



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 238-1040

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

GARLAND ROBERTS, et al.

v.

Docket No. 89-11-68

GILMER COUNTY BOARD OF EDUCATION

DECISION

Grievants are approximately twenty-eight service employees¹ of respondent Gilmer County Board of Education (GCBD). On January 17, 1989, a level one grievance was filed which alleged that GCBE had violated W.Va. Code §18A-4-8 when it eliminated six days from their 200-day contract. The grievance states: "To resolve this grievance the six days must be reinstated, bringing the employment term back to 200 days a year." After adverse rulings at the lower administrative levels, the grievance was appealed to level four February 22, 1989. A level four

¹The only record of all the grievant-parties to this case is found in an attachment to the level one filing which the grievants had signed in longhand. The signatures of Linda Cook, Brenda Sommerville and Gerald McHenry are among those which appear on the document.

hearing was held May 31, 1989,² after earlier scheduled hearings in March and April were not held but continued for cause shown. At the conclusion of hearing, grievant agreed to submit proposed findings of fact and conclusions of law by June 30 and GCBE elected a July 30 date for response; August 18 was reserved as the last day to submit a reply brief. The parties did not request or file an amended briefing schedule and grievants' August 9, 1989, submission is the only filing to date. It is presumed that GCBD has declined to submit.

The financial problems that plagued GCBD in the near past were well publicized state-wide. Suffice it to say that, because of drastic fiscal circumstances, GCBD chose to cope with its financial emergency as described in grievants' complaint. GCBE received permission for its action from then-State Superintendent Tom McNeel. An excerpt from the approval letter is as follows:

First, the State Board was reluctant to approve this petition because of the impact upon individual employees and the educational programs of Gilmer County Schools. The State Board will not accept a similar petition by the Gilmer County Board of Education at this time next year. Every possible effort must be employed to prevent this budgetary crisis from reoccurring. Secondly, it is noted that the proposed preliminary budget for FY 89 contains a reserve for an anticipated deficit as of the close of FY 88, the second successive year for a projected deficit. The Gilmer County Board of Education's attention is directed to the provisions of article 8, chapter 11 of the W. Va. Code and more particularly to §11-8-26 through 31 related to unlawful expenditures by a local fiscal body.

²Garland Roberts, the lead grievant, was the only party who appeared on grievants' behalf at the level four proceeding.

After grievants' initial filing at level one, a timeliness issue was raised by GCBE and the level one grievance evaluator found: "Pursuant to Local Policy 5140.1 and [W. Va. Code §18-29-4], I do not believe the proper steps were followed in a timely manner." Level One Decision, January 23, 1989. The level two evaluator, then-Superintendent Clacy Williams' designee, Donna Lou Wilt, again raised the timeliness issue and her February 10, 1989, decision essentially denied the grievance on that basis.

The time limit for filing a grievance is found in W.Va. Code §18-29-4 which provides:

(a) Level one.

(1) 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.

Grievants did not address the timeliness issue at the lower levels of this grievance. In its level four proposals, grievants contended that "[t]he grievance is a continuing grievance and was [timely] filed within the school year that the grievable event occurs." The novel theory continued:

The grievance concerns the employment term for the 1988-89 school year. Some of the six days eliminated were removed from the beginning of the term and others from the end of the term. However, calendar and non-calendar days are interspersed throughout the school term. The key factor triggering this grievance is the fact that only 194 days were compensated for during the year 1988-89 as a totality. It is clear that the year as a total is the grievable event. In short the grievable event commenced July 1, 1988 and did not finish until the end of the school year on June 30, 1989.

Grievants' argument on the timeliness issue completely ignores instruction, throughout Code §18-29-1, et seq., that an employee is required to timely seek resolution or timely prosecute his grievance. The grievable "event" in this case was GCBE's action on March 28, 1988, when it approved the recommendation of its superintendent to reduce the number of its non-instructional days, i.e., reduce by six days the school calendar and days on which staff salaries are based. According to GCBE's March 28 minutes, Resp. Ex. No. 11, grievants Linda Cook, Brenda Sommerville and Gerald McHenry were in attendance, thus GCBE's action was known to them at that time. Moreover, according to grievants, some of their deleted 200 days occurred in Fall 1988, thus it can be presumed that all grievants eventually knew of the grievable event upon that occurrence or receipt of the first fiscal-year 1988-89 paycheck. To find that the "grievable event" was the entire school year would be unreasonable. To adopt grievants' theory would be to embrace a notion that, after a grievable event occurs, passage of time alone will constitute a continuing practice since the employee is obviously affected every day.³ This notion flies in the face of timeliness. Grievants offered no explanation for delaying until January 17, 1989, to file their grievance. Inasmuch as grievants did not

³Applying grievants' theory could have ridiculous results. For example, a terminated employee would have an unlimited time period and opportunity to grieve if the grievable event "reoccurs" at each and every instance in which he does not receive a paycheck on a designated payday.

file a grievance within the statutory timelines or show a compelling cause for delay, this grievance is lost.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. On March 23, 1988, GCBE reduced the employment term of each grievant by six days for school year 1988-89.

2. Grievants knew or should have known of the grievable event on March 23, 1988, or at least as late as the onset of the 1988-89 school year.

3. Grievants did not file a level one grievance until January 17, 1989.

CONCLUSIONS OF LAW

1. The grievance procedure must be initiated by the employee 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. W.Va. Code §18-29-4(a)(1).

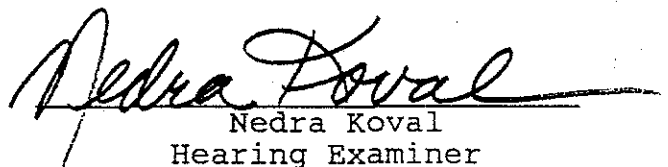
2. A delay in the filing of a grievance beyond the statutory time limits results in the loss of the grievance. Rocovich v. West Virginia University, Docket No. 89-BOR-90 (August 31, 1989); Archibald v. Randolph Co. Bd. of Educ., Docket No. 42-88-171 (December 9, 1988).

3. Grievants untimely filed this grievance and gave no reasonable excuse for delay.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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.

DATED: August 31, 1989


Nedra Koval
Hearing Examiner