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ALVIN WATTS
CECIL BRUNTY
JERRY LUCAS

v.

Docket No. 89-22-49

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

Grievants Alvin Watts, Cecil Brunty and Jerry Lucas,¹ bus operators for Respondent Lincoln County Board of Education, allege that Respondent violated W. Va. Code §18A-4-5b in deciding not to pay them for driving library runs found compensable in Isaacs v. Lincoln Co. Bd. of Educ., Docket No. 22-88-122 (Sept. 28, 1988), as Respondent had paid the grievants of Isaacs, in accordance with the order in that case. Throughout these proceedings Respondent has not disputed that Grievants drove the same library runs at issue in Isaacs but has argued that they did not file their

¹Besides listing themselves on the grievance forms as grievants, Grievants have also written as grievants "all bus operators on library runs in 1987-1988 year." While it is questionable whether such a statement would qualify other bus operators as grievants in this matter, any such issue need not be addressed, due to the outcome herein.

grievances in accordance with the timeliness requirements of W.Va. Code §18-29-4(a)(1).²

The grievances were denied at Level I and the evaluator at Level II, after a hearing on the consolidated grievances on January 17, 1989, also denied them on the grounds that they were not timely. Respondent waived a decision at Level III and Grievant filed at Level IV on February 8, 1989. A hearing was held March 10, 1989.³ Proposed findings of fact and conclusions of law were received from Grievants' counsel April 12, 1989.

Grievants contend that they scheduled a conference with their supervisor and filed their grievances on December 20, 1988, which was within fifteen working days of November 29, 1989, when Respondent voted to pay only the named grievants

²W.Va. Code §18-29-4(a)(1) provides in pertinent part:

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 or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

³At the hearing the parties agreed that the evidentiary record would consist of the record of the Level II and Level IV hearings. Also, Superintendent of Lincoln County Schools Stephen Priestley, as representative of Respondent, waived his right to submit proposed findings of fact and conclusions of law.

in Isaacs.⁴ They therefore contend that the "event upon which the grievance is based" of Code §18-29-4(a)(1) is Respondent's decision not to pay them like the Isaacs grievants⁵ and accordingly that their grievances, alleging that Respondent violated the uniformity provision of Code §18A-4-5b by refusing to pay them, is timely.

Grievants are correct that the Board's decision of November 29, 1989, was an action that can be the subject of a grievance. However, because that decision is the "event upon which the grievance[s are] based," Grievants cannot

⁴Grievants admit they learned of the grievance proceedings of Isaacs while they were ongoing. However, they did not try to be joined because they thought it was too late and they assumed that, should the grievants in Isaacs be successful, Respondent would compensate them like those grievants. The testimony of Grievants indicated that previously, when a grievance was granted, it had been Respondent's practice not only to compensate the named grievant(s) but also any and all employees against whom the same illegal action had been taken, although those employees had not been involved in the grievance. No specific instances of this practice were named.

⁵Compare Harris v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (March 23, 1989), where bus operators who had made the library runs but had not been grievants in Isaacs argued that, because their grievances were filed within fifteen days of learning that the library runs had been held compensable in Isaacs, they were timely. Harris held:

Under W.Va. Code §18-29-4(c)(1) the date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice....In that Grievants did not file within 15 days of the last library run violative of W.Va. Code §18A-4-8b(b), their grievance was not timely filed.

complain of the illegality of the library runs themselves. Rather, in order for their grievances to be granted, they must show that the November decision itself was illegal or improper.

That they have failed to do. Grievants argue that the Board's decision and action was contrary to the provision of W.Va. Code §18A-4-5b that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]" That provision clearly applies only to payments of an employer to employees directly arising out of the employment. The payments Respondent made pursuant to the order in Isaacs were not "salaries, rates of pay, benefits,"⁶ or "increments." Nor were they "compensation" within the meaning of Code §18A-4-5b. Although the Isaacs decision ordered Respondent to "compensate" the grievants therein, when doing so Respondent was not paying out any compensation as the employer to its employees. Instead, Respondent was actually paying out an award arising out of the grievance proceeding, providing the remedy required by Isaacs. That type of

⁶See O'Conner v. Marion Co. Bd. of Educ., Docket No. 24-86-267-2 (March 24, 1987), which defined "benefits" of Code §18A-4-5b as "payments made or entitlements available in accordance with a wage agreement."

payment is not the "compensation" from an employer to an employee intended by the uniformity provision.⁸

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

Findings of Fact

1. Grievants are bus operators who drove the library bus runs found compensable in Isaacs v. Lincoln Co. Bd. of Educ., Docket No. 22-88-122 (Sept. 28, 1988).

2. Grievants did not file a grievance until December 20, 1988, fifteen working days after Respondent, at its meeting of November 29, 1988, decided to pay only the named grievants in Isaacs, as ordered by that decision.

Conclusions of Law

⁸In contending that Code 18A-4-5b is applicable, Grievants rely on the ruling of Morgan v. Pizzino, 256 S.E.2d 592, 595 (W.Va. 1979), that "school personnel laws are to be strictly construed in favor of personnel." Even a strict construction of Code 18A-4-5b would not permit Grievants' construction. It is a hallmark of statutory construction that a statute must be construed in accordance with the intent of the legislature, and it is clearly contrary to the intent of the legislature that the provision apply to payments made to satisfy an award rendered in a previous grievance proceeding. To hold otherwise would permit the uniformity provision of the statute to be used as a guise to convert time-barred grievances into present valid claims.

1. Grievants' grievances, alleging that Respondent's decision of November 29, 1988, was illegal, were timely filed.

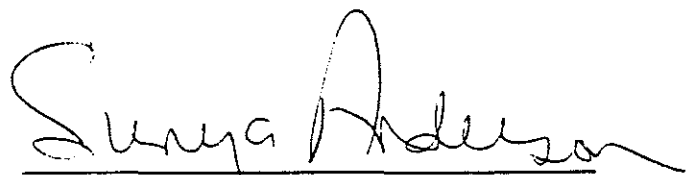
2. It is incumbent upon a grievant to prove the allegations of his grievance by a preponderance of the evidence. Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988); Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-1 (June 7, 1988).

3. Payment of an award, or any remedy mandated by a grievance decision, is not "compensation" under Code §18A-4-5b.

4. Grievants have not established any violation of the uniformity provision of Code §18A-4-5b.

Accordingly, the grievances are **DENIED**.

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


SUNYA ANDERSON
HEARING EXAMINER

Dated: April 28, 1989