Mount View High School when she needed to consult the list. MCBE did not present evidence of any intervening or superseding cause that might excuse this failure to post the seniority list. Therefore, Grievant has met her burden and established by a preponderance of the evidence that MCBE was not in compliance with W. Va. Code § 18A-4-7a(s). Accordingly, this portion of her grievance is GRANTED and MCBE is hereby ORDERED to make available to Grievant and all employees by electronic or other means the list of professional personnel employed by the county, their areas of certification and their seniority, as required by W. Va. Code § 18A-4-7a(s).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997).

2. School personnel regulations and laws are to be strictly construed in favor of the employee. Syl. pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. W. Va. Code § 18-5-45(c)(1) provides that a county board shall establish a school calendar that provides an employment term for teachers of no less than two hundred days, exclusive of Saturdays and Sundays. However, the county board may contract with all or part of its personnel for a longer term. W. Va. Code § 18-5-45(t).

4. Ordinarily, a school administrator, such as a Principal or an Assistant Principal, who volunteers to work on Saturdays, Sundays or holidays may not subsequently obtain additional compensation for such work beyond their normal salary and any applicable supplements. *See Redd v. McDowell County Bd. of Educ*., Docket No. 2009-1477-McDED (May 26, 2011).

5. The salary supplement which McDowell County Board of Education provides to Principals and Assistant Principals because those "positions will dictate additional work hours within a reasonable time frame commensurate with duties" does not mandate that an Assistant Principal report to work on a Saturday, or a day during Spring Break, and perform duties without compensation, when those days are not part of her 210-day employment contract.

6. W. Va. Code § 18A-4-7a(s) requires each county board of education to annually update a list of all professional personnel employed by the county, their areas of certification and their seniority, and to make this list available to all employees by electronic or other means.

7. Grievant established by a preponderance of the credible evidence of record that MCBE failed to comply with W. Va. Code § 18A-4-7a(s) by maintaining a posting of its professional personnel seniority list on the official bulletin boards at Mount View High School during the 2007-2008 school year.

8. W. Va. Code § 6C-2-3(b) provides that a grievant prevails by default if a required response is not made by the employer within the time limits established in this article. This provision does not apply to the West Virginia Public Employee Grievance Board's failure to meet an established time limit because the Grievance Board is not an "employer" under the statute. *See Flint v. Bd. of Educ*., Cir. Ct. of Harrison County Civil Action No. 95-C-485-1 (Nov. 10, 1998).

Accordingly, Grievant's request for a default is **DENIED** while her grievance on the merits is **GRANTED.**

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: November 9, 2012

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LEWIS G. BREWER
Administrative Law Judge