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

v.

Docket No. 89-DOE-210

**WEST VIRGINIA DEPARTMENT OF EDUCATION &
WEST VIRGINIA DIVISION OF FINANCE & ADMINISTRATION¹**

D E C I S I O N

Patsy Julius, Ed.D., serves as Regional Chapter I Coordinator for Respondent West Virginia Department of Education (Education). He presents the following grievance:

I am contesting as illegal the subtraction of the annual salary increment from the annual salary. The total salary for the year, excluding the increment, should be divided by twelve to determine the monthly salary. I cite the current practice as illegal because of the wording of the law, which states that "These incremental increases shall be in addition to any across-the-board, cost-of-living, or percentage salary increases which may be granted in any fiscal year by the Legislature." The current practice of subtracting the increment from the annual salary defeats the intent of the law, which was/is to encourage longevity. I am, therefore, requesting that my monthly salary be recalculated according to the intent of the law.

¹ The Division, formerly the Department, of Finance & Administration, is under the umbrella of the recently-created West Virginia Department of Administration.

This case involves a somewhat peculiar interfacing of two sets of West Virginia personnel laws, those relating to State employees and those pertinent to county board of education staffers. This not only will require analysis of both substantive areas, which will be accomplished later in this Decision, but also has generated tremendous procedural confusion, which is reviewed immediately supra.

PROCEDURAL HISTORY

On March 17, 1989, Grievant initiated the foregoing complaint at Level I.² It was denied there³ and at Level II

² Grievant filed a similar grievance in early March, but it was discovered to be in need of restatement. Accordingly, Grievant was afforded leave to resubmit his claim at Level I. A review of the record as a whole leads to the conclusion that Grievant may have, upon resubmission, again misstated his actual complaint at least in minor particular. However, if this indeed is true, no prejudice to him or Respondents is perceived.

³ The actual Level I decision was a request from Grievant's immediate supervisor Edward J. Moran to Carolyn R. Arrington, West Virginia Assistant State Superintendent of Schools, that Grievant's salary be adjusted as asked, and a response from Ms. Arrington that Education was without authority to do so. See n. 4.

(hereafter, Level II-A)⁴ due to lack of authority, waived at Level III⁵ and submitted at Level IV on May 16.

Although there was at that point no Level III pronouncement in this case, the record indicates that any decision at that step would have been a denial based on a lack of authority as well. The issue of whether Education could provide the relief sought was crucial, since this

⁴ The Level II-A hearing was conducted May 4 by Deputy State Superintendent of Schools Clarence Burdette as then-State Superintendent John Pisapia's designee. T. 3. Its transcript, which in places is incorrectly identified as relating to a "Grievance Level III Hearing," "Before the West Virginia State Board of Education" is part of the record at Level IV. Even the conclusory Level II-A decision, authored not by Mr. Burdette but by Dr. Pisapia, is erroneously styled "Employee Level III Grievance-Hearing of May 4, 1989." However, Dr. Pisapia accurately identified the May 4 meeting as "Level II" in an April 24 notice of hearing.

While there is an April 4 letter to Grievant from Ms. Arrington, this must be considered a reaction to Mr. Moran's recommendation, see n. 3, and therefore part and parcel of the Level I denial. The parties were advised by the undersigned, in a June 23, 1989, letter, that such would be deemed the situation. But, see n. 12.

Footnote 5, infra, further strives to clarify the procedural confusion surrounding this matter.

⁵ The Level II-A evaluator announced at the hearing that "the State Board of Education [Level III] has waived. . . [its] right to further hearing by policy." While W.Va. Code §18-29-4(c) permits education employers to bypass consideration of grievances at Level III, it would seem that the decision whether or not to do so must be made on a case-by-case basis, in keeping with all parties' continuing obligation to meaningfully attempt to resolve disputes at the lowest possible plane. Code §18-29-1; Bumgardner v. Ritchie Co. Bd. of Educ., Docket No. 89-43-222, etc. (June 12, 1989) (education); Code §29-6A-7 (state). This would be particularly true in cases of this nature, where lower level denials were on procedural and not substantive grounds.

Grievance Board is without jurisdiction to provide a remedy that cannot be supplied by the employer. See Largent v. W.Va. Dept. of Health, Docket Nos. H-88-015, etc. (Sept. 15, 1989). Education's perceived impediment to providing the requested remedy was explained in an April 4, 1989, letter from Assistant State Superintendent Carolyn R. Arrington, which is a portion of the Level I decision, see n. 3, 4. Ms. Arrington stated,

Last year the Commissioner of Finance and Administration directed that the salaries of certified personnel in the Department be computed as they are currently computed because those same personnel could not receive salaries with two different yearly increments.

At Level IV, Grievant, while not conceding the absolute necessity of doing so, moved the joinder of the West Virginia Division of Finance & Administration (F&A) per WVESEGB Rule 4.11. That Rule provides:

Any party may move to join (or add as a party to the grievance) a person or entity necessary to the final disposition of the grievance. . . .

It appeared to the undersigned that F&A indeed was an indispensable party. Education, through its agent Ms. Arrington, characterized itself as bound by F&A's direction, and Dr. Pisapia implicitly concurred with this conclusion in his Level II-A decision. Further, F&A's power to regulate certain salary matters per W.Va. Code §§5A-2-1 et seq.,

rendering it a "statutory employer" in cases such as this⁶ was recognized. F&A was joined as an additional party-respondent by order entered June 23; this transformed the case from one originally filed under the education employees grievance procedure, Code §§18-29-1 et seq., into one under the parallel state employees procedure, Code §§29-6A-1 et seq.⁷ A distinct difference between the two is that the latter does not allow bypass of Level III analysis, and indeed expressly requires a hearing at that plane. Code §29-6A-4(c). Accordingly, the June 23 order also provided for remand, so that Education and F&A might jointly have an opportunity to address Grievant's substantive concerns prior to any review thereof by this Grievance Board.⁸

In accordance with the philosophy underlying the grievance procedure, i.e., that every attempt should be made to resolve disputes at the lowest possible level; in recognition that no substantive consideration had yet been afforded this matter; and in awareness that it was likely the lowest plane vested with authority to grant the sought

⁶ The reader's attention is invited to Hayes v. DNR & CSS, Docket No. NR-88-035 (Mar. 28, 1989), for a discussion of the concept of "statutory employer."

⁷ As noted in the June 23 order, "[t]his Grievance Board finds no impediment to the Department of Education's coverage under the . . . [state] procedure, see Code §§29-6A-1, 29-6A-2(g)."

⁸ Neither Grievant nor Education was prevented from bringing F&A into this controversy prior to its submission to this Grievance Board.

remedy, remand was to Level II (hereafter, Level II-B). On July 17, 1989, a Level II-B decision was issued under the names of Ms. Arrington and Thecla Maguire, F&A Deputy Commissioner. In pertinent part, it reads,

An informal conference. . .was held with you July 17, 1989,. . .to discuss your grievance which had been remanded to level 2, with a joinder of Finance & Administration. After your presentation of the grievance and discussion by all three parties in attendance, a decision was reached based on [W.Va. Code] §18A-4-18 and §5-5-1. . . . Please note §18A-4-18 fixes the methodology for determining salaries of state Department of Education personnel who are required to hold a teaching certificate. Also §5-5-1 defines employees eligible to receive the incremental salary increase based on years of service. It provides "that the mandatory salary increase required by this article shall not apply to. . .any employee of the state whose compensation is fixed by statute or statutory schedule,". . . .

Therefore, based on the two sections. . . mentioned above, it is our joint decision that you are not eligible to receive the incremental salary increase provided under §5-5-2 above and beyond the salary you receive as fixed under §18A-4-18.

Grievant was advised of his right to appeal the resolution to Level III.⁹ On August 17, he wrote this Grievance Board and advised that, despite his July 19 advancement of his

⁹ The Level II-B evaluators stated their understanding to be that Level III within the Department of Education is represented by the State Superintendent of Schools, now Dr. Henry Marockie. It appears Dr. Marockie would instead generally be a Level II reviewer and that Level III would be embodied by the State Board of Education itself. This is consistent with the normal manner in which the procedural levels are designated in the county board of education systems in West Virginia. Any error in this regard is harmless in the instant case.

claim to Level III, he had not been contacted regarding further processing. He requested, pursuant to Code §29-6A-3(a), that a Level IV hearing be convened since the Level III evaluators had not responded to his grievance within the prescribed time limits of Code §29-6A-4(c).¹⁰ After telephone conferences with the parties, the undersigned consented to again remand the case to Level III for prompt hearing, with the caveat that if, by a date certain, the parties could arrive at a written stipulation of all pertinent facts, and agree that no further hearing would be sought at any level, a Level IV decision would issue whether or not action had been taken at Level III.¹¹ A joint stipulation of fact was filed on October 3,¹² and the parties were advised the record would be closed October 13 and that they were free to submit any additional information until then. Grievant alone made a post-October 3 submission, a

¹⁰ It is recognized that a new State Superintendent of Schools was installed and that West Virginia state government was massively reorganized within this general time frame. Therefore, certainly no bad faith on the part of Education and/or F&A is perceived in not processing Grievant's claim in a timely fashion per Code §29-6A-3(c).

¹¹ This rather contrived procedure was approved in recognition that form had overtaken substance in this case and that further administrative handling would unnecessarily delay disposition of an already-prolonged dispute. See State ex. rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986).

¹² Certain of those stipulations conflict with the procedural history recounted at n. 3, 4, 5, and are therefore rejected as clearly inaccurate. None are crucial to the resolution of this case.

written closing argument on October 13. Accordingly, this case is finally mature for disposition before this Grievance Board.

MERITS OF GRIEVANCE

Inasmuch as the Level II-B decision, the last word from Respondents herein prior to the fact stipulation, has been reproduced supra, for comparison purposes Grievant's closing argument is quoted below:

Effective for the fiscal year beginning. . . July [1, 1985], every eligible [state] employee with three or more years of service shall receive an annual salary increase equal to thirty-six dollar times the employees' years of service. . . . These incremental increases shall be in addition to any across-the-board, cost-of-living or percentage salary increases which may be granted in any fiscal year by the legislature (§5-5-2).

The Education Reform Act of 1988 states that "Personnel employed by the State Department of Education who are required to hold a teaching certificate shall receive a salary that is at least equal to the salary paid to comparable professional personnel employed by the county board [of education] where their office is located (§18A-4-18).

As a result of the Salary Increase for State Employees' law, payment of the incremental salary was begun.

When the Education Reform Act of 1988 was implemented, the incremental salary increase [for state employees] was continued. However, it was then subtracted from the annual salary of the Grievant in contradiction to the salary increase prescribed in §5-5-2, although the law specifically states that "these incremental increases shall be in addition to any across-the-board, cost-of-living or percentage salary increases which may be granted in any fiscal year by the legislature."

The reasoning for the subtraction of the incremental salary increase from the total annual salary is based on §5-5-1, which states "that the mandatory salary increase required by this article (Article 5) shall not apply to any employee. . .of the state whose compensation is fixed by statute or by statu[]tory schedule."

They (Department of Finance) insist that the salary of the Grievant is fixed by statute and is on a statutory salary schedule by virtue of being on the salary scale of the Monongalia County Board of Education (wherein the office of the Grievant is located).

The Education Reform Act of 1988 does not set the salary of the Grievant. It sets the mechanism by which the Grievant is to be paid. It states that the Grievant shall receive a salary that is at least equal to the salary paid to comparable professional personnel employed by the county board [of education] wherein his office is located. This does not set one's salary.

The argument that the Grievant is on a statutory salary schedule by virtue of having been placed on the salary schedule of Monongalia County is totally erroneous. A statutory salary schedule is one which is prescribed and set by law, such as the salary of the Governor, Secretary of State, Treasurer, etc. Salaries prescribed by boards of education vary with counties and are not statutory. The Grievant is being paid at least as much as comparable professional personnel in Monongalia County. The law passed by the legislature does not specify a salary ---only "at least equal to the salary paid to comparable professional personnel employed by the county wherein their office is located."

In conclusion, what the laws cited do is set the mechanism by which salaries may be paid, but does not set salaries.

The statutes applicable to this case are W.Va. Code §§18A-4-18, 5-5-1¹³ and 5-5-2.¹⁴ Section 18A-4-18¹⁵ provides,

Personnel employed by the state department of education who are required to hold a teaching certificate shall receive a salary that is at least equal to the salary paid to comparable professional personnel employed by the county board [of education] wherein their office is located, minus the \$600.00 authorized pursuant to. . .[W.Va. Code] §18A-4-2. . .for classroom teachers with 20 years of experience.

Code §5-5-1 provides, in pertinent part:

. . .[T]he mandatory salary increase required by this article shall not apply to. . .any employee of the state whose compensation is fixed by statute or by statutory schedule. . .

And finally, Code §5-5-2:

Effective for the fiscal year beginning. . .[July 1, 1985], every eligible [per Code §5-5-1] employee with three or more years of service shall receive an annual salary increase equal to thirty-six dollars times the employee's years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day thereof, each such employee shall receive an annual increment increase of thirty-six dollars for such fiscal year. . . These incremental increases shall be in addition to any

¹³ The parties' stipulation also made reference to Code §5-1-1. It will be assumed this was a typographical error and that §5-5-1 was the intended cite.

¹⁴ At Level II-A, there was repeated reference to "Senate Bill 14." No party has further identified "Senate Bill 14," and it has not been made available to the undersigned for his perusal. Parties are advised that West Virginia Code citations should be provided as opposed to legislative designations whenever possible.

¹⁵ It is accepted that Grievant is "required to hold a teaching certificate" within the meaning of this statute.

across-the-board, cost-of-living or percentage salary increases which may be granted in any fiscal year by the Legislature. This article shall not be construed to prohibit other pay increases based on merit, seniority, promotion or other reason, if funds are available for such other pay increases: Provided, however, That the executive head of each spending unit shall first grant the herein mandated increase in compensation to all eligible employees prior to the consideration of any increases based on merit, seniority, promotion or other reason.

Succinctly put, "[i]t is the position of. . . [R]espondents that. . .[G]rievant is an individual whose salary is fixed by statute. . .," while "[i]t is the position of. . .[G]rievant that. . .[W.Va. Code] §18A-4-18 does not 'fix his compensation by statute or statutory schedule' but merely defines the mechanism by which his salary shall be determined." Joint Stipulation of Fact, ¶¶25, 26. No authority save the named statutes has been cited by any party in support of its perspective.

The Level II-A transcript reveals that Education originally took the position that Grievant was entitled to a Code §5-5-2 increment, which totals \$720.00 since he has the maximum-applicable twenty years' service. Puzzlingly, however, F&A disallowed the \$720.00 only insofar as it supplemented Grievant's regular salary. The result was that F&A approved Education's calculating Grievant's salary by deducting \$720.00 therefrom and granting him that amount in

a lump-sum at the end of the fiscal year, this an apparent attempt to provide Grievant the Code §5-5-2 increment.¹⁶

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

FINDINGS OF FACT

1. Grievant, an employee of Respondent West Virginia Department of Education (Education), is required to hold a teaching certificate and is assigned to a Monongalia County, West Virginia worksite.

2. Effective July 1, 1985, Grievant was awarded a salary supplement per W.Va. Code §5-5-2.

3. Code §18A-4-18 was effective July 1, 1988. After this date, the West Virginia Division of Finance & Administration (F&A), which has certain control over salary aspects of state employment, refused to allow Education to pay Grievant the §5-5-2 increment over and above his salary, due to §§18A-4-18 and 5-5-1. However, it approved a plan whereby Education would pay the increment but reduce Grievant's wages, pro rata, in the amount of the increment.

4. Education and F&A, in their defenses to this grievance, have apparently for the first time officially taken

¹⁶ As he explained in his written closing, Grievant was given the Code §5-5-2 money over and above his regular wages starting July 1, 1985, but due to the passage of Code §18A-4-18, the situation changed July 1, 1988.

the position that Grievant is not entitled to the increment at all.

CONCLUSIONS OF LAW

1. W.Va. Code §5-5-2 provides an annual monetary increment for certain state employees, related to years of service with the State of West Virginia. Those whose salary is based on a statutory scale are excluded from coverage. Code §5-5-1.

2. Professional employees of the West Virginia Department of Education are due salary at least as high as that of similarly-situated county board of education employees in the county of their assignment. Code §18A-4-18. For example, a Regional Chapter I Coordinator whose duty station is Morgantown is paid using the Monongalia County Board of Education schedule as a base.

3. A county board of education in West Virginia must pay its professional personnel as much as provided by the statutory scale found at Code §18A-4-2. A professional employee's base salary is grounded on three factors, namely, education, years of experience, and position classification. Id.; see also Code §§18A-4-3, 18A-4-4. A board of education "may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to . . . training classifications, experience, responsibility and other requirements. . . ." Code §18A-4-5a.

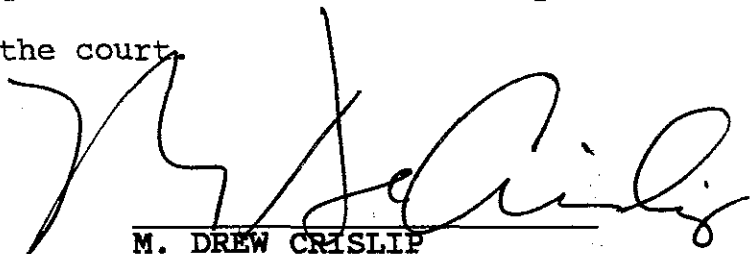
4. "Personnel employed by the state department of education who are required to hold a teaching certificate" and "receive a salary that is at least equal to the salary paid to comparable professional personnel employed by the county board [of education] where their office is located," per Code §18A-4-18, are "employee[s] of the state whose compensation is fixed by statute or statutory schedule" per Code §5-5-1.¹⁷

¹⁷ At the Level II-A hearing, Ms. Margaret Robinson, a witness for Education, explained that Code §5-5-2 was intended to provide a longevity incentive for persons working under a system not otherwise providing for such. She went on to state that Grievant did not qualify since his base salary was established by Code §§18A-4-1 et seq., which takes "years of experience" into account.

The undersigned questions the accuracy of this reasoning. While it appears that Code §5-5-2 was designed to encourage retention of state employees by providing them salary hikes based on time-in-service, that standard is different than the "years of experience" used in determining education employees' wages. For example, a teacher with fifteen years experience in another state who moved to Monongalia County, West Virginia, would presumably be given credit for her experience in the salary computation. However, if teachers were otherwise entitled, she would not be eligible for the §5-5-2 increment until she had three years of service with the state. While the distinction between experience and service is significant, it is of no moment herein, since Grievant is not subject to §5-5-2 consideration under §§5-5-1 and 18A-4-1 et seq. Implicit in this conclusion is a rejection of Grievant's unpersuasive assertion, "the laws cited. . . set the mechanism by which salaries may be paid, but do[] not set salaries."

Accordingly, this grievance is DENIED. However, Grievant is entitled to receive his full salary throughout the year, and not with \$720.00 deducted and paid him in a lump sum at the end. Accordingly, his bimonthly salary is to be recomputed, and he is to be paid interest back to July 1, 1988, to compensate him for his loss of the use of \$30.00 per paycheck since that time, less any appropriate setoff.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-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. This office should be advised of any intent to appeal so that the record may be prepared and transmitted to the court.



M. DREW CRISLIP
Hearing Examiner

Date: November 15, 1989