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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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DARRELL PRIDDY

v.

Docket No. 40-88-070

PUTNAM COUNTY BOARD OF EDUCATION

DECISION

This grievance presents the procedural issues of whether the Level III and Level IV appeals were properly and timely filed and the substantive issue whether it was proper for the respondent board of education to prohibit the grievant from being on two substitute lists at the same time.

Grievant Darrell Priddy has been employed by Respondent Putnam County Board of Education since January 1987, when he began working as a substitute aide. That summer he applied for the higher-paying position of a substitute bus operator. He was told that county policy required him to resign as a substitute aide in order to be placed on the substitute bus operator list. He complied with that requirement, resigning from the substitute aide position. Later he heard that other

employees were allowed to be on two substitute lists. On October 28, 1987, he filed this grievance, which was denied at Level I on November 3, 1987, and again denied at Level II on November 19, 1987, after a hearing on November 16, 1987.

An April 22, 1988, letter from the grievant sent this Board stated, "I filed a grievance #87007, at Level III with the Putnam County Board of Education president, Paul Knell, on November 23, 1987. I have asked for a response to my hearing at this level, and to this date have not received a response." The letter then requested appeal to this level. Accompanying the letter were all the grievance forms for the lower levels, including a Level III grievance form dated November 23, 1987, directed to Paul Knell, President, Putnam County Board of Education, as the responsible administrator.

At the Level IV hearing, held August 25, 1988, the respondent board contested that any Level III appeal had been properly filed and argued that, without a proper and timely appeal at that level, this grievance cannot be considered at Level IV. In support of its contention the board presented the testimony of Barbara Arnold, Director of Personnel and General Counsel for the board. Ms. Arnold described in detail the procedures of her office for logging in grievance cases as they are appealed and declared that all members of the board are required to turn over all appeals to her office immediately upon receipt. She moreover testified that, after she received

the grievant's Level IV appeal, she and two secretaries went through the files in her office to make sure that the Level III appeal had not been misplaced, and no appeal from the grievant was found. She further testified that she questioned each member of the board, in particular Mr. Knell, as to whether he or she had received the Level III appeal and all denied having received it. Ms. Arnold concluded that the appeal had not been received by her office and she could not verify its filing in any way whatsoever.

Grievant did not appear in person at the Level IV hearing. His counsel, who stated that he had not been aware of any issue regarding the filing of the Level III appeal prior to the Level IV hearing, responded that he had spoken to his client; that the grievant had indicated he had filed the appeal; and that, due to the failure of the board to respond to that appeal, the Level IV appeal had been filed. A stipulation was offered by counsel for the board, that, should the grievant be present, he would testify that he did file the Level III appeal with Mr. Knell, and the stipulation was accepted by the grievant's counsel.

The evidence preponderates in support of the grievant's position that he did file the appeal with a board member.¹

¹In its proposed findings of fact and conclusions of law, Respondent board does not propose a determination that Grievant did not, in fact, file the Level III appeal. Rather, the board proposes as a finding of fact, "The grievant did (footnote cont.)"

While Ms. Arnold's testimony clearly established that no appeal was received in her office, there is no direct testimony that the grievant did not provide a board member with his appeal. The stipulation must be accepted as direct testimony by the grievant that he did refer his appeal to Mr. Knell, a board member. This evidence was contradicted only by the purely hearsay testimony of Ms. Arnold that all board members denied they received any appeal--testimony that is of little probative value.

Accordingly, with acceptance that the Level III appeal was filed, it must be determined whether, nevertheless, the Level IV appeal was untimely, due to grievant's not appealing to Level IV until five months after he filed the Level III appeal, pursuant to the statute's provision that "if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level." W.Va. Code, 18-29-3(a). Firstly, it must be stressed that the inaction of the board on the Level III appeal was longer than the inaction of the grievant and, had the appeal been processed and the board made a decision adverse to grievant within those five months after which it received the appeal, the grievant would

(footnote cont.)

not attempt to obtain a Level IV appeal from the inaction of the Putnam County Board of Education for over four (4) months, assuming arguendo, that the grievant did, in fact, file a Level III appeal," and as a conclusion of law, "The grievant did not timely preserve and protect his rights in the appellate procedure from the Level III disposition, assuming arguendo that the Level III appeal was in fact filed, to the Level IV decision level." While these proposals may indicate that the respondent is no longer pressing for a determination that the grievant failed to file a Level III appeal, in that the respondent's evidence relates to the issue, it is here addressed.

have been required to file an appeal within five days thereafter. W.Va. Code, 18-29-4(d)(1). Secondly, W.Va. Code, 18-29-3(a) does not mandate any time limits in which a grievant must appeal to the next level when no action is taken at the level below and, indeed, is clearly intended to provide as an option for the grievant's benefit an action that he or she "may" take when grievant can get no action and therefore no satisfaction below. Accordingly, while there may be a case where the failure of an evaluator to issue a decision in a timely manner may be justified and a grievant's failure to appeal to the next level is not, the delay in this case of about four months from when grievant was allowed by the statute to appeal to Level IV does not warrant a determination of untimely appeal.

On the issue whether it was proper for the board to disallow the grievant's being on two substitute lists, the parties were in agreement that the grievant was required to resign as a substitute aide in order to be allowed to be put on the list for substitute bus operators. Further, the respondent board conceded that other employees had been allowed to be on more than one substitute list, justifying this differing treatment on the ground that, while it has been the board's practice and policy since 1983 to disallow an employee from being put on a second list, those employees who were already on more than one list when the board changed its policy were allowed to remain on those lists thereafter; that is, they

were "grandfathered" onto all subsequent lists. James C. McGehee, who has been Director of Adolescent Education for respondent board for approximately a year and for the prior seven years was Director of Personnel, testified that, while several employees had been allowed to remain on more than one list, as of this time probably only one or two persons remain on more than one list. He also testified that, while disallowing an employee from being put on two lists was not promulgated as official written policy until March 21, 1988, as Policy GDE, "Substitute Service Personnel Employment, Waiting List, and Testing Policy" (which was submitted into the record), the policy did not change the practice followed since 1983, for since that date no employee has been allowed to be put on two lists.

Grievant does not contend that Policy GDE is invalid but argues that, prior to its issuance in March 1988, the board's practice was invalid because it was not written and, further, due to the "grandfathering" of employees who were already on more than one substitute list in 1983, the policy has not and is not being uniformly applied, in contravention of the requirement of W.Va. Code, 18A-4-5b that "uniformity shall apply to all benefits..."

The only remedy Grievant requests is that he be allowed to be put on the substitute aide list, in addition to the

list for bus operators he is presently on. Accordingly, it is not necessary to address whether the practice of the board of disallowing an employee from being put on more than one list which predated the promulgation of Policy GDE was proper. The only issue needing resolution is whether it is proper for the board to prohibit Grievant from being on two lists at this time while it continues to allow at least one employee to remain on more than one list.

When Mr. McGehee was questioned as to whether he relied on any policy when allowing employees previously on more than one list to so remain, he could not cite any, stating that "[T]he people that were on the two lists were left on the list; we didn't try to take them off. They're still there and anybody that was on two lists would automatically stay there. Once we started we said from this time forward this would be our practice." He did agree with the board's attorney that, at the time the policy or practice changed, the law proscribed changing the conditions of employment for an employee and offered that the "relegation" provision of W.Va. Code, 18A-4-8 may be the pertinent statute.² While that provision would disallow

²W.Va. Code, 18A-4-8 provides in pertinent part: "No service employee, without his written consent, may be reclassified by class title, nor may a service employee, without his written consent, be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years."

changing the conditions of a service employee's employment within a fiscal year,

The employment terms of school service personnel can be modified without their consent by terminating the contract with written notice, stating the cause to the employee and otherwise complying with the provisions of W.Va. Code, 18A-2-6, thereby supplanting the old contracts with the modified contracts. Fayette County Board of Education v. Hunley, 228 S.E.2d 524 (W.Va. 1982).

Roach v. Mason County Board of Education, Docket No. 26-87-070 (November 30, 1987). Accordingly, no justification, based on any policy, practice, or statute, has been offered as to why over the last five years the board has not modified, pursuant to the procedures of W.Va. Code, 18A-2-6, the continuing contract of the grandfathered employees so that their contracts would conform with the practice and finally the written Policy GDE.

It is not necessary to address whether W.Va. Code, 18A-4-5b itself proscribes the disparity of treatment involved in this case because, when a board of education promulgates an official policy, such policy must be applied uniformly. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908, 912 (W.Va. 1981). Respondent board admits it is not uniformly applying its Policy GDE and indeed has offered no explanation for excepting for the last five years certain individuals from that policy and the consistent practice that preceded it.

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

FINDINGS OF FACT

1. Grievant Darrell Priddy provided Paul Knell, President Putnam County Board of Education, his Level III grievance appeal of November 23, 1987.
2. Grievant, who was substitute aide from January 1987, was required to resign that position that summer in order to be allowed to be a substitute bus operator.
3. Respondent Board of Education discontinued allowing employees to be put on a second substitute list in 1983 but allowed employees already on more than one list to remain on all such lists and at least one employee remains on more than one substitute list.
4. Respondent Board of Education on March 21, 1988, promulgated Policy GDE, which was consistent with its prior practice of prohibiting employees from being put on two substitute lists.

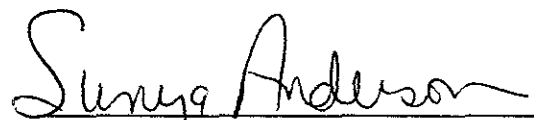
CONCLUSIONS OF LAW

1. Grievant's Level III and Level IV appeals were timely filed.
2. When the Board of Education promulgated Policy GDE, it was required to apply it uniformly. See Hawkins.

3. No justification, based on any policy, practice or statute, was provided by the Board of Education for its practice of allowing employees who were on more than one substitute list in 1983 to remain on such lists.

This grievance must be **GRANTED**. The board is **ORDERED** to place the grievant on the list for substitute aides from which he was removed and the grievant must remain on the substitute lists for aides and for bus operators, enjoying all benefits inherent thereto, until such time as the board may properly and uniformly comply with its own policy.

This decision may be appealed to the Circuit Court of Putnam County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). This office must be informed of any intent to appeal in order that the record can be prepared and transmitted to the Court.



SUNYA ANDERSON
Hearing Examiner

Dated: October 6, 1988