



Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone 348-3361

JOHN H. EARLS, JR.

v.

Docket No. 06-86-360-1

CABELL COUNTY BOARD OF EDUCATION

DECISION

Grievant, John Earls, is employed by the Cabell County Board of Education as an electronics and fire alarm technician. On October 9, 1986, he filed a grievance seeking to obtain prior service credit for pay purposes for ten years previous employment with the Huntington Fire Department. A level two evidentiary hearing was conducted by Superintendent Frum on November 3, 1986, and level three evidentiary hearings were conducted by the board of education on December 18 and 23, 1986. Appeals were received by the Education Employees Grievance Board from grievant on December 11, 1986, and from Superintendent Frum on January 13, 1987. A level four evidentiary hearing was conducted on February 26, 1987.¹

¹ The level four hearing had been scheduled for February 13 but was continued by counsel for the board of education. The parties submitted transcripts of evidence of the three evidentiary hearings listed above along with testimony of several witnesses at the level four hearing. Findings of fact and conclusions of law were requested by the hearing examiner within twenty days of the hearing; counsel for the board submitted them on March 3, 1987, but none were submitted by counsel for grievant.

(footnote continued)

Grievant began his employment with the Cabell County Board of Education in 1981 and was classified as a heating and air conditioning and fire prevention employee; in August, 1983, he assumed his present position of electronics and fire alarm technician. (Level II, p. 40). He had worked from 1969 through 1978 with the Huntington Fire Department in the Fire Alarm Division and on August 22, 1986, applied for prior service credit for pay purposes for that ten year period.

Sometime in may or June, 1986, the board of education had adopted Policy GCA, which dealt with prior work experience credit for service personnel employees.² The Policy provided that:

Experience for performing identical or similar work shall not be granted to any service employee employed after January 1, 1986. For regularly employed service personnel who were hired prior to January 1, 1986, no prior experience credit for performing identical or similar work shall be credited for salary pay purposes, except upon meeting all of the five following criteria:

1. When approved by the Cabell County Board of Education upon submission of a written application for initial employment with the Cabell County board of Education, and
2. Prior experience credit must be in the same class title as the employee is now working, and

(footnote continued)

No explanation was offered for the appeal to level four filed by grievant previous to the level three hearings.

² Counsel for the board of education represented that this was an effort by the board to equalize the treatment of service personnel employees and professional employees since teachers could obtain such credit for similar work.

3. Prior experience credit employment must have been salaried or compensated and the individual must have been eligible during that employment to participate in a state school retirement system, and
4. Prior experience credit shall be for pay purposes only and shall not be accrued for seniority purposes or for the calculation of any other benefits of employment with the Cabell County Board of Education, and
5. Prior experience credit shall not cause the individual's pay to exceed the state maximum monthly pay schedule.

Provided that: Any person who has received prior experience credit and has worked for the Cabell County Board of Education continuously since July 1, 1978, shall be exempt from the above five (5) provisions requiring application to the Board of Education and shall be entitled to keep any work experience credit heretofore granted to them prior to July 1, 1978. ³
(Employer's Exhibit 2)

Superintendent Frum, in the level two decision dated December 1, 1986, found that grievant's prior experience was substantially identical with his employment with the school board and that while the class title might not technically be the same, the day to day activities with the board were so substantially similar with his duties at the fire department as to satisfy the first criteria; that in that respect substance prevailed over form. However, it was found that grievant had failed to apply for and obtain credit

³ On the form submitted by grievant he acknowledged that he had read the Policy and believed that he met all of the five criteria.

with the West Virginia State Teacher's Retirement System and therefore had failed to satisfy the third criteria in Policy GCA, supra.

It was concluded that:

The intent of this requirement of Policy GCA is to give an employee with significant vocational qualifications an incentive to become hired by and stay employed by the Cabell County Board of Education. However, the employee must show and evidence his commitment to the school system by combining his prior pension benefits with those of the State of West Virginia School Employees Retirement program.

(Employer's Exhibit 4)⁴

At the conclusion of the level three hearing on December 18, 1986, the board decided in favor of the grievant by a unanimous vote and the hearing was adjourned. (Level III, December 18, pp. 42, 43)⁵ Thereafter, on December 23, 1986, without adequate notice to grievant, the board "reconvened" to consider the action taken on December 18; grievant and his representative objected to the procedure. (Level III, December 23, pp. 8-12). The meeting was

⁴ The decision did not contain findings of fact and conclusions of law as contemplated by W.Va. Code, 18-29-6 and as required by previous decisions of the Education Employees Grievance Board. See, e.g., Mary Adkins v. Logan County Board of Education, Docket No. 23-86-024. Accordingly, it is to be assumed that at that stage of the grievance no one had ascertained if grievant's prior service was transferable to the state school retirement system. It is further assumed that this would have been a relatively simple matter to resolve.

⁵ This level three proceeding was not actually a "hearing" but involved the unsworn argument of several of the participants. The conduct of the hearing prompted one of the board members to suggest that in future grievance hearings the board attempt to "...get a little more down to the facts involved and not so much in the personalities involved..." (Id. at p. 43).

reconvened because Superintendent Frum had informed the board that on Friday, December 19, it had been confirmed that grievant was

... a member of a private retirement plan and that that retirement plan is not reciprocal to the State Teacher's Retirement System...

(Id at p. 13).

The board adjourned the hearing into executive session and upon return the following motion was made:

MR CUMMINGS: ...I would like to make the following motion: that we allow the Board's decision of December 18, 1986, to stand with the following notation. We realize the Board made its decision upon incomplete information at that time, and we request the administration to appeal this decision to Level⁶ with that noted. (Level III, December 23, pp. 28, 29).

At the level four hearing counsel for the grievant moved to dismiss the appeal as being untimely and the question of the number of days school had been officially closed during the Christmas holidays became critical to this motion. Accordingly, Superintendent Frum was to forward to the hearing examiner an official school calendar with which to dispose of the motion to dismiss. This

⁶ One of the board members, Ms. Hagan, had been of the opinion that the reason the board reconvened was to decide whether the ruling of December 18th had been correct and, if not, to correct it. (Id. at 25).

Notwithstanding, the board acknowledged that its decision was incorrect but refused to correct it; instead it directed Superintendent Frum to appeal to level four.

calendar was to be furnished within twenty days from February 26, 1987.⁷ As of the date of this decision the school calendar was not filed with the Education Employees Grievance Board.

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 the Cabell County Board of Education as an electronics and fire alarm technician. From 1969 through 1978 he had been employed in the fire alarm division of the Huntington Fire Department performing duties similar to those he performs with the school board.

2. Grievant had made inquiry about prior service credit for this previous employment on at least one occasion after his employment in 1983 in his present job and on October 9, 1986, filed a grievance on that basis.

⁷ Another board witness, Mr. Ed McNeel, was to forward documentary evidence concerning the classification of Mr. Sam Stanley as a professional or school service personnel employee but this document was also not received. This evidence was relevant to grievant's contention that the Policy was not uniformly applied in violation of W.Va. Code, 18A-4-5b because the board had given such credit to several other employees, among whom was Mr. Stanley. Grievant had submitted an affidavit of William Zban, service personnel director for Cabell County Schools, at level four that Mr. Stanley had been given credit for 21 years in a similar situation. (Grievant's Exhibit 3).

3. In the interim the board of education had adopted a policy which set forth the criteria for eligibility for prior work experience credit for service personnel employees hired prior to January 1, 1986. One of the criteria was that the prior experience credit employment must be transferable to the state school retirement system.

4. A level two evidentiary hearing was conducted on November 3, 1986, and the grievance evaluator, Superintendent of Schools Frum, concluded that grievant had failed to satisfy that criteria; the grievance was accordingly denied at level two.

5. Grievant appealed to level three and a hearing was conducted on December 18, 1986, and the board of education ruled in grievant's favor. However, without adequate notice to grievant, the board "reconvened" on December 23, 1986, ostensibly to determine the validity of their previous decision. The board again ruled in grievant's favor but directed Superintendent Frum to appeal the decision to the Education Employees Grievance Board.

6. Superintendent Frum appealed to level four on January 13, 1987, and an evidentiary hearing was conducted on February 26, 1987. Prior to commencement of the hearing counsel for the grievant moved to dismiss the appeal as untimely and it was contended by counsel for the board that in calculating the number of days it was essential to eliminate those days school was closed over the

Christmas holidays. Superintendent Frum was uncertain as to the exact dates of closing and an official school calendar was to be submitted to the hearing examiner within twenty days of the hearing. This calendar was not filed with the Education Employees Grievance Board.

CONCLUSIONS OF LAW

1. The level three hearing of the board of education on December 23, 1986, was without adequate notice to the grievant and was a nullity.

2. On the basis of the evidence submitted the appeal to the Education Employees Grievance Board was untimely.

Accordingly, the appeal is dismissed.

Either party may appeal this decision to the Circuit Court of Kanawha County or Cabell 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: April 7, 1987