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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
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RAYMOND DUNLEAVY

v.

Docket No. 20-87-040-1

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Raymond Dunleavy, is employed by the Kanawha County Board of Education as a school psychologist and filed a grievance on November 22, 1986, alleging that he was required to work an eight and one half hour day inclusive of a lunch recess in violation of Kanawha County Schools Policy and State Board of Education Policy 5210. A level two evidentiary hearing was conducted on January 19, 1987, and the decision appealed to the Education Employees Grievance Board on February 23, 1987. The parties waived an evidentiary hearing at level four and submitted the grievance to the hearing

examiner on the level two record and legal memoranda.¹

The evidence is uncontested in this grievance and reveals that grievant has been employed as a school psychologist for two years, having executed a "Teacher's Probationary Contract of Employment" on July 1, 1986.² The contract is a standard teacher's contract and does not characterize grievant's employment as a "school psychologist", define his duties or establish his work hours. (T. 7; Grievant's Exhibit 1). These matters were addressed in a description of duties form initially given to grievant by Mr. McMillian, his supervisor, on the first day of employment (T. 8). This form is styled "Psychological Scheduling" and provides, in part, that

1. Psychologists will report to the school at 8:00 a.m. and work in the building the full school day.

¹ A supplemental brief was filed in the office of the Education Employees Grievance Board by grievant's WVEA representative on June 9, 1987; counsel for the school board elected to rely on his submission at level two and the decision of the grievance evaluator. References to the level two transcript herein will be designated as (T. __).

² Grievant has a doctorate degree and was issued a professional service certificate, issued provisionally as of July 1, 1985; he thereafter was issued a professional teaching certificate, issued provisionally.

2. Psychologists will return to the office at 3:00 p.m./or upon completing the full school day, complete paper work, telephone calls, turn in reports, etc., and remain in office until 4:30 p.m. Total preparation is to be made for the next day. (Grievant's Exhibit No. 2)

Grievant spends the majority of his time in the ten elementary schools to which he is assigned and works in those schools from about 8:00 a.m. to the end of the school day, which is approximately 2:00 to 2:15 p.m. (T. 10, 11). He returns to the central office to complete his work day at 4:30 p.m. and receives a one hour lunch period. Grievant has no administrative responsibilities in his work and supervises no other employees (T. 12, 13).

Grievant contends that a teacher's workday, unless otherwise covered in the contract, is established by W.Va. Code, 18A-4-14, by State Board of Education Policy 5210 and by Kanawha County Schools Policy II-D-2 at a maximum of eight hours; that by operation of law grievant is a teacher entitled to a maximum eight hour workday inclusive of lunch, recess and planning period.³

³ Grievant's representative relies upon several decisions of the State Superintendent holding that a school psychologist is a teacher unless he or she performs administrative or supervisory duties and that the statutory duty-free lunch and planning period allowed by W.Va. Code, 18A-4-14 are a part of the eight hour maximum employment day; that these decisions are entitled to great weight unless clearly erroneous, citing Smith v. Logan County Board of Education, 341 S.E.2d 685 (W.Va. 1985). See also, Peter Whelley v. Jefferson County Board of Education, Docket No. 19-86-242-2.

W.Va. Code, 18A-4-14 provides for the duty free lunch and daily planning period for teachers; Policy 5210 defines "regular school day" as not exceeding eight hours and Kanawha County School Policy II-A-2 provides that the standard work day for central office staff is eight hours and sets the hours at 8:00 a.m. to 12:00 noon and 1:00 p.m. to 4:30 p.m.

Counsel for the school board contends that W.Va. Code, 18A-4-14 has no application to school psychologists but is limited to classroom teachers; that the definition of "regular school day" in Policy 5210 is limited and is an unlawful extension of the rule making authority of the State Board of Education if construed to limit the right of a school board to limit the number of hours that teachers may be required to work.⁴

In addition to the foregoing factual recitation, the following specific findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant is employed by Kanawha County Schools as a school psychologist and executed a standard Teacher's Probationary Contract of Employment on July 1, 1986. He has a doctorate degree and holds a professional teaching certificate, issued provisionally.

⁴ The level two grievance evaluator decided that a school psychologist fell under the definition of "other professional employee" as per W.Va. Code, 18A-1-1 and that W.Va. Code, 18A-4-14 was applicable only to classroom teachers assigned to schools, not psychologists assigned to the central office; that no state statute mandated a specific work day for teachers or psychologists.

However, it is clear that a county board may not act in contradiction of State Board Policy, Trimboli v. Wayne County Board of Education, 280 S.E.2d 686 (W.Va. 1981), and it is to be noted that grievant is not seeking classroom teacher status with the shorter employment day but seeks to limit his work to a maximum of eight hours per day.

2. The contract executed by grievant with the school board does not characterize his employment as a "school psychologist" and does not define his duties or establish his work hours. However, grievant spends the majority of his work day in the ten elementary schools to which he is assigned and works there from about 8:00 a.m. until the end of the school day, i.e., 2:00 to 2:15 p.m. He then returns to the central office to complete his work day at 4:30 p.m.

3. Grievant receives a one hour lunch period and has no administrative or supervisory responsibilities or duties.

4. Grievant's work hours are established by directive as follows:

- a. Psychologists report to the school at 8:00 a.m. and work in the building the full school day.
- b. Psychologists return to the central office at 3:00 p.m. or upon completing the full school day, complete paper work, telephone calls, turn in reports, etc., and remain in the central office until 4:30 p.m. Total preparation is to be made for the following day.

5. Grievant alleges that the work schedule he follows is violative of law and State Board of Education Policy 5210 and the county policy itself.

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-4-14 and West Virginia Board of Education Policy 5210 limits grievant's workday to a maximum of eight hours, inclusive of at least a thirty minute lunch recess and at least a thirty minute planning period. Jaye Nesbitt v. Hancock County Board of Education, Docket No. 15-86-007.

2. State Board Policy 5210 must be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

3. Interpretations of school law made by the State Superintendent of Schools are considered as persuasive authority in the grievance procedure unless such decisions are clearly wrong.

Accordingly, the grievance is GRANTED.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



LEO CATSONIS

Chief Hearing Examiner

Dated: June 30, 1987