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

GASTON CAPERTON
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CHERYL FARRINGTON

v.

Docket No. 89-40-322

**PUTNAM COUNTY
BOARD OF EDUCATION**

DECISION

Cheryl Farrington, employed by Respondent Putnam County Board of Education as a teacher at George Washington Elementary School (Washington), filed a grievance at Level I on April 18, 1989, alleging that bus-duty requirements at Washington violated Respondent's Policy GCK that "the work day for professional personnel is seven and one-half ($7\frac{1}{2}$) hours per day" and the requirement of W.Va. Code §18A-4-14 that each regularly employed teacher "be provided a planning period within each regular school day. . . ."

While the grievance was denied at Level I, the Level II evaluator, James C. McGehee, found the alleged violations had occurred, thereby granting the grievance, and ordered the principal of Washington to

develop a bus duty schedule that will assure that students are adequately supervised and in which no teacher is required to work more than seven and one-half ($7\frac{1}{2}$) hours or to be denied their required planning period as required by West Virginia Code 18A-4-14.

Grievant's representative's copy of the decision was apparently mailed the day the decision was issued, May 19, 1989, and Grievant's copy was served May 25, 1989.¹ On June 1st Grievant's representative wrote Respondent's personnel director as follows:

This letter is in reference to the Level II decision for Cheryl Farrington, Grievance Control No. 88022. Ms. Farrington sought relief in her grievance by being compensated for the hours in excess of the seven and one-half [7- $\frac{1}{2}$] hours when completing her assigned bus duty.

Following are the hours worked for which she seeks compensation:

Early bus duty...6 times = 3 hours total
Late bus duty....9 times = 9 hours total

Ms. Farrington's daily rate of pay is \$105.18 and her hourly rate is \$14.02.

Your attention to this matter would be greatly appreciated and would result in the grievance being settled completely at Level II.

On June 16, 1989, Mr. McGehee wrote the representative, saying that Grievant had stated that her grievance could be resolved by fair compensation or by elimination of assigned bus duties, and in his response he had granted her request by requiring that duties extending the day beyond 7 $\frac{1}{2}$ hours be eliminated.

On June 22, 1989, the representative appealed the grievance to Level III, arguing that Grievant had requested

¹Of record is a May 25, 1989, letter from Respondent's Director of Personnel, wherein she explained that the Grievant's copy of the decision was sent to the wrong address. Another copy was enclosed.

compensation and elimination of bus duties. On June 27, 1989, Respondent's Secretary wrote the representative at the behest of Respondent, stating,

1. A decision was rendered at Level II on April 26, 1989. Your appeal to Level III was made on June 22, 1989. This was forty-one (41) working days from the Level II decision to the Level III appeal. West Virginia Code 18-29-4 provides five (5) days for an appeal. Your appeal seems to be untimely, and the board declines to hear it accordingly.

2. The Level II decision was for the grievant. Cheryl won the grievance. And there is some question whether she may properly appeal a grievance which was granted. For this reason as well the Board believes a hearing at Level III would be inappropriate.

On July 3, 1989, Grievant, by representative, appealed to Level IV, reiterating her allegations of violations of Policy GCK and Code §18A-4-14, and stating, "Relief sought is to be paid the compensation requested at Level II hearing." Grievant requested that the decision be made on the evidence presented below, i.e., the record of the Level II hearing of April 26, 1989. With receipt of the Grievant's proposed findings of fact and conclusions of law on August 11, 1989, a decision can be made.²

Grievant's submissions at Level IV utterly ignore the ruling at Level III that her appeal thereto was untimely filed, and by requesting a decision on the record Grievant waived any right to present any evidence at Level IV on

²Since the parties were notified that the deadline for serving their proposals was August 11, 1989, and none have been received from Respondent, it is apparent that Respondent has waived its right to submit such information.

whether there was good cause for her delay. Furthermore, since clearly the appeal to Level III was not filed within five working days of receipt of the Level II evaluator's decision, see W.Va. Code §§18-29-2(b), 18-29-5, this record does support a ruling of untimeliness. While the letters from Grievant's representative of June 1 and 16 indicate that she thought the grievance could be resolved at Level II, there is no basis for concluding that such communications tolled the timeline for appealing the Level II decision, and no communications from Respondent's representatives indicate any acceptance of any tolling. Mr. McGehee's letter was clearly only in explanation of his prior decision. Accordingly, while it may have been error for Respondent to deny the grievance on the basis of untimely appeal without providing Grievant opportunity at that level to establish good cause for her delay, since Grievant has not disputed the ruling and has waived any hearing on it and the record establishes an untimely appeal to Level III, the denial of the grievance for untimely appeal must be affirmed.

Furthermore, even if the grievance had been properly advanced, the only issue remaining at Level IV,³ whether

³Since the Level II evaluator had found Respondent in violation of the statute and policy, as alleged, no dispute thereon remained at Level IV. Inexplicably, Grievant's proposed findings of fact and conclusions of law are devoted to reiterating in detail the facts and law relating to Respondent's being in violation of the policy and statute.

Grievant is entitled to compensation, would not be disposed of in Grievant's favor. As in her statement of grievance at Level IV, supra, the only argument made in Grievant's proposed findings of fact and conclusions of law on the remedy issue is, "The grievance was granted at Level II, but compensation was not granted as requested."⁴ The simple fact of the matter is that Grievant did not clearly request both elimination of the bus duties and compensation at Level II. The grievance before the Level II evaluator stated that it "would be resolved by fair compensation for work performed outside the regular school day or by the elimination of assigned Bus Duties" [emphasis added]. Furthermore, while, as argued in the June 22nd letter, Grievant in her testimony did request both remedies, see Tr. 23, in her closing argument Grievant's representative failed to incorporate that request, stating that "the Grievant should be compensated accordingly or relieved of the bus duty required to be performed outside of the regular school day" [emphasis added]. Tr. 59. Accordingly, no error can be found in the Level II evaluator's granting Grievant only the relief of elimination of the bus duty.

⁴The Respondent at Level III was in error in indicating that Grievant could not appeal the Level II decision and a hearing would accordingly be inappropriate, for, if a grievant is not granted the remedy he or she seeks, such denial of a full remedy certainly is appealable, even if the ruling is otherwise favorable.

Finally, since Grievant's sole argument on why she should receive compensation, that the Level II evaluator erred, is rejected and no legal or equitable considerations support ordering that remedy sua sponte at this level, no further remedy will be ordered.

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

Findings of Fact

1. The Level II evaluator's decision, issued May 19, 1989, found the bus-duty requirements at Washington in violation of Respondent's Policy GCK and W.Va. Code §18A-4-14. The evaluator required the principal at Washington to eliminate the violative bus duties.

2. Grievant's representative was mailed a copy of the decision on May 19, 1989, and Grievant was mailed a copy on May 25, 1989.

3. On June 22, 1989, Grievant, by representative, appealed to Level III.

4. The appeal was found untimely at Level III.

5. Grievant's appeal to Level IV alleged that at Level II she was improperly denied compensation and requested a decision on the record below.

Conclusions of Law

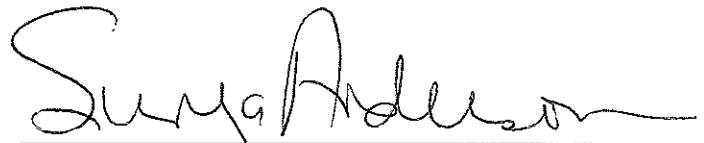
1. In that Grievant did not contest the ruling of untimely appeal to Level II and waived hearing on the matter

at Level IV and the record establishes appeal to Level III was untimely, see W.Va. Code §18-29-4(c), the ruling that Grievant untimely appealed to Level III is affirmed.

2. The Level II evaluator did not unreasonably find Grievant was requesting alternative remedies of compensation and elimination of violative bus duties and therefore did not err in ordering only the latter.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in cursive script, reading "Sunya Anderson", written in dark ink.

**SUNYA ANDERSON
HEARING EXAMINER**

DATED: August 29, 1989