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

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CLARENCE D. SPENCER, HELEN C. PETERS, LEONA A. PRICHARD,
OWEN HANEY, JR., ARTHETTA J. TAYLOR, STANLEY E. ELLIOTT,
KAREN S. MAYNARD and VIRGINIA W. PRICHARD

v.

Docket Nos. 50-88-175
50-88-197

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievants, vocational teachers for Respondent Wayne County Board of Education¹, were all denied anticipated employment for Summer 1988 on June 13 of that year, and advised of the same on or about June 14. They filed grievances at Level I on June 28 and July 1, 1988 and, after a denial there and at Level II and Respondent's waiver of

¹Grievant Phillips resigned his employment with Respondent effective August 15, 1988. It is noted that not all named Grievants went through the entire W.Va. Code §§18-29-1 et seq. process, e.g., Grievants Haney and Taylor were not party to this action at Level I; however, there has been no objection from Respondent and they and any others similarly situated will be considered appropriate parties at Level IV. Education employees and their representatives would be well-advised to use due care in fully complying with the statutory procedure in the future.

Level III consideration, properly at Level IV on October 20 and on or before December 16, 1988.² A hearing was conducted in Respondent's offices in Wayne on December 16, and the parties were granted until January 20, 1989 to submit proposed findings of fact and conclusions of law and final arguments.³ By this action, Grievants primarily seek the pay they would have received had they worked Summer 1988.⁴

²Grievants Elliott, Maynard and V. Prichard, represented by the West Virginia Federation of Teachers (AFL/CIO), originally filed a joint grievance at Level I, bypassed Levels II and III with Respondent's assent and submitted the matter to Level IV in September 1988. That grievance, assigned Docket No. 50-88-175, was remanded for lower level compliance per W.Va. Code §18-29-4(b), and it was not until December that it was appropriately instated before this Grievance Board. At that point, based on Respondent's November 1988 letter-motion therefor and good cause shown, it was consolidated with Docket No. 50-88-197, a grievance that had been jointly filed by the remaining teachers, who are represented by the West Virginia Education Association.

³In this regard, submissions from Respondent and Grievants Phillips, Jackson, Moore, Hiroskey, Wilson, Dixon, Spencer, Peters, L. Prichard, Haney and Taylor were timely; nothing was separately received from Grievants Elliott, Maynard and V. Prichard and the undersigned had presumed that they had declined to provide anything until advised on February 6, 1989 that the intention of Grievants' two representatives, since the Level IV hearing, had been for all Grievants to be party to material presented by any of the others. It is not clear what individual was to inform the Grievance Board of this plan and it is sincerely hoped that it was mere oversight and not indication of lack of cooperation between Grievants' representatives, which would be totally inappropriate in light of the consolidation order herein.

⁴On December 12, one Grievant additionally asked "that
(Footnote Continued)

All Grievants save Phillips, prior to the end of school year 1984-85, had been awarded continuing contracts of employment with Respondent. On their face, these documents provide not for a specific term of yearly employment, but only that "[t]he length of the school term is to be fixed by the [Wayne County] Board [of Education] pursuant to law"; however, it has been unrefuted throughout these proceedings that each of these Grievants' contracts was for either a 220- or 240-day term.⁵ See, e.g., letters to Grievants from former Superintendent Nolan; Level II Decisions. Further,

(Footnote Continued)

my students (73 students in regular summer program) be given 1/2 credit for their extended learning projects as was promised." This request, while certainly a noble gesture, must be denied inasmuch as relief of this nature is unavailable from this Grievance Board.

⁵Specifically, Grievants Jackson, Spencer, Peters, V. Prichard, Elliott and Haney were 240-day employees, and Moore, Hiroskey, Wilson, Dixon, L. Prichard, Maynard and Taylor were on a 220-day schedule. See, e.g., Minutes, Wayne County Board of Education, May 1, 1985. At the Level IV hearing, however, Grievant Taylor testified "on my contract, I am a ten-month [200-day] employee," T. 30, and Grievant Haney declared "the last contract I signed was a 200-day contract," T. 33. No contract between Respondent and either of these Grievants appears in the record, and if either indeed had properly entered into a 200-day agreement with Respondent prior to Summer 1988, this Decision and the relief ordered herein may be wholly inapplicable to them. If this testimony was in error and they are subject to the same continuing contract as other Grievants, their position with respect to this Decision is preserved.

The term "extended employment" has been used throughout this grievance to refer to Grievant's work beyond 200 days in a given school year. It is noted that individuals who have a 220- or 240-day contract with Respondent are not strictly under extended employment as that concept was defined by Superintendent Ferguson at Level IV, T. 48-49.

each of these Grievants worked his or her respective 220- or 240-day term at all relevant times up until Summer 1988.

By letter dated March 28, 1985, M. Joe Nolan, then Superintendent of Schools for Respondent, advised each of these Grievants as follows, in pertinent part:

I am going to recommend you be transferred from your present contract of employment which calls for 220 [or 240] days employment to a contract of employment which provides for 200 days employment. This contract will have an addendum providing for extended employment of twenty (20) [or forty (40)] days if a minimum of ten (10) students are enrolled and participating in your summer program or you have an approved summer plan. If approved by the [Wayne County] Board of Education, the transfer will be effective July 1, 1985.

The reason I am recommending this transfer (modification of contract) is to provide uniform contracts of employment for all vocational teachers and still provide instruction for those students who wish to participate in summer vocational programs.

You may request, in writing, a more detailed statement of reasons for your transfer. . . .After you receive my statement of reasons, you may make a written demand for a hearing before the [Wayne County] Board of Education on the proposed transfer. The hearing will be heard on or before the first Monday in May, 1985.

None of Grievants requested "a more detailed statement or reasons" or a hearing; however, at least some of Grievants protested the proposed change in writing, Grievants' Exhibit 3, and at least one who inquired about a hearing was assured that there was no need for that since her employment beyond 200 days would be preserved intact.⁶

⁶Grievant V. Prichard testified at Level II that she
(Footnote Continued)

By letter dated May 7, 1985, Nolan again wrote these Grievants, as follows, again in pertinent part:

At the meeting of May 1, 1985, I recommended to the Wayne County Board of Education that you be transferred from your present contract of employment which calls for 220 [or 240] days employment to a contract of employment which provides for 200 days employment. This contract will have an addendum providing for extended employment of twenty (20) [or forty (40)] days if a minimum of ten (10) students are enrolled and participating in your summer program of you have an approved summer plan. This transfer will be effective July 1, 1985.

The reason I recommended this transfer (modification of contract) is to provide uniform contracts of employment for all vocational teachers and still provide instruction for those students who wish to participate in summer vocational programs.

The evidence is uncontroverted that all these Grievants received both of these letters by certified mail with receipt returned to Respondent. Further, neither the "modified" contracts of employment nor the addenda thereto were ever drawn up or executed in any form.

Grievant Phillips, first employed by Respondent in August 1986, always worked under 200-day probationary contracts. According to Phillips, when hired he expressed

(Footnote Continued)

"confronted Mr. Foster [then Principal at Crum High School and her immediate supervisor] with it and he . . . told me that he had talked to Mr. Ferguson [acting on Mr. Nolan's behalf due to illness] and there was no need to come before the Board, because as I understood it, it was just. . . a form-type letter." T. 16-17. It is presumed that the "Mr. Ferguson" referenced is Michael Ferguson, now Superintendent of Schools for Respondent, who was present at this Level II hearing.

concern over the language of his contract since his field, vocational agriculture, "comes down from the State and from the Federal government. . . as a 240-day program." Level IV, T. 26.⁷ He further stated that he was told by Respondent's agents, whom he did not more specifically identify, that "this was the way it was done" and that his job "was definitely posted as a 240-day position." T. 25. No evidence was presented that Phillips and Respondent ever entered into a separate written contract for extra duty, but it is agreed that he did work forty days during Summer 1987, and prior to June 13 was scheduled for the same in Summer 1988.

Grievants claim violation of W.Va. Code §§18A-2-2 and 18A-2-7 in this case. As pertinent hereto, §18A-2-2 provides as follows:

The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher unless and until terminated (1) by a majority vote of the full membership of the board [of education] before April first of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board [of education] prior to. . . [its] action thereon, or (2) by written. . . resignation of the teacher before that date.

⁷Phillips presented no evidence or other explanation of this beyond his facially plausible assertion that "[u]ntil we can learn to grow crops in the wintertime, there's no way to do agriculture without the summer employment." Level IV, T. 26.

Code §18A-2-7 is titled "Assignment, transfer, promotion, demotion, suspension and recommendation of dismissal of school personnel by superintendent; preliminary notice of transfer; hearing on the transfer; proof required" and provides that, in proposed transfer situations, the employee must "be notified in writing by the superintendent on or before the first Monday in April"; may request a written statement of reasons; and may request a hearing, to be held on or before the first Monday in May, before the county board of education.

Respondent argues that it complied fully with the requirements of Code §18A-2-7 in effecting the 1985 changes in the continuing contracts of all Grievants who had them, and that Grievants waived any procedural defects by their individual failures to request a hearing thereon. It ignores Grievants' §18A-2-2 contention,⁸ but does raise,

⁸Interestingly, Grievants invited this Grievance Board's attention to a decision, apparently of the State Superintendent of Schools, they styled as "C.P. Bumgard et al. v. Monongalia County Board of Education" without further citation. According to Grievants, that case holds that extended employment may appropriately be reduced via either W.Va. Code §18A-2-2 or §18A-2-7. Because of the lack of information provided, the undersigned cannot readily locate Bumgard and so has not considered it herein; however, it is noted that applying §18A-2-7 to this scenario in lieu of §18A-2-2 would at least seem somewhat inconsistent with the mandate that "school personnel laws are to be strictly construed in favor of personnel," Morgan v. Pizzino, 256 S.E.2d 592, 595 (W.Va. 1979); also see n.5, second paragraph, supra. Parties are advised to please provide either full references to cases cited or copies thereof to this Grievance Board if they seek analysis of the same prior to decision on a given grievance.

apparently for the first time, by its proposed conclusions of law, the issue of timeliness. In that regard, Respondent characterizes this grievance as having arisen on July 1, 1985, and seeks its dismissal pursuant to Code §18-29-4(a), which requires employee complaints to be made before the formal filing of a grievance at level I by the scheduling of "a conference with the immediate supervisor," "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." It further asserts that Grievant Phillips' contract was probationary and specifically provided for a 200-day employment term and that he is therefore without a cause of action. Respondent explained that there was no summer school at all in Wayne County due solely to a lack of funds,⁹ but that this was not "decided" until its June 13 meeting.¹⁰

⁹This is surprising, inasmuch as Respondent's 1988 summer employment was provided for in its 1987-88 fiscal year budget. Level IV, T. 47. It is noted Grievants' assertion that Respondent had received governmental funds for its 1988 summer curriculum was without support in the record.

¹⁰The term "decided" appears in quotes in the body because there was no direct action disapproving summer school; rather, Respondent merely did not act to approve it. This is not to say that there was no summer activity at all sponsored by Respondent in 1988. In fact, at least one of Grievants, Haney, had as his typical summer assignment the supervision of workers under the governor's youth project, which job was posted and filled by Respondent without
(Footnote Continued)

It was stipulated at Level IV that "each of the Grievants submitted a summer program which was accepted by their principal or supervisor." T. 40. It has further been established that each of Grievants would have had at least ten students and that those programs were the same as, or similar to, the ones pursued in previous years. Further, not only were Grievants unquestionably inconvenienced by the late notice of their non-employment for the summer, a large number of students were deprived of promised, highly desirable opportunities for credit toward graduation and/or compensated work. See e.g., Level IV, T. 26; n. 4, supra.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievants, at all times pertinent hereto, were employed by Respondent as vocational education instructors.

(Footnote Continued)
application therefor by any affected Grievant for Summer 1988. Due to the outcome herein, this Grievance Board finds any such Grievant's failure to apply for the positions as posted of no moment.

2. Grievant Phillips was employed under a 200-day probationary contract each of school years 1986-87 and 1987-88. He was offered a third such contract for 1988-89 but rejected it and resigned Respondent's employ effective August 15, 1988. He worked 240 days in school year 1986-87, including forty days' service during Summer 1987. Before he signed his 1986-87 contract, he was told by Respondent's agents that his job was "posted as a 240-day position."

3. All other Grievants worked under continuing contracts which did not specify a term of employment except that it would be "fixed by the Board [of Education] according to law." However, each contract was for either 220 or 240 days, see n. 5, supra, as established by Nolan's letters and Respondent's other admissions including the Level II Decisions.¹¹ Further, each of Grievants had worked his or her respective 220- or 240-day contract term, i.e., the regular school year plus summer school or other summer programming, for Respondent for several years.

4. On or about June 14, Grievants were first advised they would not be employed during Summer 1988. This action, in

¹¹This case is thus distinguished from VanGilder v. Mineral Co. Bd. of Educ., Docket No. 28-88-076 (Aug. 31, 1988), which was relied upon by the Level II grievance evaluator.

effect, relegated them to status as 200-day employees for school term 1987-88.

5. By letter dated March 28, 1985, Respondent's then-Superintendent of Schools M. Joe Nolan notified each Grievant of his forthcoming recommendation that Grievant "be transferred from [his/her] present contract which calls for 220 [or 240] days employment to a contract...which provides for 200 days employment" with "an addendum providing for extended employment of twenty (20) [or forty (40)] days if a minimum of ten (10) students or [he/she has]...an approved summer plan." The letter, which also referred to the proposed action as a "modification of contract," also advised that, if approved by Respondent, "the transfer will be effective July 1, 1985" and that a hearing, if requested, would be held on or before the first Monday in May 1985.

6. None of Grievants requested a transfer hearing; however, at least some Grievants, after expressing concern to Respondent's agents over the proposed changes, were advised that their employment beyond 200 days was intact and there was no need to request or have a hearing thereon.

7. By letter dated May 7, 1985, Nolan advised Grievants, in effect, that Respondent had adopted his recommendations, see Finding of Fact 5, in toto.

8. Respondent did not issue to Grievants any other contracts or addenda after the execution of their 220- or 240-day continuing contracts, with the possible exceptions of Grievants Taylor and Haney. See n. 5, supra.

9. On June 13, 1988, Respondent did not act to approve summer programming, due solely to financial constraints. Accordingly, there was no summer school and Grievants were denied employment for Summer 1988.

10. Grievants were all expecting to work for Respondent during Summer 1988 and had fulfilled all requirements and made plans therefor. They were first advised of their non-employment for this period on or around June 14, 1988.

CONCLUSIONS OF LAW

1. Grievants' claim arose in June 1988 and as such was timely filed. W.Va. Code §18-29-4.

2. Grievant Phillips' contract, as written, was for 200 days and he is thus unentitled to relief, based on the information presented to this Grievance Board.¹² A Grievant

¹²His Summer 1987 employment was perhaps the result of
(Footnote Continued)

has the burden of proving his or her claims by a preponderance of the evidence. See Dotson v. Greenbrier Co. Bd. of Educ., Docket No. 13-87-321-4 (Mar. 7, 1988).

3. In order to modify the terms of employment such as the number of workdays in a continuing contract of a professional staff member, a county board of education must comply with the procedures of Code §18A-2-2. Ford et al. v. Wood Co. Bd. of Educ., Docket No. 54-87-077-3 (Dec. 21, 1987); Fain et al. v. Harrison Co. Bd. of Educ., Docket No. 17-87-082-2 (July 22, 1987). Code §18A-2-7 is inapplicable to this grievance in that no actual transfer, as that term is defined in the law, occurred or was proposed. See Bd. of Educ. of Fayette Co. v. Hunley, 288 S.E. 2d 524 (W.Va. 1982) (service employees).

4. "The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher unless and until terminated...by a majority vote of the full membership of the board [of education] before April first of the then current year." Code §18A-2-2.

(Footnote Continued)

an agreement in the nature of an oral contract, although such are generally recognized in school personnel law as inappropriate. Mason Co. Bd. of Educ. v. State Supt. of Schools, 234 S.E.2d 321 (W.Va. 1977).

5. A majority of Respondent's full membership did not vote to terminate Grievants' continuing contracts prior to April 1, 1985, nor did any Grievant enter into mutual consent for modification of his/her continuing contract; therefore, Respondent failed to meet the mandate of Code §18A-2-2.

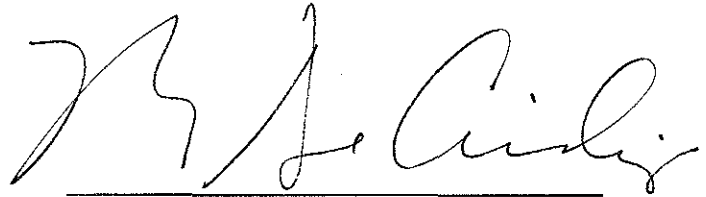
6. Absent a proper termination of Grievants' most recently executed continuing contracts, they remain in full force and effect and Respondent is obligated to honor them. See Marcum v. Wayne Co. Bd. of Educ., Docket No. 50-88-167 (Nov. 28, 1988); Steele v. Wayne Co. Bd. of Educ., Docket No. 50-87-261-1 (May 31, 1988).¹³

Accordingly, this grievance is DENIED only insofar as it relates to Grievant Phillips; and GRANTED, as it relates to all other Grievants. Accordingly, Respondent is ORDERED to compensate the successful Grievants in full, including all back-pay and -benefits, for the work they were wrongfully prohibited from performing under their respective 220- or 240-day contracts during Summer 1988.

¹³ Even if the modified contracts with addenda had been applicable, it appears that Grievants may have met the standards for guaranteed employment beyond 200 days for school year 1987-88.

This decision may be appealed to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County and such appeal must be filed only within thirty (30) days of its 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.

Dated: February 8, 1989

A handwritten signature in cursive script, appearing to read "M. Drew Crislip", written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER