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**WEST VIRGINIA EDUCATION
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JO ELLEN KARR

v.

Docket No. 18-86-297-1

JACKSON COUNTY BOARD OF EDUCATION

DECISION

Grievant, Jo Ellen Karr, filed a grievance on August 4, 1986, alleging that she had been denied a position as a substitute teacher in violation of W.Va. Code, 18A-2-3 and W.Va. Code, 18A-4-8b. A level two hearing was conducted on September 10 and by decision dated September 16, 1986, the grievance was denied.¹ The Jackson County Board of Education ratified the decision of the level two grievance evaluator on October 9 and an appeal was made to the Education Employees Grievance Board on October 17; an evidentiary hearing was conducted on December 23, 1986.

¹ At the level two hearing the grievant abandoned the contention that W.Va. Code, 18A-2-3 had been violated because it was established that the position had not been filled by a substitute teacher. (Grievant's Exhibit 6).

On December 23, 1986, counsel for the board of education made a preliminary motion to bar Mr. Joseph Furtado, UniServ consultant for the West Virginia Education Association (WVEA), from acting in the capacity of a lawyer at the level four hearing on the grounds that Mr. Furtado is not an attorney and that he is in violation of W.Va. Code, 30-2-5.² The motion was denied at that time and evidence was adduced from the grievant on the merits of the grievance.

Grievant is a substitute teacher whose employment contract terminated at the end of the school term on June 13, 1986. On July 7, 1986, a regular teacher was granted a leave of absence and grievant telephoned the board of education office to apply for the position; she had an application on file and was advised that was sufficient. Thereafter, grievant wrote letters to Superintendent of Schools Lannon expressing her interest in the vacancy and requesting an interview. Grievant received no response to her letters and on July 20 read in the newspaper that Larry Canterbury had been hired by the board of education on July 17 to fill the vacancy.

² In support of the motion, counsel for the board of education filed a letter from Mr. Jack M. Marden of the West Virginia State Bar that Mr. Furtado was not listed as a member of the Bar and a certificate under seal of Ancil G. Ramey, Clerk of the Supreme Court, that Mr. Furtado had not been admitted to practice before that Court. (Employer's Exhibit 1).

Grievant commenced her grievance on August 4, 1986, and was thereafter issued a substitute teacher's contract on August 21, 1986.³ Accordingly, it is the position of counsel for the board of education that grievant was not an "employee" as contemplated by W.Va. Code, 18-29-1, et seq., and the grievance should be dismissed. The hearing on December 23, 1986, was adjourned on motion of counsel for the board to bifurcate the hearing to resolve the jurisdictional threshold question of grievant's standing to pursue the grievance via W.Va. Code, 18-29-1, et seq. However, prior to deciding that question it would appear appropriate to address the motion to bar Mr. Furtado from participation in the level four proceeding on the basis of W.Va. Code, 30-2-5.⁴

³ In the response to the grievance at level one it is stated that the position had not been filled with a substitute teacher but with a regularly employed business education teacher; that W.Va. Code, 18A-4-8b related to regularly employed personnel, not substitute professional personnel. (Grievant's Exhibit 2). See, however, Brumfield v. Kanawha County Board of Education, Docket No. 20-86-126.

Grievant's contract was as a day-to-day substitute teacher and terminated at the end of the school year; it provided that the substitute had no substantive or procedural rights to re-employment unless granted by board policy. (Level II, Exhibit F).

⁴ The parties were requested to file memoranda on their respective legal theories and these memoranda were filed on January 15, 1987. However, neither party addressed the question of Mr. Furtado's "unlawful practice of law".

It is to be noted that W.Va. Code, 18-29-1, et seq., was designed to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and the Legislature specifically provided that it was to be construed to effectuate that purpose. (W.Va. Code, 18-29-1). W.Va. Code, 18-29-3(f) provides that an employee may have the assistance of one or more fellow employees, an employee organization representative, legal counsel or any other person in the preparation and presentation of the grievance and W.Va. Code, 18-29-6 provides that notice of a hearing shall be sent to all parties and their named representative.⁵ Section 6 further provides that all hearings are to be conducted in an impartial manner, ensuring that all parties are accorded procedural and substantive due process. Significantly, section 6 also provides that formal rules of evidence are not to be applied except that the parties are bound by the rules of privilege recognized by law. Accordingly, the entire scheme of W.Va. Code, 18-29-1, et seq., clearly contemplates a grievance system minimally burdened by overly legalistic requirements which would restrict participation to lawyers.

⁵ W.Va. Code, 18-29-3(q) defines an employee organization as any employee advocacy organization whose membership includes employees as defined in that section.

It is equally as clear that practice before an administrative agency authorized to hear evidence, subpoena witnesses and administer oaths such as the Education Employees Grievance Board constitutes the practice of law and that the exclusive authority to define, regulate and control the practice of law in this State is vested in the Supreme Court of Appeals. Christie v. W.Va. Health Care Cost Review Authority, 345 S.E.2d 22 (W.Va. 1986). The definition of the practice of law as promulgated by the Supreme Court of Appeals emphasizes the need for protection of the public from legal advice and representation from and by persons who are "unqualified and undisciplined" and is to be read in pari materia with W.Va. Code, 30-2-4 and W.Va. Code, 30-2-5, which impose misdemeanor criminal penalties for the unauthorized practice of law by a natural person or by a corporation or association.⁶ Brammer v. Taylor, 338 S.E.2d 207, 212 (W.Va. 1985).

⁶ It has been the experience of this hearing examiner that the WVEA representatives are especially competent in school law and are generally very thorough and knowledgeable with the grievance procedure. These WVEA representatives presumably represented grievants in the previous grievance procedure replaced by W.Va. Code, 18-29-1, et seq., which involved similar participation and experience. See, e.g., Jones v. Lincoln County Board of Education, 294 S.E.2d 113, 115 (1982). Cf. Smith v. Logan County Board of Education, 341 S.E.2d 685, 689 (W.Va. 1985).

At present the grievance procedure accomodates grievants with private lawyers, organizational representatives and grievants who have successfully represented themselves. See, e.g., Frances Mooney v. Marshall University, Docket No. 06-86-150-1; Steve McBride v. Wayne County Board of Education, Docket No. 50-86-184-1.

However, the conflict that exists between W.Va. Code, 18-29-1, et seq., permitting the representation of a grievant by a nonlawyer member of the WVEA and the provisions of W.Va. Code, 30-2-5, or the definition of law as promulgated by the Supreme Court of Appeals, must be resolved in favor of the stated intent of W.Va. Code, 18-29-1, et seq., to permit such representation. It is not the function of the Education Employees Grievance Board to regulate the practice of law or to otherwise emasculate the provisions of the grievance procedure by frustrating the intent thereof.⁷

The motion of counsel for the board of education to dismiss the grievance on the jurisdictional grounds of the standing of the grievant to pursue the grievance has merit and must be resolved on the facts of this grievance. W.Va. Code, 18-29-2(c), relied upon by both parties, is as follows:

"Employee" means any person hired by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

⁷ Counsel for the board of education, i.e., the prosecuting attorney and assistant prosecuting attorney of Jackson County, acknowledged that a misdemeanor warrant could be obtained and counsel are knowledgeable of the procedures to follow if their claim is genuine; however, it is apparent that the question will ultimately be resolved by the Supreme Court of Appeals.

It is to be noted that the grievance evaluators and other school officials serving as hearing examiners and representatives at level two would fall within the proscription.

Grievant was not under contract with the Jackson County Board of Education in July, 1986, when the vacancy occurred and filled or on August 4, 1986, when the grievance was filed.⁸ Had she been under contract at the time of these events it is clear that she would have standing to pursue this grievance on the basis of W.Va. Code, 18A-4-8b(a). Brumfield v. Kanawha County Board of Education, Docket No. 20-86-126.⁹

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

⁸ Grievant contends that on August 15, 1986, Superintendent Lannon advised grievant that she was ineligible to participate in the grievance process and on August 28, 1986, informed her that she was eligible; that the board is thereby estopped to deny her standing, citing Dillon v. Mingo County Board of Education, 301 S.E.2d 588 (W.Va. 1983). However, the latter interpretation was clearly erroneous and not binding on the hearing examiner. Thomas v. McDowell County Board of Education, 261 S.E.2d 66 (1979).

⁹ Brumfield was a departure from the concept that substitute teachers were not contemplated by W.Va. Code, 18A-4-8b(a) on the strong public policy of the State favoring the hiring and advancement of teachers based on their abilities. See, e.g., Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986). Prior opinions of the State Superintendent of Schools afforded some due process rights to substitute teachers as to evaluations, (Opinion of Superintendent Truby dated May 22, 1984), but not to the extent afforded to school service personnel. (Opinion of Superintendent Truby dated November 24, 1982.)

FINDINGS OF FACT

1. Grievant executed a substitute teacher contract on April 15, 1986, for the remainder of the school term which ended June 13, 1986.

2. On July 7, 1986, Mrs. Betsy Adams, a business teacher at Ravenswood High School, was given a leave of absence for the 1986-87 school year and grievant made oral application for the position. By letter dated July 15, 1986, she made written application and requested an opportunity for an interview; no response thereto was received by grievant.

3. On July 20, 1986 grievant read in the local newspaper that Bryan Canterbury had been hired to teach at Ravenswood High School; grievant later learned that Mr. Canterbury was to fill the vacancy created by the leave of absence granted to Mrs. Adams.

4. Grievant filed a grievance on August 4, 1986, alleging a violation of W.Va. Code, 18A-2-3 and W.Va. Code, 18A-4-8b. The level two grievance evaluator decided that grievant was not an employee, did not prove she was best qualified or that she was the most senior applicant. This decision was reviewed and ratified by the board of education on October 9, 1986; grievant appealed to level four and evidentiary hearings were commenced on December 23, 1986.

CONCLUSIONS OF LAW

1. W.Va. Code, 18-29-3(f) provides that a grievant may have the assistance of an employee organization representative such as a West Virginia Education Association UniServ consultant in the preparation and presentation of their grievance and such representative is not barred from participation in the grievance procedure on the grounds that the representative is not a lawyer.

2. A substitute teacher whose contract has expired is not an "employee" for purposes of contesting the filling of a vacancy by the board of education on the basis of W.Va. Code, 18A-4-8b(a).

It is accordingly ORDERED that the motion to dismiss the grievance is granted and the grievance DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or Jackson 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: February 25, 1987