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James Paul Geary
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EARL HYSELL

v.

Docket No. 26-86-159-1

MASON COUNTY BOARD OF EDUCATION

DECISION

Earl Hysell, grievant, was employed by the Mason County Board of Education in June, 1977 as a custodian III on a 240 day contract and remains as such to the present time. On November 18, 1985 he filed a level one grievance contending that he had replaced a 261 day custodian in 1977 and was entitled to have his 240 day contract upgraded to 261 days with back pay. Grievant's principal at Ordnance School, Grant Barnett, responded on that date, "A school of our size needs a 261 day custodian, therefore I recommend that this grievance be persued (sic) farther."¹

¹It appears that the principal supported grievant's claim to the 261 day contract but apparently had no authority to act accordingly.

A level two grievance hearing was conducted December 6, 1985 and denied December 13, 1985. The record does not reveal the level three action but a level four appeal was filed in early April, 1986. Originally assigned to the Elkins office, the grievance appeal was transferred to Wheeling in July, 1986, but dispositional matters were not settled until March 4, 1987.²

Grievant's level two testimonial evidence was that he began working as a full-time Custodian III at Ordnance School on a 240 day contract approximately eight years prior to filing his grievance. Mr. William Barker, presently superintendent of schools, was principal of Ordnance at the time and recommended grievant's hiring.

Grievant stated that the school was "big" and difficult to keep clean and that his duties were the same as the custodian he had replaced who had held a 261 day contract (T.14).³ Grievant testified that he believed other school custodians had been hired

²Although this case has been pending before this Board for over one year with at least one level four hearing scheduled and cancelled, grievant's agreement to the respondent board's proposal to submit the matter for decision upon the record was not received until March, 1987. Shortly thereafter, the undersigned hearing examiner requested that grievant's WVSSPA representative submit proposed findings of fact and conclusions of law no later than March 26, 1987, but no such materials have been received to date from either of the parties.

³A 261 day employee receives approximately one month additional salary, vacation benefits plus an extra 1.5 day of personal leave pursuant to W.Va. Code, 18A-4-10. The net result is that grievant is scheduled to work only a few days less than a 261 day employee but does not receive the extra month's compensation.

at 261 day contracts since his hiring and that their various school assignments were comparable to his as to size and work requirements (T.17,18). He cites the uniformity provisions of W.Va. Code, 18A-4-5(b) to support a contention that he should receive equal pay for equal work.

Grievant stated that there were additional factors establishing his entitlement to a 261 day contract. Even though his school had two custodians, himself and another, he said he did the work of two men. He suggested that the other custodians who staffed the school did not do their work. He therefore "voluntarily," but admittedly without the school board's bidding, knowledge or permission, worked in excess of his 240 day work calendar, he claimed, in order to complete the necessary custodial work at the school.⁴ Grievant stated that he discussed the problem with Mr. Barker two summers ago and was told he would have to file a grievance. He contends that his delay in filing his grievance was because he was too busy doing his job and everybody else's (T.18,19).

⁴Grievant did not specify any particular times or dates in which he performed extra work but stated that Mr. Barker (school superintendent) knew when he had done so. Mr. Barker, who was present at the hearing, neither denied nor corroborated this testimony.

School officials readily admitted that grievant is a good worker but contested his claims that he is entitled to any contract other than the 240 day contract he now holds. Initially, a timeliness issue was raised to which grievant's counsel countered by stating it was his belief that "this is a continuing grievance," and every day grievant works under his present contract is a renewal of his grievance.⁵

The respondent maintains that it is improper and unfair for grievant to wait nine years to ask for cumulative back wages. Respondent's timeliness argument is bolstered by its contention that grievant has through the years repeatedly signed his 240 day contracts and so marked those days worked on the employment calendars he also signed.

School officials also denied that two persons named by grievant were hired after him with 261 day contracts and furnished proof that one employee was originally hired and remained as a 240 day employee. (Joint exhibit No. 1). The other employee had been hired as a 261 day employee several years before grievant, according to the respondent. Contracts from 1974 through 1976 indicate that the employee held a 12-month term of employment on probationary status. Then in 1977, the year grievant was hired, the worker was granted a continuing contract which, for the first time, qualified the 12 months and now noted a 12-month - 261 day term. (Joint exhibit No. 2).

⁵This argument has little merit especially in light of grievant's own testimony that he was advised two summers previously that he could file a grievance about his problem at Ordnance.

The respondent skirted the issue of whether grievant deserved a 261 day contract in accordance with uniformity laws. Mr. George Miller, Business Manager-Treasure for Mason County Schools, acted as spokesperson for the respondent board at the level two hearing and his summation argument was, in part, as follows:

Ah, we're not saying that he doesn't deserve two hundred and sixty-one (261) day employment, but we're saying this is hardly the method to gain a two hundred and sixty-one day employment, by a grievance. If he ah..ah is content that two hundred and sixty-one (261) day employment is...would satisfy his grievance, then I think the Administration should look seriously at the amount of work he does.

...

Now, whether or not Mr. Hysell claims that he works harder than the two hundred and forty (240) day employee and so forth that's...I don't think that's the question here. I'm pretty sure that he probably does, but that's not the question. (T.43,44).⁶

In addition to the foregoing discussion, the following specific Findings of Fact and Conclusions of Law are incorporated herein.

⁶Contrary to the second portion of the pronouncement, it would appear that the crux of grievant's entitlement argument is that a 240 day custodian position is not sufficient for Ordnance, a view shared by the school's principal.

FINDINGS OF FACT

1. Grievant is presently employed as a 240 day Custodian III by the Mason County Board of Education.

2. Grievant was hired in 1977 to replace a 261 day custodian at Ordnance School, which he characterizes as big and difficult to keep clean. There was no denial that his work responsibilities were the same as the departed custodian's.

3. In 1985, at least eight years from the date of his initial employment, grievant filed a grievance asking that his contract to be extended to 261 days with retroactive back wages.

4. Grievant's belief that employees were hired for 261 day contracts at the time of or subsequent to his hiring was not conclusively proven but does not otherwise appear to be relevant to the grievance issues.

5. In spite of when grievant did pursue his dispute with school officials, he was given mixed messages about how he should attempt to resolve his onerous work situation. On one hand, the superintendent told him to file a grievance; on the other hand, another official stated that a grievance procedure was hardly the method by which to gain his remedy.

6. While the board of education strongly objected to grievant's claim for back wages and raised a timeliness protest thereof, grievant's concurrent claim that he performed the services of a 261 day custodian was not denied.

7. An advisory by grievant's principal on his level one response that grievant's claim be considered because a 261 day custodian was needed at Ordnance school was ignored by school officials with authority to do so.

8. An advisory by the respondent's spokesperson at the level two hearing that the Administration should investigate the amount of work grievant does was ignored. The official had suggested that perhaps grievant was entitled to the 261 day contract extension if that would satisfy the grievance claim (and presumably not pursue the matter of back wages).

9. Allegations made by grievant that the nature, scope and responsibilities of his custodial duties at Ordnance School could not be accomplished on a 240 work day basis, but that he nonetheless devoted his own time in order that they be performed, were not refuted, questioned or investigated by school officials and, in fact, for the most part readily acknowledged. Therefore, grievant's allegations must stand as proven.

10. Regardless of when grievant was hired, he has established that he performs the same duties as a 261 day custodian and is thus entitled to equal compensation and benefits as a matter of law.

11. Notwithstanding that work responsibilities required grievant to work more days than those for which he was contracted and paid, he did so on a voluntary basis and made no claim to extra wages for over eight years and is therefore barred from monetary relief for back wages as a matter of law.

CONCLUSIONS OF LAW

1. W.Va. Code, 18-29-4(a)(1) provides that before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. Wanda Scarberry v. Mason County Board of Education, Docket No. 26-86-291-1.

2. It is incumbent upon an employee to timely pursue their rights through the grievance process and when timeliness is questioned to demonstrate the reason for the delay and/or the applicability of W.Va. Code, 18-29-4(a)(1). Wanda Scarberry v. Mason County Board of Education, supra.

3. Grievant is estopped from asserting a right to remuneration for work performed voluntarily over a period of time without due notice to his employer of his desire to be compensated for such services and as a grievable issue is untimely as a matter of law.

4. A county board of education has a non-discretionary duty to uniformly compensate and otherwise provide benefits for all persons regularly employed and performing like assignments and duties within the county. W.Va. Code, 18A-4-5b.

5. The school board herein became cognizant of grievant's possible entitlement to an extended contract but it neither denied nor investigated grievant's belated claim, such omission a constructive admission that grievant deserves a 261 day contract.

Accordingly, this grievance is **GRANTED** as to grievant's request that his contract be extended to 261 days, effective the present 1986-87 school term, and **DENIED** as to an award of back wages.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) 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.

DATED: June 1, 1987

Nedra Koval

NEDRA KOVAL
Hearing Examiner